



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



In the matter of:)
)
) ISCR Case No. 19-02996
)
Applicant for Security Clearance)

Appearances

For Government: William Miller, Esq., Department Counsel
For Applicant: Ray Blank, Esq.

12/14/2022

Decision

DAM, Shari, Administrative Judge:

Applicant failed to mitigate the security concerns raised under the Drug Involvement and Substance Misuse guideline. National security eligibility is denied.

Statement of the Case

On January 24, 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, Drug Involvement and Substance Misuse. Applicant answered the SOR and requested a hearing (Answer).

On April 5, 2022, the case was assigned to me. On June 14, 2022, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing, setting the case for July 14, 2022. That hearing was cancelled because Applicant hired a lawyer who requested a continuance. His request was granted and the hearing was rescheduled to October 5, 2022. The hearing was held as scheduled by video teleconference.

Department Counsel offered Government Exhibits (GE) 1 through GE 6 into evidence. They were admitted. Applicant testified and offered Applicant Exhibits (AE) A through G into evidence. All were admitted. The record remained open until October 19, 2022, to give Applicant an opportunity to submit additional documents. No additional

documents were submitted. I received the transcript of the hearing on October 27, 2022. (Tr.)

Motion to Amend SOR

Based on Applicant's testimony, Department Counsel moved to amend the SOR at the conclusion of the hearing and to add the following allegation:

SOR ¶ 1.c: You used marijuana between August 2022 to at least until September 2022.

Applicant objected to the amendment, arguing that the requested extension of the time should be incorporated into SOR ¶ 1.a, and not added as a separate allegation. The motion to amend was granted over Applicant's objection. (Tr. 99-101)

Findings of Fact

In her answer to the SOR, Applicant admitted the allegations contained in SOR ¶¶ 1.a and 1.b. Her admissions are accepted as findings of fact.

Applicant is 30 years old. She is unmarried and graduated from high school in May 2011. She has been enrolled in college since 2020 and she is pursuing a bachelor's degree. (Tr. 33) She has become a firefighter. (Tr. 63)

While in high school, Applicant began working with a military recruiter. She submitted her first security clearance application (SCA) in November 2010. In it, she did not disclose that she used cocaine and marijuana while in high school. (Tr. 26-29; GE 2) She did not include that information on the advice or her recruiter. She enlisted in the Marines when she turned 18 years old in 2011. (Tr. 30-32) She subsequently received a security clearance.

Applicant testified that she began using marijuana in May 2010 while she was in high school. The last time she used it was in August 2017, before she took a position with a defense contractor. She estimated that she has used it 15 to 20 times. She used cocaine once while in high school (Tr. 28, 68-69)

In September 2011, Applicant entered active duty and went to boot camp. (Tr. 34) From 2012 to 2014, she was stationed overseas. While there, she was sexually assaulted twice. (Tr. 38) In 2013, Applicant received an Article 15 or nonjudicial punishment (NJP) for wrongful interference with an adverse administrative proceeding. (Tr. 47) She was reduced from an E-3 to E-2 and was denied reenlistment. She left the Marines in 2015, and went to the Marine Corps Reserve until 2016. (Tr. 47, 50-52; GE 4)

After returning to the states in 2014, Applicant used Ecstasy (Molly), an illegal drug, with a friend who gave it to her. She used it twice between 2014 and the time she left the Marines in 2015. She used it to "numb" herself from past traumas (including sexual assaults) and her distress over leaving the Marine Corps. She held a security clearance at the time. (Tr. 49-52, 60, 86-88)

Applicant was aware that using marijuana while she was in the Marines was a violation of the Uniform Code of Military Justice (UCMJ). She estimated she used it five separate times during her service. She held a security clearance at that time. (Tr. 72, 78-79) After leaving the Marine Corps Reserve in 2016, she used it twice with a former boyfriend between July 2017 and August 2017. She never purchased marijuana. (Tr. 81-82; GE 4)

From August 2017 to July 2020 Applicant worked for a defense contractor. She deployed to the Middle East to provide assistance to the contractor's management teams. (Tr. 53) She continues to work for the contractor on a part-time basis. Currently, she works fulltime for a non-profit organization that provides mental health services to veterans. (Tr. 22, 64-65)

In October 2017, Applicant submitted her second security clearance application (SCA-2), after starting the above position with a defense contractor. In it, she disclosed that she used marijuana from June 2008, while in high school, to August 2017, which was a month before she started her position with the defense contractor. She disclosed that she used Ecstasy between 2014 and 2017. (Tr. 67; GE 1 at 35-36) In December 2017, her security clearance was suspended pending this investigation. (GE 3)

While testifying Applicant disclosed that she smoked marijuana, one time, with a friend in August 2022, about two months before the hearing. She was having trouble sleeping and decided to use it. (Tr. 85) She regrets her decision. She knew at that time she was going to appear at this hearing. (Tr. 86, 94) She also believed that it was important to be honest about her drug use. (Tr. 61)

Applicant submitted a statement in which she acknowledged her past use of marijuana, cocaine, and Ecstasy, and her intention not to use illegal drugs in the future. If she were granted a security clearance, she agreed to an automatic revocation of it if she involved herself in future substance abuse. (AE G)

Applicant has not participated in a substance abuse program. (Tr. 90) She has not sought treatment for her history of childhood abuse or post-traumatic stress disorder (PTSD), which a psychiatrist recently diagnosed during a disability interview. The psychiatrist recommended that she participate in therapy and try medication. To date, she has not followed through with that medical advice. (Tr. 95-97)

Applicant submitted five letters of recommendation. All authors are aware of her past drug issues and the NJP she received. They attest to her competency, honesty and dedication to service. (AE A through E.)

Policies

This national security eligibility 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), which became effective within DOD on June 8, 2017.

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG 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 AG ¶ 2, describing 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.

Finally, as emphasized in 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

AG ¶ 24 describes the concerns related to 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 sets out three conditions that could raise a security concern and may be disqualifying in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant has a history of possessing and using illegal substances. She admitted that between June 2008 and August 2017, she illegally possessed and used marijuana, starting while she was in high school and continuing into her military service and subsequent to her discharge in 2016. She used it while holding a security clearance. She also illegally used Ecstasy between July 2014 and January 2015, while holding a security clearance. Applicant honestly disclosed that she used marijuana to help her sleep two months prior to this hearing. There is no evidence that she used illegal drugs while granted access to classified information. The evidence establishes AG ¶¶ 25(a) and 25(c), but not 25(f).

AG ¶ 26 lists conditions that could mitigate security concerns raised under this guideline:

- (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; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

There is insufficient evidence to establish the above mitigating conditions. Applicant has a history of illegally using and possessing marijuana from 2008 up to her recent use two months before her hearing in October 2022. She also illegally used Ecstasy twice between 2014 and 2015. There is insufficient evidence to establish mitigation under AG ¶ 26(a), given that recent usage. She acknowledges her misconduct, but she has not established a solid pattern of abstinence, as required under AG ¶ 26(b). She provided a September 25, 2022 letter stating her intention to abstain from future illegal drug use. This document is given limited weight based on her use of marijuana in August 2022. AG ¶ 26(b)(c) does not apply. Applicant has not completed a drug treatment program and has not received a favorable prognosis from a health care professional. AG ¶ 26(d) 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), “[t]he ultimate determination” of whether to grant 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 is an intelligent, competent and candid woman, who has worked hard to overcome some of the difficulties she experienced in early life and into adulthood. She joined the Marines in an attempt to change her environment and achieve success. According to her character references, she is a competent and dedicated person, who is forthright.

During her testimony, Applicant courageously disclosed that she used marijuana a month or so prior to her hearing. She did that with full knowledge of the negative repercussion it could have on her pursuit of a security clearance. Her honesty is admirable. After listening to her testify and observing her demeanor, I believe that she recognizes her need for professional help with her past struggles and that she has the fortitude to address them. At this time, she did not mitigate the security concerns raised under the guideline for drug involvement and substance misuse.

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 |
| Subparagraphs 1.a and 1.b: | Against Applicant |
| Subparagraph 1.c: | 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 eligibility for access to classified information. National security eligibility is denied.

Shari Dam
Administrative Judge