



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



In the matter of:)
)
-----) ISCR Case No. 13-01139
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

04/30/2014

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding drug involvement. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On September 4, 2008, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86).¹ On June 8, 2012, he again applied for a security clearance and submitted another SF 86.² On September 21, 2013, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued him a set of interrogatories. He responded to the interrogatories on October 18, 2013.³ On December 30, 2013, the DOD CAF issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry*

¹ Item 4 ((SF 86), dated September 4, 2008).

² Item 5 ((2012 SF 86), dated June 8, 2012).

³ Item 6 (Applicant's Answers to Interrogatories, dated October 18, 2013).

(February 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline H (Drug Involvement), and detailed reasons why the DOD CAF adjudicators could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

It is unclear when Applicant received the SOR as there is no receipt in the case file. In a statement notarized January 27, 2014, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing.⁴ A complete copy of the Government's file of relevant material (FORM) was prepared by the Defense Office of Hearings and Appeals (DOHA). The FORM was provided to Applicant on March 17, 2014, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on March 20, 2014. Applicant's response was due on April 19, 2014, but to date, no response was received. The case was assigned to me on April 28, 2014.

Findings of Fact

In his Answer to the SOR, Applicant admitted both of the factual allegations pertaining to drug involvement in the SOR (¶¶ 1.a. and 1.b.). Applicant's admissions and other comments are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 28-year-old employee of a defense contractor. He has been serving as a software engineer with his current employer since September 2008. For three months while still in college, he served part-time as an eligibility confirmer.⁵ A May 2003 high school graduate, Applicant attended a university from September 2003 until June 2008, when he received a bachelor's degree in an unspecified discipline.⁶ He has never served in the U.S. military.⁷ In about December 2009, he was granted a secret

⁴ Item 3 (Applicant's Answer to the SOR).

⁵ Item 5, *supra* note 2, at 14-15.

⁶ Item 5, *supra* note 2, at 12.

⁷ Item 5, *supra* note 2, at 19.

security clearance.⁸ Applicant is unmarried, but has resided with a cohabitant since August 2010.⁹

Drug Involvement

Applicant is a substance abuser whose choice of substances was variously identified as cannabis sativa, THC, marijuana, and hashish.¹⁰ His initial use of marijuana occurred in February 2002 in a social setting while attending high school. Thereafter, until September 2003, he smoked a hand-rolled marijuana cigarette about once a month in social settings with his high school friends. Applicant considered his use of marijuana during that period as “experimentation.”¹¹ The frequency of his marijuana use increased when he enrolled in college. Between September 2003 and March 2008, Applicant smoked marijuana cigarettes approximately three to four times per month at social gatherings and private parties, on and off campus.¹²

In September 2008, Applicant stated that his last use of marijuana occurred in March 2008, and that during the period September 2003 until March 2008, he had only used marijuana 20 times.¹³ He concealed his earlier marijuana use during the period February 2002 until September 2003, as well as the period from March 2008 until September 2008. Applicant stated that “drugs were never and could never be a life style.”¹⁴ As noted above, he was granted a secret security clearance in about December 2009.

When Applicant completed his SF 86 in 2008, one of the questions pertaining to substance abuse was, in part, as follows: “Have you ever illegally used a controlled substance while . . . possessing a security clearance”¹⁵ Although he was made aware of the Government’s heightened sensitivity regarding marijuana use, Applicant continued using marijuana from March 2008 until at least October 2009, also in social settings with friends.¹⁶ In his 2012 SF 86, Applicant acknowledged that his marijuana use spanned the entire period from February 2002 until October 2009, but minimized the frequency of such use by stating: “During the time period listed, I smoked marijuana

⁸ Item 5, *supra* note 2, at 30.

⁹ Item 5, *supra* note 2, at 21-22.

¹⁰ Marijuana is classified as a controlled substance under schedule I of the Controlled Substances Act of 1970 (21 U.S.C. § 801 *et seq.*). See Item 7 (Controlled Substances Act of 1970).

