



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



In the matter of:)
)
 ---) ISCR Case No. 14-02797
)
 Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esquire, Department Counsel
For Applicant: *Pro se*

09/22/2015

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 October 8, 2013, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.¹ On January 21, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD 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

¹ Item 2 (e-QIP, dated October 8, 2013).

Involvement), and detailed reasons why the DOD CAF was unable to make an 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 notarized statement, dated February 3, 2015, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing.² A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by the Defense Office of Hearings and Appeals (DOHA) on July 9, 2015, 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. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Guidelines applicable to his case. Applicant received the FORM on July 13, 2015. Applicant's response was due on August 12, 2015, but to date, no response has been received. The case was assigned to me on September 18, 2015.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the factual allegations pertaining to drug involvement in the SOR (¶¶ 1.a. through 1.c.). 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 30-year-old employee of a defense contractor. He has been serving as a test engineer with his current employer since April 2012.³ He worked for other employers in similar positions since May 2005.⁴ A May 2003 high school graduate, Applicant received an associate's degree in May 2005 and a bachelor's degree in an unspecified discipline in May 2012.⁵ He was a missionary for his church from September 2005 until April 2006.⁶ He has never served in the U.S. military.⁷ Applicant was granted a secret security clearance in October 2012.⁸ He was married in August 2009.⁹ Applicant has one daughter.¹⁰

² Item 1 (Applicant's Answer to the SOR, dated February 3, 2015).

³ Item 2, *supra* note 1, at 12.

⁴ Item 2, *supra* note 1, at 13-14.

⁵ Item 2, *supra* note 1, at 11-12.

⁶ Item 2, *supra* note 1, at 14-15.

⁷ Item 2, *supra* note 1, at 16.

⁸ Item 2, *supra* note 1, at 39-40.

⁹ Item 2, *supra* note 1, at 18-19.

Drug Involvement

Applicant is a substance abuser whose choice of substances was identified by Applicant as “THC, such as marijuana, weed, pot, hashish, etc.”¹¹ He smoked marijuana in cigarettes and pipes from September 2012 until September 2013. Applicant’s expressed reasons and justifications for doing so have been inconsistent. He initially indicated that he smoked marijuana for a variety of general reasons including recreation, social, and as a sleep remedy.¹² On occasions, he used it to relax while “hanging out” with friends whose names he could or would not recall.¹³ On other occasions, he smoked marijuana “in the presence . . . [of] his spouse.”¹⁴ In his Answer to the SOR, Applicant’s stated reasons changed dramatically. He explained that he had difficulty sleeping at night and wanted to move on from over-the-counter remedies and did not wish to consume prescription sleep-aids. A friend suggested he try marijuana. He did, and it helped.¹⁵ He also stated: “I never used it recreationally and it only aided in my ability to occasionally get a good night’s rest.”¹⁶ During his period of marijuana abuse, Applicant purchased approximately \$300 worth of marijuana from an online source.¹⁷ Applicant estimated that he smoked marijuana approximately two times per month.¹⁸ As noted above, Applicant held a secret security clearance during the period of his marijuana abuse.¹⁹

In December 2013, Applicant stated that his last use of marijuana occurred in September of that year, and that because of the impending birth of his child, “as well as the opportunity to work on a federal contract requiring a security clearance,” he stopped using marijuana, and he has no intent to use it in the future.²⁰ He “denied ever being dependent on/or abusing marijuana.”²¹

¹⁰ In his e-QIP, and during his interview with an investigator from the U.S. Office of Personnel Management (OPM), Applicant indicated that he anticipated the birth of a child in 2014. Item 2, *supra* note 1, at 38; Item 3 (Personal Subject Interview, dated December 23, 2013), at 2. In his Answer to the SOR, he acknowledged having a daughter. Item 1, *supra* note 2.

¹¹ Marijuana is classified as a controlled substance under schedule I of the Controlled Substances Act of 1970 (21 U.S.C. § 801 *et seq.*). Item 2, *supra* note 1, at 37.

¹² Item 2, *supra* note 1, at 37-38; Item 3, *supra* note 10, at 1-2.

¹³ Item 2, *supra* note 1, at 37; Item 3, *supra* note 10, at 1.

¹⁴ Item 3, *supra* note 10, at 1.

¹⁵ Item 1, *supra* note 2.

¹⁶ Item 1, *supra* note 2. *See for example*, Applicant’s statement that “the nature of the use was merely recreational. . . .” Item 2, *supra* note 1, at 38.

¹⁷ Item 3, *supra* note 10, at 2.

¹⁸ Item 3, *supra* note 10, at 1.

¹⁹ Item 1, *supra* note 2.

²⁰ Item 1, *supra* note 2, at 2.

²¹ Item 1, *supra* note 2, at 2.

There is no evidence that Applicant ever received any medical treatment or counseling related to the substance abuse. He claims he no longer associates with other substance abusers.²²

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.

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.”²³ 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.”²⁴

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.”²⁵ The Government initially has the burden of producing evidence to establish

²² Item 1, *supra* note 2.

²³ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

²⁴ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

²⁵ “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).

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.²⁶

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This 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."²⁷

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."²⁸ 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.

²⁶ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

²⁷ *Egan*, 484 U.S. at 531.

²⁸ See Exec. Or. 10865 § 7.

(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;

(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 September 2012 and at least September 2013, Applicant smoked marijuana cigarettes and marijuana-filled pipes approximately two times per month. He admitted using marijuana after he was granted a DOD security clearance. Depending on when Applicant described his marijuana abuse, such use was for a variety of general recreation and social reasons including, to relax while “hanging out” with friends, or in the presence of his spouse,” or to address a difficulty he had sleeping at night. His characterizations of recreational use are diametrically opposed: “I never used it recreationally” versus “the nature of the use was merely recreational. . . .” The inconsistencies in Applicant’s characterizations lead me to believe the truth lies somewhere in between his explanations: the use was for a variety of general recreation and social reasons, as well as to address his sleep issues. Applicant admitted purchasing, possessing, and using marijuana despite having been granted a security clearance. Because of the inconsistencies in Applicant’s stated reasons for his marijuana abuse, it is difficult to determine the accuracy of his estimated frequency or duration of the marijuana use. AG ¶¶ 25(a), 25(c), and 25(g) have been 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 September 2012 to at least September 2013. He smoked marijuana cigarettes and pipes approximately two times per month. Because of his inconsistent statements regarding the reasons for such marijuana abuse, it is difficult to determine if there were unusual circumstances that facilitated such activity. 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. Applicant now intends to refrain from such use in the future. The Government put its trust in Applicant when it granted him a secret security clearance in 2012, and he broke that trust when he involved himself in his repeated use of marijuana over at least a one-year period. 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, Applicant’s acknowledgment that he used marijuana in front of his wife, 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 essentially because of his sleeping problems (as well as his self-disputed general recreation and social reasons), such use may recur. Furthermore, one of Applicant’s stated reasons for stopping his use of marijuana was “the opportunity to work on a federal contract requiring a security clearance.” Applicant already had that clearance. In the absence of positive character evidence, and because of the uncertainty established by his various versions of causation, there is continuing doubt as to 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. His marijuana abuse purportedly ceased in September 2013. 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 one-year period while possessing a security clearance. He knew he was violating both federal law and his fiduciary responsibilities when he resorted to purchasing, possessing, and using marijuana, but it apparently did not matter for he did so on numerous occasions. There are several troubling aspects of this case, including Applicant's various inconsistent versions of the reasons for his marijuana use; marijuana use remains a federal criminal violation; 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.²⁹ 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.

²⁹ 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).

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
Subparagraph 1.c:	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.

ROBERT ROBINSON GALES
Administrative Judge