



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



In the matter of:)
)
) ISCR Case No. 22-01256
)
Applicant for Security Clearance)

Appearances

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

09/18/2023

Decision

BLAZEWICK, Robert B., Chief Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H, drug involvement and substance misuse, regarding her past use of marijuana, her current use of marijuana, and her intention to continue using marijuana. Applicant’s eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 13, 2022. On September 30, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse). DOD issued the SOR under Executive Order (Exec. Or.) 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

Applicant answered the SOR on October 19, 2022 (SOR answer), admitting all four allegations and providing amplifying information in a written response. She requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The SOR and Applicant's answer are the pleadings in the case.

The case was assigned to me on May 9, 2023. On July 14, 2023, DOHA issued a notice scheduling the hearing for August 29, 2023. Prior to the hearing, the Government provided two exhibits (GE 1–2) and Applicant provided ten (AE A-J).

The hearing convened as scheduled. Government Exhibits (GE) 1-2 were admitted in evidence without objection. Applicant's Exhibits (AE) A through J were also identified and admitted without objection. The record closed at the end of the hearing. DOHA received the hearing transcript (Tr.) on September 14, 2023.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a - 1.d and provided additional comments in her response to the SOR. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is a 32-year-old contractor. She is divorced and has no children. She earned her bachelor's degree in 2009. She has been employed as a contractor since 2017. (GE 1 at 5-23, Tr. 29-31)

Applicant works as a senior copy-writing supervisor. In that position, she works on projects that help military members and families find resources to assist them. She is motivated and passionate about her work. (GE 1 at 13-14, AE G & J, Tr. 23-28, 31-32)

The allegations in the SOR concern Applicant's long-term use of marijuana from about October 2006 to about January 2022 and intent to continue use (SOR ¶ 1.a); her purchase of marijuana from about October 2007 to about October 2019 (SOR ¶ 1.b); her use of cocaine and hallucinogenic mushrooms during about February 2012 (SOR ¶ 1.c); and her misuse of the prescription drug codeine from about March 2013 to about December 2013 (SOR ¶ 1.d). She admitted all four of the allegations. (SOR Answer)

In her SCA, SOR response, subject interview, and her testimony, Applicant admitted using marijuana since about October 2007. She began using it as a teenager and has found it improves her mood. She experienced depression in high school and turned to marijuana and alcohol to self-medicate. A mental health professional eventually proscribed anti-depressants which she found to be effective. She has been open with her therapist and primary care physician regarding her marijuana use and neither expressed concern. Upon legalization in her state, she obtained a medical prescription for marijuana and vapes it. She stated her prescription marijuana helps her to feel relaxed, optimistic, and peaceful. She last used marijuana the morning of the hearing. (SOR Answer, GE 1 at 41-45, GE 2 at 3-4, Tr. 34-44)

Applicant knows the use of marijuana violates federal law, even when legally prescribed under state law, but she intends to continue to use it. She considers it an effective medical treatment for her depression. She stated her employer has a policy against the use of illegal drugs. She stated her employer occasionally requires urinalysis and that though she would expect to test positive for marijuana metabolite, she was not overly concerned. (SOR Answer, GE 1 at 41-44, GE 2 at 3-4, Tr. 14, 47)

Applicant stated prior to her state legalizing marijuana for medical purposes, she would purchase it on various occasions for personal use from friends or friends of friends. She would occasionally sell small amounts to friends. On average, she purchased a few grams every few months. (GE 1 at 41-43, GE 2 at 3-4, Tr. 44-46)

In about February of 2012, while studying overseas as part of a semester abroad, Applicant used cocaine and hallucinogenic mushrooms. She was offered the mushrooms by a friend she was studying with while on a sight-seeing trip and was offered the cocaine at a night club. She did not purchase either of them. She tried both. She has not used them since and has no intention of using them again. She is no longer close to the friend who was with her at the time. (SOR Answer, GE 1 at 42-43, GE 2 at 3-4, Tr. 49-54)

Applicant tore her anterior cruciate ligament (ACL) in late 2012 or early 2013. She was prescribed codeine for pain management. During the treatment period, she did not use all of the codeine. She had four to five pills left after the prescription period ended. From March through December 2013 Applicant used the remaining four to five codeine pills for additional pain management. After they were gone, she used Tylenol or ibuprofen. (SOR Answer, GE 1 at 44-45, GE 2 at 4, Tr. 54-55)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court held in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” 484 U.S. 518, 531 (1988).

