DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 14-02744
	)	
Applicant for Security Clearance	)	

Appearances

For Government: James Norman, Esquire, Chief Department Counsel
For Applicant: *Pro se*

10/05/2015

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Decision

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MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant began smoking marijuana around August 1987, when he was serving in the United States military in Vietnam. He used marijuana recreationally over the next 46 years, including a few times per month in the seven years preceding his reported last use in September 2013. Applicant denies any intent to use marijuana in the future, but his present abstinence is brief when compared to his decades of involvement. Clearance is denied.

Statement of the Case

On August 1, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H, Drug Involvement, and explaining why it was unable to find that it is clearly consistent with the national interest to grant him security clearance eligibility. The DOD CAF took the action under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

Applicant responded to the SOR allegations on September 24, 2014, and he requested a decision on the written record without a hearing. On March 27, 2015, the Government submitted a File of Relevant Material (FORM) consisting of four documents (Items 1-4). On March 30, 2015, the Defense Office of Hearings and Appeals (DOHA) forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt. Applicant received the FORM on April 2, 2015. He did not submit a response by the May 2, 2015 due date. On May 20, 2015, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant a security clearance for Applicant. Items 1-4 included in the Government's FORM are accepted into evidence.

Findings of Fact

Applicant admitted using and purchasing marijuana on multiple occasions between August 1967 and September 2013 as alleged in the SOR (¶ 1.a). His admissions of drug involvement are accepted and incorporated as findings of fact. After considering Items 1-4, which includes Applicant's Answer to the SOR (Item 2), I make the following additional findings of fact.

Applicant is a 68-year-old college graduate. Since September 1987, he has been employed as the director of facilities and purchasing for a law firm with a defense contract. Applicant served in a branch of the United States military from March 1967 to March 1973. While serving in Vietnam from August 1967 to October 1968, Applicant held a secret security clearance. (Item 3.) Applicant earned the Air Medal and some campaign ribbons for his service, and he received an honorable discharge. (Item 2.)

Applicant was married to his first wife for only a few months, from December 1965 to May 1966 when their marriage was annulled. He and his current spouse married in December 1979, and they had a son in May 1982 and a daughter in May 1985. Their son was killed in an automobile accident sometime before May 2007. (Item 3.)

Applicant began smoking marijuana around August 1967, while he was stationed in Vietnam. (Items 1, 3.) He continued to use marijuana on occasion after he returned from the war zone, including a few times per month with his spouse over the seven years preceding his most recent use in September 2013. Applicant has friends who have used marijuana.

On October 31, 2013, Applicant completed and certified to the accuracy of an Electronic Questionnaire for Investigations Processing (e-QIP). In response to a police record inquiry concerning whether he had ever been charged with an offense involving alcohol or drugs, Applicant listed a June 1969 arrest for misdemeanor marijuana possession. In response to whether he illegally used any drug or controlled substance in the last seven years, Applicant indicated that he had engaged in the occasional social use of marijuana from approximately August 1967 to September 2013. He answered "No" to whether he intended to use the drug in the future, stating: "I don't intend to smoke it. [I]t's boring and mostly makes me anxious. [A]lso, very few friends that [sic] still use it." Applicant responded negatively to an inquiry about whether he had been involved in the

illegal purchase of any drug or controlled substance in the last seven years. In response to a question concerning any illegal use or other involvement with a drug or controlled substance while possessing a security clearance, Applicant indicated that he "smoked pot" in Vietnam from August 1967 to October 1968. (Item 3.)

On January 16, 2014, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). When asked about his previously disclosed drug offense, Applicant indicated that he was arrested in June 1969 while smoking a marijuana joint with his first wife's cousin. About one month later, he was fined $300 and placed on one year of probation. The background investigation discrepantly revealed that Applicant had been arrested in February 1969 for possession of a narcotic, possession for sale, and sale of a narcotic to a minor. When confronted about the discrepancy, Applicant admitted that pursuant to a plea deal, the charges had been reduced to a misdemeanor. He acknowledged that he had possessed a sufficient quantity of marijuana for a charge of intent to sell and surmised that the sale to a minor charge likely stemmed from the fact that his ex-wife's cousin was only 17 years old at the time. About his drug use, Applicant told the OPM investigator that he used marijuana from August 1967 to September 2013. He denied recalling the approximate frequency of his drug use other than that he smoked marijuana a few times a month in the last seven years, usually through a pipe in his home with his wife. He bought marijuana in recent years from a friend of his now deceased son. Applicant denied that he had a drug problem or that he had ever received drug treatment or counseling. He also denied any intent to use marijuana in the future because he found it boring and his friends no longer used it. (Item 4.)

There is no evidence that Applicant's off-duty recreational marijuana use has had a negative impact on his work. Applicant cited his successful career in management with a succession of law firms since 1977, and also his candor about his drug use on his e-QIP, as evidence of his reliability, trustworthiness, and good judgment. (Item 2.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered in evaluating an applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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 decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

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. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that 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. Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement

The security concern 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.

Under AG ¶ 24(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),[1] and
> (2) inhalants and other similar substances.

[1]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 I controlled substance.

