



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 21-00299
)	
Applicant for Security Clearance)	

Appearances

For Government: Nicholas T. Temple, Esq., Department Counsel
 For Applicant: *Pro se*
 08/23/2021

Decision

MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 29, 2019. On March 8, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) sent her a Statement of Reasons (SOR) alleging security concerns under Guideline H. The DCSA CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on March 18, 2021, and requested a decision based on the written record in lieu of a hearing. On April 23, 2021, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including pleadings and evidentiary documents identified as Items 1 through 3. She was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government’s evidence. She received the FORM on May 3, 2021, and did not respond to the FORM or object to the Government’s

evidence. Items 1 and 2 contain the pleadings in the case. Item 3 is admitted into evidence. The case was assigned to me on July 23, 2021.

Findings of Fact

Applicant, age 28, has never been married nor had children. She earned her high school diploma in May 2011, and a bachelor's degree in May 2015. She has been taking courses part time at a university school of business since March 2018. Applicant has been employed as a project manager by a defense contractor since June 2015. In connection with this employment, she has maintained a DOD security clearance since August 2015. (Item 3)

Applicant infrequently used marijuana from April 2011 through June 2014, during high school and college. She characterized her use during that period as "experimental" and estimated that she used marijuana no more than 10 times. She resumed using marijuana during a one-month period between March and April 2017. She attributed her use during this second period to poor decisions she made while partying in her early twenties and to her immaturity. She estimated that she used marijuana only a "handful of times" when it was offered to her. She regrets using marijuana and has no intent to use it again. (Item 2; Item 3 at 39-40)

Applicant used cocaine one time in March 2017 at a party, after a person with whom she no longer associates offered it to her. She characterized her one-time use of cocaine as a lapse in judgment. She regrets using cocaine and has no intent to use it again. She understands that, in addition to jeopardizing her career, cocaine is a dangerous drug. (Item 2; Item 3 at 40-41)

Applicant acknowledged that she possessed a security clearance when she used marijuana and cocaine in 2017, but denied that she had been granted access to classified information because she did not have a "need to know" for any classified programs at the time. She asserted that her 2017 drug use was infrequent and occurred during a short time span when she anticipated leaving her job to seek employment outside of the defense industry and would no longer need a security clearance. Once she realized that she enjoyed her job and intended to remain in her position, she recognized the need to avoid using illegal drugs. She acknowledged that illegal drug use "opens [her] up to the risk of being deemed untrustworthy and therefore not being able to renew [her] clearance." (Item 2; Item 3 at 40-41)

Applicant self-reported the history of her illegal drug use on her 2019 SCA and in her SOR answer. She acknowledged that illegal drug use is incompatible with the maintenance of a security clearance. In her subscribed and sworn SOR answer, Applicant professed a sincere commitment to remain abstinent from marijuana and other illegal drugs. She no longer associates with anyone who does any type of illegal drugs. The record did not indicate whether she self-reported her 2017 drug use to her supervisor or facility security officer prior to the disclosure she made on her 2019 SCA. (Item 2; Item 3 at 39-41)

In her SOR answer, Applicant asserted that her 2017 illegal drug use was a “regrettable but isolated incident and is not indicative of [her] character or [her] ability to follow rules.” She considers herself a very responsible and career-minded person. She is committed to her work and will not put her career in jeopardy again. She stated: “I take pride in the work I do for my company and for the [U.S.] Government and going forward from 2017, have only acted in ways that hold the trust put in me as sacred.” (Item 2)

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.” (*Egan* 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.” (EO 10865 § 2).

Eligibility for a security clearance is predicated upon the applicant 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.” (EO 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. (*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. (ISCR Case No. 92-1106 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. (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; AG ¶ 2(b)).

Analysis

Guideline H: Drug Involvement and Substance Misuse

The concern under this guideline 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.

Applicant's illegal drug use establishes the following disqualifying conditions (DC) under this guideline:

AG ¶ 25(a): any substance misuse (see above definition);

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

AG ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position.

Although Applicant denied that she had been granted access to classified information on the basis that she did not have a “need to know” for any classified programs at the time, I find that there is sufficient record evidence to apply AG ¶ 25(f). AG ¶ 25(f) applies because she had access to classified information upon being granted a security clearance in 2015, regardless of whether she actually worked on classified programs. Moreover, as a cleared defense contractor, she holds a sensitive position where she could potentially be exposed to classified or sensitive information.

Neither of the following potentially applicable mitigating conditions under this guideline are fully established:

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 or misuse is grounds for revocation of national security eligibility.

Any illegal drug use is troubling in the context of evaluating security worthiness. If Applicant had ceased all marijuana use after college, she could have demonstrated successful rehabilitation and mitigated any drug involvement concerns. However, she not only resumed using marijuana after college and during her employment as a defense contractor, but also while she held a security clearance, which is particularly egregious. This history underscores both a pattern of questionable judgment; and also calls into question her ability or willingness to comply with laws, rules, and regulations.

During a one-month period in 2017, Applicant used marijuana on more than one occasion and used cocaine for the first time. Each time that she chose to use an illegal drug during this period, she did so while in possession of a security clearance. The justifications she proffered for what she considered a temporary lapse in judgment over a short time span do less to support mitigation than to underscore the fact that Applicant knew that her 2017 drug use was incompatible with maintaining her security clearance. I recognize the passage of four years since her last drug use and credit Applicant's sincere commitment to remain abstinent from marijuana and other illegal drugs. However, the facts and circumstances surrounding her history of illegal drug use continue to raise doubts about her reliability, trustworthiness, and good judgment.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. In evaluating the relevance of an individual's conduct, an 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.

I have incorporated my comments under Guideline H in my whole-person analysis, and considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated the security concerns raised by her illegal drug use. Accordingly, Applicant 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

Formal findings 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 – 1.c: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security to grant or continue Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge