



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



In the matter of:)
)
) ISCR Case No. 14-04883
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Strzelczyk, Esquire, Department Counsel
For Applicant: *Pro Se*

11/21/2015

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana with varying frequency from October 2010 to January 2014. He continues to associate with his marijuana-using friends. His period of abstinence, in light of the record evidence, is insufficient to mitigate the drug involvement security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 29, 2014. The Department of Defense (DOD) issued him a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement) on January 22, 2015.¹ Applicant answered the SOR on February 3, 2015, and requested a hearing before an administrative judge. The case was assigned to me on July 1, 2015. The Defense Office

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.

of Hearings and Appeals (DOHA) issued a notice of hearing on July 20, 2015, scheduling a hearing for August 19, 2015.

At the hearing, the Government offered two exhibits (GE 1 and 2). Applicant testified and submitted three documents (AE 1 through 3). All exhibits were admitted without objection and made part of the record. DOHA received the hearing transcript (Tr.) on August 27, 2015.

Findings of Fact

Applicant admitted the factual allegations in the SOR - that he used marijuana with varying frequency between about October 2010 and January 2014. His admissions are incorporated as findings of fact. After a complete and thorough review of the evidence of record, and having considered Applicant's demeanor while testifying, I make the following additional findings of fact:

Applicant is a 23-year-old image scientist employed by a defense contractor since January 2014. He attended college from September 2010 through December 2013, and received his bachelor's degree in imaging science in June 2014. He has never been married, and he does not have any children. He has never held a security clearance, and he does not require a security clearance to retain his current employment.

Applicant claimed that he first illegally used marijuana in October 2010, when he was 18 years old. Applicant stated that when he began attending college, he suffered from symptoms of depression, anxiety, and sleep apnea caused by concussions he suffered while playing sports. He averred that he received some commercial prescription products; however, they were ineffective at alleviating his symptoms. His marijuana-using friends recommended he try marijuana. After doing some medical research online, Applicant concluded marijuana might help with his symptoms.

Applicant's primary method of marijuana consumption was vaporization. From October 2010 to January 2011, Applicant used marijuana once every two months for help with his symptoms. In December 2010, Applicant received another concussion while playing ultimate Frisbee; his symptoms became worse; and he increased the frequency of marijuana use up to three times a week. From April 2012 through August 2012, he did not use marijuana because he was worried about being drug-tested in his internship with a large corporation. When he returned to college in August 2012, he resumed his marijuana use at a rate of about three times a week until April 2013. Between April 2013 and September 2013, he did not use marijuana because he was worried about being drug-tested in his internship with a large corporation. (Tr. 27-28) In September 2013, he reduced his marijuana use to one time every two months until December 21, 2013. (GE 2, Tr. 47)

Applicant sought help with his symptoms of anxiety and problems sleeping from a doctor of nurse practice (psychopharmacologist). On March 29, 2013, he obtained a

prescription for marijuana, which is permitted under state law. His prescription expired on March 29, 2014, and it was not valid in a different state where he attended college. He began an internship with a defense contractor, his current employer, shortly after receiving his medical marijuana prescription, and he stopped using marijuana during his internship from April to September 2013.

Applicant returned to college in August 2013, and he used marijuana three times from September to December 21, 2013. His most recent marijuana use was on December 21, 2013, and he does not intend to use marijuana in the future. He ended his marijuana use because he no longer needed it to sleep, and his other symptoms have abated.

In total over the October 2010 to January 2014 period, Applicant used marijuana about 200 times. He used a gram of marijuana every four or five months in his vaporizer. Most of the time, he used marijuana shortly before going to bed to help him sleep. It helped him to relax and feel calm and tired. On occasion, he would use marijuana for recreational purposes.