¹¹ Item 6 (Personal Subject Interview, dated August 15, 2012), at 3.

¹² Item 6, *supra* note 11, at 3.

¹³ Item 4, *supra* note 1, at 29.

¹⁴ Item 4, *supra* note 1, at 29.

¹⁵ Item 4, *supra* note 1, at 29 (§ 24 b.).

¹⁶ Item 6, *supra* note 11, at 3.

with friends on occasion (1-2 times per month), more frequently in the earlier years (3-4 times per month).¹⁷ He also stated: "I smoked marijuana on occasion in high school and college, and on occasion afterward."¹⁸ He added: "Marijuana use was a phase of my past. It has not been a problem since I terminated my use of it, and I do not see a place for it in my future as a government contractor."¹⁹ In October 2013, Applicant responded to interrogatories by stating "I do not intend to use marijuana in the future."²⁰ He also stated: "I regret my use of marijuana as an adolescent and young adult. I do not intend to ever use it again."²¹ In January 2014, Applicant admitted using marijuana after he was granted a DOD security clearance:²²

I sincerely regret my decision to use marijuana for a period of time after being granted a security clearance. I should have been mature enough to report myself to my FSO when I made the decision to use marijuana, even though I expressed intentions not to do so. . . I swear that I shall never abuse drugs again. . . .

Applicant's motivation for using marijuana over that lengthy period was for fun and relaxation.²³ He denied ever purchasing, selling, transporting, or cultivating the marijuana during the period of his use.²⁴ He has never received any medical treatment or counseling related to the substance abuse, and he has never completed, nor is he currently participating in, a recognized drug rehabilitation support group.²⁵ He claims he no longer associates with other substance abusers.²⁶

Because Applicant did not furnish evidence of his work performance or character, either through character references or by performance appraisals, it is difficult to assess his work performance or his reputation for reliability, trustworthiness, honesty, or good judgment.

¹⁷ Item 5, *supra* note 2, at 28.

¹⁸ Item 5, *supra* note 2, at 28.

¹⁹ Item 5, *supra* note 2, at 28.

²⁰ Item 6, *supra* note 3, at 4.

²¹ Item 6, *supra* note 3, at 7.

²² Item 3, *supra* note 4. There is some inconsistency regarding dates pertaining to the last use of marijuana (identified by Applicant as October 2009) and the date the security clearance was actually granted (identified by Applicant in the 2012 SF 86 as December 2009). There is no Joint Personnel Adjudication System (JPAS) entry in the case file to verify the actual date the security clearance was granted. Initially, based on Applicant's input, it appears that the security clearance was granted after Applicant ceased using marijuana, but without specifying which dates he used the marijuana after he was granted the security clearance, Applicant specifically admitted such use.

²³ Item 6, *supra* note 11, at 3.

²⁴ Item 6, *supra* note 11, at 4; Item 6, *supra* note 11, at 3.

²⁵ Item 6, *supra* note 3, at 6-7.

²⁶ Item 6, *supra* note 3, at 5.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.”²⁷ As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”²⁸

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”²⁹ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.³⁰

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This

²⁷ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

²⁸ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

²⁹ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “Substantial evidence” is “more than a scintilla but less than a preponderance.” *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

³⁰ *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

relationship transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials."³¹

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."³² Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline H, Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

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.

(a) Drugs are defined as mood and behavior altering substances, and include:

(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;

³¹ *Egan*, 484 U.S. at 531.

³² See Exec. Or. 10865 § 7.

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 25(a), *any drug abuse (see above definition)*, is potentially disqualifying. Similarly, under AG ¶ 25(c), *illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*, may raise security concerns. Also, AG ¶ 25(g) may apply where there is *any illegal drug use after being granted a security clearance*.

Between February 2002 and at least October 2009, Applicant smoked marijuana cigarettes with varying frequency from one cigarette per month to four cigarettes per month. He admitted using marijuana after he was granted a DOD security clearance. His use of marijuana over that lengthy period was for fun and relaxation. While there is no evidence of cultivation, processing, purchase, sale, or distribution of marijuana, or the possession of drug paraphernalia, by merely using marijuana, he illegally possessed it. At some point, despite having been granted a security clearance, and having been forewarned of the Government's heightened sensitivity regarding marijuana use, Applicant made a decision to use marijuana for a period of time after being granted a security clearance. As he noted, he should have been mature enough to report himself to his FSO when he made the decision to use marijuana, despite having previously expressed his intentions not to do so. Unfortunately, he was not. In addition, Applicant's detailed histories of marijuana use are inconsistent, and it is impossible to determine the accuracy of his estimated frequency or duration of the marijuana use. AG ¶¶ 25(a) and 25(g) have been established. AG ¶ 25(c) has been partially established.

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement. Under AG ¶ 26(a), the disqualifying conditions may be mitigated where *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*. Under AG ¶ 26(b), drug involvement concerns may also be mitigated where there is *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.*

AG ¶¶ 26(a) and 26(b) minimally apply. Applicant's marijuana abuse occurred from February 2002 until at least October 2009. Attempting to specify the actual duration and frequency of such marijuana use is difficult because Applicant furnished differing versions. One version was that the use commenced in September 2003, but

another version was that it actually started in February 2002. One version was that his use ended in March 2008, but another version was that it actually ceased in October 2009. Regarding the frequency of his marijuana use, it spanned from one time per month to four times per month. Applicant has never received any medical treatment or counseling related to the substance abuse, and he has never been evaluated or diagnosed for substance abuse or dependence. While Applicant now intends to refrain from such use in the future, he already broke a similar vow in 2008. The Government put its trust in Applicant and what it thought was his candor when it previously granted him a security clearance, and he broke that trust when he continued his use of marijuana. Furthermore, while Applicant has repeatedly stated a current intention not to use any drugs in the future, he has never submitted a signed statement of intent with automatic revocation of clearance for any future violation.

Applicant's purported abstinence is viewed favorably, and he should be encouraged to continue it. He claims he no longer associates with other substance abusers, and while that may be true pertaining to high school or college friends, Applicant's acknowledgment that he used marijuana after he graduated from college, is cause for concern. Because Applicant has not furnished a reasonable basis for ignoring his fiduciary responsibilities of holding a security clearance, but instead resorted to marijuana use, claiming it was because of his youth, such use may recur. In the absence of positive character evidence, the uncertainty established by his various versions of duration and frequency of marijuana use, as well as his past failure to abstain, continues to cast doubt on Applicant's reliability, trustworthiness, or good judgment.

Whole-Person Concept

Under the whole-person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline H in my analysis below.

There is some mitigating evidence under the whole-person concept. Applicant has never been evaluated or diagnosed for drug abuse or dependence. Applicant's marijuana abuse purportedly ceased in October 2009. Applicant's abstinence is viewed favorably, and he should be encouraged to continue it. He supposedly no longer associates with other substance abusers.

There is also more substantial evidence supporting the security concerns. Applicant used marijuana over an eight year period, and did so for part of an unspecified period while possessing a security clearance. He knew he was violating both federal law and his fiduciary responsibilities when he resorted to using marijuana, but it apparently did not matter for he did so on several occasions. There are several troubling aspects of this case, including Applicant's various versions of the duration of his marijuana use; his broken vow not to use marijuana after March 2008; his continued use of marijuana after completing his first SF 86, despite being apprised of the Government's heightened sensitivity regarding marijuana use; and his continued use of marijuana after being granted a security clearance. While Applicant now intends to refrain from such use in the future, based on his track record, it is difficult to give that vow much weight.

I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.³³ Overall, the record evidence leaves me with some questions and doubts as to Applicant's eligibility and suitability for a security clearance. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has failed to mitigate the drug involvement security concerns. (See AG ¶¶ 2(a)(1) - 2(a)(9).)

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, and my interpretation of my responsibilities under the Guidelines. Applicant has failed to mitigate or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

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
Subparagraph 1.b:	Against Applicant

³³ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

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.

ROBERT ROBINSON GALES
Administrative Judge