



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



In the matter of:)
)
-----) ISCR Case No. 11-04790
)
Applicant for Security Clearance)

Appearances

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

04/04/2012

Decision

GALES, Robert Robinson, Administrative Judge:

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

Statement of the Case

On December 3, 2010, 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 an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to the interrogatories on June 10, 2011.² On August 23, 2011, DOHA 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; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative*

¹ Item 5 (SF 86), dated December 3, 2010.

² Item 6 (Applicant's Answers to Interrogatories, dated June 10, 2011).

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 DOHA 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.

Applicant acknowledged receipt of the SOR on August 30, 2011. In a statement notarized September 16, 2011,³ Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was provided to Applicant on December 30, 2011, 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 January 10, 2012, but as of March 21, 2012, he had not submitted any further documents or other information. The case was assigned to me on April 2, 2012.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations pertaining to drug involvement in the SOR (¶ 1.a.), adding explanations for his actions. 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 29-year-old employee of a defense contractor. He has been serving as an engineer with his current employer since April 2007. He was previously employed as a content engineer (part-time) from June 2003 until June 2005; an intern from June 2005 until August 2005; and a graduate student instructor (part-time) from August 2005 until December 2006. During the period December 2006 until April 2007, he considered himself unemployed while traveling around South America.⁴ A May 2001 high school graduate, he received a bachelor's degree in civil and environmental engineering in May 2005, and a master's degree in structural engineering and mechanics of materials in December 2006.⁵ Applicant has never served in the U.S. military.⁶ He has never been married.⁷

³ Item 4 (Applicant's Answer to the SOR, dated September 16, 2011).

⁴ Item 5, *supra* note 1, at 21-27.

⁵ *Id.* at 17-20.

⁶ *Id.* at 35.

⁷ *Id.* at 37.

Drug Involvement

Applicant is a substance abuser whose substance of choice is marijuana. He started using marijuana in about August 2001 at a friend's house, and continued doing so, through a "joint" or a bong, about once every month until about May 2006, while in college as an undergraduate and graduate student in the same city. His usage decreased to about two to three times per year, and remained at that frequency until about November 2010, when he purportedly ceased using marijuana.⁸ The marijuana was "freely" supplied to him by his friend.⁹ Applicant has never sold, distributed, or manufactured marijuana.¹⁰ He attributed his use of marijuana to two reasons: it was "freely" supplied to him, and it made him feel relaxed and euphoric.¹¹

In January 2011, Applicant indicated the last time he used marijuana was in November 2010, and he acknowledged that he "is considering stopping usage of marijuana completely at this point because [Applicant] does not want health insurance companies to label him as a smoker."¹² He also added that "if it is offered and it is the right time, he will smoke the marijuana."¹³ In June 2011, he clarified his comments by stating that he did "not intend to use it in the future."¹⁴ In September 2011, Applicant acknowledged that his statement of intent accompanies with it an automatic revocation of clearance for any violation.¹⁵ There is no evidence that he has used marijuana since November 2010.

Applicant has never tested positive for any illegal drug.¹⁶ He has never been professionally evaluated or diagnosed for drug abuse, and has never received any drug treatment.¹⁷

Applicant has not disassociated himself from his marijuana-supplier-friend, but that friend has purportedly decided to severely limit his use of marijuana and understands Applicant's reasons for stopping.¹⁸

⁸ Item 6 (Personal Subject Interview, dated January 26, 2011), at 3, attached to Applicant's Answers to the Interrogatories; Item 5, *supra* note 1, at 49-50.

⁹ Item 6, at 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Item 6, *supra* note 2, at 3.

¹⁵ Item 4, *supra* note 3, at 2.

¹⁶ Item 6, *supra* note 8, at 3.

¹⁷ *Id.*

¹⁸ Item 4, *supra* note 3, at 1-2.

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. In addition, AG ¶ 25(h) may apply if there was “*any expressed intent to continue drug use, or failure to clearly and convincingly commit to discontinue drug use.*” During the period August 2001 – November 2010, Applicant obtained and used marijuana. AG ¶¶ 25(a), 25(c), and 25(h), 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 condition 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. Applicant used marijuana with varying frequency from August 2001 until November 2010, a period of nearly nine and one-quarter years, because it was free and available, and his friend furnished it to him. He used it in a university setting while both an undergraduate and a graduate student, as well as in a non-school setting while working for a Government contractor. Marijuana made him feel relaxed and euphoric. The issue of marijuana’s status as an illegal drug was not a concern for him. His decision, as it pertains to his continuing use of marijuana over such a lengthy period, is troublesome. Applicant’s abstinence over the past 17 months is encouraging, but in light of the foregoing, the period is still too brief to establish that his substance abuse is unlikely to recur or that it does not cast doubt on Applicant’s reliability, trustworthiness, or good judgment.

AG ¶ 26(b) partially applies. Applicant has taken certain efforts to demonstrate his intent not to abuse any drugs in the future. He has abstained since November 2010 and he has signed a statement of intent with automatic revocation. However, while Applicant’s marijuana-supplier-friend has purportedly decided to severely limit his own use of marijuana, Applicant still associates with him. In addition, Applicant has not really changed or avoided the environment where marijuana was used. He used it in a

university setting while both an undergraduate and a graduate student, as well as in a non-school setting while working for a Government contractor, all in the same city. In addition, the demonstrated intent seems to be a fluid concept. In January 2011, Applicant indicated the last time he used marijuana was in November 2010. He also stated that he was considering stopping the use of marijuana completely because he did not want health insurance companies to label him as a smoker. He added that "if it is offered and it is the right time, he will smoke the marijuana." Under those circumstances, it appears that a more thorough demonstration of intent, supported by a longer period of abstinence, complete disassociation from drug-using associates, and avoidance of the environment where the marijuana was used, is appropriate.

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. Moreover, I have evaluated this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.²⁵

There is some evidence in favor of mitigating Applicant's conduct. Applicant's marijuana use ceased in November 2010, and he has been abstinent since that time. Applicant has never tested positive for any illegal drug, and he has never been professionally evaluated or diagnosed for drug abuse. He signed a statement of intent with automatic revocation.

The disqualifying evidence under the whole-person concept is more substantial. Applicant has a nearly nine and one-quarter year history of marijuana use, ending in November 2010. Equally troubling is his statement that he was considering stopping the use of marijuana because he did not want health insurance companies to label him as a smoker. The legal status of the substance was of no concern. He added that if

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).

marijuana is offered to him and it is the right time, he will smoke the marijuana. Applicant's actions over such a lengthy period, as well as his changing views and intentions, indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which raise questions about his reliability, trustworthiness and ability to protect classified information. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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