



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
)
[NAME REDACTED]) ISCR Case No. 19-01055
)
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

11/12/2019

Decision

MALONE, Matthew E., Administrative Judge:

Applicant did not provide sufficient information in response to the Government's case to overcome the security concerns raised by her use of marijuana while holding a security clearance, and by her deliberate false statements about her involvement with illegal drugs. Applicant's request for eligibility for access to classified information is denied.

Statement of the Case

On January 28, 2017, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain eligibility for access to classified information as part of her employment with a defense contractor. After reviewing the completed background investigation, adjudicators at the Department of Defense Consolidated Adjudications Facility (DOD CAF) could not determine that it was clearly consistent with the interests of national security for Applicant to have access to classified information, as

required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive).

On May 9, 2019, the DOD CAF issued a Statement of Reasons (SOR) alleging facts that raise security concerns addressed under Guidelines H (Drug Involvement and Substance Misuse) and E (Personal Conduct). The adjudicative guidelines cited in the SOR were issued by the Director of National Intelligence on December 10, 2016, to be effective for all adjudications on or after June 8, 2017. Applicant timely responded to the SOR (Answer) and requested a decision without a hearing.

On July 26, 2019, as provided for by paragraph E3.1.7 of the Directive, Department Counsel for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a File of Relevant Material (FORM). The FORM contained seven documents (Items 1 – 7) on which the Government relies to establish the facts alleged in the SOR. Applicant received the FORM on August 23, 2019, and she was informed she had 30 days from the date of receipt to object to the use of the information included in the FORM and to submit additional information in response to the FORM. The record closed on September 22, 2019, after Applicant did not respond to the FORM or object to the consideration of any of the Government's exhibits. I received this case for decision on October 22, 2019.

Findings of Fact

Under Guideline H, the Government alleged that Applicant used marijuana with varying frequency between 1975 and at least November 2016 (SOR 1.a); and that she used marijuana while on active duty in the U.S. Air Force between 1980 and 2000, and while holding security clearances during and after her military service (SOR 1.b).

Under Guideline E, it was alleged that Applicant intentionally made false statements to the Government in her January 2017 e-QIP by answering "No" to the e-QIP Section 23 (Illegal Use of Drugs or Drug Activity) question asking if she had ever used illegal drugs while holding a security clearance, as alleged in SOR 1.b (SOR 2.a).

In response to the SOR, Applicant admitted SOR 1.a and 1.b, but denied, with explanation, SOR 2.a. (FORM, Item 1) In addition to the facts established by Applicant's admissions, I make the following findings of fact.

Applicant is a 62-year-old employee of a defense contractor, for whom she has worked since January 2017. She was married from October 1974 until divorcing in May 1984, and she had two children, now adults, from that marriage. After receiving her high school graduate equivalency degree in December 1979, Applicant joined the Air Force in January 1980, where she served until retiring in January 2000. (FORM, Item 2)

Applicant held a security clearance while in the Air Force. She also held a security clearance while working for a federal agency between November 2003 and March 2004, and while working as a defense contractor in Afghanistan between March 2005 and July 2006. (FORM, Item 2)

As she admitted in response to the SOR, Applicant used marijuana between 1975 and 2016. She used marijuana while serving on active duty in the military and while possessing security clearances for both government and federal contractor employment. In a security clearance application submitted in July 2001, she did not disclose any prior use of marijuana; however, in an August 2001 subject interview, Applicant stated that she had used marijuana starting in 1975 and while serving in the Air Force. Applicant also has undergone treatment and counseling for mental health problems. Treatment records show that she used marijuana at least in March 2010, July 2011, and September 2014. When Applicant submitted her e-QIP in January 2017, she stated that she only used marijuana four to six times a year between April 2009 and November 2016, and that she purchased small amounts of marijuana in 2016 to use marijuana as a way to deal with personal stress. In the same e-QIP, she answered “No” to the e-QIP Section 23 question that asked if she had ever used illegal drugs while holding a security clearance. (FORM, Items 2 – 7)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). (See Directive, 6.3) Decisions must also reflect consideration of the factors listed in ¶ 2(d) of the guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest for an applicant to either receive or continue to have access to classified information. (Department of the Navy v. Egan, 484 U.S. 518 (1988))

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion. (See Egan, 484 U.S. at 528,

531) A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. (See Egan; AG ¶ 2(b))

Analysis

Drug Involvement and Substance Misuse

The security concern about illegal drug use is stated at 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.

Available information in this case requires application of the following AG ¶ 25 disqualifying conditions:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

I also have considered the following pertinent AG ¶ 26 mitigating conditions:

- (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;
- (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.

A plain reading of this record shows that there is no basis on which to apply any of these mitigating conditions. Applicant has used marijuana with varying frequency for over forty years. She also used marijuana while being entrusted with access to sensitive information, despite clear proscriptions against such conduct. Finally, as discussed below, Applicant has an equally long history of willful obfuscation when asked to disclose the adverse information about her drug involvement. Applicant did not submit any information to mitigate the security concerns raised under this guideline.

Personal Conduct

Available information shows that Applicant willfully has made repeated false statements to the government in response to questions about her use of illegal drugs. The security concern raised by this conduct is stated at 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. 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:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The SOR alleged that Applicant deliberately falsified her 2017 e-QIP by failing to disclose that she used marijuana while holding a security clearance. In support of her denial of any intent to make a false statement to the government, Applicant pointed out that she had, in fact, disclosed her use of marijuana in her e-QIP. However, that disclosure

was itself less than candid. The record evidence as a whole shows that Applicant previously has made false statements about her drug use, which is far greater in scope than what she listed in her 2017 e-QIP. All of the information probative of Applicant's intent when she submitted her e-QIP shows that she intended to mislead the Government about her use of marijuana, and that Applicant did not mitigate the resulting security concerns.

In addition to my evaluation of the facts and application of the appropriate adjudicative factors under Guidelines E and H, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). My review of all of the available information leaves unanswered the doubts about Applicant's suitability for access to classified information that were raised by her drug use and false statements. Because protection of the national interest is the principal focus of these adjudications, any remaining doubts must be resolved against the individual.

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.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all available information, it is not clearly consistent with the interests of national security for Applicant to have access to classified information. Applicant's request for security clearance eligibility is denied.

MATTHEW E. MALONE
Administrative Judge