



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



In the matter of:)
)
) ISCR Case No. 14-00775
)
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

04/24/2015

Decision

CREAN, THOMAS M., Administrative Judge:

Based on a review of the case file and pleadings, I conclude that Applicant failed to provide sufficient information to mitigate security concerns under Guideline H for drug involvement. Eligibility for access to classified information is denied.

Statement of the Case

On October 29, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his employment with a defense contractor. (Item 3) Applicant was interviewed by an investigator from the Office of Personnel Management (OPM) on December 11, 2013. (Item 4) The Department of Defense (DOD) could not make the affirmative findings required to issue a security clearance. On April 22, 2014, DOD issued Applicant a Statement of Reasons (SOR) detailing security concerns for drug involvement under Guideline H. (Item 1) The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective in the Department of Defense on September 1, 2006.

Applicant answered the SOR on October 24, 2014. He admitted the one allegation of marijuana use from May 1973 until April 2013. He noted that he no longer uses marijuana, having stopped use in April 2013. His use over the previous 40 year was light and sporadic with instances of non-use for as long as ten years. He indicated that he is not addicted to marijuana and has passed many random drug tests. Applicant requested a decision on the written record. (Item 2) Department Counsel submitted the Government's written case on January 27, 2015. Applicant received a complete file of relevant material (FORM) on February 12, 2015, and was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant timely submitted additional information. (Item 5, Response to FORM, dated February 27, 2015) The case was assigned to me on April 8, 2015.

Findings of Fact

After a thorough review of the case file and the pleadings, I make the following essential findings of fact.

Applicant is a 59-year-old high school graduate employed since October 2013 as a ship fitter by a defense contractor. He married in February 1983, separated in 1999, and finally divorced in June 2003. He has no children. (Item 2, E-QIP)

The SOR alleges that Applicant used marijuana with varying frequency from approximately May 1973 until April 2013. (SOR 1.a) The allegation is based on Applicant's response to e-QIP question 23 asking if in the last seven years he had used any drug or controlled substance. Applicant answered "Yes" and noted that he used marijuana once a month from May 1973 until August 2013. (Item 3)

In his interview with the OPM investigators, Applicant stated that his marijuana use, starting in 1973, was isolated and for short periods of time. He smoked marijuana in both paper and pipe form recreationally starting in high school until he joined the Navy in June 1975. He did not smoke marijuana while in the Navy from June 1975 until June 1981. He smoked marijuana again from June 1981 until he married in February 1983. He did not use marijuana after his marriage from February 1983 until August 2012. He used once monthly from August 2012 until April 2013. His use was recreational because he liked the way marijuana made him feel relaxed. He never paid for marijuana since it was provided by the people he smoked with. He no longer associates with anyone that uses marijuana. He has no intention to use marijuana in the future because his new job means a lot to him. He has never received treatment or counseling for drug use. He emphasized that he never had a problem due to marijuana use, and does not need marijuana to function. (Item 4 at 1-2)

In his response to SOR, Applicant admitted the allegation of marijuana use but stated he has not used marijuana for over a year. His marijuana use over the last 40 years was light and sporadic with periods of nonuse over 10 years. He is not addicted to marijuana. He was tested many times in a random drug testing job situation always with

negative results. He is willing to be tested randomly again. He is capable of abstaining from marijuana use for the remainder of his life.

In his response to the FORM, Applicant pointed out that he held a security clearance while on active duty in the Navy and for a number of years while working for another defense contractor. He noted that the response on the e-QIP that he used marijuana monthly referred only to the last period of use from August 2012 until April 2013. Prior to that, his use was about once a month during the times that he was using marijuana. He emphasized that marijuana use was infrequent and only in a social situation. He stated that in the 40 years he noted he used marijuana, he actually did not use marijuana in approximately 35 of those years. He reiterated that he always passed random drug tests and rigorous background checks. Applicant wrote that “[He] has shown a capacity to refrain from drug use whenever he saw fit and when he determined that the circumstance made it necessary.” (Response to FORM, dated March 19, 2015)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the administrative 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.

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 over-arching adjudicative goal is a fair, impartial, and common sense 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 burden of persuasion to obtaining 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 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.

Analysis

Guideline H, Drug Involvement

The use of an illegal drug can raise questions about an individual's reliability and trustworthiness, because it may impair judgment and raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Drugs are mood and behavior altering substances, and include those listed in the Controlled Substances Act of 1970. Marijuana is listed in the Act. Drug abuse is the illegal use of a drug or the use of a legal drug in a manner that deviates from approved medical direction (AG ¶ 24). Applicant admits to using marijuana from May 1973 until April 2013. Applicant's marijuana use raises the Drug Involvement Disqualifying Conditions AG ¶ 25(a) (any drug use).

I considered the following Drug Involvement Mitigating Conditions under AG ¶ 26:

(a) the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(b) a demonstrated intent not to abuse 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.

While there is no "bright line" rule for determining when conduct is recent or sufficient time has passed since the incidents, a determination whether past conduct affects an individual's present reliability and trustworthiness must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without evidence of drug involvement, there must be an evaluation whether that period of time demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation.

Applicant admits sporadically using marijuana from May 1973 until April 2013. He used marijuana monthly from 2012 until 2013, so his use is recent and frequent. He used marijuana willingly so it was not used under any unique circumstances. Applicant stated he intends not to use marijuana in the future because his present job means a good deal to him.

Applicant has not used marijuana for approximately two years. He stopped using marijuana at times during his 40 years of marijuana use, but always returned to use marijuana. As he stated in his response to the FORM, "I believe that I have consistently shown a capability to abstain from use whenever I saw fit and when I determined that circumstances made it necessary." This is not the statement of an individual who decided not to use an illegal drug in the future. It is the statement of a person who is willing to use an illegal drug whenever he thinks necessary. He has not shown an unequivocal intent not to abuse drugs in the future. Under these circumstances, two years of abstinence from marijuana use is not a sufficient time for Applicant to meet his burden to show changed circumstances or conduct that indicates he has reformed and will no longer use illegal drugs. His use of marijuana under the circumstances can occur again and it could cast doubt on his reliability, trustworthiness, and good judgment. When there has been more time of abstinence from drug use, Applicant could be granted access to classified information at present. There is no compelling evidence of a changed circumstance indicating reform or rehabilitation. AG ¶¶ 26(a) and 26(b) do not apply.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant's active duty service in the Navy, his service with a defense contractor, and his successful access to

classified information in the past. I considered Applicant's stated intention not to use illegal drugs in the future. Applicant sporadically used marijuana willingly and deliberately for over 40 years. Applicant has not presented sufficient information to establish reform and changed circumstances sufficient to indicate that he will not use illegal drugs in the future. Applicant has not met his burden to show that his drug use from 1973 until 2013 no longer reflects adversely on his reliability, honesty, trustworthiness, and good judgment. His past knowing and intentional use of marijuana shows that he may not properly safeguard classified information. For all these reasons, I conclude Applicant has not mitigated the security concerns for illegal drug use. Overall, the record evidence leaves me with questions and doubts as to Applicant's judgment, reliability, and trustworthiness. He should not be granted access to classified information.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

THOMAS M. CREAN
Administrative Judge