Under AG ¶ 24(b), drug abuse is defined as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." Disqualifying condition AG ¶ 25(a), "any drug abuse," applies because Applicant used marijuana recreationally from August 1967 to at least September 2013. In the seven years preceding his reported last use in September 2013, Applicant used the drug a few times a month. AG ¶ 25(c), "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," also applies because Applicant purchased marijuana on occasion over his 46 years of involvement. Applicant started using marijuana while he held a secret clearance and was serving in a war zone in 1967 and 1968, but there is no evidence that he has since held a DOD clearance. The security concerns that implicate AG ¶ 25(g), "any illegal drug use after being granted a security clearance," are so extenuated at this time to be of little relevance, if any, to Applicant's current eligibility for a security clearance.

Mitigating condition AG ¶ 26(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," is not sufficiently established. There is no evidence of any illegal drug involvement by Applicant since September 2013. However, given the number of years which Applicant used marijuana, his use cannot reasonably be considered as having "happened so long ago" or having been so infrequent to not cast doubt on his judgment. His use of marijuana in his home with his wife shows that marijuana was part of his lifestyle and not under unusual circumstances.

On his e-QIP and during his interview, Applicant denied any intent to use marijuana in the future. As a threshold matter, I did not have an opportunity to assess Applicant's credibility in person on this issue. However, he displayed sufficient candor about his drug involvement on his e-QIP and during his interview for me to accept as credible his denials of any future intent. The salient issue is whether he can be counted on to abide by that stated intent. The circumstances of his drug involvement are relevant and material to that assessment. For his drug involvement to be mitigated under AG ¶ 26(b), there must be a demonstrated intent not to abuse any drugs in the future, which can be shown by:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence; and

(4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant did not execute a separate statement of intent acknowledging his willingness to abstain with automatic revocation of clearance eligibility for any future drug involvement. However, his e-QIP denial of any intent of future marijuana use was under penalty of 18 U.S.C. § 1001 for any false statement. There is a reasonable basis to

favorably consider AG ¶ 26(b)(4), but Applicant has not adequately shown that he is no longer associating with persons involved in marijuana use. On his e-QIP, he explained that he did not intend to use marijuana in part because "very few friends that [sic] still use it." Some of his friends were still smoking marijuana. During his OPM interview on January 16, 2014, Applicant related that his friends no longer use marijuana, which contradicts his earlier statement. It is unclear if his later statement was referring to those friends who were using the drug as of October 2013 and now had a change of attitude about marijuana. Without knowing the nature and extent of his contacts with those friends, the risk of Applicant using marijuana in the future cannot completely be discounted.

Regardless of whether Applicant continues to maintain friendships with persons who use marijuana, neither AG ¶ 26(b)(1) nor AG ¶ 26(b)(2) can reasonably apply in this case without substantial, credible evidence that his spouse is abstaining from marijuana use and intends to maintain a drug-free lifestyle going forward. Applicant explained to the OPM investigator that in the last seven years, he used marijuana usually in the form of a marijuana pipe in his home with his wife. The logical inference is that Applicant's spouse smoked the drug with him. The record before me for review is otherwise silent on the issue of his spouse's drug involvement.

As of his e-QIP, Applicant had been abstinent from marijuana for approximately one month. The FORM contains no evidence of any marijuana involvement by Applicant after September 2013. His abstinence of 1.5 years as of March 2015 is some evidence of ability to abide by his stated intent. In assessing whether security concerns may have become attenuated by the passage of time to no longer cast doubt on an individual's reliability, trustworthiness, or good judgment, the DOHA Appeal Board has consistently held that it is a question for the administrative judge to resolve based on the evidence as a whole. *See e.g.*, ISCR Case No. 14-01847 (App. Bd. Apr. 9, 2015); ISCR Case No. 11-12165 (App. Bd. Jan. 29, 2014). Applicant claims that marijuana caused him some anxiety, but it is difficult to reconcile with his decades of abuse, which suggests some level of enjoyment. Applicant used marijuana while employed by a succession of law firms, despite the illegality of its use.[2] A longer period of abstinence is needed before I can reasonably conclude that his marijuana use and purchase will not reoccur. The drug involvement concerns are not mitigated.

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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).[3] In making the overall commonsense determination required under AG ¶ 2(c), I have

[2] Initiative petition 1-502 was approved by the voters of Applicant's state on November 6, 2012. It became effective 30 days later. As codified in the state's uniform controlled substances act (§ 69.50 et seq. of the state's Revised Code), it decriminalized the possession of one ounce or less of useable marijuana by persons age 21 or older. Marijuana use remains prohibited under federal law and is inconsistent with security clearance eligibility.

[3]The factors under AG ¶ 2(a) are as follows:

considered Applicant's poor judgment in abusing marijuana. Applicant's candor about his drug involvement weighs in his favor under the whole-person evaluation, but more evidence of reform is required to overcome the negative implications for his security worthiness caused by his years of disregard of the laws concerning the use of controlled substances.

Security clearance decisions are not intended as punishment for past wrongdoing. At the same time, once a security concern arises, there is a strong presumption against the grant or continuation of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). For the reasons discussed under Guideline H, *supra*, it is not clearly consistent with the national interest to grant Applicant security clearance eligibility at this time.

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

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.

Elizabeth M. Matchinski
Administrative Judge

(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.