



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-02054

Appearances

For Government: Douglas Velvel, Esquire, Department Counsel

For Applicant: Archibald J. Thomas, III, Esquire

11/30/2016

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 August 27, 2012, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.¹ On October 10, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (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); 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

¹ GE 1 (e-QIP, dated August 27, 2012).

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 sworn statement, dated November 9, 2015, Applicant responded to the SOR allegations and requested a hearing before an administrative judge.² Department Counsel indicated the Government was prepared to proceed on March 30, 2016. The case was assigned to me on June 6, 2016. A Notice of Hearing was issued on June 28, 2016, and I convened the hearing, as scheduled, on July 14, 2016.

During the hearing, 2 Government exhibits (GE 1 and GE 2) and 12 Applicant Exhibits (AE A through AE L) were admitted into evidence without objection. Applicant testified. The transcript of the hearing (Tr.) was received on July 26, 2016. The record closed on July 26, 2016.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in the SOR under drug involvement (§§ 1.a., 1.b., and 1.c.) and personal conduct (§ 2.a.). 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 31-year-old employee of a defense contractor. He has been serving as a systems administrator since April 2015.³ He had previously served as an information systems associate with a different employer from August 2012 until February 2015, at which time he was assigned as a meteorological system administrator associate professional.⁴ He is a 2003 high school graduate. After attending several community colleges and universities on a periodic, part-time basis for several years, Applicant received a bachelor of science degree in business administration in August 2015.⁵ He has never served in the U.S. military.⁶ Applicant was granted a top secret security clearance in November 2012.⁷ When he changed positions in 2015, the level of his clearance was administratively reduced to secret.⁸ He has never been married.⁹

² Applicant's Answer to the SOR, dated November 9, 2015.

³ Tr. at 16; AE A (Letter, dated April 2, 2015).

⁴ GE 1, *supra* note 1, at 17; AE H (Letter, dated February 20, 2015).

⁵ GE 1, *supra* note 1, at 13-16; AE D (Transcript, dated August 24, 2015); Tr. at 32.

⁶ GE 1, *supra* note 1, at 33.

⁷ GE 2 (Joint Personnel Adjudication System (JPAS) Incident History, dated January 29, 2016); Tr. at 37.

⁸ Tr. at 38.

⁹ GE 1, *supra* note 1, at 35.

Drug Involvement and Personal Conduct

Applicant was a substance abuser whose substance of choice was marijuana, a form of cannabis. He initially characterized his marijuana use over the years as “a few times on random occasions.”¹⁰ He contended his marijuana use occurred when he was younger and in a college environment, during the following periods: approximately March 2004, just to try it; June 2005, at a party; and Summer 2009, at a concert.¹¹ He quantified his marijuana use during 2004-2005 as three times, and added an additional five times during the period 2007-2009.¹² When he completed the e-QIP section on the illegal use of drugs or drug activity in August 2012, Applicant explained that he did not plan to use marijuana because it is against his religious beliefs, such use is illegal, he did not want to get arrested, and because he wants to have a long career and will not jeopardize his opportunity.¹³ As noted above, the security concerns over his self-described marijuana abuse were apparently mitigated by his stated future intentions, and in November 2012, Applicant was granted a top secret security clearance.

In mid-March 2014, Applicant and his girlfriend were at a friend's residence watching basketball on television. There was some tension and stress in his relationship with his girlfriend, and when his friends started passing around some marijuana, he joined in and smoked some marijuana as well.¹⁴ He participated in the activity despite the facts that marijuana use was illegal in the state, that such use was against his religion, and that it was a violation of his security clearance responsibilities under DOD policy.¹⁵ On March 25, 2014, as a result of a random drug test administered to Applicant on March 19, 2014, a notification was issued that Applicant had tested positive for marijuana.¹⁶ As a result of the positive drug test, Applicant's employer immediately placed him on medical leave and provided with a mandatory referral to the employee assistance program (EAP) to begin a course of treatment that the EAP dictates, and that he successfully complete that course of treatment.¹⁷ Applicant was not evaluated or diagnosed for substance abuse or dependence.¹⁸ Applicant successfully completed the EAP treatment program and, on

¹⁰ GE 1, *supra* note 1, at 42.

¹¹ Applicant's Answer to the SOR, *supra* note 2, at 1. Applicant told an investigator from the U.S. Office of Personnel Management (OPM) that he stopped using marijuana between 2005 and 2007 because his girlfriend did not want him to use drugs. See Tr. at 39. Nevertheless, that intention apparently changed at some point after 2007.

¹² Tr. at 36.

¹³ GE 1, *supra* note 1, at 43.

¹⁴ Tr. at 44-46.

¹⁵ Tr. at 46-48.

¹⁶ AE I (Letter, dated March 25, 2014); GE 2, *supra* note 7.

¹⁷ AE I, *supra* note 14; GE 2, *supra* note 7.

¹⁸ Tr. at 57-58.

May 9, 2014, he returned to work.¹⁹ In accordance with the EAP program requirements, Applicant continued outpatient treatment, participating in 16 individual therapy sessions, and at least one drug screen, between March 2014 and June 2014. He was discharged having met his treatment goals and program requirements.²⁰ Applicant denies having any continuing relationships with those whom he used marijuana with in the past.²¹ He also denied using marijuana since he completed his treatment program.²²

Applicant attributed his most recent “isolated” use of marijuana as a lapse of judgment and a huge mistake.²³ Despite his past history of substance abuse, Applicant does not see himself as a drug abuser.²⁴ His commitment is now not to ever use marijuana again because it is not worth his job and future.²⁵

Job Performance, Character References, and Community Activities

Applicant’s manager supports the retention of a security clearance because, especially during times of stress, Applicant has been honest and forthcoming regarding his past use of marijuana.²⁶ Applicant’s most recent employee performance appraisal, created in February 2016, notes that he meets judgment expectations and consistently exceeds business ethics expectations.²⁷ He received one spot award in recognition of his team contributions on one particular mission activity,²⁸ as well as an above and beyond award for other mission activities.²⁹ As a result of performance ratings and promotions, Applicant has received several salary increases.³⁰ A church elder, who has known Applicant for over 20 years, characterized Applicant as clearly demonstrating initiative, ability, integrity, and leadership.³¹ Applicant described himself as a church member since 1993, where his father is the pastor. He has also been a volunteer wrestling assistant coach at the local high school.³²

¹⁹ GE 2, *supra* note 7.

²⁰ GE 2, *supra* note 7; AE L (Letter, dated July 11, 2016); AE K (Drug Screen Report, dated June 4, 2014).

²¹ Tr. at 51.

²² Tr. at 25-26, 35.

²³ Tr. at 35, 53; Applicant’s Answer to the SOR, *supra* note 2.

²⁴ Tr. at 39.

²⁵ Tr. at 35.

²⁶ AE G (Character Reference, dated February 18, 2016).

²⁷ AE B (Employee Performance Appraisal, dated February 12, 2016).

²⁸ AE C (Certificate, dated September 10, 2015).

²⁹ AE C (Email, dated December 9, 2014).

³⁰ AE H (Letter, dated February 20, 2015).

³¹ AE F (Character Reference, dated March 27, 2016).

³² Tr. at 18, 34

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.”³³ 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.”³⁴

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.

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.”³⁵ 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.³⁶

³³ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

³⁴ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

³⁵ “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).

³⁶ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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.”³⁷

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.”³⁸ 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 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;

³⁷ *Egan*, 484 U.S. at 531.

³⁸ 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. In addition, “testing positive for illegal drug use” may raise security concerns under AG ¶ 25(b). Similarly, AG ¶ 25(g) may apply where there is “any illegal drug use after being granted a security clearance.”

Applicant’s history of marijuana abuse occurred periodically over a decade, interspersed with several periods of abstinence, commencing in approximately March 2004, when he initially experimented with it; again in June 2005 at a party; and during a Summer 2009 concert (when he was 24 years old). He quantified his marijuana use during 2004-2005 as three times, and added an additional five times during the period 2007-2009. In his August 2012 e-QIP, Applicant explained that he did not plan to use marijuana because it is against his religious beliefs, such use is illegal, he did not want to get arrested, and because he wants to have a long career and will not jeopardize his opportunity. The security concerns over his self-described marijuana abuse were apparently mitigated by his stated future intentions, and in November 2012, Applicant was granted a top secret security clearance. In March 2014, when he was about 29 years old, Applicant tested positive for marijuana. AG ¶¶ 25(a), 25(b), 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.”

In addition, AG ¶ 26(d) may apply where there is a “satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.”

AG ¶¶ 26(a) and 26(d) do not apply. AG ¶ 26(b) only minimally applies. Applicant’s marijuana abuse occurred on at least nine occasions between March 2004 and March

2014. There was nothing unusual about such use for it generally occurred in social settings, including parties and concerts with friends. While Applicant participated in individual therapy sessions under the direction of a licensed clinical social worker (LCSW) who holds a master's degree in social work (MSW), there is no evidence that Applicant has ever received any "medical treatment" related to the substance abuse. 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 abuse except for his initial experimentation in 2004 in wanting to try it, which I interpret as curiosity, and his most recent abuse in 2014 due to stress. No explanations were furnished regarding the other incidents of such abuse, except for being younger and in a college environment. Without that knowledge, it is difficult to conclude that such inappropriate and illegal behavior is unlikely to recur.

When Applicant completed his e-QIP section in August 2012, he explained that he did not plan to use marijuana in the future for several identified reasons: (1) it is against his religious beliefs; (2) such use is illegal, and he did not want to get arrested; and (3) because he wants to have a long career and will not jeopardize his opportunity. The security concerns over his self-described marijuana abuse were apparently mitigated by his stated future intentions, and in November 2012, Applicant was granted a top secret security clearance. Applicant's expressed future intentions and his promise to avoid a resumption of his earlier substance abuse lasted 19 months when he reverted to his old ways.

Nothing actually changed between August 2012 and March 2014: Applicant's religious beliefs were the same as they were before; marijuana abuse was still illegal; and Applicant did not want to jeopardize his professional career. In August 2012, and again now, Applicant contends that he has changed and become more mature, and that he no longer intends to abuse any drugs in the future. Applicant again claims to be no longer associating with drug-using associates and contacts; he no longer goes to places where he used marijuana; and that he has abstained. In light of his positive test result in March 2014, Applicant's "demonstrated intent not to abuse any drugs in the future," is given less weight than it would have received without that positive test. In addition, while Applicant has purportedly been abstinent from March 2014 until the date the record closed in July 2016 – a period of 28 months, he had also previously purportedly abstained for equal or longer periods. 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 March 2014 is viewed favorably, and he is encouraged to continue it. However, Applicant has not furnished a reasonable basis for ignoring his fiduciary responsibilities of holding a security clearance and again turning to marijuana to address a period of stress. 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 under AG ¶ 16(e): “[P]ersonal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing”

Applicant’s marijuana abuse, with special emphasis on the marijuana abuse that resulted in a positive test result while he was the holder of a security clearance, constitute such personal conduct. My evaluation of Applicant’s actions reveals an individual who has established a pattern of 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. AG ¶ 16(e) has been established.

The guideline also includes a condition that could mitigate security concerns arising from personal conduct. 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 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) minimally applies. As noted above, the security concerns over Applicant’s self-described marijuana abuse were apparently mitigated by his stated future intentions, and Applicant was granted a top secret security clearance. Applicant’s expressed future intentions and his promise to avoid a resumption of his earlier substance abuse lasted 19 months. And then he experienced a lapse of judgment and made a huge mistake. Simple substance abuse is material and significant, not a minor offense. Using marijuana while holding a security clearance is considered even more significant. While Applicant’s marijuana abuse was relatively infrequent during the entire decade of such abuse, there were no unique circumstances surrounding such abuse to render it unlikely to recur, especially in light of his previous declared intentions which did not last. Applicant’s marijuana abuse did not take place under unique circumstances. Applicant’s actions 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 self-reported his earlier marijuana abuse. Applicant's substance abuse purportedly ceased in March 2014, 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 federal 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 all three 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.³⁹ 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
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.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

³⁹ 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).