



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



In the matter of:)
)
-----) ISCR Case No. 14-01411
)
Applicant for Security Clearance)

Appearances

For Government: Gregg A. Cervi, Esquire, Department Counsel
For Applicant: *Pro se*

02/05/2015

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 January 15, 2014, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.¹ On June 10, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility – Division A (CAF) issued a Statement of Reasons (SOR) to her, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (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

¹ Item 5 (e-QIP, dated January 15, 2014).

Guideline H (Drug Involvement), and detailed reasons why the DOD CAF adjudicators could not 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 statement notarized June 20, 2014, Applicant responded to the SOR allegations, and elected to have her 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 prepared by the Defense Office of Hearings and Appeals (DOHA). The FORM was provided to Applicant on November 4, 2014, and she 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 November 12, 2014. Applicant's response was due on December 12, 2014, but to date, no response was received. The case was assigned to me on February 4, 2015.

Findings of Fact

In her Answer to the SOR, Applicant admitted the factual allegation pertaining to drug involvement in the SOR (¶ 1.a.). 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 52-year-old employee of a defense contractor. She has been an employee of the same employer in a variety of geographical locations since 1983, and is currently serving as a systems integration business analyst senior staff.³ A May 1980 high school graduate, Applicant received a bachelor's degree in management in May 1994 and a master's degree in management in December 1999.⁴ She has never served in the U.S. military.⁵ Applicant was previously granted a secret security clearance that expired in 2004.⁶ Applicant was married in July 1981,⁷ and she has two children: a son born in 1990 and a daughter born in 1991.⁸

² Item 4 (Applicant's Answer to the SOR).

³ Item 5, *supra* note 1, at 11; Item 6 (Personal Subject Interview, dated February 20, 2014), at 1-2.

⁴ Item 5, *supra* note 1, at 9-10; Item 6, *supra* note 3, at 1.

⁵ Item 5, *supra* note 1, at 12.

⁶ Item 5, *supra* note 1, at 35.

⁷ Item 5, *supra* note 1, at 15.

⁸ Item 5, *supra* note 1, at 16-17.

Drug Involvement

Applicant is a substance abuser whose choice of substances was marijuana.⁹ Her initial use of marijuana occurred in April 2011 in an effort to self-medicate to alleviate the pain from a migraine headache. She contends that she has been suffering from “debilitating migraine headaches” for the past 20 years, and that she had tried every prescription drug available for the treatment of migraine headaches with little or no relief.¹⁰ Applicant did not submit any medical diagnoses or records to substantiate her condition, previous medical treatment, or various prescriptions. She acknowledged both “experimenting” with, and “using,” marijuana between six and eight occasions when she was in her late 40’s and early 50’s, generally at home in the presence of her husband, until July 2013. She said she experimented to self-medicate, and used it “a few times as an alternative to alcohol in social situations.”¹¹ The marijuana was eaten in cookies and chewable candies, as well as smoked in “joints.”¹² The marijuana made Applicant feel relaxed and happy, but it failed to alleviate her headache pain.¹³

The marijuana was furnished to her at no cost by a friend who, in turn, had a friend who had legally purchased it using a medical marijuana prescription card in a state where such purchases are legal.¹⁴ Applicant claims she ceased using marijuana in July 2013, and, because she subsequently moved from a state where marijuana use is legal to a different state, she no longer associates with her marijuana-supplying friends.¹⁵ She has no intentions of ever using marijuana again,¹⁶ and has indicated a willingness to sign a statement saying so.¹⁷

Because Applicant did not furnish evidence of her work performance or character, either through character references or by performance appraisals (other than her self-characterizations of being an extremely ethical person who has received high performance ratings),¹⁸ it is difficult to assess her work performance or her reputation for reliability, trustworthiness, honesty, or good judgment.

⁹ Marijuana is classified as a controlled substance under schedule I of the Controlled Substances Act of 1970 (21 U.S.C. § 801 *et seq.*).

¹⁰ Item 4, *supra* note 2.

¹¹ Item 5, *supra* note 1, at 33.

¹² Item 6, *supra* note 3, at 2.

¹³ Item 6, *supra* note 3, at 2.

¹⁴ Item 6, *supra* note 3, at 2; Item 4, *supra* note 2.

¹⁵ Item 4, *supra* note 2.

¹⁶ Item 6, *supra* note 3, at 2.

¹⁷ Item 4, *supra* note 2.

¹⁸ See Item 4, *supra* note 2.

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.”¹⁹ 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.”²⁰

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.”²¹ 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.²²

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

¹⁹ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

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

²¹ “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).

²² *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."²³

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."²⁴ 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;

²³ *Egan*, 484 U.S. at 531.

²⁴ 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 April 2011 and at least July 2013, when she was in her late 40’s and early 50’s, Applicant consumed marijuana in edible form or smoked it in joints. She admitted using marijuana after her security clearance had already expired. Her use of marijuana on at least six to eight occasions over that lengthy period was primarily to self-medicate, but apparently also for fun and relaxation, for she used it as a substitute for alcohol. While there is no evidence of cultivation, processing, purchase, sale, or distribution of marijuana, or the possession of drug paraphernalia, by merely using marijuana, she illegally possessed it. At some point, despite having been previously granted a security clearance (that had already expired), and having been forewarned of the Government’s heightened sensitivity regarding marijuana use by federal civil servants and federal contractors, Applicant made a decision to use marijuana. While the sale of marijuana for medical use in the state may have been legal in that state for the person to whom it was sold, it was illegal under federal law. Applicant illegally used marijuana prescribed for someone else. AG ¶¶ 25(a) and 25(c) have been established. AG ¶ 25(g) has not 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 April 2011 until at least July 2013. Applicant has never received any medical treatment or counseling related to the substance abuse, and she has never been evaluated or diagnosed for substance abuse or dependence. While Applicant now intends to refrain from such use in the future, she did not submit a signed statement of intent with automatic revocation of clearance for any violation. She also noted that because she moved to another state, she no longer associates with drug-using associates and contacts, and has changed the environment where the marijuana was

used. That position is actually not fully accurate, because Applicant acknowledged she used marijuana at home.

Applicant's purported abstinence is viewed favorably, and she should be encouraged to continue it. However, Applicant has not furnished a reasonable basis for ignoring federal and state drug policy, but instead resorted to marijuana use, claiming it was merely to self-medicate. Such use may recur if her purported migraine headaches should reappear. In the absence of positive character evidence, the uncertainty established by her reasons for using marijuana (self-medication versus a substitute for alcohol), 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 worked for the same employer in various locations since 1983. She has never been evaluated or diagnosed for drug abuse or dependence. Her marijuana experimentation and use purportedly ceased in July 2013. Applicant's abstinence is viewed favorably, and she should be encouraged to continue it. She claims to have no intention to use marijuana in the future.

There is also more substantial evidence supporting the security concerns. There are several troubling aspects of this case, including Applicant's continued use of marijuana despite being apprised of the Government's heightened sensitivity regarding marijuana use; her violation of federal law; her use of marijuana over a two-year period when she was in her late 40's and early 50's; and her wrongfully acquiring the marijuana that had been prescribed for someone else.

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.²⁵ 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 she 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 she 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

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

²⁵ 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).