



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



In the matter of:)
)
) ISCR Case No. 15-02920
)
Applicant for Security Clearance)

Appearances

For Government: Braden Murphy, Esquire. Department Counsel
For Applicant: Alan V. Edmunds, Esquire

06/06/2016

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H, drug involvement. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On December 16, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement. The action was taken 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 answered the SOR on January 25, 2016, and requested a hearing before an administrative judge. The case was assigned to me on April 8, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 21, 2016. I convened the hearing as scheduled on May 9, 2016. The Government offered

exhibits (GE) 1 through 4, which were admitted into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through N, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on May 17, 2016.

Procedural Matters

Department Counsel moved to amend the SOR to accurately reflect the evidence. Applicant had no objection. SOR ¶¶ 1.b, 1.c, and 1.d are amended, deleting the words “Marine Corps” and substituting the words “Air Force.” The motion was granted.¹

Findings of Fact

Applicant admitted all of the allegations in SOR except that in ¶ 1.a. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 56 years old. He is a high school and technical school graduate. He was married from 1983 to 1998 and from 1999 to 2001. He married his current wife in 2005. He has an adult son from his first marriage and three adult stepchildren. He has worked for the same federal employer since 1984, but had periods of time when he was laid off. Applicant was granted a security clearance in April 2003.²

Applicant served in the military from 1978 to 1980 and received a General Discharge Under Honorable Conditions. His certificate of release or discharge from active duty notes the reason for his separation as “misconduct-drug abuse.”³ Applicant disclosed on his security clearance application that he received a General Discharge Under Honorable Conditions because he was “unadaptable for the military way of life. I was in Germany at the time and was drinking and using ‘hash.’”⁴

Applicant began using marijuana in high school in 1976 and continued to use it until February 1996.⁵ He testified he used it on a casual basis.⁶ While serving in the Air Force, Applicant received three Uniform Code of Military Justice (UCMJ) Article 15

¹ Tr. 11.

² Tr. 19-22, 36; GE 1.

³ AE B, C.

⁴ Tr. 34; GE 1.

⁵ Tr. 24; Answer to SOR.

⁶ Tr.24.

disciplinary hearings. All three were for possession of marijuana. They occurred in August 1979, September 1979, and August 1980.⁷

In Applicant's sworn statement on October 18, 2002, to a government investigator, he disclosed that when he began using marijuana in high school he used it every week or two from 1976 to 1978. Applicant used hashish on a "near daily" basis, while in the military.⁸ He smoked it in a pipe. He used cocaine a total of three or four times beginning in 1979 and his last use was in about 1982. He experimented with LSD four or five times while in the military. His rationale for the illegal drug use was that it was common in his social circle and drugs were readily available. He continued to use marijuana on a recreational basis from 1980 to 1996, and while he was employed with his current federal employer beginning in 1984. He stated he was unaware of his employer's drug policy. He used marijuana one to two times weekly for most of this particular period until 1996.⁹

Applicant testified that he was arrested in 1995 because "I had a few plants," referring to marijuana plants.¹⁰ He was charged with the felony offense of manufacturing marijuana. On cross-examination he admitted that he was growing marijuana, but could not remember the number of plants he was growing. In his 2002 sworn statement, he admitted there were a total of 280 plants. He began growing marijuana plants in 1984. His crop varied from year to year. He grew it to satisfy his own needs and sold small amounts to close friends, but not for a profit. In his statement he stated that he was just trying to get his money back. Applicant agreed to help law enforcement in exchange for having the charge adjudicated in state court vice federal court and a reduction in sentence. He pled guilty to the felony offense, but it appears he was sentenced as a first offender, completed the terms of the sentence, remained on probation for five year, and then the charge was dismissed.¹¹

In his 2002 sworn statement, Applicant stated that he learned from his mistakes and paid a price because of them. He further stated he had no intention of using illegal

⁷ Tr. 25; GE 2.

⁸ Tr. 35-36. Applicant testified that he could not recall what he told the government investigator regarding how often he used hashish in the Air Force. He further testified that his use of hashish was "random."

⁹ Tr. 32, 36-37, 50-51; GE 3. Applicant was charged with driving under the influence (DUI) of alcohol in 1981. He pled nolo contendere and paid a fine. He was arrested again in 1981 for DUI after being involved in an accident with his motorcycle. He paid a fine and his license was suspended for a year. I have not considered Applicant's DUI arrests and other illegal drug use, except as alleged in the SOR, for purposes of disqualifying conditions, but considered them when analyzing potential mitigation, credibility determination, and the whole person.

¹⁰ Tr. 26.

¹¹ Tr. 26-27; GE 3; AE D.

drugs in the future. He testified that when he was arrested it was during a period when he was laid off from work by his employer.¹²

Applicant resumed using marijuana in approximately June 2012 and continued to use it until he participated in a drug test held by his employer in October 2012, when he tested positive for marijuana. A trace amount of marijuana was also found in Applicant's car. Applicant testified that he was aware at the time that the use of illegal drugs was prohibited while holding a security clearance. Applicant was suspended for two weeks by his employer in October 2012 for the failed drug test. He was advised not to return to work until he was sure the drug was no longer in his system so he would not test positive upon his return. He did not return to work for an additional three weeks. He passed the drug test and was permitted to return to work. He was on probation with his employer for two years and was subject to random drug testing.¹³

