



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



In the matter of:)	
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)	ISCR Case No. 18-00604
Applicant for Security Clearance)	

Appearances

For Government: Raashid Williams, Esq., Department Counsel
 For Applicant: *Pro se*
 12/17/2019

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke her eligibility for access to classified information. She failed to mitigate the security concerns stemming from her drug involvement and substance abuse, criminal activity, and personal conduct. Accordingly, this case is decided against Applicant.

Statement of the Case

On May 4, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that her circumstances raised security concerns under Guideline H (drug involvement and substance abuse), Guideline J (criminal activity), and Guideline E (personal conduct). This action was taken under Executive Order (E.O.) 10865, Safeguarding Classified Information within Industry (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program (January 2, 1992), as amended (Directive). The Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), effective within the Defense Department on June 8, 2017, apply here. Applicant answered the SOR on June 7, 2018, and requested a hearing to establish her eligibility for continued access to classified information.

I was assigned this case on September 13, 2018. On December 10, 2018, a date mutually agreed to by the parties, a hearing was held. Applicant testified, and the exhibits offered by the parties were admitted into the record without objection. (Government Exhibits (GE) 1 – 5; Applicant's Exhibits (AE) A. I left the record open until close of business December 24, 2018, to allow Applicant to submit additional exhibits. Applicant timely submitted documents that were marked as AE B and admitted into evidence without objection. The transcript of the hearing (Tr.) was received on January 2, 2019.

Findings of Fact

Applicant is 35 years old, a high school graduate with 75 credit hours towards her Bachelor's degree. She is divorced and has two children, a 14 year-old daughter and a one-year old foster son. Applicant served in the United States Air Force from August 2002 until her honorable discharge in June of 2008. Since June 2008 she has worked as an engineer for a defense contractor and holds a secret security clearance. (GE 1; Tr. 21-23.)

Under Guideline H, the SOR made three allegations: (1) from 2010 until September 2017, Applicant used marijuana with varying frequency; (2) from December 2013 until September 2017, Applicant used marijuana with varying frequency while holding a security clearance; (3) in August 2017 and October 2017, Applicant tested positive for THC after taking drug tests. (SOR ¶ 1.) Applicant admitted those allegations. (Answer ¶¶ H.a-c.)

Under Guideline J, the SOR made two allegations: (1) in April 2017, Applicant was arrested and charged with DUI, careless driving and speeding, and was sentenced to 20 days in jail (suspended) and three years of unsupervised probation; (2) Applicant is currently on probation until August 2020. (SOR ¶ 2.) Applicant admitted those allegations. (Answer ¶¶ J.a-b.)

Under Guideline E, the SOR made four allegations: (1) it repleaded the allegations under Guidelines H and J; (2) Applicant falsified her July 21, 2017 e-QIP by answering "No" to the question about any illegal drug use in the past seven years; (3) Applicant falsified her July 21, 2017 e-QIP by answering "No" to the question about ever using illegal drugs while holding a security clearance. (SOR ¶ 3.) Applicant admitted those allegations but claimed that she did not deliberately falsify her e-QIP answers and that her answers were negligent and unintentional. (Answer ¶¶ E.c-d.)

Applicant testified about her use of marijuana. She started using marijuana in about 2010 with a friend who lived nearby. Applicant's friend used it for migraine headaches and recommended it to Applicant. At that time, Applicant suffered from migraine headaches that were caused by a jet ski accident in 2008 or 2009. Applicant went to physical therapy, but it did not help. Before she tried marijuana, Applicant dealt with her migraines by going into a closet with the lights off. Her migraines were fairly debilitating, so she thought she would try marijuana. Applicant's use of marijuana varied

with the severity of the migraines, at most two to three times a month but not consistently. The worse the migraines, the more she would use marijuana. Applicant was desperate, and the marijuana was very effective. Applicant last used marijuana in September 2017. She never sought medical marijuana or any prescription medicine for her migraines because of the history of drug abuse among her family members. Applicant never purchased marijuana; her friend would give her whatever she needed. She still sees her friend, but only occasionally. Applicant still has migraines, but she now treats her migraines by going into the closet, but with Excedrin instead of marijuana. (Tr. 24-30, 42-43, 49-52.)

Applicant learned while in the Air Force that the use of marijuana was illegal and that using marijuana violated her security clearance. She also knew in 2010 when she began using marijuana that it was illegal and violated her security clearance. Applicant has had a clearance since 2002, and it got renewed in about 2012 or 2013. She had been using marijuana for two to three years before that renewal. When she filled out her form for that renewal, Applicant did not admit that she had been using marijuana. In the 2012 or 2013 time frame, when she was getting her clearance renewed, she kept smoking marijuana. When filling out her renewal application in 2012 or 2013 and the July 2017

application (alleged in the SOR), Applicant just skimmed through the clearance application questions about illegal drug usage. She has "heavy drug users" in her family but did not consider herself to be a drug user. At the time of completing the clearance applications, Applicant did not understand that her answers of "No" to Section 23 questions about illegal drug usage were false. She does understand that now and testified that she answered "No" falsely four times (two in 2012/2013 and two in 2017). Applicant testified that she was "absolutely not" addicted to marijuana and has had no withdrawal symptoms of any type since her last use of marijuana in September 2017. (Tr. 24-32, 43.)

Applicant testified about her DUI arrest in April 2017. She had gone to an establishment and had one shot and one-and-a-half beers over three hours. She did not finish her second beer. Applicant thought she had been drinking responsibly and did not feel inebriated. She knew that she would be the driver that evening. Applicant was pulled over for speeding. Her passenger was a friend who had also been drinking. The officer said he could smell alcohol and gave Applicant a breathalyzer test, which she failed. Applicant self-reported this incident to her employer a couple of weeks later, although she spoke directly to her supervisor about it shortly afterwards. Her supervisor gave her instructions about whom she was supposed to report to at the company. Applicant waited a couple of weeks to report, because she was nervous and worried about "fallout." As a result of the April 2017 DUI, Applicant was enrolled in an early intervention program for alcohol abuse in August 2017. She continued to use marijuana and tested positive for marijuana in that intervention program in August 2017 and October 2017. Applicant did not complete that program due to a death in the family. In 2018, she enrolled in a substance abuse program, as ordered in her sentence. The program ran 13 weeks, one hour per week in group sessions. Applicant submitted post-hearing the weekly urinalysis results from April 30, 2018 to October 29, 2018. All results were negative for alcohol and marijuana and other controlled substances. Although she was still using marijuana when she reported her DUI to her employer in May 2017, Applicant did not report her marijuana

usage. She is a social drinker, but she does not drink very often, perhaps once or twice a month. Applicant is on unsupervised probation until August 2020. (Tr. 32-48; AE A; AE B.)

Law and Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individuals are eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2; SEAD-4, ¶ E.4.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. SEAD-4, Appendix A, ¶¶ 2(c), 2(d).

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). In resolving the ultimate question regarding an applicant’s eligibility, “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” SEAD-4, Appendix A, ¶ 2(b). See also SEAD-4, ¶ E.4. Moreover, the Supreme Court has held that officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Discussion

Guideline H, Drug Involvement and Substance Abuse

Under AG H for drug use, suitability of an applicant may be questioned or put into doubt because drug use can both impair judgment and raise questions about a person's ability or willingness to with laws, rules and regulations:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Controlled substance means any "controlled substance" as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above. (AG ¶¶ 24, 25 and 26 (setting forth the concern and the disqualifying and mitigating conditions).)

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug;
- (c) illegal possession of a controlled substance...; and
- (f) any illegal drug use while granted access to classified information.

I have also considered all of the mitigating conditions for drug involvement under AG ¶ 26 and found the following relevant:

- (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; and,
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this 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.

Applicant admitted her use of marijuana from 2010 until September 2017, and that her use occurred while she held a security clearance. Facts admitted by an applicant in an answer to an SOR require no further proof by the Government. ISCR Case No. 94-1159 at 4 (App. Bd. Dec. 4, 1995) (“any admissions [applicant] made to the SOR allegations . . . relieve Department Counsel of its burden of proof”); ISCR Case No. 94-0569 at 4 and n.1 (App. Bd. Mar. 30, 1995) (“[a]n applicant’s admissions, whether testimonial or written, can provide a legal basis for an Administrative Judge’s findings”).

Marijuana is a Schedule I controlled substance, and its possession is regulated by the federal government under the Controlled Substances Act. 21 U.S.C. § 811 et seq. In an October 25, 2014, memorandum, the Director of National Intelligence reaffirmed that the use of marijuana is relevant to national security determinations, regardless of changes to state laws concerning marijuana use. James R. Clapper, Director of National Intelligence, Memorandum: Adherence to Federal Laws Prohibiting Marijuana Use (October 25, 2014). AG ¶¶ 25(a), (b), (c), and (f) apply.

I have considered the mitigating conditions cited above and find that they do not apply. First, the 2017 last use of marijuana while holding a clearance is not so long ago to negate security concerns. Second, Applicant’s use of marijuana was not infrequent. It was several times a month depending on the frequency and severity of her migraines. Finally, Applicant has not presented a long enough track record of abstinence to mitigate the security concern caused by her illegal drug usage. Therefore, I find against Applicant on SOR ¶¶ 1.a, b, and c.

Guideline J, Criminal Conduct

The criminal conduct security concern is detailed in AG ¶ 30:

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.

I have considered the disqualifying conditions under AG ¶ 31, and the following apply:

- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and
- (c) individual is currently on parole or probation.

Applicant's arrest and conviction of DUI in April 2017 trigger security concerns under AG ¶¶ 31(b) and (c). The question is whether Applicant has mitigated the security concerns raised by her criminal conduct.

The potentially mitigating conditions are set forth in AG ¶ 32 as follows:

(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; and

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

Applicant's arrest and conviction of DUI in April 2017 cannot be mitigated by the passage of time, just over two years. In addition, Applicant will be on probation until August 2020. It is true that she successfully completed a substance abuse program. I find, however, that Applicant needs to present a longer track record of no criminal incidents. Since she testified that she only drinks occasionally, it would appear that Applicant is capable of developing such a track record. On this record, however, I find against Applicant on SOR ¶¶ 2.a and b.

Guideline E, Personal Conduct

AG ¶ 15 sets forth the general concern based on personal conduct that is relevant in this case:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility.

AG ¶ 16(a) provides the specific disqualifying condition that is potentially applicable in this case:

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer....

In this case, the SOR alleged that Applicant deliberately failed to disclose in her July 21, 2017 security clearance application that she had used marijuana while possessing a security clearance. Applicant admitted that omission in her answer to the SOR and in her hearing testimony. She also admitted at the hearing that she failed to disclose that information during her clearance renewal process in 2012 or 2013. Because the Government did not move to amend the SOR to add that allegation, I may only consider that non-alleged conduct to assess Applicant's credibility, to evaluate her case for mitigation, or to perform a whole-person analysis. ISCR Case No. 14-01941 at 3 (App. Bd. Mar. 30, 2015).

A statement is false or dishonest when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if, for example, the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, reasonably did not know the information, or genuinely thought the information did not need to be reported. In assessing an allegation of deliberate falsification, I consider not only the allegation and Applicant's answer but all relevant circumstances, with particular scrutiny of Applicant's state of mind or intent. (AG ¶¶ 2(a) and (d)(1)-(9) (explaining the "whole-person" concept and factors).)

Applicant has had a security clearance since she joined the Air Force in 2002. She renewed that clearance in 2012 or 2013, and again in 2017. Applicant is not new to the security clearance process and reporting requirements for incidents that may trigger security concerns. In fact, Applicant knew that she was required to report her April 2017 DUI to her employer. At the same time, she did not report her periodic usage of marijuana, which had been reportable since she began using in 2010. None of Applicant's explanations were sufficient to justify omitting her illegal drug usage from the July 21, 2017 security clearance application. I find against Applicant on SOR ¶¶ 3.

Conclusion

The record raises doubts about Applicant's current reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept. Accordingly, I conclude that Applicant did not meet her ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant her eligibility for 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 (Drug Involvement):	Against Applicant
Subparagraphs 1.a – 1.c:	Against Applicant

Paragraph 2, Guideline J (Criminal Conduct):	Against Applicant
Subparagraphs 2.a – 2.b:	Against Applicant
Paragraph 3, Guideline E (Personal Conduct):	Against Applicant
Subparagraphs 3.a-3.d:	Against Applicant

Philip J. Katauskas
Administrative Judge