



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



In the matter of:)	
)	
)	ISCR Case No. 18-02722
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel O. Reilley, Esq., Department Counsel
 For Applicant: Jeffery Billet, Esq.
 11/13/2019

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to deny her eligibility for a security clearance to work in the defense industry. Applicant failed to mitigate the security concerns raised by her history of marijuana use, including after being granted a security clearance in 2008. Clearance is denied.

Statement of the Case

Acting under under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive), and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on June 8, 2017, the DOD issued a Statement of Reasons (SOR) detailing security concerns under the drug involvement and substance misuse and personal conduct guidelines on December 14, 2018. DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant’s security clearance and recommended that the case be submitted to a Defense Office of Hearings and Appeals (DOHA) administrative judge for a determination whether to deny her security clearance.

Applicant timely answered the SOR and requested a hearing. At the hearing, convened on June 12, 2019, I admitted Government's Exhibits (GE) 1 and 2, without objection. Applicant objected to the admission of a summarized subject interview written by a background investigator from the Office of Personnel Management, on the grounds that the document was not properly authenticated under Additional Procedural Guidance ¶ E3.1.20. I sustained the objection and the document is appended to the record as GE 3 for identification purposes only. I admitted Applicant's exhibits A through M, without objection. Applicant testified at the hearing, as did two character witnesses. DOHA received the transcript (Tr.) on June 25, 2019.

Findings of Fact

Applicant, 36, has worked for her current employer, a consulting firm, since 2010. In her position as a management consultant, she has occasion to work on assignments that require access to classified information. She was first granted access to classified information while sponsored by a previous employer in September 2008. She has since maintained security clearance eligibility. Applicant completed her most recent security clearance application in January 2017 to obtain a higher level of access. On the application, she disclosed marijuana use from May 2002 to December 2005 and then again from October 2010 to September 2015, while holding a security clearance. Applicant's marijuana use is the basis for the SOR. (Tr. 21, 51; GE 1-2.)

Applicant used marijuana while in college from 2002 to 2005. She testified that she first used marijuana when it was passed to her at a party and that she continued to use the drug in similar social settings until she graduated. In her 2008 security clearance application and at hearing, Applicant admitted that she used marijuana eight times while in college and that she stopped using to improve her chances of getting a federal job or a job that required a security clearance. (Tr. 33-35, 55-56; GE 2.)

Applicant abstained from the drug for five years. In 2010, she claims that she accidentally consumed the drug at a friend's party. After this incident of accidental ingestion, she admits to resuming marijuana use in social settings. She also used the drug while on vacation in the Netherlands in 2011. She claims to have stopped using the drug in 2015. It is unclear from the record how many times between 2010 and 2015 Applicant used the drug. On her January 2017 security clearance application, Applicant disclosed that she, "... rarely use[d], (maybe once or twice a year, if at all), estimating 10 to 15 times within the last 10 years." Applicant admits that her drug use between 2010 and 2015 occurred while she had a security clearance and that she worked on projects that required access to classified information during that time. Between 2010 and 2015, Applicant experienced professional growth with increased responsibilities, including two promotions and supervisory duties. To her knowledge, Applicant's employer does not have a policy prohibiting drug use or a drug-testing program. She also claims she was unaware of her duty to report illegal drug use to her facility security officer. (Tr. 35-42, 48-49, 59, 61, 77-78; GE 1.)

Applicant claims that marijuana use is no longer consistent with her lifestyle. She is serious about her career, which is evident through her positive performance

evaluations and awards. She is active in her employer's community efforts and participates in several volunteer activities on her personal time. Applicant claims that she has withdrawn from the friend groups with whom she used marijuana. At hearing, she presented several character letters in addition to the testimony of two witnesses. All attest to her drug-free lifestyle and overall good character. Applicant submitted a signed statement of intent to abstain from future drug use. She has also been in contact with her employer's security office about the existence of a drug-testing program in the event she is granted a conditional clearance. (Tr. 29-32, 43-46, 53-54, 78-102; AE A-F, I-M.)

In January 2019, in preparation of the hearing, Applicant submitted to a voluntary substance abuse evaluation. The evaluator, a licensed clinical social worker (LCSW), specializing in substance abuse and addictions counseling, interviewed Applicant, performed a drug assessment-screening test, reviewed the SOR, and the AG. The LCSW did not review the Applicant's security clearance applications. During the interview, Applicant told the LCSW that she only used marijuana on three occasions between 2002 and 2005, not eight as disclosed on her 2008 security clearance application. According to the evaluation report, Applicant described her use as reluctant, only succumbing to the insistence and pressure of her peers. Applicant only described three instances of marijuana use between 2010 and 2015, two of which were accidental. The LCSW opined that Applicant was remorseful about her conduct and diagnosed her with "No Use Disorder," and determined that no treatment was warranted. (AE G-H.)

At the hearing, Applicant testified that she did not appreciate the prohibition against marijuana use while having a security clearance. According to Applicant, other individuals in her friend group between 2010 and 2015, led her to believe that marijuana use while holding a security clearance was not a "big deal" and would likely be admonished by a "finger wag."

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 to be 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, administrative judges apply the guidelines 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(a), 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 national security eligibility will be resolved in favor of the 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.

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 the applicant or proven by Department Counsel.” The applicant 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 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 EO 10865 provides that adverse 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

The illegal use of controlled substances can raise questions about an individual’s reliability and trustworthiness, 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. (See, AG ¶ 24.) Applicant admits to using marijuana at least eight times between 2002 and 2005. She also admits to using marijuana between 2010 and 2015 after being granted a security clearance in September 2008. Drug involvement and substance misuse disqualifying conditions ¶ 25(a), “any substance misuse,” and ¶ 25(f), “any illegal drug use while granted access to classified information...,” apply.

The favorable information in the record including: Applicant’s lifestyle changes in support of abstinence, her favorable work performance history, and positive character references, does not mitigate the drug involvement concern. Applicant’s illegal drug use is not mitigated by the passage of time and continues to reflect negatively on her ongoing security worthiness. Her drug use did not occur under unusual circumstances, and was more than a youthful indiscretion that occurred during college. Applicant’s use of marijuana after becoming a working professional was intentional and recreational. Furthermore, her use of illegal drugs while having a security clearance shows a lapse in

judgment that cannot be considered minor. She acted in disregard of federal law and of the voluntary fiduciary relationship she entered into with the government when she became a clearance holder. Although she has stated she will not use the drug in the future, she has demonstrated a lack of credibility that gives her promise little weight.

Applicant lied about her history of drug use during her substance abuse evaluation. The evaluation report offers a summarization and characterization of Applicant's history of marijuana use that contradicts with Applicant's statements to the government during this adjudication. The nature of the inconsistent statements are not the result of a faulty memory, but a purposeful effort to characterize her drug use as reluctant and accidental. In this case, Applicant's inconsistent statements are even more troubling because the government did not compel the evaluation or the production of the resulting report. Applicant lied in a setting completely of her own making. The only reasonable explanation for her doing so is to ensure she received the desired diagnosis and prognosis. None of the drug involvement and substance misuse mitigating conditions apply.

Applicant's drug use is also cross-alleged under the personal conduct guideline. Applicant's history of use of illegal drug when considered with the false statements she made during her voluntary substance abuse evaluation supports a negative whole-person assessment as described in AG ¶ 16(c). Applicant's conduct revealed questionable judgment, untrustworthiness, reliability, lack of candor, and an unwillingness to comply with rules and regulations, and other characteristics indicating that she may not properly safeguard classified information. None of the personal conduct mitigating conditions apply.

Based on the record, I have significant reservations about Applicant's current security worthiness. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(d). Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. (*Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988).) The evidence supports a negative whole-person assessment indicating that Applicant lacks the judgment, reliability, and trustworthiness required of those granted 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, Drug Involvement and Substance Misuse:	AGAINST APPLICANT
Subparagraph 1.a	Against Applicant
Paragraph 2, Personal Conduct	AGAINST APPPLICANT

Formal Findings (Continued)

Subparagraph 2.a:

Against Applicant

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Nichole L. Noel
Administrative Judge