Applicant attributed his resumption of marijuana use to a stressful period in his life and because he was suffering from anxiety. In April 2012 his mother was ill and placed in a nursing home. She passed away about a month later. Applicant had difficulty sleeping and used over-the-counter medication to help, but it did not work. He attempted to cope. His father became sick in June 2012. Applicant's brother offered him the marijuana to help him sleep. Applicant testified he would use marijuana every two to three days on some occasions, then not use it for about seven days. He estimated from June 2012 to October 2012, when he tested positive, he used marijuana about 10 to 12 times. He stated he was weak and succumbed to using marijuana when his brother offered it. Applicant stated it was his brother who contacted his employer about his marijuana use because his brother was contesting their father's will. He is now estranged from his brother. He stated he has not used marijuana since October 2012.¹⁴

Applicant testified that if he were suffering from stress and anxiety today he would not succumb to using marijuana because he has a wonderful wife and a good job. He participated in counseling through an employer assistance program for approximately one month, which included alcohol/drug education. No substance abuse problem was identified.¹⁵ After he tested positive for marijuana, Applicant sought medical help for his anxiety and sleeping problems. He was prescribed a medication.¹⁶ He stated he no longer associates with drug abusers. He signed a statement of automatic revocation of a security clearance if he uses illegal drugs in the future. Applicant has not tested positive for marijuana since October 2012. He provided the results of an alcohol/drug evaluation conducted in April 2016. He was not diagnosed as

¹² Tr. 37-40; GE 3.

¹³ Tr. 22-24, 27-34, 41-45, 48-49.

¹⁴ Tr. 22-24, 28, 31, 41-44, 51.

¹⁵ Tr. 49-50-52; AE E, F, G.

¹⁶ Tr. 28; AE G.

dependent on marijuana or alcohol and it appears he did not exhibit signs of withdrawal or in need of detoxification. His level of risk was determined to be low.¹⁷

Character letters describe Applicant as knowledgeable, conscientious, courteous, helpful, respectful, loyal, trustworthy, dedicated, and valued. He has a strong work ethic and a take-charge attitude.¹⁸

Policies

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 used 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 not drawn 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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 the applicant may deliberately or inadvertently fail to safeguard

¹⁷ Tr. 28, 45-48; AE G, H, I, J, N.

¹⁸ AE K, L, M.

classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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

AG ¶ 24 expresses the security concern for drug involvement:

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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

- (a) any drug abuse;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) any illegal drug use after being granted a security clearance.

Applicant used marijuana from approximately 1976 to October 2012. There is significant evidence that he used marijuana regularly from 1976 to 1996. He was disciplined three times while in the military for possession of marijuana. In 1995, he was arrested and pled guilty to a felony charge of manufacturing marijuana. He was growing approximately 280 marijuana plants. It appears he may have stopped using marijuana after his arrest, but resumed in June 2012 and continued to sometime in October 2012. These later uses occurred while he held a security clearance. The above disqualifying conditions apply.

I have considered the mitigating conditions under AG ¶ 26. The following are potentially applicable:

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

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

Applicant's last reported illegal drug use was in October 2012 after he tested positive for marijuana. He had been using marijuana over a five-month period beginning in June 2012 while holding a security clearance. Applicant has a long history of marijuana use with varying frequency beginning in 1976. He used it frequently while he was in the military, and his discharge, although under honorable conditions, was because of misconduct due to drug abuse. He continued to use marijuana while he was employed by his current employer, a federal contractor. He was arrested and charged in 1995 with a felony for manufacturing marijuana. He worked with law enforcement and was given a reduced sentence. He used marijuana again in 2012. Applicant stated during a sworn statement to a government investigator in 2002 that he did not intend to use illegal drugs in the future. Although, it has been three and a half years since Applicant's last marijuana use, his behavior was not infrequent, did not happen under unique circumstances, and it casts doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 26(a) does not apply.

Applicant testified that he will not use marijuana again because he has a good job and a good wife, both of which he had when he used marijuana in 2012. He made the same promise in 2002. He stated he no longer associates with those who use illegal drugs. He signed a letter of intent with automatic revocation of clearance if he uses illegal drugs in the future. Although AG ¶ 26(b) has some application, Applicant has a significant history of drug use. First, he used it while serving in the military, then for a significant period of time while working for a federal contractor. He was then arrested for manufacturing marijuana, and then over a five-month period he used marijuana while holding a security clearance. The evidence establishes minimal mitigation under AG ¶ 26(b).

Applicant participated in counseling and was not diagnosed as drug dependent. His was given a prognosis of low risk, presumably for future drug abuse. Although it appears Applicant is not addicted to drugs, the evidence shows he succumbs to using marijuana. He had an extended period of abstinence, and then resumed using marijuana. These are lifestyle choices. There is some evidence of mitigation under AG ¶ 26(d), but it is insufficient and does not outweigh the lifestyle choices Applicant made when he repeatedly used marijuana in his past and while holding a security clearance.

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 the facts and circumstances surrounding this case. I have incorporated my comments under Guideline, H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is 56 years old. He has a long history of marijuana use beginning in high school, continuing during his military service, and was basis for his separation from the Air Force. He was growing 280 marijuana plants when he was arrested and charged with manufacturing marijuana, while he was laid off from work. After being granted a security clearance in 2003, he chose to use marijuana over a five-month period in 2012, until he tested positive during a drug test by his employer. Applicant has exhibited a long history of illegal drug involvement. Overall, the record evidence leaves me with serious questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the drug involvement guideline.

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
Subparagraphs 1.a-1.g:	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 a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge