



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



In the matter of:)
)
) ISCR Case No. 19-03719
)
Applicant for Security Clearance)

Appearances

For Government: Kelly Folks, Esquire
For Applicant: Dan Meyer, Esquire

01/13/2021

Decision

LYNCH, Noreen A., Administrative Judge:

Statement of the Case

This case alleges security concerns raised under Guidelines H (Drug Involvement and Substance Abuse) and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

On February 5, 2020, in accordance with Department of Defense (DOD) Directive 5220.6, as amended (Directive), the DOD issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E.¹

Applicant timely answered the SOR and requested a hearing before an administrative judge. (Answer) The case was assigned to me on October 1, 2020. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October

¹ The action was taken under Executive Order 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 or after September 1, 2006. Since that time, the AG were amended and it is now in effect for any adjudications on or after June 8, 2017.

20, 2020, scheduling the hearing for November 19, 2020. I convened the hearing as scheduled.

The Government submitted four documents marked GX 1-3. There was no objection to the documents, and they were entered into the record. Applicant submitted five documents marked AX A-E, without objection and admitted into the record. At Applicant's request, the record was held open until November 26, 2020. The Applicant submitted one document as clarification and the Government submitted one document. The exhibits (GX 4) and (AX F) were entered into the record without objection from either side.

Findings of Fact

Applicant is 27 years old. She is single and has no children. She obtained her undergraduate degree in 2016. She is employed as a systems engineer and has worked for her current employer since April 2017. (Tr. 26). Applicant completed her latest security clearance application (SCA) on February 4, 2019. (GX 3)

The SOR alleges under Guideline H that Applicant used marijuana, with varying frequency, from about October 2011 until about April 2018 (1.a); that she used marijuana while granted access to classified information (1.b) and that she intends to use marijuana in the future (1.c). The SOR alleges under Guideline E that Applicant falsified her November 20, 2017 SCA when she answered "No" to Section 23: which asks whether she possessed or used illegal drugs in the previous seven years (2.a). Applicant admitted the allegations under 1.a and 1.b, and she denied 1.c and 2.a.

Applicant testified that she participated in the professional development program and rotated positions in the company that she is currently employed with for about four years. (Tr.15) She elaborated that she had a "really good understanding of the defense industry and expand[ed] her knowledge." (Tr. 15) She explained that she is a natural leader and has been a good example for women." (Tr. 17) Applicant admitted that she took initial training for security, but she could not recall training on how to complete a security clearance application. (Tr. 18) It was when she received the SOR that she realized that she had "triggered" the security concerns under Guidelines H and E. She acknowledged she received counseling from her attorney.

Applicant began smoking marijuana in 2011 when she was in college. (GX 3) She admitted this in her subject interview and stated that she used it to calm her anxiety. The usage was approximately twice a week. She admitted that she used the marijuana in California because it was legal in that state. (GX 3) When she came to Maryland, she knew it was illegal under Maryland law, and she stopped using marijuana in April 2018. In her March 2019, subject interview Applicant stated that she did use marijuana while holding her security clearance in 2017. (GX 4) She denied this allegation at the hearing, stating that she did not understand the question. She said she had a security clearance, but she did not actually have access to any classified

information. (Tr. 27) She stated if it became federally legalized, she would continue to use marijuana. In 2019, she had never sought treatment for anxiety.

At the hearing Applicant presented a multitude of reasons why she used marijuana, which did not conform to her answers in her 2019 subject interview. After receiving the SOR and seeking advice of counsel, she explained that the use of marijuana was due to her high levels of anxiety, family background, financial issues, and stressful relationship. (AX C). She stopped associating with people who use marijuana, obtained an evaluation, and signed an intent not to use marijuana in the future. (Tr. 23) She also stated that she is extremely sorry. (Tr. 25) At one point, she stated that she did not understand the difference between federal and state law despite her security training.

In October 2020, Applicant obtained an evaluation from a psychologist who concluded Applicant did not appear to be in acute emotional distress. (AX E) She admitted to episodic bouts of anxiety or depression. In that report it was recommended that she establish and maintain outpatient treatment for psychiatry and psychiatric treatment since her relocation to Maryland. (AX E) The psychologist noted that Applicant has an inclination toward adventuresome behavior and risk taking which might suggest a higher propensity to alcohol and drug abuse when compared to sample norms. (AX E)

Applicant completed a SCA in November 2017. (GX 2) She did not disclose her use of illegal drugs and answered "No" to Section 23, which asked whether she possessed or used illegal drugs in the last seven years. In her answer, she denied the allegation stating that there were many parts to the application, and it took her a long time to complete it. She stated that she asked her peer and no one mentioned that she should list the marijuana use. (Tr. 29) She stated at the hearing that she answered, no, to illegal drug use but she knew she had used marijuana and countered that by saying she did not read the question thoroughly. (Tr. 30) Applicant also blamed it on her belief that using marijuana in California was not illegal because marijuana use was legal under California state law. She stated that from a federal perspective she did not understand that marijuana was illegal. This is hard to find credible given her work in the defense field and her program training. (Tr. 32-33)

Applicant changed her answer in her February 4, 2019 SCA, with respect to drug use in the past seven years. She said she spoke to some people, but did not think to check with her facility security officer (FSO) for advice. (Tr. 35-36) She elaborated that she answered she would use marijuana in the future, but that was before she engaged a psychologist or attorney. (Tr. 37) She also stated that she was confused when she received her security clearance.

The Government, in a post-hearing submission presented proof that Applicant received her security clearance on December 12, 2017. Applicant was adamant that she would no longer use marijuana but stated that the fear of losing her security clearance really made her stop smoking marijuana. (Tr. 49) The Applicant submitted a

clarification stating that some peers told her not to report the marijuana use on the second application, and she was confused. (AX F) She did not provide the names of the peers that gave her this advice.

Applicant submitted eight declarations concerning her good character and each attested to her reliability, trustworthiness, and ability. (GX 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. 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.

Under Directive ¶ E3.1.14, the Government must 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. The Government reposes a high degree of trust and confidence in those granted access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard such information. Decisions shall be in terms of the national interest and do not question the loyalty of an applicant.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern for this guideline is set forth in AG ¶ 24, where it is noted that the illegal use of a controlled substance, and the use of other substances that can 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. This is 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. Such use also raised questions about a person's ability or willingness to comply with laws, rules, and regulations.

Here, Applicant admitted she used marijuana with varying frequency from October 2011 until April 2018. She admitted that she had a security clearance since 2017. This is sufficient to raise AG ¶ 25(a): any substance misuse, and ¶ 25(f): any illegal use while granted access to classified information or holding a sensitive position. The Government's substantial evidence, as provided by Applicant's admissions, thus raises security concerns under Guideline H. Therefore, the burden shifts to Applicant to produce evidence to rebut, explain, extenuate, or mitigate related security concerns.

Under Guideline H, conditions that could mitigate security concerns arising from drug involvement and substance misuse are enumerated. The following mitigating conditions under AG ¶ 26 potentially apply to Applicant's case:

- (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 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's last possession and use of marijuana, an illegal substance to possess under federal law, took place in April 2018. She acknowledged using marijuana with varying frequency during the period from 2001 through 2018. In terms of age, maturation, and work history, sufficient time has not passed to deem her marijuana usage as remote. She provided 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. I find drug involvement and substance misuse security concerns are not mitigated.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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, and

(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 person may not properly safeguard classified or sensitive information.

Here, Applicant intentionally answered "No" on her November 20, 2017 (SCA) in response to a question inquiring whether she had illegally possessed or used any controlled substance, for example marijuana, in the last seven years. (Section 23) She responded "Yes" on her February 4, 2019 SCA. Her reasoning was not credible in that she changed her answer due to confusion and after speaking to peers. The question is clear and not confusing.

AG ¶ 17 describes conditions that could mitigate security concerns. Potentially applicable in this matter is 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, untrustworthiness, or good judgment.

Here, Applicant exhibited two instances of unreliable conduct reflecting questionable judgment. These include the few instances she used marijuana between 2011 and 2018. She held a security clearance in 2017. Her failure to disclose on her

first SCA that she had used marijuana was intentional. The responses that she provided were not reasonable or credible and varied each time she responded. She gave various reasons why she answered “No” to Section 14. She later provided information on the second SCA. However, I do not find her testimony credible or reliable. I do not find her claims of confusion to be plausible, given the plain language of the question on the SCAs. I find none of the mitigating conditions apply in this case.

Whole-Person Concept

Under the whole-person concept, one must evaluate security clearance eligibility by considering the totality of the applicant’s conduct and all relevant circumstances. Consideration shall be given to the nine adjudicative process factors listed at AG ¶ 2(d). The final determination must be an overall commonsense judgment based on 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, and conducted a whole-person analysis based on the record. In addition to Applicant’s past drug involvement and personal conduct. She was not credible in her testimony concerning her knowledge of the defense industry and her confusion about so many things. After the SOR, she sought an evaluation and counseling. The report stated that she does have a slightly higher inclination for further drug abuse. She is however, on the right track, if she receives treatment. She admitted that she was scared of losing her security clearance. She signed a declaration of intent and went to a psychologist.

Applicant seemed very casual about her marijuana use and the reason for the security clearance. She stated that she did not know the difference between federal and state law pertaining to marijuana possession and use despite receiving security training. I find Applicant did not persuade me that despite her many excuses she has mitigated her case under both guidelines. She used marijuana while holding a clearance. After the fact, she has obtained counseling and vows not to use marijuana in the future, but I find these belated actions to be of insufficient weight given the whole picture of the case.

Applicant intentionally falsified an SCA regarding her possession and use of marijuana. The reasons she gave are not plausible. I have doubts as to Applicant’s trustworthiness, judgment, and reliability. Any doubts must be resolved in favor of the Government. Under these circumstances, I find Applicant has not mitigated drug involvement and substance misuse, and personal conduct security concerns due to intentional falsification of her 2017 SCA. Clearance is denied.

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.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST applicant
Subparagraph 2.a:	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 interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Noreen A. Lynch
Administrative Judge