



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-04170

Appearances

For Government: Michelle Tilford, Esquire, Department Counsel

For Applicant: *Pro se*

06/28/2018

Decision

GALES, Robert Robinson, Administrative Judge:

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

Statement of the Case

On February 10, 2014, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application. On December 28, 2017, 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 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, effective June 8, 2017.¹

The SOR alleged security concerns under Guideline H (Drug Involvement and Substance Misuse), Guideline J (Criminal Conduct), and Guideline 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.

It is unclear when Applicant received the SOR as there is no receipt in the case file. On January 23, 2018, he responded to the SOR 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 mailed to Applicant by the Defense Office of Hearings and Appeals (DOHA) on February 14, 2018, 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 Adjudicative Guidelines applicable to his case. Applicant received the FORM on February 19, 2018. Applicant's response was due on March 21, 2018. As of April 16, 2018, Applicant had not submitted any response to the FORM. The case was assigned to me on June 11, 2018.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with a brief comment, one of the factual allegations pertaining to drug involvement and substance misuse (§ 1.b.). He denied the remaining allegation, also with some comments, and he failed to specifically address the allegations under criminal conduct and personal conduct of the SOR. Applicant's admissions and 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 32-year-old employee of a defense contractor. He has served as a local area network (LAN) administrator since January 2014. Applicant previously worked with another employer as a network analyst from March 2013 until January 2014, and before that, as a junior systems administrator from October 2010 until August 2012. He is a 2004 high school graduate, and received a bachelor's degree in an unspecified discipline in 2009. He has never served with the U.S. military. He was granted a secret clearance in 2014. Applicant has never been married, but has cohabited since 2014. He has no children.

¹ Although the SOR caption and introductory portion refer to this case as an application for a Public Trust Position with an automated data processing (ADP) case number, Department Counsel indicated that there was a scrivener's (sic) error, and that the case is actually an application for a security clearance and the case number prefix should be ISCR, not ADP.

Drug Involvement and Substance Misuse, Criminal Conduct, and Personal Conduct²

On February 17, 2017, nearly three years after he was granted a secret clearance, Applicant was sitting in his vehicle at a shopping center waiting for a friend. A police officer approached the vehicle and knocked on the window to ask Applicant some questions. When Applicant lowered the window, the officer smelled marijuana coming from the car. When the officer indicated that he wished to search the vehicle, Applicant acknowledged that he did have marijuana in the vehicle. The officer found and seized “a couple grams of marijuana” from the vehicle. Applicant was arrested, cited for possession of marijuana, a misdemeanor, given a court date, and released on summons. In August 2017, Applicant accepted a plea offer under which he entered a plea of guilty to the reduced charge of trespassing, also a misdemeanor. He was sentenced to supervised probation for 12 months, and fined \$250 plus \$91 in court costs.³

Although Applicant later claimed that the marijuana belonged to a friend, he was unwilling to provide the friend’s name because he did not want to incriminate the friend. Applicant acknowledged that he and his friend were together earlier that day, and that the friend had left the marijuana in the car. It is unclear if Applicant used the marijuana with his friend in his vehicle as Applicant claimed to have “never used marijuana before,” that he “has never used drugs illegally,” and that he “has no intent for any future use.”

Applicant continues to associate with lifelong, childhood friends who use marijuana recreationally. He did not indicate any intention to disassociate himself from any of his drug-using friends.

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.”⁴ 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.”⁵

² The sources of information regarding Applicant’s association with illegal drugs are found in Item 4 (Court Traffic/Criminal Case Details, downloaded February 9, 2018); Item 5 (Personal Subject Interview, dated September 19, 2017); (Joint Personnel Adjudication System (JPAS), Incident Report Adjudication, downloaded February 9, 2018); Item 2 (Answer to SOR, dated January 23, 2018).

³ Item 4, *supra* note 2.

⁴ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

⁵ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

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.

In the decision-making process, facts must be established by "substantial evidence."⁶ 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.⁷

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."⁸

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."⁹ Thus, nothing in this

⁶ "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).

⁷ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

⁸ *Egan*, 484 U.S. at 531.

⁹ See Exec. Or. 10865 § 7.

decision should be construed to suggest that I have based this decision 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:

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 two conditions under AG ¶ 25 that could raise security concerns in this case:

(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

(f) any illegal drug use while granted access to classified information or holding a sensitive position.

On February 17, 2017, nearly three years after he was granted a secret clearance, Applicant was arrested, cited for possession of marijuana, a misdemeanor, given a court date, and released on summons. In August 2017, Applicant entered a plea of guilty to the reduced charge of trespassing, a misdemeanor. He was sentenced to supervised probation for 12 months, and fined \$250 plus \$91 in court costs. AG ¶ 25(c) has been established. There is no evidence that Applicant actually “used” the marijuana in his vehicle. Notwithstanding the fact that the odor of marijuana came from the vehicle in which he was sitting, while there is some evidence of drug involvement, it is insufficient to prove that Applicant used marijuana to establish AG ¶ 25(f).

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.

Neither of the mitigating conditions apply. Applicant acknowledged that there was marijuana in his vehicle, and eventually claimed it belonged to “a friend” whom he refused to identify. He continues to maintain friendships with drug-using individuals, and there is no expressed intent to disassociate himself from them. While Applicant claimed to have no intention to use illegal substances in the future, it should be noted that he did not submit 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. Under the circumstances, Applicant’s actions continue to cast doubt on his current reliability, trustworthiness, and good judgment.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

The guideline notes two conditions under AG ¶ 31 that could raise security concerns in this case:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and

(c) individual is currently on parole or probation.¹⁰

The information and discussion above related to Drug Involvement and Substance Abuse are also significant under Criminal Conduct and are adopted herein. In February 2017, Applicant was arrested, cited for possession of marijuana, a misdemeanor, given a court date, and released on summons. In August 2017, he entered a plea of guilty to the reduced charge of trespassing, a misdemeanor. He was sentenced to supervised probation for 12 months. There is no evidence in the case file that Applicant's period of supervised probation has been decreased or that it has expired. Accordingly, AG ¶¶ 31(b) and 31(c) have been established.

The guideline also includes examples of conditions under AG ¶ 32 that could mitigate security concerns, but none of them apply. Under the circumstances, Applicant's actions 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 ¶ 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 or sensitive information. Of special interest is any failure to

¹⁰ 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 parole status and continued association with drug-users will be considered only for the five purposes listed above.

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.

The guideline also includes examples of some conditions that could raise security concerns under AG ¶ 16:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing;

(2) while in another country, engaging in any activity that is illegal in that country;

(3) while in another country, engaging in any activity that, while legal there, is illegal in the United States;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

My discussions related to Applicant's Drug Involvement and Substance Misuse, and Criminal Conduct, are adopted herein. As noted above, in February 17, 2017, nearly three years after he was granted a secret clearance, Applicant was arrested, cited for possession of marijuana, a misdemeanor, given a court date, and released on summons. In August 2017, he entered a plea of guilty to the reduced charge of trespassing, a misdemeanor. He was sentenced to supervised probation for 12 months. Applicant initially acknowledged that the marijuana belonged to him, but eventually changed his position by claiming it belonged to "a friend" whom he refused to identify. He continues to maintain friendships with drug-using individuals, and there is no expressed intent to disassociate himself from them. AG ¶¶ 16(e) and 16(g) have been established. None of the remaining disqualifying conditions apply, especially AG ¶¶ 16(c) and 16(d), essentially because Applicant's conduct in several different adjudicative areas are sufficient for an adverse determination under those other guidelines.

The guideline also includes examples of conditions under AG ¶ 17 that could mitigate security concerns arising from personal conduct, but none of them apply. Under the circumstances, Applicant's actions continue to cast 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.¹¹

There is some evidence in favor of mitigating Applicant's conduct. Applicant is a 32-year-old employee of a defense contractor. He has served as a LAN administrator since January 2014. He received a bachelor's degree in 2009. He was granted a secret clearance in 2014. He claimed to have never used drugs illegally, and he has no intention to use illegal substances in the future.

The disqualifying evidence under the whole-person concept is simply more substantial. As noted above, Despite his maturity and employment responsibilities, while holding a security clearance in February 2017, he was in his vehicle when someone in the vehicle, perhaps even himself, used marijuana – an activity prohibited by the U.S. Government and his employer. The use was sufficient to enable a police officer to subsequently detect the odor of marijuana coming from the vehicle when Applicant lowered his window to speak with the officer. Inside the vehicle the officer found “a couple grams of marijuana.” It is especially troubling that Applicant refused to identify his drug-using friend, he has not disassociated himself from his other drug-using friends, and he may actually still be on probation, indicating that he is not sufficiently rehabilitated to hold a security clearance.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his drug involvement and substance misuse, criminal conduct, 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 Directive ¶ E3.1.25, are:

¹¹ 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).

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a. and 1.b.:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.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