



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



In the matter of:)
)
) ISCR Case No. 19-01960
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: Troy L. Nussbaum, Esq.

01/24/2020

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the drug involvement and substance misuse security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On July 26, 2019, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement and substance misuse. Applicant responded to the SOR on August 12, 2019, and requested a decision on the written record in lieu of a hearing. On November 4, 2019, Applicant changed her request to a hearing before an administrative judge. The case was assigned to me on November 20, 2019. The hearing was convened as scheduled on January 8, 2010.

Procedural and Evidentiary Rulings

Evidence

Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. Applicant testified, called two witnesses, and submitted Applicant's Exhibits (AE) A through G, which were admitted without objection.

Motion to Amend SOR

Department Counsel moved to amend the SOR by changing the date in SOR ¶ 1.a from "March 2017" to "August 2018." The motion was granted without objection.

Findings of Fact

Applicant is a 52-year-old executive of a defense contractor. She has worked for her current employer or a predecessor company since 1985. She is applying for a security clearance for the first time. She earned a General Educational Development (GED) high school equivalency degree in 1984. She earned associate, bachelor's, and master's degrees in 2002, 2004, and 2008. She is married with two adult children and two grandchildren. (Transcript (Tr.) at 18, 28-31, 34, 44; GE 1)

Applicant smoked marijuana when she was a teenager and young adult. In 1983, when she was 15 years old, she was arrested and charged with possession of drug paraphernalia. The charge was dismissed. She used cocaine on about two or three occasions in 1985 or 1986. She did not particularly care for it, and never used it again. (Tr. at 36-38, 44; Applicant's response to SOR; GE 1, 2; AE A)

Applicant did not use any illegal drugs between about 1986 and 2015. In about 2015, she resumed smoking marijuana on an irregular basis after it was offered to her by a friend. Applicant does not live in a state that has legalized possession of marijuana. She used it a "handful" of times with her friend who provided the marijuana. Her company has a policy against using illegal drugs or being under the influence during working hours, but it does not have a policy against all drug use. (Tr. at 38-39, 40-44; Applicant's response to SOR; GE 1, 2; AE A, F)

Applicant reported all her illegal drug use on the Questionnaire for National Security Positions (SF 86) she submitted in August 2017. She noted that she intended to use marijuana in the future with the following caveat: "On special occasion only – unless the security clearance prohibits it then I won't."

During her background interview in September 2018, she discussed her drug use and admitted that she smoked marijuana in August 2018. She indicated that she did not think that marijuana use was a "big deal." She explained that marijuana use was legal in many states and that there was less of a stigma attached to using marijuana. She indicated that she intended to continue to smoke marijuana, but that she would be willing to stop if required by her employer. (Tr. at 52-53; GE 1, 2)

Applicant realized after the interview that her answers were worrisome to the investigator. She indicated in her response to the SOR that “self-reflection made [her] realize that this very rare occasion of self-gratification is not worth losing [her] job or being viewed as someone that can’t be trusted.” She has not used any illegal drug since before her interview. She wrote that receiving the SOR “was both embarrassing and humbling”:

I will never regret my being honest during this process; it is one-hundred percent who I am as a person. I do, however, regret that the choices I have made as an adult have put me in this embarrassing situation in asking for a second chance.

Applicant credibly testified that she did not intend to use marijuana or any other illegal drug in the future. She still sees the friend she smoked marijuana with, but Applicant told her that she no longer uses marijuana. She does not know if the friend still smokes marijuana, as the friend does not do so in her presence. Applicant completed a 16-hour drug and alcohol awareness class in November 2019. She now completely realizes that marijuana use is against the law, not responsible conduct, and that it is a “big deal.” She provided a signed statement of intent to abstain from all illegal drug use with the acknowledgment that any future involvement with illegal drugs would be grounds for revocation of her security clearance. (Tr. at 41-42, 46-48, 53; Applicant’s response to SOR; AE A-C)

Applicant informed her family and management in her company about her drug use. She started in her original company in 1985 when she was 18. Her husband has worked for the company almost as long. She rose through the company and earned a management position in about 1995. She became better educated, continued to grow into a senior-level manager, and became a director in 2013. She volunteers in her community and is well respected by other senior management in her company, as reflected by the testimony of another executive, multiple character letters, and other documents. She is praised for her excellent job performance, strong moral character, loyalty, professionalism, leadership, judgment, work ethic, dedication, reliability, trustworthiness, and integrity. (Tr. at 16-26, 32-34, 44, 55-60; GE 1; AE D, E, G)

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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(c), 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."

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

Guideline H, Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse 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 guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant possessed and used marijuana, cocaine, and drug paraphernalia when she was young. She possessed and used marijuana again from about 2015 through August 2018. AG ¶¶ 25(a) and 25(c) are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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
- (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 went about 30 years without using illegal drugs. During that time, she completed her education, married, had children, and ascended in her company to a director position. In spite of all that success, she returned to using marijuana when a friend offered it to her. She succumbed to the change in the perception of marijuana, or as she put it, that it was not a "big deal." She explained during her background interview

that marijuana use was legal in many states and that at that time, there was less of a stigma attached to using marijuana.

Applicant realized after the interview that her marijuana use was inconsistent with the behavior of a responsible adult, senior executive, and potential holder of a security clearance. She indicated in her response to the SOR that “self-reflection made [her] realize that this very rare occasion of self-gratification is not worth losing [her] job or being viewed as someone that can’t be trusted.” Applicant’s recent marijuana use is troubling, particularly her use after submitting the SF 86. An applicant’s use of illegal drugs after having completed a security clearance application raises questions about his or her judgment, reliability, and willingness to comply with laws, rules, and regulations. See, e.g., ISCR Case No. 16-03460 at 3 (App. Bd. May 24, 2018). Nonetheless, I am convinced that she has learned a valuable lesson, and her misconduct will not be repeated.

Applicant provided a signed statement of intent to abstain from all illegal drug use with the acknowledgment that any future involvement with illegal drugs would be grounds for revocation of her security clearance. She credibly testified that she will not use any illegal drugs in the future. She fully disclosed her drug use on her SF 86 and during her background investigation, which bolsters her credibility. I find that Applicant has abstained from illegal drug use for an appropriate period, and that illegal drug use is unlikely to recur. AG ¶¶ 26(a) and 26(b) are applicable.

Whole-Person Concept

Under the whole-person concept, the 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. The 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.

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. I have incorporated my comments under Guideline H in my whole-person analysis. I also considered Applicant’s favorable character evidence.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the drug involvement and substance misuse security concerns.

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, Guideline H:	For Applicant
Subparagraphs 1.a-1.d:	For Applicant

Conclusion

It is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Edward W. Loughran
Administrative Judge