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 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(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.” 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 not drawn 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. Under Directive ¶ E3.1.15, 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 to obtain a favorable security decision.”

A person who seeks access to classified information enters 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.

Analysis

Guideline H, Drug Involvement and Substance Misuse

AG ¶ 24 articulates the security concern regarding drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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.

Applicant has used marijuana with varying frequency, from about October 2006 to at least January 2022. She intends to continue to use her medically prescribed marijuana even though she acknowledges its use violates federal law. She illegally purchased marijuana with varying frequency from about October 2007 to at least October 2019. She

used cocaine and hallucinogenic mushrooms in about February 2012. She used four to five prescription codeine pills after her prescription for them had expired.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution;
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant's long-term use of marijuana, use of cocaine and hallucinogenic mushrooms, and expired codeine satisfy AG ¶ 25(a). The illegal use of marijuana, a Schedule I controlled substance under 21 U.S.C. § 812(c), alone constitutes substance misuse. Her illegal purchase of marijuana satisfies AG ¶ 25(c). Finally, her expressed intent to continue marijuana use satisfies AG ¶ 25(g).

Next, I considered the mitigating conditions under AG ¶ 26. The following 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;
- (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 is grounds for revocation of national security eligibility; and
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended.

Considering the evidence, none of the mitigating conditions apply to SOR ¶¶ 1.a - b. Applicant's marijuana use is frequent, ongoing, and she intends to continue her use. She admitted she had last used marijuana the before the hearing. I did not consider this as disqualifying as it was not alleged, however, I did weigh it in considering mitigation. SOR ¶ 1.b is a closer call as Applicant's purchases of marijuana since legalization in her state in 2019 are legal under state law, however, they remain illegal under federal law. Mitigating condition AG ¶ 26(a) applies to SOR ¶¶ 1.c. Applicant's use of cocaine and

hallucinogenic mushrooms in February 2012 occurred over 11 years ago, when she was in college studying overseas, she did not purchase them, and has no desire to use them again. I find SOR ¶¶ 1.c is mitigated. Applicant's use of four to five codeine pills prescribed to her outside of the prescription period to relieve pain was ten years ago. I find SOR ¶ 1.d is also mitigated.

Marijuana use and possession remains prohibited under federal law. "Medical marijuana has no special or preferred status under either the adjudicative guidelines or the new clarifying guidance. "[D]isregard of federal law pertaining to marijuana remains relevant, but not determinative, to adjudications of eligibility for access to classified information" SecEA Clarifying Guidance at 2." ISCR Case No. 20-02974 at 5 (App. Bd. Feb 1, 2022).

Applicant's candor is commendable and I weighed that in her favor. All of the allegations in the SOR were known only because she disclosed them on her SCA. Nonetheless, Applicant admits she knows marijuana use is prohibited under federal law. She has used marijuana consistently for nearly 17 years. This behavior raises substantial questions about her judgment, reliability, and willingness to comply with laws, rules, and regulations. Viewed as a whole, her conduct raises eligibility concerns, such as poor judgment, that are broader than her marijuana use.

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 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 Guideline H in my whole-person analysis. I conclude Applicant did not provide sufficient evidence to mitigate the security concerns about her drug involvement and substance

misuse, which includes an expressed intent to continue use. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility for a security clearance.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant

Conclusion

In light of all the circumstances, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Robert B. Blazewick
Administrative Judge