



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [REDACTED]) ISCR Case No. 19-00527
)
 Applicant for Security Clearance)

Appearances

For Government: Raashid S. Williams, Esq., Department Counsel
For Applicant: *Pro se*
02/18/2020

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 granted.

Statement of the Case

Applicant submitted her most recent security clearance application (SCA) on October 30, 2017. On March 11, 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 March 18, 2019, and requested a decision on the written record without a hearing. On December 4, 2019, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including six exhibits. 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 January 2, 2020, and timely submitted her response, to which the Government did not object. I marked for identification the six

exhibits offered by the Government as Government Exhibits (GE) 1 through 6. GE 1 and 2 contain the pleadings in the case. GE 3, 5, and 6 are admitted into evidence. GE 4 is discussed below. The case was assigned to me on November 26, 2019.

Evidentiary Matter

Applicant was interviewed by a DOD-authorized investigator on September 11, 2018 in connection with her 2017 SCA. GE 4 is summary of the interview prepared by the investigator. GE 4 purports to be an accurate summary of the information that Applicant provided to the investigator during the interview. Since GE 4 was not authenticated as required by Directive ¶ E3.1.20, the Government acknowledged that some of the information contained therein could be inaccurate or outdated.

The Government included in the FORM a notice advising Applicant of her right to object to the admissibility of GE 4 on the ground that it was not authenticated, to comment on the accuracy of the information contained in the summary, and to make any corrections, additions, deletions, or updates necessary to make it clear and accurate. Applicant was also notified that if she did not raise any objection to GE 4 in her response to the FORM, or if she did not respond to the FORM, she could be considered to have waived any such objection, and GE 4 could be considered as evidence in her case.

Applicant raised an objection to GE 4 in her FORM response on the basis that the information therein was not accurate. She asserted several specific facts that were inconsistent with the information discussed with the investigator during the interview. The Government did not object to Applicant's FORM response or otherwise oppose Applicant's objection to the admission of GE 4. Accordingly, Applicant's objection to GE 4 is sustained and it will not be considered as evidence in her case.

Findings of Fact

Applicant, age 41, has never married nor had children. She has cohabited with her boyfriend since 2016. She earned a high school diploma in 1996, a bachelor's degree in 2001, and a master's degree in 2014. She has been employed as a finance director by a defense contractor since July 2010. She maintained a DOD security clearance from about 2007 or 2008 until she was laid off by her previous employer in May 2010. (GE 3)

The SOR alleged that Applicant "purchased and used marijuana with varying frequency from approximately January 1998 through at least April 2017." (SOR ¶ 1.a). It also alleged that her purchase and use continued to occur after she had been granted a security clearance in approximately 2008. (SOR ¶ 1.b). Applicant admitted SOR ¶ 1.a, but clarified that she has not purchased marijuana since 2001, only used marijuana twice after 2003, and has not used marijuana since April 2017. She denied SOR ¶ 1.b on the basis that she never used marijuana while having an active security clearance. (GE 2)

Applicant began experimenting with marijuana and other illegal drugs during high school and college. She continued to use marijuana for several years after college. She estimated her frequency of use as follows: cocaine, 10 times between June 1995 and

July 2000; marijuana, 30 times between January 1998 and January 2003; and ecstasy, two times between January 1999 and December 1999. She used them in social settings, and received them gratis from people with whom she was socializing. She purchased marijuana only on a “few” occasions, and never in mass quantities or for the purpose of redistributing it. She stopped using marijuana in 2003 because she matured and decided that it did not benefit her in anyway. After she stopped using marijuana, she intentionally avoided situations where marijuana was present. She had no intent to use marijuana or other illegal drugs in the future. (GE 5 at 35-36; GE 6)

Applicant used marijuana on two occasions after 2003, once while on vacation on an unspecified date in 2014 and once at music festival in April 2017 (for reasons not explained in the record). While she was not in possession of an active security clearance on either occasion, she was employed by a defense contractor. The record did not specify whether she was subjected to any type of drug-use policy by her employer. She has not used marijuana or other illegal drugs since April 2017. (FORM response; GE 2; GE 3 at 33-34)

Applicant first applied for a DOD security clearance in 2005. During that process, she self-reported the history of her marijuana and other illegal drug use on her 2005 SCA and during her 2007 security clearance interview. She was granted a clearance which she maintained until she was laid off in 2010. That clearance did not transfer to her current employer because she did not have a need for a security clearance. She now has a need for a security clearance so her current employer is sponsoring the pending application, which was initiated in October 2017. She self-reported the history of her marijuana use within the last seven years on her 2017 SCA and candidly discussed it in her SOR answer and FORM response. Her 2014 and 2017 marijuana use occurred prior to her submission of the 2017 SCA. (FORM response; GE 2, 3, 5, 6)

In her subscribed and sworn SOR answer, Applicant reiterated her commitment to remain abstinent from marijuana and other illegal drugs. She provided 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 her security clearance eligibility. She understands the seriousness of illegal drug use and that it is incompatible with the maintenance of a security clearance. She has never used illegal drugs while in possession of an active security clearance, and would never do so. She considers herself a steward of the U.S. government and would never do anything to jeopardize proprietary, sensitive, or classified information. (GE 2; FORM response)

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. 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. (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.

The facts and circumstances of Applicant's marijuana use establish two 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.

The SOR alleged facts that rendered the following additional disqualifying condition potentially applicable: AG ¶ 25 (f) any illegal drug use while granted access to classified information or holding a sensitive position. Applicant was granted a DOD security clearance in about 2007 or 2008, which she maintained until she was laid off in 2010. That clearance did not transfer to her current employer because she did not have a need for a security clearance. She now has a need for a security clearance so her current employer is sponsoring the pending application. Her marijuana use in 2014 and 2017 occurred during a period when she did not possess an active security clearance. Thus, I find that there is insufficient record evidence to apply AG ¶ 25(f).

The security concerns raised under this guideline have been mitigated by the following applicable factors:

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 experimented with marijuana and other illegal drugs throughout high school and college. Her marijuana use continued through her early twenties, when she stopped and expressed an intent never to use it in the future. For reasons not explained in the record, she used marijuana twice in her late thirties. While she was not in possession of an active security clearance on either occasion, she was employed by a defense contractor. However, there was no evidence in the record that she was subjected to any type of drug-use policy by her employer.

Applicant was candid about her drug use during the security clearance process in 2005 and 2017. She understands that illegal drug use is incompatible with maintaining a security clearance. She has never used illegal drugs while in possession of an active security clearance, and would never do so. She has not used marijuana in at least two years. To reinforce her commitment to abstain from using marijuana or any other illegal drugs in the future, she provided 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 her security clearance eligibility.

Applicant's decision to use marijuana twice in her early thirties after she had been granted a security clearance and been employed in the defense sector was poor judgment. However, the facts and circumstances of her use suggest that it is not likely to recur. Moreover, she was frank about her marijuana use and demonstrated a commitment to abstinence. Thus, I conclude that Applicant's marijuana and other illegal drug use is not likely to recur, and does not cast doubt on her current reliability, trustworthiness, and 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 mitigated the security concerns raised by her marijuana use. Accordingly, Applicant 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

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H: FOR APPLICANT

Subparagraphs 1.a – 1.b: For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is granted.

Gina L. Marine
Administrative Judge