



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



In the matter of:)
)
 ----) ISCR Case No. 14-04570
)
 Applicant for Security Clearance)

Appearances

For Government: Richard A. Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

07/29/2015

Decision

GALES, Robert Robinson, Administrative Judge:

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

Statement of the Case

On May 20, 2014, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.¹ On January 28, 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 Guideline H (Drug

¹ GE 1 (e-QIP, dated May 20, 2014).

Involvement), 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 February 11, 2015. In a sworn statement, dated March 3, 2015, Applicant responded to the SOR allegations and requested a hearing.² Department Counsel indicated the Government was prepared to proceed on May 26, 2015. The case was assigned to me on June 1, 2015. A Notice of Hearing was issued on June 5, 2015, and I convened the hearing, as scheduled, on June 24, 2015.

During the hearing, two Government exhibits (GE 1 and GE 2) and six Applicant Exhibits (AE A through AE F) were admitted into evidence without objection. Applicant testified. The transcript of the hearing (Tr.) was received on July 1, 2015. The record closed on July 1, 2015.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in the SOR under drug involvement (¶ 1.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 27-year-old employee of a defense contractor. He has been serving as a student assistant with his current employer, a well-respected, nationally known, university, since May 2014.³ He was unemployed from July 2013 until May 2014. A May 2006 high school graduate, Applicant received a bachelor's of science degree in May 2011.⁴ He continued his graduate studies in electrical engineering at the same university, but to date, he has not received his advanced degree.⁵ He has never served in the U.S. military.⁶ Applicant has never held a security clearance.⁷ He has never been married.⁸

² Applicant's Answer to the SOR, dated March 3, 2015.

³ GE 1, *supra* note 1, at 13-14.

⁴ GE 1, *supra* note 1, at 12; AE A (Transcript, dated June 23, 2015), at 1.

⁵ GE 1, *supra* note 1, at 12-13.

⁶ GE 1, *supra* note 1, at 20.

⁷ GE 1, *supra* note 1, at 30.

⁸ GE 1, *supra* note 1, at 22.

Drug Involvement

Applicant was a substance abuser whose substance of choice was marijuana.⁹ He did not experiment with marijuana while in high school, but in October 2010, upon reconnecting with a friend (Mr. A) from his high school years who was using marijuana, Applicant expressed an interest in doing so.¹⁰ After initially using marijuana at his friend's apartment, as well as the apartments of Mr. A's friends, Applicant started using marijuana alone in his own apartment. In his e-QIP, Applicant acknowledged having used "THC, such as marijuana, weed, pot, hashish, etc." from October 2010 until at least March 2014. He quantified the frequency as approximately on a weekly basis for a period of three years, starting in late 2010 and continuing until 2014. Applicant estimated that he had used marijuana on approximately 250 occasions.¹¹ He stated that since the start of 2014, he used marijuana on one occasion as he had been "largely focused on succeeding in school and procuring summer employment."¹² Applicant added that the position for which he is seeking a security clearance is basically a three-semester-long job interview. He does not intend to risk losing his position especially not due to any factor within his direct control, such as marijuana use.¹³

During his interview with an investigator from the U.S. Office of Personnel Management (OPM) on June 27, 2014, Applicant said he smoked marijuana from a bowl alone at his residence two or three days a week. He purchased his marijuana from an individual (Mr. B) whose first name was revealed (Applicant could not recall the individual's last name) for \$60 per one-eighth of an ounce. In March 2014, Applicant smoked marijuana for two to three hours per day for seven straight days at his parents' home during spring break.¹⁴ During that period, he purchased the marijuana from another friend (Mr. C) whose first name he revealed, but whose last name Applicant declined to reveal because he did not want to see his friend get into trouble. Applicant has also purchased marijuana from two other individuals (Messrs. D and E).¹⁵

Applicant smoked marijuana, which he considered a recreational activity, because it enabled him to relax, and it caused him to be quieter and easy going.¹⁶ He ceased using marijuana because he does not want to lose his employment if he cannot

⁹ Tr. at 24.

¹⁰ Tr. at 24-25.

¹¹ Tr. at 32.

¹² GE 1, *supra* note 1, at 28-29.

¹³ GE 1, *supra* note 1, at 29.

¹⁴ Tr. at 34.

¹⁵ GE 2 (Personal Subject Interview, dated June 27, 2014), at 4.

