



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



In the matter of:)
)
 ----) ISCR Case No. 11-12471
)
 Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esquire, Department Counsel
For Applicant: *Pro se*

07/31/2013

Decision

GALES, Robert Robinson, Administrative Judge:

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

Statement of the Case

On May 27, 2011, 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 November 28, 2012, the Department of Defense (DOD) issued him a set of interrogatories. He responded to the interrogatories on December 14, 2012.² On March 28, 2013, the DOD 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); and the *Adjudicative Guidelines for Determining*

¹ Item 5 (SF 86), dated May 27, 2011.

² Item 6 (Applicant's Answers to Interrogatories, dated December 14, 2012).

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 received the SOR on April 5, 2013. In a statement notarized April 25, 2013,³ 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 May 9, 2013, 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 May 14, 2013, but as of July 18, 2013, he had not submitted any further documents or other information. The case was assigned to me on July 23, 2013.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the factual allegations pertaining to drug involvement and personal conduct (¶¶ 1.a. through 1.c., 2.a., and 2.b.) in the SOR. 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 apprentice laborer with his current employer since May 2011. He was previously employed as a radio broadcaster, media relations assistant, media relations director, and laborer. He was unemployed from September 2010 until May 2011.⁴ Applicant never served in the U.S. military,⁵ and never held a security clearance.⁶ Applicant received a vocational certificate in audio engineering in December 2003, and a bachelor's degree in communications in May 2010.⁷ He has never been married.⁸

³ Item 4 (Applicant's Answer to the SOR, dated April 25, 2013).

⁴ Item 5, *supra* note 1, at 18-27.

⁵ Item 5, *supra* note 1, at 28.

⁶ Item 5, *supra* note 1, at 38-39.

⁷ Item 5, *supra* note 1, at 16-17.

⁸ Item 5, *supra* note 1, at 30.

Drug Involvement and Personal Conduct

Applicant is a substance abuser whose substance of choice is marijuana. Because of inconsistencies in his various versions of his substance abuse history, it remains unclear as to the accurate length and frequency of such abuse. He acknowledged in his SF 86 that he had used marijuana a couple of times per month while attending college from April 2007 until May 2009, "as an alternative to using alcohol."⁹ He certified that his statement was true, complete, and correct to the best of his knowledge and belief and was made in good faith.¹⁰ In reality, Applicant's response was false. He subsequently admitted that he deliberately failed to disclose that he had used marijuana from May 2009 to May 2011.¹¹

During his personal subject interview, conducted by an investigator from the U.S. Office of Personnel Management (OPM) in June 2011, Applicant modified his earlier substance abuse history and admitted that he had continued to use marijuana until April 2011. He also acknowledged that he was afraid to admit the true history on his SF 86 because doing so might jeopardize his job.¹² He stated that he took three or four puffs of marijuana from a pipe with his college roommates, either at his residence or at a friend's residence.¹³ Marijuana made him sleepy, but never caused him any problems.¹⁴ Applicant contended that he stopped using marijuana because he was aware that continuing to do so would jeopardize his employment.¹⁵ He also stated that he intended to "never use illegal drugs again."¹⁶

On July 18, 2011, Applicant was reinterviewed by the same OPM investigator. Applicant again changed the description of his marijuana use, and acknowledged that from May 2009 until May 2010, he used illegal drugs approximately two times per week; and from May 2010 until April 2011, he diminished his use to once every three months. This time he described his use as two to three puffs on a cigarette.¹⁷ Applicant also indicated that his father became aware of his drug use in April 2004, when Applicant mistakenly left a bag of marijuana on a counter at his father's residence, and his father confronted him about it.¹⁸

⁹ Item 5, *supra* note 1, at 37-38.

¹⁰ Item 5, *supra* note 1, at 41.

¹¹ Item 4, *supra* note 3, at 2.

¹² Item 6 (Personal Subject Interview, dated June 16, 2011), at 6.

¹³ Item 6, *supra* note 12, at 6.

¹⁴ Item 6, *supra* note 12, at 6.

¹⁵ Item 6, *supra* note 12, at 6.

¹⁶ Item 6, *supra* note 12, at 6.

¹⁷ Item 6, *supra* note 12, at 8.

¹⁸ Item 6, *supra* note 12, at 8.

On August 17, 2011, Applicant was reinterviewed, and Applicant again changed the description of his marijuana use. This time, Applicant acknowledged that he had actually commenced using illegal drugs in approximately August 2003.¹⁹

On September 7, 2011, Applicant was reinterviewed, and Applicant again changed the description of his marijuana use. He acknowledged smoking one or two marijuana cigarettes two times per week. He stated that he continued such use beyond April 2007. As a result of his marijuana use, Applicant gained weight and his grades at school went down.²⁰ He did not include his marijuana use for the period August 2003 until April 2007 because such consistent drug use might look bad for his background investigation.²¹ Applicant denied using any drugs since April 2011, because the availability of such drugs was very limited in the location in which he resided, and he did not have any contacts in the area. Still, he acknowledged he “would continue using drugs only for recreation.”²² He added, if he returned to where he went to school, where drugs would be available, he “would hopefully not use any drugs.”²³

In December 2012, in response to an inquiry from a DOD adjudicator, Applicant admitted that he had used marijuana since June 2011. He used marijuana with friends during Christmas 2011, and again in 2012. He stated that he smokes marijuana for “its anxiety alleviating qualities.”²⁴

Applicant’s SF 86 contained the following question: “In the last 7 years, have you been involved in the . . . purchase . . . of any controlled substance [including marijuana]?” Applicant answered “no.”²⁵ He certified that his statement was true, complete, and correct to the best of his knowledge and belief and was made in good faith.²⁶ In reality, Applicant’s response was false. He subsequently admitted that he deliberately failed to disclose that he had purchased marijuana from April 2007 to May 2011.²⁷ During his initial OPM interview in June 2011, Applicant admitted that he had purchased marijuana.²⁸ During his July 2011 OPM interview, he again admitted having purchased marijuana during the period May 2009 until May 2010, insisting that after

¹⁹ Item 6 (OPM Report of Investigation (ROI), dated August 17, 2011).

²⁰ Item 6 (OPM ROI, dated September 12, 2011).

²¹ Item 6, *supra* note 19.

²² Item 6, *supra* note 19.

²³ Item 6, *supra* note 19.

²⁴ Item 7 (Statement, dated December 21, 2012).

²⁵ Item 5, *supra* note 1, at 37.

²⁶ Item 5, *supra* note 1, at 41.

²⁷ Item 4, *supra* note 3, at 2.

²⁸ Item 6, *supra* note 12, at 6.

May 2010, the marijuana was always furnished by someone else.²⁹ During his September 2011 OPM interview, Applicant admitted that during the period from August 2003 until April 2007, he generally purchased one-eighth of an ounce of marijuana once every two weeks, spending approximately \$50 per purchase.³⁰ In December 2012, he acknowledged purchasing either one-eighth of an ounce or one-quarter of an ounce of marijuana for between \$70 and \$125 on four occasions in 2012.³¹

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.”³² 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.”³³

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.”³⁴ The Government initially has the burden of producing evidence to establish

²⁹ Item 6, *supra* note 12, at 8.

³⁰ Item 6, *supra* note 19.

³¹ Item 7, *supra* note 24.

³² *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

³³ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

³⁴ “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.³⁵

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."³⁶

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."³⁷ 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.

³⁵ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

³⁶ *Egan*, 484 U.S. at 531

³⁷ 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, where there is an *expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use*, AG ¶ 25(h) may apply. During the period 2003 until 2012, Applicant purchased, possessed, and used marijuana. Although he stated, at one point, that he intended to “never use illegal drugs again,” he subsequently acknowledged he “would continue using drugs only for recreation.” Those statements, along with his repeated use of marijuana, reflect a probable intent to continue illegal drug use, and a failure to clearly and convincingly commit to discontinue drug use. 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) and 26(b) do not apply. Applicant used marijuana with varying frequency from 2003 until 2012. He claims he did so generally in social settings because of “its anxiety alleviating qualities,” and “as an alternative to using alcohol.” The issue of marijuana’s status as an illegal drug was apparently not a concern for him. His

continuing abuse of marijuana over such a lengthy period, after being interviewed by OPM on multiple occasions, despite initially claiming to have no intention of doing so, is troublesome. As he stated, he “would continue using drugs only for recreation.” Applicant has shown little effort to demonstrate an intention not to abuse any drugs in the future. While he has changed the environment where marijuana was used, he simply relocated that environment to other locations. Likewise, while some of his drug-using associates and contacts have relocated, he simply made new drug-using associates and contacts. Other than an admission in December 2012 that he has continued using marijuana as recently as 2012, there is no evidence of any specific period of abstinence since then.

In light of the foregoing, it appears that a more thorough demonstration of sustained abstinence is appropriate to satisfy continuing concerns that his marijuana abuse is unlikely to continue or recur or that it does not cast doubt on Applicant’s reliability, trustworthiness, or good judgment. There should be a proven period of abstinence, complete and clear disassociation from drug-using associates, and avoidance of the environments where the marijuana was used.

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 conditions that could raise security concerns. Under AG ¶ 16(a), security concerns may be raised when there is a:

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.

Under AG ¶ 16(b), security concerns may be raised by:

deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant’s responses to the SF 86 inquiries and to the questions of the OPM investigators (although not alleged in the SOR) were false and concealed the full scope

of Applicant's substance abuse history. His initial responses were made because he was afraid to admit the true history on his SF 86 because doing so might jeopardize his job. The subsequent responses regarding his drug use were made because the truth "might look bad for his background investigation." AG ¶¶ 16(a) and 16(b) have been established.

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. If the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened 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(c) may apply. As to Applicant's responses to the SF 86 inquiries and to the questions of the OPM investigators, AG ¶¶ 17(a) and 17(c) do not apply.

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.³⁸

There is some evidence in favor of mitigating Applicant's conduct. Applicant has been with his current employer since May 2011. He has never been arrested for marijuana abuse.

The disqualifying evidence under the whole-person concept is much more substantial. For nearly ten years, from 2003 until 2012, Applicant purchased,

³⁸ 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).

possessed, and used marijuana. His responses to the SF 86 inquiries and to the questions of the OPM investigators were false and concealed the full scope of Applicant's substance abuse history. He repeatedly furnished false intentions to not use marijuana in the future. Applicant's actions over such a lengthy period, as well as his changing stories, 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
Subparagraph 1.b.:	Against Applicant
Subparagraph 1.c.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Subparagraph 2.b.:	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