



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



In the matter of:)
)
) ISCR Case No. 17-04287
)
Applicant for Security Clearance)

Appearances

For Government: Kelly Folks and Nicole A. Smith, Esq., Department Counsels
For Applicant: Aileen B. Xanakis, Esq.

02/26/2019

Decision

CREAN, THOMAS M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, I find that Applicant failed to mitigate drug involvement and substance abuse security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on March 28, 2016, to retain a security clearance required for her duties with a defense contractor. Applicant reported on this e-QIP that she occasionally used marijuana from June 1979 until June 2013. She also reported experimental use of marijuana in September 2014. Applicant also reported that she was granted eligibility for access to classified information in May 2009.

On April 4, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns for drug involvement and substance misuse (Guideline H). These actions were 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 June 8, 2017.

Applicant answered the SOR on April 26, 2018. She admitted the two allegations of drug involvement and substance misuse. She noted that her marijuana use was sporadic, and she did not use marijuana between 2009 and 2014. She admitted that she used marijuana one time in 2014 and again one time in September 2017. Department Counsel was prepared to proceed on June 1, 2018, and the case was assigned to me on September 10, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on September 12, 2018, scheduling a hearing for November 7, 2018. I convened the hearing as scheduled. The Government offered two exhibits were marked and admitted into the record as Government Exhibits (GX) 1 and 2, and were admitted without objection. Applicant testified, and offered four exhibits which I marked and admitted into the record without objection as Applicant Exhibits (AX) A through D. DOHA received the transcript of the hearing (Tr.) on November 16, 2018.

Findings of Fact

Applicant's admissions are included in my findings of fact. After a thorough review of the pleadings, transcript, and exhibits, I make the following additional findings of fact. Applicant is 59 years old. She graduated from high school. She received an associate's degree in May 1982. She has taken some college courses but has not received a degree. She has received computer-based certifications. Applicant first married in December 1978 and divorced in June 1981. She married a second time in June 1981 and divorced in June 1989. She married a third time in September 1990 and divorced in June 2005. She has one child from her third marriage. Applicant has worked supporting various companies and defense contractors as a project manager or director. Her hobby is to do bead work on dresses. (Tr. 16-22; Gov. Ex. 1, e-QIP, dated March 28, 2016; GX 2, Response to Interrogatories and Personal Subject Interview, dated March 23, 2018; AE A, Resume, undated; AE B, Transcript, dated August 24, 2015)

The SOR alleges that Applicant used marijuana, with varying frequency, from about 1980 through at least September 2017 (SOR 1.a); and used marijuana after being granted a DOD security clearance in June 2014 (SOR 1.b).

Applicant received her first eligibility for access to classified information while supporting a United States Army command in 2009. Her clearance was renewed in June 2014. (Tr. 27-30)

Applicant first used marijuana in 1982 when she was 23 years old. She was dating her future second husband who was a marijuana user. He asked her to try the drug and she did. There was occasional use, about once or twice a year, in the following eight or nine years she was married to her second husband. After they divorced in 1989, she did not use marijuana again until 2014. She characterized her use as infrequent. (Tr. 30-33; 43-44)

Applicant did not use marijuana when married to her third husband from 1990 to 2005. Applicant had a significant other living with her from 2009 until 2014. During this time, she used marijuana once or twice. Her significant other, who was a heavy marijuana user, smoked the drug in her presence. While she used marijuana only infrequently, she believes she inhaled marijuana from the second-hand smoke from her significant other. (Tr. 33-34, 44, 53-55)

In 2014, Applicant had a friend visiting her who had not previously used marijuana. She suggested to the visiting friend that they use the marijuana left over from her significant other. Applicant and her friend smoked the marijuana once using a pipe. She used the drug voluntarily. She told her security office about this use of marijuana a few months later when she had a periodic review for her security clearance. (Tr. 33-37, 44-45)

On Labor Day weekend in 2017, Applicant was visiting a friend in a state where marijuana is legal. She attended a party with her friend and tried a piece of candy laced with marijuana. A significant number of people attending the party were using the candy. Applicant's friend did not force her to use the marijuana candy, and Applicant did not buy the marijuana candy. The individual is still Applicant's friend, but Applicant now stays with her brother and his family when she visits the state. Her brother is not a marijuana user. (Tr. 37-38)

