



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



In the matter of:)
)
) ISCR Case No. 19-00045
)
)
Applicant for Security Clearance)

Appearances

For Government: Michelle Tilford, Esq., Department Counsel
For Applicant: *Pro se*

07/25/2019

Decision

GLENDON, John Bayard, Administrative Judge:

Applicant contests the decision of the Department of Defense Consolidated Adjudications Facility (DOD CAF) that it was unable to find that it was clearly consistent with the national interest to grant her access to classified information. The DOD CAF alleges in its February 2019 Statement of Reasons (SOR) that Applicant purchased and used marijuana from 2007 to the date of the SOR and deliberately omitted this information in responding to a question about her past illegal drug use in a security clearance application (SCA). The record evidence supports an unfavorable decision. Applicant's access to classified information is denied.

History of the Case

In June 2016, Applicant submitted the SCA as a first-time applicant for a security clearance in connection with her employment with a federal contractor. Following an investigation, including two background interviews of Applicant, one in November 2017

and the second in August 2018, the DOD CAF issued the SOR, which sets forth allegations under Guidelines H (Drug Involvement and Substance Misuse) and E (Personal Conduct.) Applicant timely responded to the SOR and requested a decision based upon the administrative record without a hearing before an administrative judge.

On April 16, 2019, Department Counsel submitted a File of Relevant Material (FORM) with five government exhibits (GE) attached. Applicant received the FORM on May 3, 2019, and was given 30 days to respond. She did not respond to the FORM. Absent any objection, the government's evidence is admitted into the record. On July 9, 2019, the case was assigned to me.

Findings of Fact

Applicant admitted the allegations in her SOR response. I have incorporated her admissions in my findings of fact. Applicant's personal information is extracted from her SCA, GE 1, unless otherwise indicated by a parenthetical citation to the record.

Applicant, 34, began working for her initial security clearance sponsor in April 2016. In December 2016, her employment changed from being an employee of a recruiting and staffing agency under contract with a prominent research university to being a full-time employee of the university with the title of "Research Associate 1." In 2007, she earned bachelor's degrees in Information Systems and Marketing, and she earned a master's degree in 2011. At a later date, she also earned a Six Sigma Certificate. She has never married and has no children. (GE 4 at 7.)

In 2007, Applicant began smoking marijuana after she stopped playing college basketball. As a college athlete, she was drug tested and did not use marijuana during that time. Since then, she has smoked marijuana "on and off," sometimes frequently, up to the date of the SOR. She also purchased marijuana for her personal use. During this period, she smoked marijuana by herself in her home. She stated in her August 2018 background interview that she intends to continue smoking marijuana in the future. She also told the interviewer that she would stop using marijuana if she was told that it was a requirement to do so to keep her job or to hold a security clearance. (GE 4 at 12, 14.)

Since her graduation from college in June 2007, Applicant has resided in a state where it is illegal to purchase or possess marijuana. She knew from her college drug testing experience that possessing marijuana was a criminal offense. The purchase and possession of marijuana is also a criminal offense under federal law. I take administrative notice of the fact that marijuana is listed as a Schedule 1 Controlled Substance under federal law. (GE 5 at 1, 3.)

Applicant omitted from her SCA that she had purchased and used marijuana in the prior seven years. She also failed to admit to her illegal activity during her first background interview in November 2017, even though the investigator questioned her about other

illegal activity in her past. The government's investigators developed information during their investigation that Applicant had used marijuana in the past and conducted a follow-up interview in August 2018. In that interview, the investigator confronted Applicant with information about her past drug use. Applicant admitted her history of purchasing and smoking marijuana since 2007. She reported that she did not think it was important to admit her use of marijuana in her SCA. As noted, she also admitted in her SOR response the SOR allegations that she had purchased and used marijuana since 2007 and that she deliberately omitted this information in her SCA. (GE 4 at 14.)

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 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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." 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern under this guideline is set out in AG ¶ 24 as follows:

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.

Applicant’s admissions in her SOR response and the documentary evidence attached to the FORM establish the following potentially disqualifying condition under Guideline H:

AG ¶ 25(a): any substance misuse (see above definition);

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(g): expressed intent to continue drug involvement, or failure to clearly and convincingly commit to discontinue such misuse.

The following mitigating conditions are potentially applicable:

AG ¶ 26(a): the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

AG ¶ 26(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.

AG ¶¶ 26(a) and (b) are not established. Based upon Applicant's admission of SOR ¶ 1.a, Applicant's use of marijuana was as recent as her February 2019 SOR response. She has smoked marijuana over a twelve-year period, sometimes frequently. She has provided no factual basis on which it could reasonably be concluded that her past purchases and uses of marijuana are unlikely to recur or that her drug involvement does not cast doubt on her current reliability, trustworthiness, or judgment. Also, Applicant has not claimed that she has taken actions to change or overcome her past use of marijuana and that she has established a pattern of abstinence. Moreover, she advised the investigator who interviewed her in August 2018 that she intended to continue to use marijuana. Her comment in the interview about discontinuing her use of marijuana if it was a condition of her employment or necessary to become eligible for a security clearance was never followed up with any mitigating evidence

Guideline E, Personal Conduct

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

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.

Applicant's admissions in her SOR response under ¶ 2.a and the documentary evidence attached to the FORM establish the following potentially disqualifying condition under Guideline E:

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, determine employment

qualifications, award benefits or status, determine national security eligibility or trustworthiness, or ward fiduciary responsibilities.

Applicant's drug involvement is cross-alleged under Guideline E in SOR ¶ 2.b. The disqualifying condition set forth in AG ¶ 16(c) is not perfectly applicable because Applicant's conduct is sufficient for an adverse determination under Guideline H. AG ¶ 16(c) reads as follows:

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.

I conclude, however, that this Guideline E disqualifying condition and the general Guideline E concerns about questionable judgment and an unwillingness to comply with rules and regulations set forth in AG ¶ 15, above, are established by Applicant's drug involvement.

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 make a prompt, good-faith effort to correct the omission of her past use of marijuana in her SCA. She only admitted her actions after being confronted about them in her follow-up interview by an investigator following the development of information about her past actions from other sources during the government's investigation. She also failed to admit to her illegal use of a drug when discussing her past criminal conduct in her initial background interview. Moreover, the record contains no basis to conclude that her questionable judgment and unwillingness to comply with rules and regulations are unlikely to recur. AG ¶¶ 17(a) and (c) are not established.

Whole-Person Analysis

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. 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 and applying the adjudicative factors in AG ¶ 2(d), specifically: (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.

After weighing the disqualifying and mitigating conditions under Guidelines H and E and evaluating all of the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by her drug involvement and substance misuse and her personal conduct.

Formal Findings

Guideline H, Drug Involvement and Substance Misuse:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Guideline E, Personal Conduct:	AGAINST APPLICANT
Subparagraph 2.a - 2.b:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

John Bayard Glendon
Administrative Judge