



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



In the matter of:)
)
-----) ISCR Case No. 09-01677
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Gina L. Marine, Esquire, Department Counsel
For Applicant: *Pro se*

May 7, 2010

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant is a 58-year-old U.S. native, who voluntarily acquired Irish citizenship. He smoked marijuana with his sons and nephews on occasion, no more than 25 times, in the seven years preceding his security clearance application filed in September 2008. Foreign preference concerns are mitigated because he had not exercised a benefit or privilege of his Irish citizenship. Drug involvement concerns are not mitigated because there is an unacceptable risk of recurrence. Clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on September 29, 2008. On August 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H, drug involvement, and Guideline C, foreign preference, that provided the basis for its preliminary decision to deny him a security clearance. 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) promulgated by the President on December 29, 2005, and effective within the Department of Defense as of September 1, 2006.

Applicant responded to the SOR on September 9, 2009, and he requested a hearing. On September 25, 2009, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On November 6, 2009, I scheduled a hearing for December 10, 2009.

I convened the hearing as scheduled. Two Government exhibits (Ex. 1-2) were admitted into evidence without objection. Applicant testified, as reflected in a transcript (Tr.) received on December 17, 2009. At Applicant's request, the record was kept open for one week for him to submit documentary evidence. On December 11, 2009, Applicant timely submitted a statement of his intent to abstain from illegal drug use in the future. Department Counsel did not object, and the document was admitted into evidence as Exhibit A.

Findings of Fact

DOHA alleged under Guideline H, drug involvement, that Applicant used marijuana from about September 2001 to at least September 2008 (SOR 1.a). Under Guideline C, Applicant was alleged to have taken action to acquire Irish citizenship as a U.S. citizen (SOR 1.b). Applicant admitted the allegations, which are incorporated as factual findings. After considering the pleadings, exhibits, and transcript, I make the following additional findings of fact.

Applicant is a 58-year-old divorced father of five adult children. His career has been in manufacturing management. Since December 2006, he has been employed as the director of operations for a defense contractor. (Ex. 1) He seeks a secret-level security clearance. (Tr. 29.)

Drug Involvement

Applicant tried marijuana while he was in college, sometime between September 1969 and May 1973. He could not stand the smell. Then, at a party 10 or 12 years ago, Applicant smoked a marijuana cigarette passed to him by some friends. It did not do anything for him at the time. As his four sons grew and went to college, their social activities began to include marijuana. Applicant smoked marijuana on occasion at family gatherings when it was offered to him to bond with his sons or nephews or both ("I'm not trying to be the hip dad, I just want them to know that, you know, I understand some of the things that they go through. . ."). (Tr. 47.) In the seven years preceding his application for a security clearance filed in September 2008, Applicant smoked marijuana on average three or four times a year, no more than 25 times. Applicant had been offered marijuana on other occasions and declined it. (Tr. 39.) Applicant did not seek out the marijuana. Nor did he possess it other than when it was passed to him. (Ex. 1, 2, Tr. 21, 34-38.) He does not remember the date of his last use, other than it

was within the last two or three years. (Tr. 38-39, 42.) He understood that he was engaging in illegal activity when he smoked marijuana. (Tr. 42.)

Applicant was not knowingly in the presence of someone smoking marijuana in 2009. (Tr. 41.) As of December 2009, his 30-year-old son and his 24-year-old daughter were still living with him. (Tr. 45.) Within the past two years, Applicant smelled marijuana in his home, which led him to believe that one of his adult children had been smoking it. He has not told them to cease their marijuana use because they are adults. (Tr. 47.) Applicant has informed his children that his security eligibility was being questioned because of his occasional use of marijuana with them and that "it's not a good thing to be doing." (Tr. 44.)

On his e-QIP completed on September 29, 2008, Applicant disclosed that he used marijuana approximately 25 times from about September 2001 to "Present." (Ex. 1.) On January 9, 2009, Applicant was interviewed, in part about his drug use. He told a government investigator that his sons and nephews occasionally smoke marijuana for recreational purposes. At family gatherings, or when they visit him, he has accepted offers from them to take a puff from one of their cigarettes. He obliged them in order to bond with his children and make them feel comfortable. Applicant indicated that he smoked marijuana no more than three or four times a year, and that his previous estimate of 25 times was at the high end. He asserted that he would have no problem discontinuing this drug use for a security clearance. (Ex. 2.)

At his hearing, Applicant testified that if his clearance was denied, he could not promise that he would not use the drug again, but he does not see any future use as likely, since marijuana is not important to him and he did not really care for it ("I could probably say almost with 95 percent surety that I probably wouldn't anyways [sic] because I don't care for it"). (Tr. 39, 47-48). He testified that marijuana use was "just not that big of a deal." (Tr. 40.) Applicant is willing to submit to a drug test to prove he can abstain from illegal drugs. (Tr. 43.) On December 11, 2009, Applicant executed a statement of intent to never use drugs again, with the understanding that "if [he is] ever found to have again used marijuana then automatic revocation of clearance for any violation for the use of marijuana would be imposed." (Ex. A.)

Foreign Preference

In about 2001 or 2002, Applicant and five of his seven siblings acquired Irish citizenship, taking advantage of a limited opportunity under European Union rules offered to those of Irish heritage. Applicant's and his siblings' maternal grandparents were natives of the Republic of Ireland. Expecting to work another 15 to 20 years, Applicant understood that acquisition of Irish citizenship would eliminate the need to acquire a work visa and facilitate travel should he become employed in Europe in the future. (Ex. 1, 2, Tr. 21-23, 25, 32.) Applicant's sisters acquired the documents necessary to prove Irish lineage through their maternal grandmother. After they submitted their applications and supporting documentation, they had to appear in person at the Irish Consulate with evidence proving their identity and residency. Applicant does not believe that he had to declare any fidelity to Ireland to acquire Irish

citizenship, but he does not recall for certain. (Tr. 28.) He has not taken any action to maintain his Irish citizenship, and he does not know whether any such action is required. He has not communicated with the Irish Consulate since he acquired his foreign citizenship. (Tr. 48.)

Applicant has never applied for an Irish passport or voted in an Irish election. He has not applied for employment in Europe. He is willing to renounce his Irish citizenship, if required, to obtain a security clearance, but he would prefer to retain his dual citizenship. His Irish citizenship has become a source of family pride for him. (Tr. 28-31, 51.) His Irish citizenship has not affected his loyalty or allegiance to the United States. (Ex. 2, Tr. 23.)

Applicant has no relatives who currently reside in Ireland. He first traveled to Ireland on a one-week tour in June 2005 with his sons and their fiancées, before the marriage of his oldest son. In May 2007, he spent about a week in Ireland. His brother won a stay in a home in Ireland in a raffle, and Applicant accepted an invitation to accompany his brother and brother's family. (Ex. 1, Tr. 33-34.)

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 overarching 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. 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 ultimate burden of persuasion as 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 that 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. 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

Drug Involvement

The security concern about 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),¹ 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.

Applicant smoked marijuana once in college some 26 to 30 years ago. He tried it again at a party in the mid to late 1990s. In about September 2001, he began to take hits off marijuana cigarettes passed to him by his sons or nephews. Despite knowing of its illegality, Applicant smoked marijuana to “bond” with these family members about three or four times per year on average, as many as 25 times total, over the next seven

¹Schedules 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.

years. AG ¶ 25(a), “any drug abuse,” applies. AG ¶ 25(c), “illegal drug possession, cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia,” applies only in the limited sense that Applicant can be said to have had physical custody or possession of the marijuana when he smoked it.

Due to the occasional nature of his abuse, Applicant cannot now recall the last time he smoked marijuana, other than it was within the last two or three years. AG ¶ 26(a), “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is likely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment,” is not particularly persuasive in mitigation, given the relative recency of his abuse, his age at the time, and his knowing disregard of its illegality. By joining his children in their marijuana use, he was implicitly condoning their illegal behavior as well.

Concerning whether Applicant has demonstrated an intent to forego future drug abuse under AG ¶ 26(b), AG ¶ 26(b)(1), “disassociation from drug-using associates and contacts,” and AG ¶ 26(b)(2), “changing or avoiding the environment where drugs were used,” do not apply. While it would be unrealistic to require Applicant to terminate his relationships with his children, he could reasonably be expected under the circumstances to inform his adult children not to use marijuana around him or in his home. Within the past two years, he smelled marijuana in his home. He has not confronted his children about their drug use because they are adults. It is possible, if not likely, that family members will smoke marijuana in his residence in the future. There is no indication that any of Applicant’s sons or nephews have ceased their involvement with the drug, and Applicant used the drug in his home with them in the past.

