



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No. 14-06940

Appearances

For Government: Andrea M. Corrales, Esquire, Department Counsel
For Applicant: *Pro se*

01/28/2016

Decision

HOWE, Philip S., Administrative Judge:

On August 27, 2012, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP). On May 15, 2015 the Department of Defense Consolidated Adjudications Facility (DODCAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H, J, and E. 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 within the Department of Defense on September 1, 2006.

Applicant answered the SOR in writing on May 29, 2015. Applicant requested his case be decided on the written record in lieu of a hearing.

On August 17, 2015, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM), consisting of Items 1 to 4,

was provided to the Applicant on August 19, 2015. He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the file on September 3, 2015.

Applicant did not file a Response to the FORM within the 30-day time allowed that would have expired on October 3, 2015.

Department Counsel submitted four Items in support of the SOR allegations. Item 4 is inadmissible. It will not be considered or cited as evidence in this case. It is the summary of an unsworn interview of Applicant conducted by an interviewer from the Office of Personnel Management in November 2012. Applicant did not adopt it as his own statement, or otherwise certify it to be accurate. Under Directive ¶ E3.1.20, this Report of Investigation summary is inadmissible in the absence of an authenticating witness. In light of Applicant's admissions, it is also cumulative.

I received the case assignment on November 9, 2015. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Findings of Fact

Applicant admitted the allegations in Paragraph 1. He neither admitted nor denied the allegations Paragraphs 2 and 3 that refer to the allegations in Paragraph 1 and charge the same acts as criminal conduct and personal conduct. Therefore, the absent answers will be treated as if he denied them. (Items 1, 2)

Applicant is 53 years old. He is married and has two children. He works for a defense contractor and has since 1991. (Item 3)

The SOR alleges Applicant used marijuana with varying frequency from September 1979 to approximately August 2012 (Subparagraph 1.a). Applicant admits that allegation. Then the SOR alleges Applicant bought marijuana from about September 1979 to August 2012 (Subparagraph 1.b). Applicant admits that allegation. Next, the SOR alleges Applicant intends to continue using marijuana in the future (Subparagraph 1.c). He admits that allegation. After Applicant received his Department of Defense security clearance on or about November 30, 2001, he continued to smoke marijuana (Subparagraph 1.d). Finally, Applicant was charged with unlawful possession of less than 8.5 grams of marijuana by municipal police in his home city in approximately November 2010 (Subparagraph 1.e). (Items 1-3 at Section 23)

Applicant likes to smoke marijuana. When he bike rides, hikes, or back packs on a trip he likes to use marijuana because it makes these trips more enjoyable. He also claims to have pudendal neuralgia¹, a medical condition that he claims benefits from marijuana use. Applicant does not explain how that works. He did not submit a medical

¹ The pudendal nerve runs through the buttocks and into the perineum of the body. The neuralgia is a disorder of this nerve. One cause of it is excessive sitting as bicyclists do. (see Pain.about.com)

statement from his physician about it. His Answer also claims he has a medical marijuana card and his physician's recommendation that he use marijuana within his state. He also admits he was charged with the possession of marijuana a few months before he first obtained his medical marijuana card. Applicant claims he has a "wonderful family life" and a successful career. He does not think smoking marijuana adversely affects his family or professional life. (Item 3 at Sections 23 and 25)

In Section 23 of his e-QIP Applicant denies using marijuana during the period he held a security clearance from 2001 onward. (Item 3 at Section 23)

Applicant did not submit any statements on his behalf other than his comments in his Answer written on the SOR. (Items 1, 2)

Applicant did not provide any evidence concerning the quality of his job performance. He submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). 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, the administrative judge applies the guidelines in conjunction with the factors listed in AG ¶ 2 describing 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.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain,

extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to illegal drugs:

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Four of the eight conditions apply:

(a) any drug abuse (see above definition);

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

(g) any illegal drug use after being granted a security clearance; and

(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant abuses marijuana as defined in the guideline in AG ¶ 24(a) and (b). He admits smoking marijuana since 1979. AG ¶ 25(a) is established.

Applicant obtained and thereby possessed the marijuana he used. AG ¶ 25(c) is established by his admissions and his e-QIP answers.

Applicant used marijuana while he held a security clearance. That was issued to him in 2001 and he admits using marijuana at least until August 2012. AG ¶ 25(g) is established.

Applicant's Answer and his answers to the e-QIP questions show he thinks there is medical benefit and a pleasure component to smoking marijuana. Under Federal law the use, possession, sale, growing, and purchase of marijuana is a violation of law. His statements in those two above-referenced documents show he has the expressed intent to continue using marijuana because he thinks it provides him with various benefits. AG ¶ 25(h) is established.

AG ¶ 26 provides four conditions that could mitigate security concerns:

(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;

(b) 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; and

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

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and,

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

None of them apply to Applicant. His marijuana use is current and frequent, and the circumstances are not unusual. AG ¶ 26(a) is not established.

Applicant has not demonstrated an intent not to abuse marijuana in the future. In fact, exactly the opposite intent was clearly stated in the Answer and e-QIP. He has a medical marijuana card for his buttocks pain, demonstrating a clear intent to continue to use marijuana. In addition, he uses it for pleasure and does not think it adversely affects his family or employment. AG ¶ 26(b) is not established.

The remaining two mitigating conditions pertain to prescription drugs and participation in a drug rehabilitation program. Neither situation occurred in Applicant's life, so AG ¶ 26(c) and (d) are not established.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct:

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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying:

- (a) a single serious crime or multiple lesser offenses;
- (b) discharge or dismissal from the Armed Forces under dishonorable conditions;)
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
- (d) individual is currently on parole or probation; and
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant committed a series of lesser offenses by smoking marijuana for 33 years. He was charged with unlawful possession of less than 8.5 grams in November 2010. AG ¶ 31(a) is established.

Applicant admitted smoking marijuana from 1979 at least until August 2012 and does not believe there is anything wrong with his actions. AG ¶ 31(c) is established.

None of the remaining three disqualifying conditions apply based on the facts in this case.

AG ¶ 32 provides four conditions that could mitigate security concerns:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

None of them are established in Applicant's situation. His use of marijuana is recent and recurring. He intends to continue using it. He admits his use of marijuana, so there is evidence he committed the offenses. There is no evidence of any rehabilitation

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance 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, and cooperation with medical or psychological evaluation; 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.

AG ¶ 16 describes seven conditions that could raise a security concern and may be disqualifying. Two may apply:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group; and

(g) association with persons involved in criminal activity.

Applicant's use of marijuana since 1979 and continued use is personal conduct that creates a vulnerability to exploitation, manipulation, or duress because if his employer knew he was smoking marijuana while holding a security clearance it would affect Applicant's personal, professional, and community standing. AG ¶ 16(e) is established.

Applicant smoked marijuana by getting it from vendors or friends. If they and he possessed or transferred marijuana, then they engaged in criminal activity as stated in the guideline and Federal law. AG ¶ 16(g) is established.

AG ¶ 17 provides seven conditions that could mitigate security concerns. Two may apply:

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant continues to use marijuana, ostensibly because it causes him no harm and helps him endure his pudendal neuralgia. His continued use of marijuana does not

establish AG ¶ 17(e) because no positive steps have been taken to reduce vulnerability to exploitation or duress.

Applicant continues his same course of action, including associating with his friends. He has not shown that he will change his associates or anything else associated with his marijuana use. AG ¶ 17(g) does not apply.

None of the other mitigating conditions are established clearly or are relevant to Applicant's situation.

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 relevant 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 facts and circumstances surrounding this case. Applicant was an adult when he started smoking marijuana. He held a security clearance while doing so since 2001. He expressed pleasure and offered medical reasons for continuing to use marijuana. Applicant does not see anything wrong with smoking marijuana. None of his medical explanations were supported by competent medical authorities. His smoking will continue by his declaration. There is no rehabilitation undertaken or planned.

Overall, the record evidence leaves me with questions or substantial doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising under the guideline for Drug Involvement, Criminal Conduct, or Personal Conduct.

Formal Findings

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

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

PHILIP S. HOWE
Administrative Judge