Applicant has contact with two or three of his college marijuana-using friends once every two months via text messaging and the internet. He continues to meet in person with them about twice a year. Applicant testified that his friends still use marijuana in front of him, but with his permission. His friends “are very respectful of [his] situation with a security clearance and [his] job.” (Tr. 49, 58) Applicant works in a drug-free workplace; however, he has not been tested for drug use with urinalysis. He has never been arrested for a drug offense. He disclosed his drug use on his January 29, 2014 SCA, and discussed his marijuana use in detail with an investigator from the Office of Personnel Management (OPM). (GE 1, 2) He has not received any drug rehabilitation treatment or counseling. (Tr. 56)

The director of Applicant’s company believes that Applicant has demonstrated maturity, competency, trustworthiness, and a “consistently high level of integrity.” In his opinion, Applicant has “established himself as an essential member of the [DOD contractor’s] team.” He is conscientious, focused, detail-oriented, responsible, and reliable. Applicant’s efforts contributed to successful completion of a major contract, and he has excellent potential to contribute to the national defense. The director’s letter does not indicate whether he is aware of Applicant’s history of illegal marijuana use and continuing association with marijuana users. (AE 1)

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 two drug-involvement disqualifying conditions that could raise a security concern and may be disqualifying in this particular case: “(a) any drug

abuse;² and “(c) illegal drug possession.” AG ¶¶ 25(a) and 25(c) apply because Applicant used marijuana about 200 times from October 2010 to December 2013.³ He possessed marijuana before he used it. Consideration of 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 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.

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.

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

(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.

Considering the evidence as a whole, in this particular case, I find that the passage of time so far is insufficient to mitigate the drug involvement security concerns. Applicant's marijuana-using friends recommended he tried marijuana to alleviate his symptoms. He used marijuana frequently between October 2010 and January 2014. He knew that using marijuana was illegal and a concern to prospective employers because he stopped using marijuana during his two internships. He was concerned about testing positive for the use of drug. Notwithstanding, after the internships he continued his marijuana use. His most recent use of marijuana occurred weeks before he started working for his current employer in January 2014. He recognized the adverse impact on his career future drug use will have because he is employed by a DOD contractor that has a requirement for a drug-free workplace. AG ¶ 26(a) does not fully apply and does not mitigate the security concerns.

Applicant testified that he suffered from symptoms of depression, anxiety, and sleep apnea caused by concussions he suffered. He claimed that he sought the assistance of medical professionals to deal with his symptoms and had to resort to the use of an illegal substance. He presented no documentary evidence of any medical treatment he received using conventional, legal medications to address his medical problems. Nor did he present evidence of a recent diagnosis and prognosis concerning his medical condition, or a possible addiction to marijuana. Considering the period during which he used marijuana, and the frequency of his use, questions remain as to whether Applicant's marijuana abuse could recur.

Applicant averred that he has not used marijuana since January 2014. He promised to continue to abstain from drug possession and use. However, Applicant has not disassociated from his drug-using associates and contacts. His marijuana-using friends still use marijuana in his presence, albeit with Applicant's permission. Moreover, he did not provide a signed statement of intent with automatic revocation of clearance for any violation. AG ¶ 26(b) does not apply.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse drugs after being issued a prescription that is lawful under federal law. He did not provide proof of satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, and a favorable prognosis by a duly qualified medical professional.

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 23-year-old imaging engineer employed by a defense contractor since January 2014. There is no evidence of criminal conduct or of violations of his employer's rules unrelated to his marijuana abuse, or that he used illegal drugs after obtaining employment with the DOD contractor.

The director of Applicant's company lauded Applicant's maturity, competency, trustworthiness, integrity, reliability, responsible behavior, and contributions to the DOD contractor. In his opinion, Applicant has strong potential to contribute to the national defense.

I considered that the only evidence of marijuana use is his admissions on his 2014 SCA, to an OPM investigator, in his SOR response, and at his hearing. His primary reason for using marijuana was to help him with symptoms of sleeplessness and anxiety while he was in college. In 2013, his symptoms and marijuana use were greatly reduced, and he has about 18 months of abstinence from marijuana use.

Notwithstanding, Applicant has not disassociated from his drug-using friends who still use marijuana in his presence, and he did not provide a signed statement of intent with automatic revocation of clearance for any violation. Applicant's current association with marijuana-using friends raises questions about his judgment and his ability and willingness to comply with the law, rules, and regulations. On balance, the passage of time so far is insufficient to establish a track record of no drug abuse, and that he possesses the judgment to alleviate the security concerns. Applicant failed to mitigate the security concerns pertaining to drug involvement.

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

JUAN J. RIVERA
Administrative Judge