



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 19-03550
)	
Applicant for Security Clearance)	

Appearances

For Government: David F. Hayes, Esq., Department Counsel
 For Applicant: *Pro se*
 03/09/2021

Decision

HESS, Stephanie C., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct). Applicant failed to mitigate the security concerns raised by her recent illegal drug use and drug-related conduct and her omissions and falsifications regarding it. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on January 28, 2019. On April 30, 2020, the Department of Defense (DOD) sent her a Statement of Reasons (SOR), alleging security concerns under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct). The DOD acted under Executive Order (E.O.) 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 DOD on June 8, 2017.

Applicant answered the SOR and requested a decision on the record without a hearing. Department Counsel submitted the Government’s written case on October 13,

2020. On October 16, 2020, a complete copy of the file of relevant material (FORM,) which included Government Exhibits (GX) 1 through 5, was sent to Applicant. The DOHA transmittal letter informed Applicant that she had 30 days after her receipt to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. She received the FORM on October 23, 2020, and did not file a response. The DOHA transmittal letter and receipt are marked as Administrative Exhibit 1. The case was assigned to me on January 21, 2021.

Findings of Fact

Under Guideline H, the SOR alleges that Applicant used heroin with varying frequency from about December 2014 until about September 2018; amphetamines from 2015 until August 2018; benzodiazepines in August 2018; and marijuana from 2011 until 2018. The SOR also alleges that Applicant was arrested and charged with possession and use of drug-related objects in December 2014 and that she tested positive for opiates and benzodiazepines in August 2018. The SOR further alleges that Applicant was required by her employer to receive treatment beginning in August 2018 for conditions diagnosed as amphetamine and opioids use disorders, but after failing her urinalysis in September 2018 by testing positive for opiates, she was terminated from her employment and she discontinued treatment. Applicant admits each of these allegations with explanations.

Under Guideline E, the SOR alleges that Applicant falsified three of her responses regarding illegal drug use on her 2019 e-QIP; that she was terminated by her employer in September 2018 for violation of rules and is not eligible for rehire; that she falsified the reason for leaving this employment on her 2019 e-QIP; and that she falsified material facts about her drug use and her reason for leaving her employment in 2018 during her personal subject interview (PSI) in April 2019. Applicant admits each of these allegations. Applicant's admissions are incorporated in my findings of fact.

Applicant, 27, is an associate technical professional in test engineering employed by a defense contractor since January 2019. She received her bachelor's degree in mechanical engineering in 2016. She and her husband married in 2016. This is her first application for security clearance. (GX 2.)

The information in the record regarding Applicant's drug abuse is derived from two sources: Applicant's treatment records wherein she provided written information regarding her drug abuse, and the affirmed summary of the statements she made during her PSI. The information regarding her 2014 drug-related arrest is derived from these two sources and her FBI rap sheet. Applicant's reporting of the length and frequency of her use of marijuana, opiates, amphetamines/methamphetamine, and other drugs is inconsistent within her two accounts. After considering the record to include Applicant's admissions to the SOR allegations, I make the following findings of fact:

Applicant used heroin from 2014 until at least 2018, amphetamines/methamphetamine and benzodiazepines from at least 2015 until at least 2018, and marijuana from 2011 until at least 2018;

Applicant was arrested in December 2014 while at a motel with her then-boyfriend now-husband after injecting heroin. She was charged with possession and use of drug-related objects, a misdemeanor, and possession of a Schedule I controlled substance (heroin), a felony. The felony charge was not prosecuted and the misdemeanor charge was dismissed;

Applicant first used heroin, amphetamines/methamphetamine, and benzodiazepines with her boyfriend/husband;

In August 2018, Applicant was late for work because she was passed out in her car in the parking lot. Applicant had been injecting heroin and methamphetamine throughout the previous night. Applicant told her supervisor that she had been injecting methamphetamine, her supervisor called the paramedics, and Applicant was hospitalized;

After this incident, as a condition of continued employment, Applicant's employer required her to complete a treatment program. Applicant underwent an evaluation, was diagnosed with amphetamine and opioids use disorders, and was prescribed outpatient treatment which she entered on August 13, 2018;

While in treatment, Applicant tested positive for opiates during a random drug screening conducted by her employer. She denied any illegal drug use, stating that she did not understand how she could have tested positive, but was terminated from her employment. She discontinued treatment;

Applicant intentionally failed to disclose her illegal drug use and her treatment on her 2019 e-QIP and initially during her PSI;

Applicant intentionally failed to disclose her termination from employment on her 2019 e-QIP and initially during her PSI;

Applicant has not participated in any additional drug treatment;

Applicant repeatedly lied to the investigator during her PSI until the investigator confronted her with the information about her illegal drug use, drug treatment, and termination from employment.

Applicant stated in her PSI that she has not illegally used drugs since she entered treatment in August 2018, reiterating that she did not understand how she tested positive in September 2018 while in treatment. She asserted that there is no likelihood of any

recurrence of illegal drug use. She stated that she no longer uses any illegal drugs and does not associate with anyone who does. She further stated that she and her husband have agreed that they “do not need to use drugs anymore and they have heard horror stories about people who have used drugs.”

In her responses to DOHA’s interrogatories, Applicant stated, “While I have not completed treatment, I have not returned to any substance abuse. Moving from my previous residence and contacts . . . helped the situation greatly.” Applicant also asserted that she was “very forthcoming” during her PSI, further stating that her illegal drug use and related conduct were mistakes that she has moved past and that she hopes her “honesty and good behavior since are taken into account” in her security clearance determination.

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.” *Id.* 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.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant’s 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.” See Exec. Or. 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. See *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. See 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. See 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; see AG ¶ 2(b).

Guideline H, Drug Involvement and Substance Misuse

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

The illegal use of controlled substances . . . 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 admissions, corroborated by the record evidence, establish the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse;

AG ¶ 25(b): testing positive for illegal drugs;

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

AG ¶ 25(e): failure to successfully complete a drug treatment program prescribed by a duly qualified medical or mental health professional.

The following mitigating conditions may also apply:

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;
- (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; and

AG ¶ 26(d): satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant was arrested and charged in December 2014 while possessing heroin and drug paraphernalia after injecting heroin with her boyfriend/husband. Between 2014 and 2018, she used heroin, amphetamines/methamphetamine, benzodiazepines, and marijuana with varying frequency. After a significant drug-related incident at work in August 2018, Applicant's employer required her to successfully complete a drug treatment program as a condition of continued employment. She underwent an evaluation and was diagnosed as having amphetamine and opioid use disorders and was prescribed outpatient treatment. Despite her conditional employment, Applicant tested positive for opioids and benzodiazepines while in treatment. She denied any illegal drug use, but was terminated from her employment and did not successfully complete the program. She has not engaged in any other drug treatment.

In her April 2019 PSI and her February 2020 responses to interrogatories, Applicant asserted that she had not illegally used drugs since before she entered treatment in August 2018. She also stated that she had no future intention of using illegal drugs and that she no longer associated with anyone who uses illegal drugs.

There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows "a significant period of time has passed without any evidence of

misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

In considering the totality of the evidence, particularly Applicant’s long period of illegal drug use until at least 2018, her dishonesty regarding such use and her lack of regard for the consequences of her illegal drug use including her termination from employment, I conclude that Applicant’s illegal use was recent and casts doubt on her current reliability, trustworthiness, and good judgment. Further, given her ongoing denial of use after testing positive while in treatment, her failure to continue treatment, and her statement that she should be given credit for her honesty regarding her illegal drug use, I find her assertions that she has not used illegal drugs since August 2018, will not do so in the future, and no longer associates with anyone who uses illegal drugs to lack credibility and that her illegal drug use is likely to recur. AG ¶¶ 25(a) through 25(c) and 25(e) apply. None of the mitigating conditions apply.

Guideline E: Personal Conduct

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.

AG ¶ 16: Conditions that could raise a security concern and may be disqualifying include:

- 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;

AG ¶ 16(b): deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;

AG ¶ 17: Conditions that could mitigate security concerns include:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

AG ¶ 17(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

AG ¶ 17(g): association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant admits that she intentionally falsified material facts on her 2018 e-QIP and repeatedly during her PSI. She did not disclose the derogatory information regarding her drug-related arrest, her illegal drug use, and her termination from employment until confronted by the investigator. Despite failing a drug test that resulted in being terminated from her employment, Applicant continues to deny that she used illegal drugs. Her illegal drug use and related conduct is recent and casts doubt on her current reliability, trustworthiness, judgment, and willingness to comply with rules and regulations. Due to Applicant's false statements and omissions and her ongoing inconsistent statements, she lacks credibility regarding her future use of illegal drugs, drug-related conduct, and

association with individuals involved in criminal conduct. AG ¶¶ 16(a) through 16(c) apply. None of the mitigating conditions apply.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a).

I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but I have also considered the following:

Applicant was not forthcoming about her recent illegal drug use and drug-related conduct to include her 2014 arrest and 2018 termination from employment. Despite her diagnoses of drug dependence, she has not completed any treatment. She continues to deny her recent drug use that resulted in a positive drug test and termination from her employment. Her lack of honesty and recent illegal drug use and drug-related conduct continues to cast doubt on her security-clearance worthiness.

After weighing the disqualifying and mitigating conditions under Guidelines H and E and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by her conduct. Accordingly, I conclude she 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

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraphs 1.a – 1.f:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct)	AGAINST APPLICANT
Subparagraphs 2.a - 2.g:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Stephanie C. Hess
Administrative Judge