



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



In the matter of:)
)
) ISCR Case No. 20-01823
)
Applicant for Security Clearance)

Appearances

For Government: Eric Price, Esq., Department Counsel
For Applicant: *Pro se*

07/13/2021

Decision

BENSON, Pamela C., Administrative Judge:

Applicant failed to mitigate the security concerns arising from her past and continued use of marijuana during the course of her DOD security clearance investigation. She also failed to mitigate the personal conduct security concerns developed from her failure to disclose her illegal drug use on the security clearance application (SCA). National security eligibility for access to classified information is denied.

Statement of the Case

On August 2, 2019, Applicant completed and signed her security clearance application. On October 16, 2020, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (Drug Involvement and Substance Misuse), and Guideline E (Personal Conduct). The action was taken 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 *National Security Adjudicative Guidelines* (AG) effective within the DOD on June 8, 2017.

Applicant provided an undated response to the SOR. She requested a hearing before an administrative judge. The case was assigned to me on April 14, 2021, and the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for May 18, 2021.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 and 2, and Applicant did not provide any documents. I held the record open for two weeks, until June 1, 2021, at the request of Applicant, who wanted to submit documents after the hearing. On May 31, 2021, Applicant timely submitted four documents which I labeled as Applicant Exhibit (AE) A, B, C, and D. I admitted all proffered exhibits into evidence without objection. The record closed June 1, 2021, and DOHA received the hearing transcript (Tr.) on June 9, 2021.

Findings of Fact

Applicant is 22 years old. In May 2020, she earned a bachelor's of science degree in aerospace engineering. She is currently engaged, and she does not have any children. While enrolled in college, she accepted a 2019 summer internship with a defense contractor. After the internship was completed, she was offered full-time employment by the same defense contractor to begin the week following her college graduation. Her job title is aerodynamics engineer. She learned that she had been issued an interim DOD security clearance when she started her full-time employment in May 2020. After the issuance of the SOR in October 2020, she no longer possessed a DOD security clearance. (Tr. 14-17, 21; GE 1)

Drug Involvement and Substance Misuse and Personal Conduct

The SOR alleges Applicant used marijuana with varying frequency, starting in 2018 and that she intends to use marijuana in the future. (¶ 1.a) She admitted SOR allegation (¶ 1.a) and listed that the total number of times she used marijuana was less than seven. She did not respond to the concern that she intends to use marijuana in the future. She denied SOR ¶ 2.a, which alleged that she deliberately failed to disclose her use of marijuana on her SCA. Applicant listed in her SOR response that she did not fully understand the question and answered it incorrectly with no intent to falsify.

Applicant first used marijuana in 2018 during her junior year of college by ingesting a cookie that had marijuana. She also ingested marijuana a second time via a gummy edible that same year. In addition to the edibles, she estimated that she smoked marijuana on approximately seven occasions with the last occurrence in 2019. She has never purchased marijuana. (Tr. 17-20, 23-24, 30; GE 2)

Applicant completed her SCA in August 2019. Under section 23 entitled "Illegal Use of Drugs or Drug Activity" she answered "No" to the question asking whether she had illegally used any drugs or controlled substances within the last seven years. At the hearing Applicant testified that she read the question as pertaining to "hard" drugs only, such as heroin, cocaine, etc. She was not aware that she was required to disclose her

infrequent use of marijuana until she had her background interview about two months after submitting the SCA. (Tr. 31-33; GE 1)

During Applicant's October 2019 background interview, she was asked by an investigator if she had used any illegal drugs, and she replied that she had not. Then the investigator stated; "Including marijuana?" At that moment, she realized that the SCA question encompassed all drugs, including marijuana. In her state of residence, marijuana use is legal only if an individual is prescribed marijuana to treat a medical condition. Applicant acknowledged that recreational use of marijuana in her state is not legal and that all of her possessions of marijuana before using it were considered illegal. She answered the investigator's follow-up question by disclosing her use of marijuana on two occasions. When asked about her future intentions of using illegal marijuana, Applicant stated that if her employer does not conduct random drug tests, she might smoke marijuana in the future. However, if her employer does conduct random drug tests, then she would not use marijuana in the future. During the hearing she also admitted that she used marijuana once or twice in late 2019 after the background interview was conducted. She now has no intention of using marijuana in the future. (Tr. 25-26, 31, 37-40; GE 2)

During the hearing Applicant admitted that her fiancé currently uses marijuana approximately four times a year. He lives with Applicant and occasionally uses marijuana in front of her. She also testified that some of her family members currently use marijuana. She stated that she made it clear to everyone that she has no interest in smoking or ingesting marijuana ever again, and they respect her wishes in this matter. (Tr. 41-43)

Applicant's current manager provided a character reference letter. He has observed her work for just over a year and finds Applicant to be trustworthy, reliable, and a talented employee. Another co-worker and Applicant's fiancé also provided character reference letters. Both of these individuals described Applicant as honest, accountable and morally conscientious. They believe she should be granted a DOD security clearance. The last document submitted by Applicant is an undated employee award presented to her for her outstanding work contributions. (Tr. AE A, AE B, AE C, AE D)

Policies

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 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, these guidelines are applied 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 access to classified information will be resolved in favor of 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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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 Executive Order 10865 provides that 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

AG ¶ 24 expresses the security concern for drug involvement:

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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

AG ¶ 25(a) any substance misuse; and AG ¶ 25(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant used marijuana, with varying frequency, from about 2018 to late 2019. She stated during her October 2019 background interview that she would continue to use marijuana in the future as long as her employer does not conduct random drug testing. She continued to use marijuana on one or two occasions after her background interview was conducted. The above disqualifying condition applies.

