



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 18-01095
)	
Applicant for Security Clearance)	

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: Mark A. Myers, Esq.

05/23/2019

Decision

HESS, Stephanie C., Administrative Judge:

Applicant mitigated the potential security concerns raised by her sporadic marijuana use over a five month period in 2015 while holding a security clearance and by her failure to disclose the uses on her security clearance application in 2016. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on August 9, 2016. On August 27, 2018, the Department of Defense (DOD) sent her a Statement of Reasons (SOR), alleging security concerns under Guideline E (Personal Conduct). The DOD acted under Executive Order (Ex. Or.) 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) implemented by DOD on June 8, 2017.

Applicant submitted her Answer to the SOR on September 26, 2018, requesting a hearing before an administrative judge. Department Counsel was ready to proceed on December 20, 2018, and the case was assigned to me on January 30, 2019. On April 3,

2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant through counsel that the hearing was scheduled for April 23, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted into evidence without objection. Applicant testified and Applicant's Exhibits (AX) A through G were admitted without objection. DOHA received the transcript (Tr.) on May 2, 2019.

Findings of Fact

Applicant is a 34-year-old database administrator currently employed by a defense contractor since August 2016. She earned her associate's degree in 2007 and her bachelor's degree in information systems technologies in 2009. She was first granted a secret security clearance in October 2009. (GX 1; Tr. 22.)

Under Guideline E, the SOR alleges that Applicant used marijuana with varying frequency between May and October 2015 while holding a security clearance. The SOR also alleges that Applicant failed to disclose this use as required on her August 2016 e-QIP. Applicant admits the marijuana use while holding a clearance, but denies the two allegations of intentional falsification of her e-QIP. Applicant's admissions are incorporated in my findings of fact.

From April 2015 until February 2016, Applicant was working as a senior database engineer. Although Applicant's security clearance was still active, her position did not require her to have a security clearance and she did not have access to classified information. In May 2015, Applicant began dating her former boyfriend. Applicant's former boyfriend used marijuana recreationally. He was aware that Applicant had never previously used marijuana or any illegal drug, but pressured her to smoke marijuana with him. After declining several offers, Applicant succumbed to what she described as peer pressure, and smoked marijuana with her former boyfriend. She did not actively consider that her marijuana use could have a negative impact on her security clearance worthiness. (Tr. 17-19.)

Between May and October 2015, Applicant smoked marijuana approximately four or five times, or roughly once a month. The marijuana made her feel relaxed and sleepy. (GX 2.) She broke up with her former boyfriend in October 2015 and has not used marijuana or any illegal drug since that time. (Tr. 18-21.) She has no intention of future use and has submitted a signed statement of intent to never use illegal drugs again with the understanding that any involvement with illegal drugs is grounds for revocation of her security eligibility. (AX G.) Applicant does not have any contact with her former boyfriend or associate with anybody who uses illegal drugs. She voluntarily participated in an eight-hour drug and alcohol awareness class in April 2019, in which she learned how to avoid situations where illegal drugs are being used and how to make better decisions about her environment. (Tr. 18-21; Tr. 30-32.) Applicant voluntarily disclosed her marijuana use during her personal subject interview (PSI) prior to being confronted. (Tr. 25-26.)

Applicant did not disclose the fact that she had used marijuana in the prior seven years or that she had used marijuana while holding a security clearance on her e-QIP as

required. Applicant volunteered during her PSI that she was embarrassed about her marijuana use and had not told anyone about it. She also stated that she did not believe she had to affirmatively state that she had used marijuana while holding a security clearance because she did not use marijuana while working in the secured position. During her PSI, Applicant said she should have disclosed her marijuana use on her e-QIP, and that her failure to do so was a mistake that she needed to rectify. (Tr. 26-27.)

Applicant's friend since 2016 is aware of the SOR issues and states that Applicant is professional and trustworthy and should be allowed to maintain her security clearance. A friend of Applicant since elementary school, who was also aware of the SOR allegations, states that Applicant's clearance should be continued because she is loyal, honest, and dedicated to supporting the United States. Applicant has been highly recommended for employment and for a security clearance by former supervisors and coworkers since 2009. (AX C.) Applicant is remorseful for her conduct and understands why it raised security concerns. She is committed to increasing her knowledge and professionalism and has received certifications in her field. She is dedicated to her job, stating that her career is her top priority. (Tr. 55-57.) Applicant was sincere, candid, and humble while testifying.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant's meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline E, Personal Conduct

The concern under this guideline is set out in AG ¶ 15:

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. . . .

The following disqualifying condition is applicable to the concerns raised by Applicant’s use of marijuana while holding a security clearance:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other

characteristics indicating that the individual may not properly safeguard classified or sensitive information.

The following mitigating conditions are potentially applicable:

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

AG ¶ 17(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

AG ¶ 17(g): association with persons involved in criminal activities was unwitting, has ceased, or occurred under such circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, willingness to comply with rules and regulations.

Applicant used marijuana on four or five occasions in 2015 with a former boyfriend with whom she no longer has any contact. She held an active security clearance at the time of her marijuana use, but was not working in a cleared position. She did not realize that using marijuana while holding a clearance, despite whether or not she was working in a cleared position could have an adverse impact on her security clearance eligibility. She never previously used marijuana, nor has she since. Afterwards, Applicant chose never to use marijuana again. Applicant willingly participated in a drug and alcohol awareness program where she learned how to make better choices about her environments. She does not have a social circle that includes people who use illegal substances.

Applicant recognizes that her decision to use marijuana in general, and specifically while holding a clearance, was a mistake. She accepts responsibility for her actions and is remorseful for her conduct. She has provided a written statement in which she acknowledges the use, states her intent of no future use of any illegal drugs, and recognizes that any such use will result in the loss of her security clearance.

Applicant's last use of marijuana in 2015 is not recent. The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006). The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006).

Applicant's use of marijuana while holding a security clearance places a heavy burden on her to establish mitigation. After considering the record as a whole, specifically, the circumstances surrounding Applicant's limited use of marijuana, the length of time

that is passed since that limited use, and Applicant's remorse for her actions, I conclude that Applicant has met her heavy burden of proof and persuasion. Applicant's marijuana use happened under circumstances that are unlikely to recur, and does not cast doubt on her current reliability, trustworthiness, or good judgment. AG ¶¶ 17(c), 17(d), and 17(g) apply.

The following disqualifying condition is applicable to the concerns raised by Applicant's failure to disclose her marijuana use while holding a security clearance on her e-QIP as required:

AG ¶ 16(a): deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations . . . [or] determine national security eligibility.

The following mitigating conditions are potentially applicable:

AG ¶ 17(a); the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Applicant failed to list her four to five uses of marijuana in her 2015 on her 2016 e-QIP because she was embarrassed. She did not list for marijuana use while holding a security clearance because she had not been working in a cleared position and erroneously thought that she was not required to do so. However, Applicant recognized that she was required to disclose this use during her background investigation and volunteered information about her use during her PSI. Her falsification was not recent and is unlikely to recur and does not cast doubt on her current reliability, trustworthiness, or good judgment. AG ¶¶ 17(a) and 17(c) apply.

Whole-Person Concept

Under AG ¶ 2, 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. In applying the whole-person concept, an 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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d).

I have incorporated my comments under Guideline E and in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but I have also considered the following:

Applicant is highly regarded and trusted by her long-time friends and former supervisors and coworkers. Her several uses of marijuana while holding a security clearance place a heavy burden on Applicant to establish mitigation. Additionally, her initial failure to be forthcoming about her use raises concerns about her trustworthiness. After considering the record as a whole, specifically, the circumstances surrounding Applicant's brief period of marijuana use, the length of time that is passed since that use, Applicant's remorse for her actions, and her current clear understanding of her obligation for truthfulness, I conclude that she has met her heavy burden of proof and persuasion. Applicant's testimony was credible, humble, and sincere.

After weighing the disqualifying and mitigating conditions under Guideline E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by her past conduct. Accordingly, I conclude she has carried her burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraph 1.a through 1.d:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Stephanie C. Hess
Administrative Judge