



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



In the matter of:)
)
) ISCR Case No. 20-01892
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: *Pro se*

08/18/2021

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 December 3, 2020, 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 December 17, 2020, and requested a hearing before an administrative judge. The case was assigned to me on June 28, 2021. The hearing was convened as scheduled on July 19, 2021. Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. Applicant testified and submitted Applicant’s Exhibits (AE) A through G, which were admitted without objection.

Findings of Fact

Applicant is a 36-year-old architect. She has worked since 2014 for an architectural company that has defense contracts. She is applying for a security

clearance for the first time. She earned a bachelor's degree in 2007 and a master's degree in 2014. She has never married, and she has no children. (Transcript (Tr.) at 11, 16, 27-28; GE 1, 2)

Applicant smoked marijuana on an irregular basis starting in 2009 when she was in college. She has a good memory of the eight times she used it, which includes once in 2013; once in April 2014 in edible form (candy); once in July 2014; once in 2016, again in candy; in July 2018 in a tea bag; in 2019 in the form of a popsicle; and in August 2020. She reported minimal if any effects from the marijuana. The only time she purchased marijuana was when she bought the tea bag for about \$3 at a marijuana dispensary after she saw marijuana tea bags discussed in "O," the Oprah Winfrey magazine. The title article was "High Tea," and the lead to the article on the cover of the magazine was: "Is marijuana the new merlot? Mellow out." (Tr. at 19, 22; Applicant's response to SOR; GE 1, 2; AE E, F)

Applicant reported her marijuana use on the Questionnaire for National Security Positions (SF 86) she submitted in January 2020. She noted that her last use was in about September 2019. She forgot about at least one time that she used marijuana, and stated that she believed she smoked marijuana three times and consumed marijuana edibles twice. She wrote: "Marijuana does not seem [to] affect me. It only makes me smell unfortunate." (GE 1)

Applicant fully discussed her marijuana use when she was interviewed for her background investigation in April 2020. She noted that a personal amount of marijuana is legal under the law of her state, but she understood that the federal government has a different position. She stated that she was still curious about marijuana because of the little effect it had on her. She was unable to state that she would not try it again. (GE 2)

Applicant used marijuana again in August 2020. She reported her use in response to DOHA interrogatories. She indicated that she did not understand the full ramifications of her marijuana use. She thought the most important thing was to be honest about her marijuana use, which she was. She now completely realizes that marijuana use is against the law, not responsible conduct, and inconsistent with holding a security clearance. (Tr. at 22-25; Applicant's response to SOR; AE F)

Applicant credibly testified that she did not intend to use marijuana or any other illegal drug in the future. She indicated it was never something that she particularly enjoyed. She still sees friends who use marijuana, as it is prevalent in her state, but she told her friends that she does not use marijuana, and they do not use it in her presence. She passed a drug test in January 2021. She was evaluated by a licensed clinical social worker (LCSW) who concluded that she did not meet the criteria for a substance abuse disorder or a mental health disorder. 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. I found her to be forthcoming and credible. (Tr. at 19-27; Applicant's response to SOR; AE B, D, F)

Applicant volunteers in her community and is well respected by senior management in her company. She is praised for her excellent job performance, strong moral character, discretion, self-discipline, judgment, trustworthiness, leadership, honesty, reliability, work ethic, and integrity. (AE A, C, 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. 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 lived in a world where marijuana was so common and accepted that Oprah Winfrey's magazine questioned whether it was the "new merlot." She used it sporadically over the years, but experienced little effect from it. She did not think much of it, even after she submitted a security clearance application and was interviewed for her background investigation. She thought the most important thing in pursuing a security clearance was to be honest about her marijuana use, which she was.

Applicant now completely realizes that marijuana use is against federal law, not responsible conduct, and inconsistent with holding a security clearance. She credibly testified that she will not use illegal drugs in the future. She fully disclosed her drug use on her SF 86 and throughout the security clearance proceedings, which bolsters her credibility. Applicant's conduct no longer casts doubt on her reliability, trustworthiness, and good judgment. 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

Subparagraph 1.a: 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