I have considered the mitigating conditions under AG ¶ 26. The following are potentially applicable:

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

Applicant used marijuana, with varying frequency, from 2018 to at least late 2019. She admitted that her possession of marijuana before using it was illegal in her state. She did not provide any information about her illegal drug use on her August 2019 SCA because she thought it pertained to illegal "hard" drugs. She claimed that she only realized that her illegal use of marijuana was supposed to be included on the SCA during her background interview in October 2019. It was also at this time she comprehended that using any illegal substance, to include marijuana, was a security concern to the federal government. Despite this awareness, she reported to the investigator that she would continue to use marijuana in the future if her employer did not conduct random drug testing. Applicant also continued to use marijuana on one or two occasions after her interview was conducted, and during the course of her on-going security clearance investigation. This conduct shows poor judgment and casts doubt on Applicant's reliability and trustworthiness. Mitigating condition AG ¶ 26(a) does not apply.

Applicant stated that her live-in fiancé is a current user of marijuana, and the possession of marijuana for recreational use is illegal in their state. She also admitted

that on occasion he uses marijuana in her presence. She also has other family members who currently use marijuana. Applicant stated that she has abstained from using marijuana since late 2019. I find that under the circumstances, it is too soon to determine whether Applicant is committed to a lifestyle without the recreational use of marijuana. Her last use of marijuana was less than two years ago, and she has not disassociated with close individuals who continue to use marijuana. More time is needed to establish her newfound commitment and rehabilitation. Mitigating condition AG ¶ 26(b) does not apply. None of the mitigating conditions apply and security concerns pertaining to drug involvement and substance misuse are not mitigated.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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 ¶ 16 describes one condition that could raise a security concern and may be disqualifying in this case, "(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, . . . determine security clearance eligibility or trustworthiness. . . ."

The SCA in evidence supports the security concern addressed above.

AG ¶ 17 sets forth potentially applicable mitigating conditions under Guideline E:

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

(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.

Applicant omitted information about her illegal use of marijuana on her August 2019 SCA. She denied that her failure to disclose her recent marijuana use was made with an intent to conceal or deceive. She stated she misread the question as pertaining to disclosure of "hard" drugs only. Her explanation is not credible. During the hearing Applicant admitted she was aware that her possession of marijuana for recreational use was illegal in her state. She is college educated, and the SCA question is clear and unambiguous - within the last seven years had she illegally used any drug or controlled substances? Use of a drug or controlled substance includes injecting, snorting, **inhaling**,

swallowing, experimenting with or otherwise consuming any drug or controlled substance. (Emphasis added) Applicant answered this question “No.”

During Applicant’s October 2019 background interview, she reported to the investigator that she had used marijuana on two occasions. Although this may be construed as a prompt, good-faith effort by Applicant to correct her previous omission, the mitigating condition is undermined by her inconsistent accounts of her history of marijuana involvement. During the hearing, she admitted consuming marijuana edibles on two occasions and smoking marijuana on five or six occasions up to the time she was interviewed by the DOD authorized investigator. This significant inconsistency is troubling. Personal conduct security concerns are not mitigated.

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 must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline H and Guideline E and the AG ¶ 2(d) factors in this whole-person analysis.

The Federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. In deciding whether to grant or continue access to classified information, the Federal government can take into account facts and circumstances of an applicant’s personal life that shed light on the person’s judgment, reliability, and trustworthiness. Furthermore, security clearance decisions are not limited to consideration of an applicant’s conduct during work or duty hours. Even if an applicant has a good work record, his or her off-duty conduct or circumstances can have security significance and may be considered in evaluating the applicant’s national security eligibility.

To her credit, Applicant made positive changes in her life, which are supported by her character reference letters. She is considered a talented employee. I find that she is

young and her marijuana involvement may be attributed to, at least in part, to immaturity, and more time is needed to establish her commitment to remaining drug-free. She lives with her fiancé who continues to use marijuana, and at times, in her presence. This difficult situation makes her future use of marijuana more likely to recur. Most concerning, however, was Applicant's awareness and understanding of the government's concern about her illegal use of marijuana and then using marijuana on one or two more occasions while her security clearance investigation was on-going. After evaluating all the evidence in the context of the whole person, I conclude Applicant has failed to mitigate drug involvement and substance misuse security concerns and personal conduct 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:	AGAINST APPLICANT
Subparagraphs 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, I conclude that it is not clearly consistent with national security to grant Applicant's national security eligibility. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge