



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-01967

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro se*

12/29/2014

Decision

GALES, Robert Robinson, Administrative Judge:

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

Statement of the Case

On April 5, 2007, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.¹ On November 4, 2013, he submitted another e-QIP.² On June 18, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility – Division A (CAF) issued a Statement of Reasons (SOR) to him under 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);

¹ GE 1 (e-QIP, dated April 5, 2007).

² GE 2 (e-QIP, dated November 4, 2013).

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 Guidelines H (Drug Involvement) and E (Personal Conduct), and detailed reasons why the DOD adjudicators were unable to find 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.

Applicant indicated that he received the SOR on June 28, 2014. In a sworn statement, dated July 15, 2014, Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing “unless one is required.”³ On July 31, 2014, pursuant to ¶ E3.1.7., Additional Procedural Guidance, Encl. 3, the Directive, Department Counsel requested a hearing.⁴ He indicated the Government was prepared to proceed on September 25, 2014. The case was assigned to me on October 14, 2014. A Notice of Hearing was issued on October 28, 2014, and I convened the hearing, as scheduled, on November 19, 2014.

At the commencement of the hearing, Department Counsel moved to amend the SOR by withdrawing one of the allegations under Guideline E. There being no objection by Applicant, the motion was granted, and SOR ¶ 2.b. was withdrawn.⁵ During the hearing, two Government exhibits (GE 1 and GE 2) and two Applicant Exhibits (AE A and AE B) were admitted into evidence without objection. Applicant testified. The transcript of the hearing (Tr.) was received on December 2, 2014. The record closed on November 19, 2014.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in the SOR under drug involvement (¶¶ 1.a. and 1.b.) personal conduct (¶¶ 2.a. and 2.b.). Applicant’s admissions 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 32-year-old employee of a defense contractor. He has been serving as a consultant with his current employer since September 2013.⁶ He has also been a part-time technical college adjunct instructor since August 2010, as well as a part-time business owner since March 2011. He was unemployed from June 2013 until September 2013, following an unspecified period during which Applicant was on annual

³ Applicant’s Answer to the SOR, dated July 15, 2014.

⁴ Joint Exhibit I (Letter, dated July 31, 2014).

⁵ Tr. at 10; GE 2, *supra* note 2, at 14-15.

⁶ Tr. at 28-29, 53.

leave and administrative leave due to medical issues.⁷ A May 2001 high school graduate, in December 2006, Applicant received an associate's degree in computer science,⁸ and in February 2010, he received a bachelor's degree.⁹ He has never served in the U.S. military.¹⁰ Applicant was granted a secret security clearance in May 2007.¹¹ He has never been married.¹²

Drug Involvement

Applicant was a substance abuser whose substances of choice were marijuana and hashish, both of which are forms of cannabis. He characterized his use over the years as "experimental use."¹³ He started using marijuana when it was offered to him by a good friend at a party in December 2005, when he was 23 years old.¹⁴ Although he cannot recall the exact date when he next used marijuana, he believes it occurred in 2006.¹⁵ The specific circumstances surrounding such use were not developed. Applicant acknowledged that his marijuana use during those two incidents was not associated with any stressful situations.¹⁶

He continued using marijuana or hashish on at least two or three additional occasions from 2007 until May or June 2013, generally in social settings with friends or family.¹⁷ He attributed his most recent use of marijuana to stress and significant work pressures, burnout, drowsiness at work, and excessive sleep issues. At the time, he was receptive to anything to treat his problems because the medical professionals were not helping him.¹⁸ In May or June 2013, while on administrative leave from his employer because of his health problems, and while still possessing the security clearance that was issued to him in 2007, Applicant was in a social setting with his cousin, and his cousin offered him some marijuana.¹⁹ He used some "concentrated hashish" and

⁷ GE 2, *supra* note 2, at 16; Tr. at 28.

⁸ GE 2, *supra* note 2, at 11; Tr. at 53-54.

⁹ Tr. at 54-56; GE 2, *supra* note 2, at 12. Applicant acknowledged that the date appearing in GE 2 is in error.

¹⁰ GE 2, *supra* note 2, at 23.

¹¹ GE 2, *supra* note 2, at 39; Tr. at 29.

¹² GE 2, *supra* note 2, at 24.

¹³ GE 2, *supra* note 2, at 36.

¹⁴ GE 2, *supra* note 2, at 36; Tr. at 32-33.

¹⁵ Tr. at 33.

¹⁶ Tr. at 33.

¹⁷ Tr. at 23-24, 35-36, 45, 51.

¹⁸ Tr. at 24-25, 30.

¹⁹ Tr. at 24, 45.

became ill, throwing up multiple times.²⁰ He contends he has not used marijuana or hashish since 2013.²¹ Applicant indicated that he does not intend to use any more drugs in the future.²²

The weekend before the hearing, Applicant and another musician were practicing music (Applicant plays the guitar) in a house and Applicant was offered some marijuana. Applicant declined the offer.²³ The other individual proceeded to smoke some marijuana.²⁴

Although Applicant believed that marijuana use in the particular state in which he used it is illegal, he claimed to be unaware of the U.S. Government's zero tolerance policy for illegal drug use.²⁵ In addition, while he claimed to be unaware that his employers had a drug policy, he acknowledged that he could have been required to undergo drug screens.²⁶

Applicant has never received any medical treatment or counseling related to the substance abuse.²⁷ He has never been evaluated or diagnosed for substance abuse or dependence.²⁸

Personal Conduct

On April 5, 2007, when Applicant completed his initial e-QIP (GE 1), he responded to a question pertaining to drug use. The question in Section 24 asked if, in the last seven years, he had illegally used any drugs or controlled substances, including marijuana and hashish. Applicant answered the question with "no."²⁹ He certified that the response was "true, complete, and correct" to the best of his knowledge and belief. His response to the question was false, for Applicant concealed his marijuana use during the seven-year period leading up to the date he completed the e-QIP. In his Answer to the SOR, Applicant indicated that he had received no guidance during the application process, that over a three-day period he had made multiple submissions of

²⁰ GE 2, *supra* note 2, at 36; Tr. at 23-24.

²¹ Tr. at 24, 35.

²² Tr. at 25.

²³ Tr. at 36-37, 43-44.

²⁴ Tr. at 44-45.

²⁵ Tr. at 37-38.

²⁶ Tr. at 34.

²⁷ Tr. at 52.

²⁸ Tr. at 52.

²⁹ GE 1, *supra* note 1, at 27.

the e-QIP, and that because the process was being expedited in the interest of filling a particular job opening, his response was merely a clerical oversight.³⁰ He subsequently denied intending to falsify his response, and contended the response was an oversight because he had hastily, not fully, read the question.³¹ In November 2013, when Applicant completed his most recent e-QIP (GE 2), he more accurately portrayed his previous drug abuse.

Job Performance and Character References

A number of current and former supervisors, colleagues, and students offered accolades about Applicant. He has been characterized as self-motivated and organized, dedicated and thorough, creative and pro-active, professional, approachable, exceptionally talented and knowledgeable, hard-working, and sincere, with a willingness to share knowledge.³² Applicant has received a variety of awards and certificates of appreciation recognizing his outstanding efforts, engineering support, and outstanding performance in support of a diverse missions.³³

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.”³⁴ 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’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”³⁵

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

³⁰ Applicant’s Answer to the SOR, *supra* note 3, at 1; Tr. at 39.

³¹ Tr. at 41-42.

³² AE B (Character References, dated November 18, 2014).

³³ AE A (Certificates, various dates).

³⁴ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

³⁵ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

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 over-arching adjudicative goal is a fair, impartial and common sense 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."³⁶ 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.³⁷

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 protect or 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."³⁸

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."³⁹ 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 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

³⁶ "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).

³⁷ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

³⁸ *Egan*, 484 U.S. at 531

³⁹ See Exec. Or. 10865 § 7.

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;

(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, AG ¶ 25(g) may apply where there is “any illegal drug use after being granted a security clearance.”

Applicant used marijuana or hashish on at least two occasions, in social settings, from December 2005 to some point in 2006. Between May 2007 and May or June 2013, he used marijuana or hashish on at least two or three additional occasions, generally in social settings, although he had previously been granted a security clearance in May 2007. During what he contends was his last such use, Applicant used the substance to self-medicate himself because of various health issues. AG ¶¶ 25(a) 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) does not apply. AG ¶ 26(b) only minimally applies. Applicant’s marijuana or hashish abuse occurred on at least five occasions between December 2005 and May or June 2013. There was nothing unusual about such use for it generally occurred in social settings with friends or family members. Applicant has never received any medical treatment, counseling, or education related to the substance abuse, and he has never been evaluated or diagnosed for substance abuse or dependence. He remains significantly unaware as to his true motivation for turning to marijuana use. Without that knowledge, it is difficult to conclude that such inappropriate and illegal behavior is unlikely to recur.

There is little evidence that Applicant has changed or avoided the environment where he used marijuana or hashish, or that he has disassociated himself from drug-using associates and contacts. To the contrary, he was with a friend who used marijuana just one weekend before the hearing. While Applicant intends to refrain from such use 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 since May or June 2013 is viewed favorably, and he should be encouraged to continue it. However, because Applicant has not furnished a reasonable basis for ignoring his fiduciary responsibilities of holding a security clearance, but instead resorted to marijuana use, such use may recur, and the uncertainty continues to cast doubt on Applicant’s reliability, trustworthiness, and good judgment.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The guideline notes a condition that could raise security concerns. The “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities”, may raise security concerns under AG ¶ 16(a).

Applicant’s omission and concealment in his response to an inquiry during the completion of his 2007 e-QIP of information pertaining to his substance abuse provides sufficient evidence to examine if Applicant’s answer was a deliberate falsification pertaining to material information, as alleged in the SOR, or was the result of confusion or misunderstanding on his part. I had ample opportunity to evaluate the demeanor of Applicant, observe his manner and deportment, appraise the way in which he responded to questions, assess his candor or evasiveness, read his statements, and listen to his testimony.

Applicant’s explanations, where there were explanations, regarding that answer were not supportive of any possible mistakes to dissuade me from concluding his true intentions at the time he completed that application. Applicant’s character references described him as organized, thorough, creative, and pro-active. Yet, Applicant claimed that he had received no guidance during the application process, that over a three-day period he had made multiple submissions of the e-QIP, and that because the process was being expedited in the interest of filling a particular job opening, his response was merely a clerical oversight that was caused because he had hastily, not fully, read the question. My evaluation of Applicant’s actions reveals an individual who has established a pattern of rule-breaking behavior by frequently skating on the edge. He violated law and policy by engaging in the use of illegal substances, and continued doing so after he was granted a security clearance. My conclusion is that he concealed his marijuana use in the e-QIP because he feared the truth would jeopardize his chances of employment. AG ¶ 16(a) has been established.⁴⁰

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct. AG ¶ 17(a) may apply if “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” Similarly, AG ¶ 17(c) may apply if “the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened

⁴⁰ The Appeal Board has explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant’s intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant’s intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10390 at 8 (App. Bd. Apr. 12, 2005) (citing ISCR Case No. 02-23133 (App. Bd. Jun. 9, 2004)).

under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment."

AG ¶¶ 17(a) and 17(c) minimally apply. When Applicant completed his 2013 e-QIP he corrected the 2007 omission and concealment of the true facts pertaining to his substance abuse, but that act, taking place six years after the initial submission of the 2007 e-QIP, cannot be considered to have been promptly made. The 2007 omission and concealment were material and significant, not minor. It did not take place under unique circumstances. It appears to have occurred on only one occasion. Now that the truth is finally revealed, it is unlikely to recur. Nevertheless, Applicant's actions do cast doubt on his reliability, trustworthiness, and 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 Guidelines H and E in my analysis below.

There is some mitigating evidence under the whole-person concept. Applicant is an outstanding employee who has apparently made significant contributions to the missions of his employers. He is a talented and approachable teacher. Applicant has never received any medical treatment, counseling, or education related to the substance abuse, and he has never been evaluated or diagnosed for substance abuse or dependence. Applicant's substance abuse purportedly ceased in May or June 2013, one and one-half years ago. Applicant's abstinence is viewed favorably, and he should be encouraged to continue it.

There is also more substantial evidence supporting the security concerns. Applicant used marijuana both before and while possessing a security clearance. In doing so, he was violating both federal and state law as well as his fiduciary responsibilities. Applicant remains significantly unaware as to his true motivation for

turning to marijuana use. Without that knowledge, it is difficult to conclude that such inappropriate and illegal behavior is unlikely to recur.

There are three positive qualities associated with trustworthiness, reliability, and being an overall good security risk: a strong social consciousness, or willingness to abide by the rules; self-control, or the ability to exercise responsible and rational control over one's impulses; and the capacity for making commitments, or the ability to maintain personal or job commitments over time. Applicant's actions in the areas of substance abuse and personal conduct indicate that he has shortcomings in at least two of these important areas. In turning to marijuana, he failed to respect authority, rules, and accepted standards of behavior, and it reflected poor self-control.

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.⁴¹ 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 and personal conduct security concerns. See AG ¶¶ 2(a)(1) - 2(a)(9). 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
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Withdrawn

⁴¹ 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 national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ROBERT ROBINSON GALES
Administrative Judge