



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



In the matter of:)
)
) ISCR Case No. 14-05329
)
Applicant for Security Clearance)

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: *Pro se*

02/10/2016

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana with varying frequency from 2010 to at least January 2014. His evidence is insufficient to mitigate the drug involvement security concerns. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 5, 2014. On February 7, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement).¹ Applicant answered the SOR on March 10, 2015, and elected to have his case decided on the written record.

¹ The action was taken 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.

A copy of the Government's file of relevant material (FORM), dated October 13, 2015, was mailed to him the same day. Applicant acknowledged receipt of the FORM on October 16, 2015. He was allowed 30 days to submit any objections to the FORM and to provide material in rebuttal, extenuation, and mitigation. Applicant did not respond to the FORM or submit any information after his receipt of the FORM. The case was assigned to me on January 21, 2016.

Ruling on Evidence

Department Counsel's submission included a summary of a personal subject interview on April 3, 2014. (Item 6) The summary was not authenticated as required by the Directive ¶ E3.1.20. Department Counsel's submission included a footnote advising Applicant that Item 6 was not authenticated and that failure to object to Item 6 might constitute a waiver of the authentication requirement.

Applicant did not respond to the FORM. However, a pro se applicant's failure to object to an unauthenticated personal subject interview is not tantamount to waiver of the authentication requirement. Waiver means "[t]he voluntary relinquishment or abandonment - express or implied - of a legal right or advantage; the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." Black's Law Dictionary, 1717 (Bryan A. Garner ed., 9th ed., West 2009). The record does not reflect that Applicant understood the concepts of authentication, waiver, and admissibility. It also does not reflect that he understood the implications of waiving an objection to the admissibility of Item 6. Thus, Item 6 is inadmissible and I have not considered it.

Findings of Fact

Applicant admitted the SOR factual allegation, with explanations. His admission is incorporated in the findings of fact. After a thorough review of the record evidence, including his 2014 SCA (FORM, Item 5) and his answer to the SOR (Item 4), I make the following findings of fact:

Applicant is a 27-year-old electrical engineer. He graduated from high school in 2007, and received his bachelor's degree in June 2011. He started working with his current employer, a federal contractor, immediately after his college graduation. He has never been married and has no children. He has been residing with a cohabitant since September 2013. (FORM, Item 5) This is Applicant's first security clearance application.

Applicant disclosed in Section 23 (Illegal Use of Drugs or Drug Activity) of his 2014 SCA that he illegally used marijuana with varying frequency from about 2010 to 2014. (FORM, Item 5) He stated that he used marijuana to ease the symptoms of a chronic medical condition. The frequency of his marijuana use depends on the severity and frequency of the symptoms, up to a few times a month. He stated:

I have used marijuana as an alternative form of treatment for Crohn's disease, after discovering medical studies that found it to be an effective treatment for this disease. Having been diagnosed at 6 years old, I had been treated with a variety of prescription medicines, many of which were immune-suppressants and came with highly unpleasant side effects. Specifically, having a compromised immune system led to frequent contraction of common illnesses. The use of marijuana has helped me cope with this disease and ease my dependence on medicines that compromised my immune system and general quality of life. (FORM, Item 5)

Applicant further stated that he is still exploring other treatments for Crohn's disease, but until a better treatment can be found, he intends to continue using marijuana to treat his symptoms. In his answer to the SOR, Applicant stated that his use of marijuana was limited to evenings before going to bed. He believes that his use of marijuana could not be used to blackmail him or to lead him to break other laws. He stated that if it was clearly necessary, he could make do without it, though his health would suffer. (Answer to the SOR)

Applicant submitted no documentary evidence to show that his use of marijuana was legal or pursuant to a prescription issued by a duly qualified medical professional. The record is silent as to the circumstances surrounding his acquisition of marijuana, the extent of his contacts with his drug-using friends and associates, and whether Applicant is addicted to marijuana.

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

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern for drug involvement:

Use 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.

Applicant illegally used marijuana with varying frequency from around 2010 to at least 2014. He intends to continue using marijuana as an alternative form of treatment for Crohn’s disease.

AG ¶ 25 describes three conditions related to drug involvement that could raise a security concern and are disqualifying in this case:

- (a) any drug abuse;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

AG ¶ 26 provides three 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;

(4) a signed statement of intent with automatic revocation of clearance for any violation.

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended;

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

None of the Guideline H mitigating conditions are raised by the facts and circumstances in this case. Applicant's use of marijuana occurred frequently, it is ongoing, and he expressed his intent to continue using marijuana.

Applicant claimed that he used marijuana as an alternative form of treatment for Crohn's disease. Nevertheless, he failed to submit documentary evidence to show that his use of marijuana was legal or pursuant to a prescription issued by a duly qualified medical professional. His evidence is insufficient to mitigate the drug involvement security concerns.

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.

Applicant is a 27-year-old employee of a defense contractor. He has worked for a federal contractor since 2011. He illegally used marijuana with varying frequency from 2010 to at least 2014. His use of marijuana continues to raise questions about his reliability, trustworthiness, judgment, and ability to comply with the law, or to protect classified information. He failed to mitigate the Guideline H security concerns.

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

Subparagraph 1.a: Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant eligibility for a security clearance to Applicant. Clearance is denied.

JUAN J. RIVERA
Administrative Judge