



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 14-04506
)
Applicant for Security Clearance)

Appearances

For Government: Benjamin Dorsey, Esquire, Department Counsel
For Applicant: *Pro se*

11/25/2015

Decision

RIVERA, Juan J., Administrative Judge:

Applicant used marijuana on four occasions between February 2000 and June 2013. In 2013, he used marijuana while possessing a top secret security clearance. More time without illegal drug use is necessary to provide assurance of Applicant's judgment and his willingness to comply with laws, rules, and regulations. He did not mitigate drug involvement security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted security clearance applications (SCA) on June 3, 2008, and November 25, 2013. The Department of Defense (DOD) issued him a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement) on March 16, 2015.¹ Applicant answered the SOR on April 8, 2015, and requested a

¹ The DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

hearing before an administrative judge. The case was assigned to me on July 1, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 6, 2015, scheduling a hearing for August 26, 2015.

At the hearing, the Government offered three exhibits (GE 1 through 3). Applicant testified and submitted two documents post-hearing (AE 1 and 2). He also submitted a reference letter attached to his answer to the SOR. All exhibits and the reference letter were admitted without objection and made part of the record. DOHA received the hearing transcript (Tr.) on September 3, 2015.

Findings of Fact

Applicant admitted all the factual allegations in the SOR – that he illegally used marijuana, at least four times, between February 2000 and June 2013, and that his last use occurred while holding a top secret security clearance. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 39-year-old project manager employed by a federal contractor since 2007. In 1998, he was awarded a Bachelor of Science degree with a major in electrical engineering. In August 2008, he received a secret-level security clearance, which later was upgraded to a top secret clearance. Applicant married in 1998, and he has three sons, ages four, six, and nine. There is no evidence of any additional security concerns other than those alleged in the SOR.

Applicant submitted his first SCA on June 3, 2008, and disclosed that he illegally used marijuana once in 2000 and once in 2007. He submitted his second SCA on November 12, 2013, and admitted that he used marijuana once in 2006 and once in June 2013. He explained that he did not intend to use marijuana in the future because “it’s not worth breaking the law or risking my ability to get a security clearance.” (GE 1) Applicant possessed a top secret security clearance when he illegally used marijuana in June 2013.

Applicant testified that he did not use marijuana prior to 2000. In 2000, a friend of Applicant’s wife and her husband visited them at Applicant’s home and they brought marijuana to share. Applicant, his spouse, and the other couple went to Applicant’s basement where they smoked the marijuana. In 2006, Applicant and his spouse attended a beach party at one of her friend’s home. A marijuana pipe was being passed around among the attendants, and Applicant and his spouse used marijuana.

Applicant was employed by another company from 2000 to 2007. During this period, he did not have a security clearance, and his employer did not have a drug-testing program for employees. However, Applicant knew that the possession and use of marijuana was illegal.

In 2007, while working for his current employer (a federal contractor), Applicant used marijuana for the third time, primarily because of peer pressure. He was 32 years old at the time of his marijuana use in 2007. He and his wife attended a friend’s beach

party where a marijuana pipe was being passed around among the attendants. Applicant and his spouse used marijuana. Applicant's employer has a policy against illegal drug use. Applicant did not have a security clearance in 2007 when he used marijuana, but he was aware of his employer's policy against the illegal use of drugs.

In June 2013, Applicant and his spouse visited the same friends with whom they smoked marijuana in the past, and all of them smoked marijuana. In 2013, Applicant was 37 years old, and he possessed a top secret security clearance. At his hearing, Applicant testified that he "suspected" marijuana use was against the rules for security clearance holders. (Tr. 35) Applicant's facility security officer (FSO) and human resources director provided a reference letter indicating that she counseled Applicant concerning the responsibilities that come along with holding a security clearance. She believed that he understood his responsibilities.

In May 2014, Applicant and his spouse ended their association with his spouse's friends who were involved in the use of marijuana. Apparently, the personal relationship ended with the end of their business relationship. Applicant testified that in December 2013, after a health warning from his physician, he changed his lifestyle. He is now eating healthier, doing exercise, and he has lost 30 pounds. In April 2015, he passed a drug test his employer conducted. (AE 1)

Applicant's spouse ended her marijuana use to support Applicant. She no longer associates with her marijuana-using friends. Her friends were the ones that provided Applicant and her marijuana on all four occasions that Applicant used marijuana. She expressed remorse and regret for her involvement with her marijuana-using friends and for putting her husband in those situations. Applicant's spouse described him as "a wonderful man and father. [He is] extremely respected and good at his job." She took responsibility for her role in providing marijuana to Applicant, and she emphasized that their marijuana use would not occur in the future. (AE 2)

Applicant's human relations director and facility security officer (FSO) stated that Applicant was "a model employee and extremely trustworthy." Applicant is a valuable asset and has made important contributions to the defense contractor where he is employed.

Policies

Eligibility for access to classified information may be granted "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case

can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Drug Involvement

AG ¶ 24 articulates the security concern concerning drug involvement:

[u]se of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 25 describes three drug-involvement disqualifying conditions that could raise a security concern and may be disqualifying in this particular case: "(a) any drug abuse;"² "(c) illegal drug possession;" and "(g) any illegal drug use after being granted a security clearance." Applicant used marijuana³ on four occasions between February

²AG ¶ 24(b) defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

³AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

2000 and June 2013. In June 2013, Applicant used marijuana while possessing a top secret security clearance. AG ¶¶ 25(a), 25(c), and 25(g) apply. Consideration of possible mitigating conditions is required.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶ 26 provides for potentially applicable drug involvement mitigating conditions:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence; and
 - (4) a signed statement of intent with automatic revocation of clearance for any violation.

There are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004)." The passage of time after ending marijuana use is not considered in isolation. Marijuana use after completing an SCA "undercuts" favorable application of the drug

involvement recency mitigating condition. ISCR Case No. 06-18270 at 3 (App. Bd. Nov. 7, 2007).

Applicant used marijuana on four occasions between February 2000 and June 2013. During his marijuana use in June 2013, Applicant held a top secret security clearance. Applicant participated in a drug screening test when he was hired by his current employer. He has known about his employer's policy against the use of illegal drugs since then. Additionally, he knew or should have known of the Government's security concerns about cleared personnel using illegal drugs, because he submitted a SCA in 2008, and answered questions about his past drug use.

Applicant's illegal marijuana use while holding a top secret clearance adversely reflects on his judgment and his willingness and ability to follow the law, rules, and regulations. Nevertheless, Applicant's recognition of the adverse impact on his life of drug abuse creates some certitude that he will continue to abstain from drug use. AG ¶ 26(a) partially applies to his illegal drug possession and use-related offenses.

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. Applicant claimed that he has disassociated from his drug-using associates, friends, and contacts, except for his wife. He has broken his patterns of drug abuse, and he has changed his life with respect to illegal drug use. He has abstained from drug abuse for about 27 months. Applicant did not provide "a signed statement of intent with automatic revocation of clearance for any violation." AG ¶ 26(b) partially applies, but does not fully mitigate the drug involvement security concerns.

In conclusion, Applicant ended his drug abuse in June 2013, about 27 months before his August 2015 hearing. The motivations to stop using illegal drugs are evident. He understands the adverse results from drug abuse.⁴ He has shown or demonstrated enough of a track record of no drug abuse to partially, but not completely, mitigate drug involvement as a bar to his access to classified information.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

There is some evidence supporting approval of Applicant's clearance. Applicant is a 39-year-old project manager, and he has worked for the same defense contractor since 2007. In August 2008, he received a security clearance. There is no evidence of security violations or concerns, except for his drug-related offenses. His admissions of marijuana possession and use on his SCAs are positive signs that Applicant is taking

⁴Loss of a security clearance, potential criminal liability for possession of drugs, and adverse health and employment effects resulting from drug use are among the strong motivations for remaining drug free.

responsibility for his drug abuse in the context of his security clearance. He stopped using illegal drugs in June 2013.

Applicant is considered to be “a model employee and extremely trustworthy.” He is also a valuable asset and has made important contributions to his defense contractor employer. His spouse described him as “a wonderful man and father. [He is] extremely respected and good at his job.” Applicant and his spouse promised that their marijuana use would not occur in the future.

The evidence against approval of Applicant’s clearance is more substantial at this time. Applicant illegally used marijuana on four occasions between 2000 and 2013. In 2013, he used marijuana while possessing a top secret security clearance. Each time he possessed illegal drugs, he committed a federal crime. He showed especially poor judgment in using marijuana while employed at a company prohibiting illegal drug use, and while holding a top secret security clearance.

It is well settled that once a concern arises regarding an applicant’s security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. *See Dorfmont*, 913 F. 2d at 1401. Unmitigated drug involvement concerns lead me to conclude that grant or continuation of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary to justify the award of a security clearance in the future. With continued effort towards abstaining from drug involvement, and a track record of behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his security clearance worthiness in the future.

After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, based on the law, as set forth in *Egan*, I find that Applicant has not fully mitigated or overcome the security concerns pertaining to drug involvement. For the reasons stated, I conclude he is not eligible for access to classified information at this time.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

JUAN J. RIVERA
Administrative Judge