



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



In the matter of:)
)
 ---) ISCR Case No. 15-08615
)
 Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esquire, Department Counsel
For Applicant: *Pro se*

10/03/2017

Decision

GALES, Robert Robinson, Administrative Judge:

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

Statement of the Case

On February 18, 2015, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.¹ On August 4, 2016, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. Applicant responded to those interrogatories on September 22, 2016.² On November 24, 2016, 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

¹ Item 2 (e-QIP, dated February 18, 2015).

² Item 3 (Applicant's Responses to Interrogatories, dated September 22, 2016).

and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006.³ 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 December 5, 2016. In a sworn statement, dated December 6, 2016, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing.⁴ A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by (DOHA) on January 9, 2017, 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. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the previous Adjudicative Guidelines applicable to his case. Applicant received the FORM on February 3, 2017. Applicant's response was due on March 5, 2017. Applicant failed to submit any response. The case was assigned to me on October 1, 2017.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the factual allegations pertaining to drug involvement (§ 1.a.) and personal conduct (§§ 2.a. and 2.b.) of the SOR. 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 29-year-old employee of a defense contractor. He has been a senior laminator with the company since August 2009. He previously held diverse relatively brief part-time positions (cashier and account assistant) with a variety of other employers. He is a June 2006 high school graduate, and he earned a number of college credits, but no degree. Applicant has never served in the U.S. military. He has never held a security clearance. Applicant was married in 2010 and divorced in 2013. He has one son, born in 2009.

³ Effective June 8, 2017, by Directive 4 of the Security Executive Agent (SEAD 4), dated December 10, 2016, *National Security Adjudicative Guidelines* (AG) for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position, were established to supersede all previously issued national security adjudicative criteria or guidelines. Accordingly, those guidelines previously implemented on September 1, 2006, under which this security clearance review case was initiated, no longer apply. In comparing the two versions, there is no substantial difference that might have a negative effect on Applicant in this case.

⁴ Item 1 (Answer to the SOR, dated December 6, 2016).

Drug Involvement and Substance Abuse

Applicant is a substance abuser whose choice of substances has been marijuana.⁵ He commenced using marijuana, usually by smoking it in a pipe, in July 2004 - when he was 16 years old - and he continued using it until at least April 2015. Throughout his high school years, he generally smoked marijuana an average of six times per year. That frequency diminished to one to two times per year once he turned 18. He usually smoked marijuana with an identified friend, either in his home or in his friend's home. He routinely contributed funds to enable his friend to obtain the marijuana they smoked. It is unclear why Applicant used marijuana for so long for he claimed that it made him lazy, and he really didn't enjoy smoking it.

Applicant never failed a drug test, and he has never had any contact with law enforcement authorities with respect to his marijuana use. Although Applicant claimed he stopped smoking marijuana in April 2015, nearly two months before he was interviewed on June 1, 2015, by an investigator from the U.S. Office of Personnel Management (OPM), he offered no explanation as to why he stopped using marijuana, or what his intentions might be regarding his future use of marijuana.

Personal Conduct

On February 18, 2015, when Applicant completed his e-QIP, he responded to certain questions in Section 23 - Illegal Use of Drugs or Drug Activity. Two of the questions asked were if, in the last seven years, Applicant had: illegally used any drugs or controlled substances, to include injecting, snorting, inhaling, swallowing, experimenting with or otherwise consuming any drug or controlled substance; and been involved in the illegal purchase . . . of any drug or controlled substance. Applicant responded "no" to both questions. In so doing, he intentionally falsified material facts and deliberately omitted both the illegal use and the purchase of marijuana. Because of the way the SOR was drafted, Applicant's omission in his e-QIP regarding the purchase of marijuana is considered unalleged conduct in SOR 1.a.⁶ Upon subsequently being interviewed by the OPM investigator, Applicant stated that he did not list his marijuana-related activities because he did not know he needed to do so.⁷

⁵ Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substance. See Drug Enforcement Administration listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Sch. I).

⁶ Unalleged conduct can be considered for certain purposes, as discussed by the DOHA Appeal Board. (Conduct not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole-person analysis under Directive § 6.3.). See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006); (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See also ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). Applicant's contribution of funds for the purchase of marijuana will not be considered under the Guideline for Personal Conduct except for the five purposes listed above.

⁷ Item 3 (Personal Subject Interview, dated June 1, 2015), at 5, included in the set of interrogatories.

On September 22, 2016, when Applicant responded to the interrogatories, he responded to a question that asked “[h]ave you ever purchased or contributed money towards the purchase of marijuana?” Applicant responded “no.”⁸ In so doing, he intentionally falsified material facts regarding his admitted contribution of funds to purchase marijuana.

Although not alleged in the SOR, Applicant has a history of alcohol abuse, operating unregistered vehicles, operating vehicles on suspended licenses, and traffic citations. As a result of those activities, he has been repeatedly involved with police and judicial authorities.⁹

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.”¹⁰ 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.”¹¹

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines 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.

⁸ Item 3, *supra* note 2.

⁹ Applicant’s repeated involvement with police and judicial authorities over this unalleged conduct will not be considered except for the five purposes listed above. See note 6.

¹⁰ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

¹¹ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

In the decision-making process, facts must be established by “substantial evidence.”¹² 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.¹³

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.”¹⁴

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.”¹⁵ 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 and Substance Abuse

The security concern relating to the guideline for Drug Involvement and Substance Abuse is set out in AG ¶ 24:

¹² “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).

¹³ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

¹⁴ *Egan*, 484 U.S. at 531.

¹⁵ See Exec. Or. 10865 § 7.

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

Furthermore, on October 25, 2014, the Director of National Intelligence (DNI) issued Memorandum ES 2014-00674, *Adherence to Federal Laws Prohibiting Marijuana Use*, which states:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines (Reference H and I). An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

The guideline notes several conditions under AG ¶ 25 that could raise security concerns in this case: "(a) any substance misuse (see above definition); and (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia."

Applicant purchased, possessed, and used marijuana from July 2004 until at least April 2015. AG ¶¶ 25(a) and (c) have been established.

The guideline also includes examples of conditions under AG ¶ 26 that could mitigate security concerns arising from Drug Involvement and Substance Misuse:

(a) 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; and

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to: (1) disassociation from drug-using associates and contacts; (2) changing or

avoiding the environment where drugs were used; and (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

I have concluded that none of the AGs apply. Applicant's substance abuse took place over an eleven-year period, and the circumstances under which it occurred were not unusual. Applicant admitted that he contributed to the purchase of marijuana, possessed it, and used marijuana, at least until April 2015. At no point did he ever state that he had no intention to use marijuana in the future. He never indicated that he would no longer associate with the friend with whom he used marijuana or to whom he contributed the funds to enable his friend to purchase the marijuana they smoked. There is no signed statement of intent to abstain from all drug involvement and substance misuse. Applicant's actions, under the circumstances, continue to cast doubt on his current reliability, trustworthiness, and good judgment.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 16:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

¶ 16: The guideline notes some conditions that could raise security concerns under AG

(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 national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

Applicant's numerous comments provide sufficient evidence to examine if his responses were deliberate falsifications, as alleged in the SOR, or merely a misunderstanding of the true facts on his part. Proof of an error in a response, standing alone, does not establish or prove an applicant's intent or state of mind when the response occurred. As an administrative judge, I must consider the record evidence as a whole to determine whether there is a direct or circumstantial evidence concerning Applicant's intent or state of mind at the time the alleged falsification occurred. I have considered the entire record, including Applicant's initial and subsequent comments.¹⁶ As noted above, Applicant omitted and concealed his lengthy period of marijuana use when he falsely answered the drug-related questions in Section 23 of his e-QIP in February 2015. He subsequently admitted that his actions were deliberate. When questioned by the OPM investigator in June 2015, he was at least more candid when he admitted the multi-year period of marijuana use. However, when responding to the interrogatories in September 2016, he again omitted and concealed his repeated contributions of funds to purchase marijuana over that multi-year period. He subsequently admitted that his actions were deliberate. AG ¶¶ 16(a) and 16(b) have been established.

The guideline also includes examples of conditions under AG ¶ 17 that could mitigate security concerns arising from personal conduct. They include:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

¹⁶ The Appeal Board has cogently 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. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)). See also ISCR Case No. 08-05637 at 3 (App. Bd. Sept. 9, 2010) (noting an applicant's level of education and other experiences are part of entirety-of-the-record evaluation as to whether a failure to disclose past-due debts on a security clearance application was deliberate).

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) 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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

I have concluded that none of the mitigating conditions apply. Applicant's repeated falsifications related to his lengthy period of marijuana use, with the most recent such falsification occurring in September 2016, were deliberate. A key component of the protection of classified information is reliance on security clearance holders to accurately report potential compromise of classified information. A person who has offered false statements regarding past actions cannot be relied upon to report potential compromise of classified information. Applicant's actions, or relative inaction, under the circumstances casts substantial doubt on his current 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 SEAD 4, App. A, ¶ 2(d):

(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 SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant 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 the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.¹⁷

There is some evidence mitigating Applicant's conduct. There is no evidence of misuse of information technology systems, or mishandling protected information. Applicant candidly acknowledged his lengthy and frequent association with marijuana to the OPM investigator in June 2015. He has abstained from further marijuana use since April 2015.

The disqualifying evidence under the whole-person concept is more substantial. Applicant purchased, possessed, and used marijuana from July 2004 until at least April 2015. He deliberately omitted and concealed his lengthy period of marijuana use when he falsely answered the drug-related questions in his February 2015 e-QIP. When responding to interrogatories in September 2016, he again deliberately omitted and concealed his repeated contributions of funds to purchase marijuana over a multi-year period. At no point did Applicant ever state that he had no intention to use marijuana in the future; or that he would no longer associate with the friend with whom he used marijuana or to whom he contributed the funds to enable his friend to purchase the marijuana they smoked. There is no signed statement of intent to abstain from all drug involvement and substance misuse.

As stated in the DNI memorandum cited above, "an individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations." Applicant has a history of ignoring established rules and regulations related to drugs, alcohol abuse, operating unregistered vehicles, operating vehicles on suspended licenses, and traffic citations. With the exception of his marijuana use, as a result of those other activities, he has been repeatedly involved with police and judicial authorities. Such a history leaves little room for confidence that an individual is a good candidate for security clearance eligibility. It should also be noted that Applicant offered no character references to attest to his honesty, reliability, trustworthiness, and good judgment.

Overall, the evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude

¹⁷ 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).

Applicant has failed to mitigate the security concerns arising from his drug involvement and substance misuse and personal conduct. See SEAD 4, App. A, ¶¶ 2(d)(1) through 2(d)(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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a. and 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 interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ROBERT ROBINSON GALES
Administrative Judge