



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



In the matter of:)
)
) ISCR Case No. 20-00167
)
 Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: Alan Edmunds, Esq.

April 4, 2022

Decision

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns regarding Guideline H (drug involvement and substance misuse). Clearance is granted.

Statement of the Case

On June 21, 2019, Applicant submitted a Questionnaire for National Security Positions (SF-86). On March 17, 2020, the Defense Counterintelligence and Security Agency, Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H. The SOR detailed reasons why the CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On April 13, 2020, Applicant submitted her Answer to the SOR. On November 27, 2020, Department Counsel was ready to proceed. On December 15, 2020, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On May 10, 2021, DOHA issued a notice of DCS video teleconference hearing scheduling the hearing for June 28, 2021. The hearing was convened as scheduled. Department

Counsel submitted Government Exhibits (GE) 1 and 2, which were admitted without objection. Applicant testified, did not call any witnesses, and submitted Applicant Exhibits (AE) A through G, which were admitted without objection. I held the record open until July 16, 2021, to afford the Applicant an opportunity to submit additional evidence. Applicant through counsel timely submitted AE H through K, which were admitted without objection. On July 14, 2021, DOHA received the hearing transcript (Tr.).

Findings of Fact

Background Information

Applicant is a 45-year-old project planner employed by a defense contractor since November 2008. (Tr. 12-14; GE 1) She briefly held an interim secret security clearance that was withdrawn as a result of these proceedings. She seeks a clearance which is a requirement of her continued employment. (Tr. 14, 30-31; GE 1)

Applicant received her high school diploma in June 1994. She was awarded an associate of arts degree in June 2008. (Tr. 14-15; GE 1; AE K) She was married from August 2000 to January 2007. That marriage ended by divorce. She has one adult son, who resides with her and for whom she provides support. At the time of her hearing, she was engaged to be married. (Tr. 15-16; GE 1)

Drug Involvement and Substance Misuse

Applicant reported drug use on her June 21, 2019 SF-86 when applying for a security clearance with her current defense contractor. (GE 1) She was subsequently interviewed on August 19, 2019, by an Office of Personnel Management (OPM) investigator regarding her drug use. (GE 2) She elaborated on her drug use in her April 13, 2020 SOR Answer as well as during her testimony. The following summarizes that drug use.

SOR ¶ 1.a alleged that Applicant used marijuana with varying frequency from about June 1997 to about July 2019. She admitted this allegation. (SOR Answer) Applicant testified that she would have to guess regarding her frequency of marijuana use during that timeframe. She stated that there were “large periods of time” when she did not use marijuana. In a post-hearing statement, Applicant indicated that she used marijuana in 1997, 1998, 2005, 2006, 2007, 2011, 2012, 2016, and 2019. (Tr. 17-19; AE J)

Applicant first used marijuana after high school, “[m]aybe around [age] 21 or so.” (Tr. 28) She was unable to state with certainty the exact number of times she used marijuana over the years, but was able to say that she did not use it on a regular basis. She has been diagnosed with acute anxiety, and on the infrequent times she used marijuana, it was at home. She did not purchase marijuana, but rather friends or family would offer it to her. As noted above, there were gaps of time when she did not use marijuana for years at a time. (Tr. 28-30)

SOR ¶ 1.b alleged that Applicant used marijuana in about July 2019, after completing her June 21, 2019 SF-86, to obtain a security clearance with DoD. Applicant admitted this allegation, stating that “this was one of the biggest mistakes I have made in my life.” (SOR Answer) She was on vacation with her father waiting for a flight at a Canadian airport in a designated marijuana and vaping area. She submitted a photograph of the airport sign verifying this. (SOR Answer; Tr. 33) Her father offered her some of his marijuana cigarette to calm her nerves and help her sleep during their flight. Applicant was convinced that her marijuana use was not illegal at the time given the fact that it was legal in Canada and there were other individuals smoking marijuana. She understands now that her assumption was incorrect. She apologized for her actions and stated that she has not used marijuana since that occasion and would not use marijuana in the future. (SOR Answer; Tr. 18-20, 33, 35-36)

Applicant added that had she known marijuana use was “illegal in the eyes of the Department of Defense,” she would not have used it. (Tr. 20) Applicant’s father submitted a signed, sworn, statement in which he stated that he is a combat-decorated U.S. Marine Corps veteran with a 100% Veterans Affairs (VA) disability due to severe injuries received in Vietnam. He uses marijuana to alleviate pain and discomfort and he “will never use marijuana in her (Applicant’s) presence in the future no matter where we are located.” (AE H; Tr. 37-38) Applicant has discussed her father’s use of marijuana with him and has made it “very clear” that he will not be able to self-medicate in her presence. Applicant’s father does not live nearby and she is not able to see him as often as she would like. She did not see him at all during 2020, and has only seen him twice in 2021, due to the COVID pandemic. (Tr. 36-37)

SOR ¶ 1.c alleged that Applicant intended to use marijuana in the future. Applicant denied this allegation. (SOR Answer) Applicant stated that is contrary to what she told the investigator during her OPM interview. She clarified what she told the investigator, which was, “if it was legal, I would use marijuana in the future.” She added, “I understand that marijuana is not legal, and I have not used it since July 7, 2019. Marijuana is legal in [her state of residence] and many other states. This however is no excuse as it is Federally illegal.” She further emphasized that she has no intent to use marijuana in the future. (SOR Answer; Tr. 20-21)

Applicant understands that if she holds a security clearance, she is held to a higher level of scrutiny than the average worker at her office. She also now understands that if she is visiting a country where marijuana use is legal, she is still prohibited using it under any circumstances. Applicant committed to avoid circumstances where marijuana was present. (Tr. 31-33)

Applicant submitted a signed, sworn statement of intent, dated June 18, 2021, to avoid any future drug use or other illegal use of drugs both presently and in the future, with the understanding that any drug violation will result in the automatic revocation of clearance. (Tr. 25-26; AE G) Post-hearing, Applicant submitted a negative drug test dated July 15, 2021. (AE I) She does not associate with anyone, apart from her father, who uses marijuana. He uses marijuana under medical supervision, has a medical

marijuana card, and uses marijuana to cope with post-traumatic stress and pain from war-related injuries he sustained in Vietnam. (Tr. 24-25)

Character Evidence

Applicant submitted three reference letters from a former supervisor, former customer, and a long-time friend. The collective sense of these references is that Applicant is an enthusiastic, trustworthy, and competent individual, who contributes to the mission and assigned tasks. (Tr. 22-23, 34; AE C) Applicant submitted performance evaluations covering 2015 to 2021 from her current employer. They document a work record in which Applicant has performed well in her professional capacity and contributes to the national defense. She is technically competent, well liked, trusted, and is respected by her peers and management. (Tr. 22; AE B)

Applicant stated that she is not a risk to national security, is dedicated to her job, and is “very proud of what we do and how we support our military.” (Tr. 27) She submitted photographs of her fiancé, son, and herself; a photograph of her home; and a photograph of her in her work environment. (Tr. 26-27; AE D – AE F)

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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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 clearance 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

Drug Involvement and Substance Misuse

AG ¶ 24 describes the security concern about drug involvement and substance misuse:

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.

AG ¶ 25 provides two conditions that could raise a security concern and may be disqualifying in this case:

(a) any substance misuse (see above definition); and

(g) expressed intent to continue drug involvement and substance abuse, or failure to clearly and convincingly commit to discontinue such misuse.

These proceedings were initiated after Applicant self-reported her marijuana use on her June 21, 2019 SF-86, and later during her August 19, 2019 OPM interview. These self-disclosures establish AG ¶¶ 25(a) and 25(g). Further review is required.

AG ¶ 26 lists two conditions that could mitigate security concerns:

(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.

Considering the totality of the circumstances in this case, I find application of AG ¶¶ 26(a) and 26(b), 26(b)(1), 26(b)(2), and 26(b)(3) is appropriate and mitigating.

Concerning AG ¶ 26(a), there are no “bright line” rules for determining when conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the Directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows, “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge’s decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle change and therapy. For the recency analysis, the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.”) (citation format corrections added).

Applicant's last marijuana use was in June 2019, about 24 months before her hearing. Her marijuana use occurred infrequently from 1997 to 2019, a period of 22 years. She used marijuana during 9 of those 22 years, with the most recent use in July 2019 after completing her June 2019 SF-86. Her reason for using marijuana when she did was to deal with her anxiety issues. She did not hold a clearance during any of the times she used marijuana, however, using marijuana after completing her SF-86 is arguably of the most concern in this case. I found Applicant's explanation credible that she did not believe her use of marijuana with her father while waiting at a Canadian airport was wrong. She clearly recognizes the significance of that incorrect assumption.

The record contains persuasive evidence that Applicant has turned the corner on achieving drug abstinence. She recognizes the importance of being a responsible family member and employee, and that her actions can affect others. She also fully recognizes that there is no room for any drug use while holding a security clearance. Applicant's self-reflection, change in behavior, and support from her family, friends, and associates, in addition to her 24 months of sobriety, are indicative of an individual who wants to right her course. The absence of evidence of more recent or extensive drug use, and her promise not to use illegal drugs in the future eliminates doubts about her current reliability, trustworthiness, and good judgment with respect to abstaining from illegal drug use. In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

AG ¶ 26(b) lists three ways Applicant can demonstrate her intent not to abuse illegal drugs in the future. Applicant has engaged in a significant amount of self-reflection regarding her behavior, and recognizes that such behavior is incompatible with holding a security clearance. Applicant has committed to disassociation from drug-using associates and contacts, with the exception of her father, discussed above, and avoiding any environment where drugs are used. She clarified her answer to the OPM investigator regarding future drug use. Lastly, she provided a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant's reference letters document that she is an individual who possesses character and integrity. Applicant's work performance evaluations reflect the caliber of

the contribution she is making as an employee. Her performance further reflects her work behavior is not indicative of someone with a drug problem. As an employee, she is viewed as reliable, a constant learner, and an individual with integrity. At her hearing, Applicant acknowledged that future drug abuse is incompatible with her future career and family plans, and manifested a steadfast commitment to continue lifestyle changes consistent with total abstinence of involvement with all other illegal drugs.

In evaluating Applicant's credibility, I did so after assessing her demeanor, overall candor on other matters, and reputation among her superiors and peers. Given the circumstances of Applicant's background, her explanation for her actions, and her subsequent actions, I find credible her assertion that she will not use any illegal substance in the future. AG ¶¶ 26(a) and 26(b), 26(b)(1), 26(b)(2), 26(b)(3) apply. Drug involvement and substance misuse security concerns are mitigated.

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.

The ultimate determination whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c). The discussion under Guideline H is incorporated in this whole-person section. However, further comments are warranted.

Applicant has been and is willing to maintain conduct expected of one entrusted with a security clearance. She self-reported her drug use knowing that such disclosure could jeopardize her clearance eligibility. I note that her drug use did not occur while she held a clearance. Applicant's employer, friends, and family support her. She has a history of stable employment and a strong work ethic. This level of support and self-introspection should ensure her continued success. Applicant demonstrated the correct attitude and commitment to remaining drug free. She has multiple indicators of a mature, stable, responsible, and trustworthy person. She was serious, candid, and credible at the hearing. She appears to have cooperated fully and provided truthful information during the security clearance process and during her OPM interview. She made a good impression on me during the hearing. I believe Applicant has learned from this experience, and is committed to remaining drug-free.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines.

Formal Findings

The formal findings on the allegations set forth in the SOR are as follows:

Paragraph 1, Guideline H: FOR APPLICANT

Subparagraphs 1.a – 1.c: For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. National security eligibility is granted.

Robert Tuider
Administrative Judge