



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



In the matter of:)
)
) ISCR Case No. 19-02256
)
Applicant for Security Clearance)

Appearances

For Government: Kelly M. Folks, Esq., Department Counsel
For Applicant: Leon J. Schachter, Esq.

11/13/2020

Decision

Curry, Marc E., Administrative Judge:

Applicant mitigated the security concerns stemming from her use of cocaine, but failed to mitigate the security concerns related to her repeated failure to disclose her cocaine use on security clearance applications completed in 2004 and 2016. Clearance is denied.

Statement of the Case

On October 4, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct, explaining why it was unable to find it clearly consistent with the national security to grant her security clearance eligibility. The DOD CAF took the action 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 *Nat. Sec. Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on June 8, 2017.

On October 31, 2019, Applicant answered the SOR allegations, admitting all of the allegations, and requesting a hearing. The case was assigned to me on February 21, 2020. The hearing was initially scheduled for April 23, 2020, but was continued indefinitely because of the coronavirus pandemic. On August 7, 2020, the case was rescheduled for September 14, 2020. The hearing was held as rescheduled. I received and incorporated four government exhibits into the record, marked as Government Exhibits (GE) 1 through GE 4, and I incorporated seven Applicant exhibits (AE), accepted into the record as AE A through AE G. In addition, I received the testimony of Applicant and two character witnesses. The transcript (Tr.) was received on September 28, 2020.

Findings of Fact

Applicant is a 43-year-old, married woman with two children, ages six and four. She earned an associate's degree in 1998 and a bachelor's degree in 2003. Since 2017, she has been working for a defense contractor. (Tr. 17)

Applicant is highly respected on the job. Her current supervisor characterized her as extremely trustworthy and honest. (AE C at 1) A previous supervisor characterized her as "hardworking, flexible, and adaptive." (AE B at 3) In 2019, she received a certificate for exceptional performance. (AE G) Applicant is active in her community, volunteering for an organization that helps disabled people. (AE C)

Applicant used cocaine approximately three to four times while in college. (Tr.19; GE D at 2) She stopped using cocaine during her senior year in 2003. After graduating from college, she returned home and reconnected with some high school friends. She resumed her cocaine use while socializing with them, using approximately two or three times between 2003 and 2008. (Answer at 3; Tr. 22) One of her episodes of cocaine use occurred after she had been granted a security clearance. (Tr. 45) She has not used cocaine since 2008.

Applicant no longer socializes with the people with whom she used cocaine after graduating from college. (Tr. 26) She is the primary income earner in her family and is dedicated to living a responsible, healthy lifestyle, and setting a good example for her children. (Tr. 32; AE D at 2) On October 24, 2019, Applicant executed an affidavit memorializing her intention not to resume cocaine use in the future. (AE F)

On October 28, 2019, Applicant was evaluated by a certified substance abuse counselor. (AE D) The counselor characterized Applicant's cocaine use as "short-term" and "non-patterned," falling well below the threshold for misuse or abuse. (AE D at 3-4) Considering the sporadic nature of the cocaine use and length of time that has elapsed since Applicant last used cocaine, the counselor concluded that it no longer posed a potential security concern. (AE D at 5-6)

Applicant deliberately failed to disclose her cocaine use when disclosure was required on a security clearance application completed in 2004. She omitted this

information because she “was just too ashamed to admit that [she] had ever done anything like that.” (Tr. 27)

In 2016, Applicant completed another security clearance application. She “doubled down” and again deliberately omitted her past cocaine use. (Tr. 27) When she completed the application, she was eight months pregnant, and did not want “to let [her] family down.” Applicant was haunted by her falsifications. This prompted her to disclose them on a security clearance application completed in 2018. (GE 1 at 33)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overall adjudicative goal is a fair, impartial, and commonsense decision. 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. 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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concerns about drug involvement and substance misuse are set forth 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. . . .

Applicant's use of cocaine between 2000 and 2008, including on one occasion that occurred when she held a security clearance, triggers the application of AG ¶¶ 25(a), "any substance misuse," and 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position."

According to a substance abuse counselor who evaluated Applicant in 2019, Applicant's cocaine use was infrequent and did not reach the threshold to be characterized as abuse. Applicant has not used cocaine in more than ten years, and no longer associates with the people with whom she used cocaine. Moreover, she executed a statement of intent not to resume cocaine use in the future. Under these circumstances, the following mitigating conditions apply under 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;

(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; . . . [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.

I conclude Applicant has mitigated the drug involvement and substance misuse security concern.

Guideline E, Personal Conduct

Under this guideline, "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." (AG ¶ 15)

Although Applicant's cocaine use was casual, infrequent, and remote in time, she intentionally failed to disclose it, when disclosure was required, on two separate security clearance applications in 2004 and 2016, respectively. Disqualifying condition 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 award fiduciary responsibilities,” applies.

Fear of the consequences of disclosing adverse information does not mitigate the intentional failure to disclose it on security clearance applications. (DISCR OSD No. 89-1586 at 4 (App. Bd. October 26, 1990). Moreover, although Applicant ultimately disclosed her falsifications, she did not do so until 14 years after her first falsification and two years after the repeated falsification on her second security clearance application. Under these circumstances, the relevant, potentially mitigating condition AG ¶ 17(a), “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts,” does not apply. While Applicant showed some reform under AG ¶ 17(d) by admitting her falsifications during her subject interview, this effort at rectification is too belated to conclude that “such behavior is unlikely to recur.”

Whole-Person Concept

Under the whole-person concept, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). They are as follows:

- (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.

Applicant’s cocaine use was infrequent and remote in time. In tandem with the substance abuse counselor’s favorable evaluation, I conclude Applicant has mitigated the drug involvement and substance misuse security concern. Conversely, Applicant failed to disclose her cocaine use during the course of two security clearance investigations. The nature and seriousness of these transgressions and their repeated nature generate unmitigated security concerns about Applicant’s judgment.

Formal Findings

Formal findings for 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

Subparagraph 1.a:

For Applicant

Paragraph 2, Guideline E:

AGAINST APPLICANT

Subparagraph 2.a – 2.b:

Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge