



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



In the matter of:)	
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Applicant for Security Clearance)	ISCR Case No. 21-01326

Appearances

For Government:
Tara Karoian, Esquire, Department Counsel

For Applicant:
Ryan C. Nerney, Esquire
Tully Rinckey, PLLC

February 28, 2023

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

Applicant submitted her most recent Electronic Questionnaires for Investigations Processing (e-QIP) on October 29, 2020. (Government Exhibit 1.) On November 25, 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). 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 January 25, 2022, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on May 13, 2022. The case was assigned to me on June 1, 2022. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on June 15, 2022. I convened the hearing as scheduled on July 27, 2022. The Government offered Government Exhibits 1 through 5, which were admitted. Applicant testified on her own behalf, called two witnesses, and submitted Applicant Exhibits A through P. Applicant's exhibits were admitted without objection. DOHA received the transcript of the hearing (Tr.) on August 9, 2022.

Findings of Fact

Applicant is a 48-year-old Labor Relations Staff employee with a defense contractor. She has worked for the company since 2000. She is single. Applicant has received a bachelor of arts degree and a master's degree. She is seeking to retain a security clearance granted in approximately 2006 in connection with her work with the DoD. (Government Exhibit 1 at Sections 12, 13A, 17, and 25; Applicant Exhibit E.)

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 both allegations under this paragraph with explanations.

Applicant admitted that she used marijuana less than ten times in the 1990s. That use is not alleged in the SOR and is in the distant past. This use has no current security significance. (Applicant Exhibit M; Tr. 101-102.)

Applicant stated that she was unintentionally exposed to marijuana in 2014 and 2015. She denies intentionally using it during the period of her employment. (Tr. 62-63.)

In 2014 she attended an outdoor concert with friends. During this concert neighboring attendees shared food such as brownies and cookies. Applicant ate several of these items. After she consumed them one of the neighbors told her that the baked goods contained marijuana. Applicant testified that she did not know that before she ate them, felt no affects from eating the food, and has no knowledge as to whether the person was telling the truth. (Tr. 63-66, 107-108.)

The next time Applicant was exposed to marijuana was about a year later, in 2015, while on vacation with several other people. Some of these people were friends of Applicant, others were friends of her friends. Several of them, including Applicant, used

vape pens. Applicant's used tobacco in hers. On one occasion Applicant picked up the wrong vape pen by accident. She took a puff and found that it had a strange flavor. She enquired and was told by the owner, a friend of a friend, that it contained marijuana. Once again, Applicant did not feel any affects, and has no knowledge as to whether the person was telling the truth. (Tr. 66-71.)

Subsequent to these two incidents Applicant is much more careful about taking food from strangers in concert-like situations. In addition, she has stopped using vape pens altogether. (Tr. 66, 69, 71-73.)

Applicant has repeatedly stated that these were her last "uses" of marijuana and that she has no intent of using marijuana in the future. Even though Applicant does not believe she has or had a drug problem, she has taken several steps to assure the Government that she is being proactive in preventing a future problem. Applicant has taken a course in drug and alcohol awareness, and also one in marijuana education. She has taken several negative drug tests. (Applicant Exhibits J, L, N, and O; Tr. 72, 74.)

Applicant received an evaluation dated December 20, 2021, from a psychologist. The report covered the area of drug abuse. (Applicant Exhibit M.) He conducted a thorough examination of Applicant that included an interview, various psychological tests, and review of relevant documentation. The psychologist opined, "[Applicant] does not now nor has she ever met criteria for a diagnosable substance-related disorder." (Applicant Exhibit M at 6; Tr. 102-106.)

Applicant has also submitted a signed statement of intent "not to use or be involved with illegal drugs in the future." The statement also declared that Applicant understood that such involvement "may be grounds for revocation or denial of national security eligibility." (Applicant Exhibit K.)

Paragraph 2 (Guideline E – Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because she has engaged in conduct that shows poor judgment, untrustworthiness, or unreliability. Applicant admitted both the allegations under this paragraph with explanations.

2.a. Applicant filled out an e-QIP in September 2015. (Government Exhibit 2.) Section 23 of the questionnaire asked Applicant about her drug use history. Specifically, Applicant was asked whether she had used controlled substances during the previous seven years. Applicant stated, "No." This was an incorrect answer to a relevant question about Applicant's drug use history.

Applicant stated that her reason for not disclosing the two incidents of marijuana use in 2014 and 2015 was because she thought they were too minor and inconsequential to disclose. She specifically stated that she did not have an intent to deceive the

Government about this accidental use, that it was simply a mistake on her part. (Tr. 75-76, 89, 115-116.)

Applicant began working closely with Mr. C, an investigator for her employer, in about 2013. Mr. C testified that he communicates with Applicant on almost a daily basis. When Applicant began preparing to fill out her 2020 questionnaire, she asked Mr. C for his advice in filling out the form. He advised her to not make her own decisions as to what the Government felt was relevant or important. Rather, he advised her to be proactive in telling the Government about incidents she did not think were important. (Tr. 24-36, 92.)

Applicant filled out that second questionnaire in October 2020. (Government Exhibit 1.) In answering the same question in Section 23 about her drug use over the past seven years Applicant stated, "Yes." This was based on the advice of Mr. C to be completely forthcoming no matter how minor she believed the information to be. She further indicated that the usage extended from 2014 to 2016, which was in error. Applicant went on to explain, "While out at events (concerts, celebrations) I have smoked and eaten edibles that contained marijuana that I did not know/ know contained marijuana." She further stated, "I'm estimating the times at less than 10 as I don't know how many times for an exact number." Applicant stated that the number ten was used to include all of the baked goods she ate at the 2014 concert, in an attempt to be completely forthcoming. This was a more accurate statement of her use, though somewhat confusing. (Tr. 76-79, 89, 94-98.)

A Report of Investigation (ROI) was prepared by a government investigator based on his notes from an interview with Applicant. The ROI stated, "From 1/14 to 1/16, Subject [Applicant] smoked and ate marijuana at concerts, parties, someone's house, and at camping trips for a total of 10 times." Applicant vehemently disagreed with the investigator's version of the interview. (Government Exhibit 5; Tr. 80-88, 109-112.)

Based on the advice of Mr. C, Applicant also revealed a 1995 arrest for petty theft under Section 22 of the same questionnaire. This arrest would not have been required under the terms of the question, but Applicant put it down in an attempt to be completely forthcoming.

Applicant stated that she has learned to "pay attention to what's written on your SF-86." (Tr. 116-117.)

2.b. The Government alleges in this subparagraph that the Applicant's drug use history, as set forth under Paragraph 1, above, is also cognizable under Guideline E.

Mitigation

A good friend of Applicant's testified on her behalf. This person, Ms. M, is a Director of Human Resources for a division of Applicant's defense employer. The witness has human resources responsibility for 8,000 personnel in her division. She has a Top-Secret

clearance and is knowledgeable about security responsibilities. She is aware of the allegations in this case. The witness has known Applicant since elementary school and is the person who recruited Applicant for the company. The witness believes Applicant to be completely honest, trustworthy, and of a stellar character. The witness gave the Applicant her highest recommendation. (Tr. 37-58.)

The witness Mr. C also submitted a statement on Applicant's behalf, in addition to his testimony. He has known Applicant for ten years in a professional capacity as an investigator. Mr., C was apprised of the allegations in this case. He stated, "[Applicant] has a solid understanding and appreciation for classified work activities at [her employer], and has demonstrated her commitment to protecting National Security through her positive work ethic and actions." He also testified that she is honest with a high degree of integrity. (Applicant Exhibit G at 10-12; Tr. 24-36.)

Additional letters of recommendation were submitted by coworkers and personal friends. Each of them has known Applicant for over ten years. All of them have knowledge of the allegations in this case. They all state that Applicant is trustworthy and believable. They find her to be a hard-working person of integrity and recommend her for a position of trust. (Applicant Exhibit G at pages 1-9, 13-15.)

Applicant is viewed as a solid performer by her employer. She has repeatedly received recognition for her job performance. (Applicant Exhibits D, F, and P.)

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); and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant accidentally used marijuana twice in 2014 and 2015, while she was employed in the defense industry and held a security clearance. Both of the stated disqualifying conditions apply.

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.

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 and issued the Guidance to "provide clarifying guidance." 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.

Applicant was accidentally exposed to marijuana twice over seven years ago. The evidence is clear and convincing that her ingestion was not voluntary. This conduct was in the past and has not been repeated. Applicant thoroughly understands the consequences of any future drug use or exposure, and has taken several steps to avoid it. She has submitted a signed statement of intent. Viewing her extremely minor marijuana use in the context of the whole person, Applicant has mitigated the security significance of her past drug involvement. Paragraph 1 is 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. Two are potentially applicable in this case:

(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 individual may not properly safeguard classified or sensitive information.

Applicant submitted false material information about her drug use history on a Government personnel security questionnaire in 2015. Based on my analysis of the evidence I find that Applicant had no intent to falsify the document. Rather, she answered incorrectly due to her misunderstanding of the requirements of the form. The cited disqualifying conditions minimally apply to the facts of this case.

The following mitigating conditions under AG ¶ 17 are possibly applicable to Applicant's conduct:

(a) the individual made prompt, good faith efforts to correct the omission, concealment, or falsification before being confronted with 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; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant freely admitted that she made a mistake in deciding that her accidental drug use did not need to be disclosed on her 2015 e-QIP because it was accidental. When filling out the 2020 questionnaire Applicant was fully forthcoming about her accidental drug involvement. She was also truthful with a Government investigator, even though she disagreed with his version of the interview. Her voluntary admissions on the second e-QIP and during the interview were the only evidence the Government had to establish any drug use on her part, and alleviated any security significance of her prior falsification, intentional or not. This conduct was an aberration in judgment that will not be repeated. Applicant has mitigated the security significance of her accidental falsifications on a Government questionnaire in 2015.

As stated under Paragraph 1, above, Applicant's drug use was accidental and infrequent, in the past, and she evinces a credible intent not to use marijuana in the future. She has mitigated subparagraph 2.b.

Applicant has mitigated both subparagraphs under this guideline. Paragraph 2 is found for Applicant.

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 mitigated her minor drug use and the falsification, intentional or not, of her 2015 security clearance application. Her recent forthright disclosures minimized or eliminated the potential for pressure, coercion, or duress. Continuation or recurrence of similar conduct is unlikely. Overall, the record evidence does not create any doubt as to Applicant's present suitability for national security eligibility and a security clearance.

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:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a and 2.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is 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 granted.

WILFORD H. ROSS
Administrative Judge