



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 21-00103
)
Applicant for Security Clearance)

Appearances

For Government: Patricia M. Lynch-Epps, Esq., Department Counsel
For Applicant: *Pro se*

02/02/2022

Decision

RICCIARDELLO, Carol G., Administrative Judge:

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

Statement of the Case

On June 29, 2021, 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, 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 adjudicative guidelines (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR on August 5, 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 October 6,

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 2 through 4. (Item 1 is the SOR) Applicant did not respond to the FORM or object to any of the evidence offered. Items 2 through 4 are admitted into evidence. The case was assigned to me on December 1, 2021.

Findings of Fact

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

Applicant is 25 years old. She graduated from high school in 2014 and college with a bachelor's degree in 2018. She is not married and has no children. She began her employment with a federal contractor in January 2018. (Item 3)

Applicant completed her security clearance application (SCA) in March 2020. In it, she disclosed that she was arrested for driving while intoxicated (DWI) in October 2018, a misdemeanor. In her SOR answer, she explained she tested positive for marijuana at the time of her arrest, but also had a blood alcohol level over the legal limit. She pled guilty and was found guilty of DWI and received 360 days of probation, 35 hours of community service, 30 days suspended license, court fees, and she was required to attend an alcohol education class. As part of her probation, she received random drug tests. In November 2018, during her probation in-processing, she tested positive for marijuana. Applicant's DWI was not alleged in the SOR. (Any derogatory information that was not alleged will not be considered for disqualifying purposes, but may be considered in the application of mitigating conditions and in a whole-person analysis.) (Items 3 and 4)

Applicant was subjected to a random drug test in February 2019, while on probation. She tested positive for marijuana. (Item 4) She stated in her answer:

I take full responsibility for my lapse in judgment. No one person has been more disappointed in me than myself. With grace, [my probation officer] forgave my mistake if I proved through my actions that no other offense would occur during my probation sentence. I am cognizant of the fact that not too many offenders are offered this same level of forgiveness or mercy that I was given. With [my probation officer's] guidance as well as a complete change of my mindset, I showed that I was worthy of moving past this offense by completing the terms of my probation sentence with complete respect for the people and system that showed me the brighter path to take. The Honorable [Judge] relieved me of my probation sentence in August 2019. (Item 2)

Applicant disclosed in her SCA that she used marijuana from about August 2014 to August 2019. She stated that she used it about once every few months at social activities from 2014 to 2016. (Item 3) Regarding whether she intended to use marijuana in the future, she stated:

I do not intend on using this controlled substance in the future because it is illegal in the state of [X]. I am also not interested in hindering my ability to efficiently perform my job at a professional standard or jeopardize my judgment or ability to function as a safe and trustworthy member of society. (Item 3)

Applicant was interviewed by a government investigator in May 2020. During her interview she reiterated that she began using marijuana in college when she was about 18 years old. She smoked or ingested it in a food substance until about August 2019. She confirmed that she tested positive during her probation in-processing in November 2018. She did not disclose to the government investigator that she had also tested positive during a random drug test for marijuana use in February 2019 while on probation. She stated in her answer to the SOR that during her phone interview with the government investigator in May 2020, the February 2019 positive drug test was not brought up. (Item 2, 3) She stated:

This is solely due to the immense amount of shame and disappointment I was still internally marinating in. To this day, I deeply regret not being transparent with [the investigator]. This lack of transparency stemmed from my inability to forgive myself for my transgressions. (Item 2)

Applicant admitted to the government investigator that in April 2020, after completing her SCA, she used marijuana at a friend's house. She was offered food knowing it had marijuana in it and she consumed it. The government investigator queried her about using marijuana while employed by a federal contractor. She advised him that her employer did not conduct drug tests, so she was not worried about being fired for her marijuana use. She was asked about her future intention regarding marijuana use and whether she would commit to stop using it and she said she would stop. (Items 2, 4)

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
- (b) testing positive for an illegal drug.

Applicant admitted to illegally using marijuana from 2014 to April 2020; testing positive for marijuana use while on probation; and using it after she had completed her SCA. 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 marijuana use was about a month after she had completed her SCA. Prior to then she used it while on probation. Although, she is remorseful for her conduct, she has not yet demonstrated a maturity that is required of someone who may have access to classified information. She has not established a sufficient period of abstinence or evidence that she no longer associates with drug-using associates, and she has not demonstrated a sincere commitment to not use illegal drugs in the future. The evidence is insufficient at this time to conclude future use is unlikely to recur. She had previously stated in her SCA that she did not intend to use marijuana in the future, but then did so shortly after completing her SCA. Her past conduct casts doubt on her current reliability, trustworthiness, and good judgment. AG ¶ 26(a) and 26(b) do not apply.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concerns for personal conduct:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

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

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

After completing her SCA in March 2020, about a month later, Applicant knowingly used marijuana. The above disqualifying condition applies.

The following mitigating conditions under AG ¶ 17 are potentially applicable to the disqualifying security concerns based on the facts:

(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 was on notice that the illegal use of marijuana was inconsistent with holding a security clearance. A short time after completing her SCA, she went to a friend's house and consumed marijuana. Applicant voluntarily disclosed this information to the government investigator, but also failed to disclose to him that she had tested positive for marijuana use in February 2019 while on probation. She has not demonstrated an understanding about the importance of remaining drug-free. Her lack of concern that she would be fired because her employer does not conduct drug testing raises issues about whether she can be trusted to remain abstinent. Her actions cast doubt on her reliability, trustworthiness, and good judgment. The above mitigating condition does not apply.

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 Guidelines H and E in my whole-person analysis.

Applicant has not met her burden of persuasion. The record evidence leaves me with questions and doubts as to her 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, and Guideline E, personal conduct.

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

Carol G. Ricciardello
Administrative Judge