¹⁶ GE 2, *supra* note 15, at 4; Tr. at 46.

obtain a security clearance. He has never been arrested or charged for his drug involvement; failed a drug test; or received any drug counseling.¹⁷

Applicant considers his past use of marijuana to be a mistake, and he does not question the fact that he violated state and federal laws in using marijuana. He now considers his past actions to be shortsighted and irresponsible. He regrets them unequivocally.¹⁸ Applicant does not intend to use any more drugs in the future, and he signed a statement of intent to remain abstinent with the understanding that any violation will result in the automatic revocation of his security clearance status.¹⁹

As noted above, Applicant chose not to reveal the full names of his suppliers and those with whom he used marijuana. Mr. A currently resides in another state;²⁰ Mr. B is deceased (attributable to drug involvement);²¹ Applicant sees Mr. C once every six months;²² and he keeps in close personal contact with Messrs. D and E.²³

Character References

Applicant's scoutmaster from his years in both the Cub Scouts and Boy Scouts noted that Applicant "embodied the principles of the Scout Oath and Law," and he has grown up to be a responsible adult.²⁴ A friend who has known Applicant since they were in middle school together, and who is currently an officer in the U.S. Army, considers Applicant to be a loyal friend and a diligent, conscientious worker. He has no reason to question Applicant's integrity.²⁵ A faculty member of the university where Applicant is a student assistant considers Applicant to be hardworking, professional, polite, straightforward, and honest.²⁶

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security

¹⁷ GE 2, *supra* note 15, at 4; Tr. at 50-51.

¹⁸ Tr. at 42, 45-47.

¹⁹ AE F (Statement of Intent, dated June 24, 2015).

²⁰ Tr. at 25.

²¹ Tr. at 27, 49.

²² Tr. at 49.

²³ Tr. at 49.

²⁴ AE D (Character Reference, dated June 18, 2015).

²⁵ AE B (Character Reference, dated June 22, 2015).

²⁶ AE E (Character Reference, dated June 23, 2015).

emphasizing, “no one has a ‘right’ to a security clearance.”²⁷ 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.”²⁸

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.”²⁹ 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.³⁰

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

²⁷ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

²⁸ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

²⁹ “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).

³⁰ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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.”³¹

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.”³² 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;

(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.

³¹ *Egan*, 484 U.S. at 531.

³² See Exec. Or. 10865 § 7.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 25(a), “any drug abuse (see above definition)”, is potentially disqualifying. Similarly, AG ¶ 25(c) may apply where there is “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.”

Applicant used marijuana on a weekly basis (generally two or three days per week), on approximately 250 occasions, for a period of three years, starting in October 2010 and continuing until at least March 2014. In March 2014, Applicant smoked marijuana for two to three hours per day for seven straight days. He purchased his marijuana from several individuals, paying \$60 per one-eighth of an ounce. Applicant’s actions were in violation of state and federal law. AG ¶¶ 25(a) and 25(c) 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.”

AG ¶ 26(a) does not apply. AG ¶ 26(b) only minimally applies. Applicant’s marijuana abuse occurred on approximately 250 occasions over a period of three years, starting in October 2010 and continuing until at least March 2014 – a little over 15 months ago. It was a recreational activity, and it enabled him to relax. As such, Applicant’s marijuana abuse was not long ago, infrequent, or under unusual circumstances. Applicant has never received any medical treatment, counseling, or education related to the substance abuse, and he has never been evaluated or diagnosed for substance abuse or dependence. Applicant intends to refrain from such use in the future, and he has submitted a signed statement of intent with automatic revocation of clearance for any future violation. However, there is little evidence that Applicant has changed or avoided the environment where he used marijuana, or that he has disassociated himself from drug-using associates, suppliers, and contacts. To the contrary, Applicant sees Mr. C once every six months; and he keeps in close personal contact with Messrs. D and E. Applicant’s purported abstinence since March 2014 is viewed favorably, and he should be encouraged to continue it for a more appropriate period. Notwithstanding Applicant’s pledge for future abstinence, the relatively brief

period of abstinence, his continuing relationships, and remaining in the environment where he abused marijuana, continue to cast doubt on Applicant's 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 in my analysis below.

There is some mitigating evidence under the whole-person concept. When he was younger, Applicant purportedly embodied the principles of the Scout Oath and Law. He is an outstanding employee who has apparently made significant contributions to the research mission of his employer. He has never received any medical treatment, counseling, or education related to the substance abuse, and he has never been evaluated or diagnosed for substance abuse or dependence. Applicant's substance abuse purportedly ceased in March 2014, approximately 15 months 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 on approximately 250 occasions, for a period of three years. In doing so, he was violating both federal and state law. 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 area of substance abuse indicate that he has shortcomings in at least two 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.