Applicant knew the candy had marijuana in it, She knew she had a security clearance at the time. From 2009, she knew that the use of marijuana was against security rules and regulations. She characterized her use of the marijuana candy as bad judgment on her part. She used the marijuana candy because she was in an environment where the rules were different and marijuana was legal. The people she knew at the party were using marijuana because it was legal. She did it as an experiment to gain knowledge of the effects of the marijuana candy. Her security clearance was an issue and she knew she had to report her use to her security officer when she returned. (Tr. 38-40; 45-47. 49-50)

Applicant reported her use of the marijuana candy to her security officer on her return from the trip. She has never taken a drug test with her company. Her company was in the middle of a review of security clearances for their employees. If the company had not been involved in the review process, Applicant would have reported her use of marijuana candy at her next security review. The security personnel would not have known about her use of marijuana if she did not report it herself. (Tr. 40-43, 50-53)

Applicant presented four affidavits of recommendation for granting her eligibility for access to classified information from friends, fellow workers, and her security manager. The writers attest to her dedication, work ethic, knowledge and excellent work performance. They did not believe the allegations reflect Applicant's character, respect for law and rules, or willingness and ability to protect classified information. They found Applicant to be responsible and trustworthy. (AE C)

Applicant also submitted her statement of intent not to use illegal substances or abuse prescription drugs in the future. She agrees to be randomly drug tested. If a drug test is positive, she agrees to immediate and unqualified revocation of her security clearance. (AE D)

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

Drug Involvement and Substance Misuse

The use of an illegal drug or misuse of a prescription 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. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. Drugs are defined as mood and behavior altering substances, including drug material and other chemical compounds identified and listed in the Controlled Substances Act of 1970. Marijuana is included in the Schedule 1 list. (AG ¶ 24)

Applicant used marijuana occasionally from 1980 until May 2014. She was granted eligibility for access to classified information in June 2014. In September 2017, she knowingly consumed a marijuana infused candy. Applicant's admissions and the available evidence is sufficient to raise the following Drug Involvement and Substance Abuse Disqualifying Conditions under AG ¶ 25:

- (a) any substance misuse;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

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) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome the problem, and has established a pattern of abstinence, including, but not limited to:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used; and

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

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. Based on an evaluation of the evidence presented at the hearing and in the case file, I conclude that the mitigating conditions do not apply.

Applicant used marijuana occasionally from 1982 until 1989 with her second husband. She did not use marijuana from 1989, when she divorced her second husband, until she used again a few times while living with a significant other from 2009 until 2014. Her significant other was a heavy marijuana user and she also inhaled second-hand marijuana smoke. Applicant used marijuana once in May 2014. She was granted access to classified information in June 2014. She used marijuana in the form of a candy in 2017.

The majority of Applicant's use of marijuana was infrequent and occasional. However, her use of marijuana was under circumstances that are likely to recur. While the use was infrequent and occasional, her marijuana use was over an extended period of time. She would stop for a while, then use marijuana again. She knowingly and continually lived with marijuana users for a number of years. She even introduced a friend to marijuana and provided the illegal drug. The circumstances of her use were not unusual but voluntary, under normal circumstances, and could recur.

After being granted eligibility for access to classified information, she used marijuana in the form of candy. She knew the candy contained marijuana, she knew she had a clearance, and she knew that security clearance and government workplace rules prohibited the use of marijuana. Applicant did not present evidence of enrollment in or attendance at a drug treatment program.

Her last use was only about 18 months ago. Under these circumstances, there has not been an appropriate period of abstinence. Even though Applicant provided a statement that she does not intend to use drugs in the future and her security clearance could be revoked if she did use illegal drugs, she has not established sufficient circumstances that indicate a change in lifestyle and environment. Applicant failed to mitigate security concerns for drug involvement.

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 the recommendations of Applicant's friends and coworkers that she is reliable and trustworthy and should be granted eligibility for access to classified information. The allegations under Guideline H, as established by the government's evidence, reflect a lack of good judgment by Applicant. The evidence shows a use of marijuana even while having eligibility for access to classified information. Applicant's statement of intent not to use marijuana in the future has little impact because of her previous history of voluntary use. These facts leave me with questions and doubts about Applicant's judgment and her suitability for access to classified information. For all these reasons, I conclude that Applicant has not mitigated drug involvement security concerns. Eligibility for access to classified information is denied.

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.b: | 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.

THOMAS M. CREAN
Administrative Judge