There is no evidence that Applicant has used any marijuana since around September 2008, if not before. See AG ¶ 26(b)(3), (stating, “an appropriate period of abstinence”). But his abstinence is reflective more of the random nature of his drug involvement than of an intent to abstain in the future. It was not until marijuana became an issue for his clearance that Applicant considered not using it in the future, and his promises to abstain have been motivated by, if not contingent on, him holding a security clearance. During his January 2009 interview, he indicated he would have no problem discontinuing his marijuana use for a security clearance. In his Answer to the SOR, Applicant indicated he was willing to attest to never using marijuana again. But he then admitted at his hearing that he could not rule out future marijuana use if his clearance was denied, although he also testified that he “probably” would not use the drug again because it was “just not that big of a deal.” (Tr. 40.) Before the record closed, he provided the “signed statement of intent with automatic revocation of clearance for any violation” required under AG ¶ 26(b)(4). Applicant’s willingness to abstain is credible, but it is not enough to overcome the drug involvement concerns. His failure to ask his children to abstain from drug use in his home raises considerable doubts about whether he has a serious intent to obey the law, and it raises an unacceptable risk of a relapse.

Foreign Preference

The security concern about foreign preference is set out in AG ¶ 9:

When an individual acts in such a way to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

A citizen of the United States from birth, Applicant voluntarily acquired Irish citizenship through descent in 2001 or 2002, as a convenience if he should have the opportunity to work in Europe in the future. He assumed he would not need a work visa, and it would facilitate travel in Europe. Applicant's status as a dual national is not necessarily indicative of a foreign preference. See AG ¶ 11(a) (stating, "dual citizenship is based solely on parents' citizenship or birth in a foreign country"), in this case grandparents' birth, as mitigating of foreign preference concerns. But his voluntary acquisition of foreign citizenship as an adult raises significant foreign preference issues under AG ¶ 10(b), "action to acquire or obtain recognition of a foreign citizenship by an American citizen."

However, there is also no evidence that Applicant has actively exercised a right, privilege or obligation of his foreign citizenship that would fall within AG ¶ 10(a). He has never acquired an Irish passport. See AG ¶ 10(a)(1) (stating, "possession of a current foreign passport"). His two trips to Ireland, taken in 2005 and 2007, were on his U.S. passport. He has not performed any military service for Ireland. See AG ¶ 10(a)(2) (stating, "military service or a willingness to bear arms for a foreign country"). He has not accepted any benefits from Ireland. As a dual citizen living in the United States, it is unclear whether he is eligible for any "educational, medical, retirement, social welfare, or other such benefits" addressed in AG ¶ 10(a)(3). He has never resided in Ireland, so AG ¶ 10(a)(4), "residence in a foreign country to meet citizenship requirements," does not apply. Although his initial motivation in obtaining Irish citizenship was to avoid having to acquire a work visa for employment in Europe, he is not currently "using foreign citizenship to protect financial or business interests in another country." See AG ¶ 10(a)(5). Applicant has not sought or held a political office in Ireland, and he has not voted in a foreign election, so AG ¶¶ 10(a)(6) and 10(a)(7) are likewise not pertinent.

Applicant expressed a willingness to renounce dual citizenship. He has taken no steps toward that end, and admitted that he would prefer to retain his Irish citizenship. So, while AG ¶ 11(b), "the individual has expressed a willingness to renounce dual citizenship," applies, it does not carry the same weight in mitigation as efforts to renounce. That having been said, Applicant has not shown that he prefers Ireland to the United States. His Irish citizenship at this point is retained out of pride in his heritage and as a source of bragging rights over the two siblings who did not apply for Irish citizenship. Having exercised no rights or obligations of his Irish citizenship in the past seven or eight years, Applicant is not likely to do so in the future. He has not inquired whether he has to take any action to maintain his Irish citizenship, and indicated that he is not certain whether he is still an Irish citizen.

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):

(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.

Applicant displayed extremely poor judgment in using marijuana on repeated occasions with his sons and nephews. His drug use, while not frequent, is of concern because it was in knowing disregard of its illegality and he was of an age where he could reasonably be expected to conform his behavior to the law. As of his hearing in December 2009, he could not rule out future use if his clearance was denied. He is willing to abstain from marijuana use in order to obtain a security clearance, but he formulated this intent too recently to prove a demonstrated intent not to abuse marijuana in the future. He has not told his children to stop their drug use, or to avoid using it in his home.

The United States recognizes, but does not encourage, dual citizenship because of the obligations that may ensue to the foreign country. Although the process of applying for Irish citizenship took some effort on his part, for all practical purposes, he is an Irish citizen in name only. His clear preference is for the United States, where he has lived his entire life. His retention of his Irish citizenship is of little security concern provided he does not actively exercise his Irish citizenship.

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 C:	FOR APPLICANT

Subparagraph 2.a:

For 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