



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [REDACTED]) ISCR Case No. 19-00836
)
 Applicant for Security Clearance)

Appearances

For Government: Eric C. Price, Esq., Department Counsel
For Applicant: *Pro se*
10/28/2019

Decision

MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 11, 2018. On April 26, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent her a Statement of Reasons (SOR) alleging security concerns under Guideline H. The DOD CAF acted under Executive Order (EO) 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 the DOD on June 8, 2017.

Applicant answered the SOR on May 13, 2019, and requested a decision on the written record without a hearing. On August 5, 2019, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including documents identified as Items 1 through 3. She was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government’s evidence. She received the FORM on August 12, 2019, and did not

respond. Item 1 contains the pleadings in the case. Items 2 and 3 are admitted into evidence. The case was assigned to me on October 3, 2019.

Administrative Notice

I *sua sponte* took administrative notice of how the U.S. Department of Justice Drug Enforcement Administration (DEA) defined “marijuana concentrates” in guidance it issued in December 2014 (HE I). That definition follows:

A **marijuana concentrate** is a highly potent THC (Tetrahydrocannabinol) concentrated mass that is most similar in appearance to either honey or butter, which is why it is referred to or known on the street as "honey oil" or "budder."

Marijuana concentrates contain extraordinarily high THC levels that could range from 40 to 80%. This form of marijuana can be up to four times stronger in THC content than high grade or top shelf marijuana, which normally measures around 20% THC levels.

I have *sua sponte* included this DEA guidance in the record as HE I. Because these *sua sponte* actions did not affect either the relative positions of the parties or my decision, prior notice to the parties was not required.

Findings of Fact

Applicant, age 26, has cohabited with her fiancé since November 2013. She earned a bachelor’s degree in 2016. She has been employed by a defense contractor as an assistant scientist since August 2018. This is her first application for a security clearance.

Applicant used marijuana daily from December 2012 through August 2018. She either smoked it or consumed marijuana concentrates in her home. She described her use as both “medicinal (not prescribed)” and “recreational.” She maintained that marijuana helped her with “sleep, appetite, and various pains such as headaches, stomach aches, and muscle pains.” (Item 2 at 33-34; Item 3 at 8)

Applicant understands that marijuana use is not compatible with holding a security clearance. However, her intent regarding future marijuana use changed during the course of the security-clearance investigations process. In her September 2018 SCA, she answered “Yes” to whether she intended to use marijuana in the future and explained: “When I no longer have a job that requires a security clearance or a job that is involved in public safety, and if I move to a legalized recreational state, I will probably resume usage.” She reiterated that response during her November 2018 security-clearance interview (SI). However, in her April 2019 response to Government-issued interrogatories (Interrogatory Response), she “emphatically” asserted that she no longer intended to use marijuana in the future due to the “many improvements” she experienced in her “quality of life” during the seven months that she had then abstained from marijuana. She reported

“improved memory and concentration, improved coordination, more motivation, and more willing [sic] to take on responsibility [sic] at work and in the home.” She stated that she was “committed to taking any type of drug screening as often as needed.” The record did not specify any drug-screening results. (Item 2 at 33-34; Item 3 at 4 and 5)

Applicant primarily obtained the marijuana that she used from her fiancé (also a marijuana user), who bought it from his friends. Once she stopped using marijuana, her fiancé continued to use marijuana, but agreed to cease using it in their home or in her presence. In December 2018, her fiancé obtained a prescription for medical marijuana use and a state-issued medical marijuana use registry identification card. Before that, his marijuana use was not prescribed. (Item 3 at 4-5)

Applicant was required to list three people “who know [her] well” on her SCA. She described one such individual as a friend and former work associate (Friend). During her November 2018 SI, Applicant revealed that she sold her fiancé’s marijuana concentrate to Friend three to five times in 2017. On these occasions, she gave her fiancé the money she received from Friend, who then gave it to a third party. She agreed to sell to Friend because he was “a friend who would provide her marijuana,” and was unable to acquire any on his own at the time. She acknowledged only one occasion in 2017 when she bought marijuana from Friend. Applicant does not intend to either buy or sell marijuana in the future. (Item 2 at 16 and 22; Item 3 at 4-6)

Applicant identified two of her fiancé’s friends with whom she had previously smoked marijuana. She did not specify whether these were the same friends from whom her fiancé bought marijuana. As of November 2018, she had stopped socializing “in person” with them while they were using marijuana, but continued socializing “online” with them for the purpose of playing video games. In April 2019, she maintained that she had “cut all forms of contact/not met up with” them or Friend, except for an exchange she had with Friend about a job opportunity. That exchange did not take place in person. (Item 3 at 4 and 6)

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.” (*Egan* 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.” (EO 10865 § 2).

Eligibility for a security clearance is predicated upon the applicant 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.” (EO 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. (*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. 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. (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; AG ¶ 2(b)).

Analysis

Guideline H (Drug Involvement and Substance Misuse)

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

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 use, sale, and purchase of marijuana establish the following disqualifying conditions under this guideline:

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

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

Neither of the following potentially applicable mitigating conditions under this guideline are established:

AG ¶ 26(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

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, 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 used marijuana daily for nearly six years. She discontinued her use merely fourteen months ago when she applied for a security clearance. She illegally purchased and sold marijuana on multiple occasions. Despite earlier statements to the contrary, she professed a sincere intent never to use marijuana again after experiencing positive benefits from abstention. However, she did not provide the signed statement of intent described in AG ¶ 26(b)(3). She also did not establish a sufficient pattern of abstinence in light of the recency and circumstances of her use, particularly given her fiancé's continued prescribed marijuana use. At this time, I am unable to conclude that her marijuana use is unlikely to recur and have doubts about her reliability, trustworthiness, and good judgment.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security

must be an overall common sense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. In evaluating the relevance of an individual's conduct, an administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (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.

I have incorporated my comments under Guideline H in my whole-person analysis, and I have considered the factors AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated the security concerns raised by her use, sale, and purchase of marijuana. Accordingly, Applicant has not 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

Formal findings 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.c:	Against Applicant

Conclusion

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

Gina L. Marine
Administrative Judge