



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



In the matter of:)
)
) ISCR Case No. 20-02661
)
Applicant for Security Clearance)

Appearances

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

10/07/2021

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H, drug involvement and substance misuse. Eligibility for access to classified information is denied.

Statement of the Case

On December 20, 2020, the Defense Counterintelligence and Security Agency issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse. 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 adjudicative guidelines (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR on April 1, 2021, and elected to have her case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's file of relevant material (FORM), and Applicant received it on June 8, 2021.

She was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. The Government's evidence is identified as Items 1 through 6. Applicant provided a response to the FORM and it is marked as Applicant's Exhibit (AE A). There were no objections to any of the evidence offered and they are all admitted. The case was assigned to me on September 1, 2021.

Findings of Fact

Applicant admitted both SOR allegations. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 40 years old. She earned a bachelor's degree in 2004. She married in 2015 and has a four-year-old child. She held an interim secret security clearance in 2008 and was granted a secret security clearance in 2009, which she has held to the present. She has been employed by the same federal contractor since August 2006. (Items 3, 5, 6)

In Applicant's May 2019 security clearance application (SCA) she disclosed that she used marijuana from January 1999 to March 2019. She stated: "I have used marijuana at concerts or specific events. She said: "This may happen about 2 times a year." She admitted that she held a security clearance at the time of her uses. She stated: "I have no plans to continue use, however, I do not know that I would not use it again in those instances." (GE 3)

During Applicant's background interview, the government investigator inquired about her last marijuana use in March 2019. Applicant stated she was at a concert and may have passively inhaled marijuana so she listed this as a "use." She said she last smoked marijuana in 2016 at a concert. She said it is usually provided by unknown people at concerts. She has used marijuana intermittently throughout the years, sometimes going many years without using. She stated she had no further intent to use marijuana in the future. She explained however that she cannot control others smoking marijuana around her when she attends concerts or events and that she could inhale marijuana while there and then she could potentially test positive during a drug test. She will try her best to remove herself from crowds where marijuana is being used. (GE 4)

Applicant stated she did not fully understand the consequences of smoking marijuana, but learned it could jeopardize her career and it is not worth using. She claimed she was unaware of any policy by her employer that prohibited marijuana use outside of work. (GE 4)

In Applicant's response to the FORM she stated: "During my interview, I did not deny what was in my application. I did not read the investigator's summary as contradictory to my response, so did not object to the report." (AE A)

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines (AG). 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 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states 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 as to obtaining 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 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

The security concern relating to the guideline 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.

AG § 25 provides conditions that could raise security concerns. The following are potentially applicable:

- (a) any substance misuse; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant admitted to illegally using marijuana from 1999 to 2019. She was granted an interim secret security clearance in 2008 and a secret clearance in 2009. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from drug involvement and substance misuse. The following mitigating conditions under AG § 26 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 to overcome the 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 being 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's last illegal marijuana use was two months before she completed her most recent SCA. Although she said this use was through passive inhalation, I did not find her statement credible. Applicant has used marijuana numerous times while holding a security clearance. Her explanation that she did not know if her employer had a policy against using marijuana while not at work, does not relieve her of her duty to abstain while entrusted with a security clearance. Applicant had a duty to know the rules when she was granted a security clearance Applicant's statement that in the future, she may be around people who are smoking marijuana so she may passively inhale it and then test positive is somewhat disingenuous as a future defense to testing positive for drugs. Although Applicant says she does not intend to use marijuana in the future, I am not convinced that future use is unlikely to recur. Her past conduct casts doubt on her current reliability, trustworthiness, and good judgment. AG ¶ 26(a) does not apply.

Applicant stated she does not intend to use marijuana in the future, but she has no control over those around her at concerts who may be using it. She will try and remove herself from crowds that may be using marijuana, but she has no control over passively inhaling the drug. This equivocal commitment is insufficient to apply AG ¶ 26(d).

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 the 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 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 in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant is 40 years old. She has held a security clearance since 2008 and has used marijuana from 1999 to 2019. Applicant has not met her burden of persuasion. The record evidence leaves me with questions and doubts as to Applicant's eligibility and

suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement and substance misuse.

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-1.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 to grant Applicant’s eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge