



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No. 21-02169

Appearances

For Government: Brittany White, Esquire, Department Counsel

For Applicant: *Pro se*

September 30, 2022

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

Applicant submitted her Electronic Questionnaires for Investigations Processing (e-QIP) on December 9, 2020. (Item 3.) On December 1, 2021, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines H (Drug Involvement and Substance Misuse) and E (Personal Conduct). (Item 1.) The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines effective within the Department of Defense after June 8, 2017.

Applicant answered the SOR in writing (Answer) on December 10, 2021, with explanations. She requested her case be decided on the written record in lieu of a hearing. (Item 2.) On January 13, 2022, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM), consisting of Items 1 to 4, was provided to Applicant, who received the file on February 7, 2022.

Applicant was given 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant elected not to submit any additional information. The case was assigned to me on April 12, 2022. Based upon a review of the pleadings and exhibits, national security eligibility for access to classified information is denied.

Findings of Fact

Applicant is a 26-year-old mechanical technician with a defense contractor. She is single and has one child. She is a high school graduate. She is seeking to obtain national security eligibility in connection with her work with DoD. (Item 3 at Sections 13A, 17, and 18,)

Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)

The Government alleges in this paragraph that Applicant is ineligible for clearance because she has used illegal drugs. Applicant admitted allegations 1.b, 1.c, and 1.d without reservations. She admitted in part and denied in part allegations 1.a, 1.e, and 1.f, with explanations.

1.a. Applicant admitted using marijuana from about November 2012 to December 2020. She used marijuana about once or twice a month during that period. (Answer; Item 3 at Section 23; Item 4 at 6-7.)

The allegation alleged that Applicant stopped using marijuana in May 2021. This date was based on a handwritten answer concerning her last date of use Applicant made in DOHA interrogatories signed by her on October 13, 2021. (Item 4 at 20.) Applicant denied that part of the allegation in her Answer, stating, "I realized that is a date error on my part. My last use was Dec 20." When responding to allegations 1.e and 1.f in her Answer, which also refer to May 2021 as her last date of use, Applicant described her entry as, "a typo error." Department Counsel argued in the FORM that this statement of Applicant concerning the wrong date lacked credibility.

1.b. Applicant admitted that she used hallucinogenic mushrooms on one occasion in 2018. (Item 3 at Section 23; Item 4 at 7-8.)

1.c. Applicant admitted using cocaine on one occasion in 2017 in her Answer. In her e-QIP, during a subject interview with an authorized investigator for the DoD, and in

her interrogatory answers, she admits to using cocaine two times in 2017. I find that she used cocaine twice in 2017. (Item 3 at Section 23; Item 4 at 7, 20.)

1.d. Applicant admitted using methamphetamine one time in 2017. (Item 3 at Section 23; Item 4 at 7.)

1.e. Applicant admitted using marijuana in December 2020 after beginning to work for her current employer in a sensitive position in November 2020. She stated in her Answer, "I deny I used in May 2021 as that was a typo error."

1.f. Applicant admitted using marijuana after filling out her e-QIP in December 2020. She stated in her Answer, "I deny I used marijuana in May of 2021 as this was a typo error."

With regard to any future use of drugs Applicant stated in her interrogatory response, "It is my intent to live a long healthy life, with no use of harmful substances. I have occasionally used marijuana as a means of leisure, but I would never allow any substance to interfere with my career development and employment." (Item 4 at 21.)

Paragraph 2 (Guideline E – Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because the conduct alleged in subparagraphs 1.a, 1.e, and 1.f shows poor judgment, untrustworthiness or unreliability. Her conduct will be evaluated under this guideline as well. She did not admit or deny the single allegation under this paragraph, which I view as a denial.

Policies

When evaluating an applicant's national security eligibility for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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, “Any 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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, and has the ultimate burden of persuasion as to obtaining 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)

The security concern relating to Drug Involvement and Substance Misuse is set forth 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.

I have examined the disqualifying conditions under AG ¶ 25 and especially considered the following:

(a) any substance misuse (see above definition).

Applicant used marijuana on an occasionally frequent basis from 2012 to at least December 2020, or May 2021. She used cocaine, mushrooms, and methamphetamine on an experimental basis five years ago. The stated disqualifying condition applies.

The following mitigating conditions under AG ¶ 26 have also been considered:

(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;

(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.

Applicant's cocaine, mushroom, and methamphetamine use was experimental in nature. It ended five years ago and she evinces a credible intent not to use any of those drugs in the future. Mitigating condition AG ¶ 26(a) applies to those allegations. Subparagraphs 1.b, 1.c, and 1.d are found for Applicant.

Applicant used marijuana for about eight years on an occasional basis ending somewhere between December 2020 and May 2021. I am viewing her signed Answer and signed Item 4 as equivalent to a signed statement of intent.

In my analysis, I have taken administrative notice of the Security Executive Agent (SecEA) "Clarifying Guidance Concerning Marijuana for Individuals Eligible to Access Classified Information or Eligible to Hold a Sensitive Position," dated December 21, 2021 (Guidance). In her Guidance, the SecEA noted the increased number of states that have legalized or decriminalized the use of marijuana. She reaffirmed SecEA's 2014 memorandum regarding the importance of compliance with Federal law on the illegality of the use of marijuana by holders of security clearances. She provided further

clarification of Federal marijuana policy writing that this policy remains relevant to security clearance adjudications “but [is] not determinative.” She noted that the adjudicative guidelines provided various opportunities for a clearance applicant to mitigate security concerns raised by his or her past use of marijuana. (Guidance at 1.)

Applicant’s marijuana use ended between December 2020 and May 2021. Using either date, it is simply too soon to be sure she will not use marijuana in the future. Viewed in the context of the whole person, Applicant has not mitigated the security significance of her past drug use within such a recent period of time.

Allegations 1.e and 1.f are cumulative, since they allege the same conduct over the same period as 1.a. Under the particular circumstances of this case they are found for Applicant.

Paragraph 2 (Guideline E – Personal Conduct)

The security concern relating to the guideline 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. One is potentially applicable in this case:

(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 individual may not properly safeguard classified or sensitive information.

Applicant used marijuana between 2010 and sometime between December 2020 and June 2021. The above disqualifying condition has application to the facts of this case.

The following mitigating condition under AG ¶ 17 is possibly applicable to Applicant’s conduct:

(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.

I have examined Applicant's conduct in using marijuana until sometime between December 2020 and June 2021. I have also considered the fact that she used marijuana after being employed by a defense contractor and after filling out her e-QIP. For the reasons stated under Guideline H, above, I find Applicant has not mitigated the allegations under this paragraph.

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 relevant 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 national security 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 pertinent facts and circumstances surrounding this case. Applicant has not mitigated her drug use. Overall, the record evidence does create substantial doubt as to Applicant's present suitability for national security eligibility and a security clearance. Paragraphs 1 and 2 of the SOR are found against Applicant.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b through 1.f:	For 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 or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge