



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



In the matter of:)
)
) ISCR Case No. 22-02599
)
)
Applicant for Security Clearance)

Appearances

For Government:
Andrew H. Henderson, Esquire, Department Counsel

For Applicant:
Pro se

September 27, 2023

Decision

GLENDON, John Bayard, Administrative Judge:

Applicant has not mitigated security concerns raised by her drug involvement in July 2020 and her falsifications about that drug involvement in her most recent e-QIP, and a prior instance of drug involvement in an earlier security clearance application. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted her most recent Electronic Questionnaire for Investigations Processing (e-QIP) on October 20, 2021 (2021 e-QIP). (Government Exhibit 1.) On February 3, 2023, the Department of Defense Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense

(DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective within DoD after June 8, 2017.

Applicant responded to the SOR (Answer) on March 8, 2023, and requested a decision based upon the administrative record without a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On March 29, 2023, Department Counsel requested a hearing pursuant to Paragraph E3.1.7 of the Directive. Department Counsel was prepared to proceed on March 29, 2023. The case was assigned to me on April 4, 2023. DOHA issued a Notice of Hearing on April 18, 2023, scheduling the case to be heard via TEAMS video teleconference on June 6, 2023.

I convened the hearing as scheduled. Department Counsel offered nine documents marked as Government Exhibits (GE) 1 through 9, which were admitted without objection. Applicant testified on her own behalf. She did not offer any documentary evidence. DOHA received the transcript of the hearing (Tr.) on June 13, 2023. (Tr. at 9-10.)

Findings of Fact

Applicant is 26 years old and is married. She earned a high school diploma in May 2015. She served in the Army National Guard (ANG) in State 1 from October 2014 to October 2020 and was honorably discharged as a Uniform Signal Support System Specialist (E-3). In November 2014 she submitted an e-QIP (2014 e-QIP) (GE 2) in connection with her enlistment in the ANG and was granted a security clearance. She has worked for a DoD contractor since September 2019. She subsequently submitted a second security clearance application, the October 2021 e-QIP. She is seeking to retain national security eligibility in connection with her employment. (Tr. at 13, 15, 17; GE 1 at 7, 11, 12-14, 19-20, 32-33.)

Paragraph 1: Guideline H, Drug Involvement and Substance Misuse

The Government alleged in this paragraph that Applicant is ineligible for clearance because she has tested positive for THC in July 2020. (SOR ¶ 1.a). In her Answer Applicant denied this allegation and provided an explanation of the circumstances of the drug test.

I make the following findings of fact with respect SOR allegation ¶ 1.a:

Applicant was drug tested on July 27, 2020, in connection with her ANG service. The test results were reported by the lab on August 5, 2020, as positive for THC, or marijuana. On August 18, 2020, a flag was initiated by the Deputy Chief of Staff G-1 of State 1's ANG. The reason provided in the Report to Suspend Favorable Personnel Actions (Flag), DA Form 286 (August 2020 DA 286 or GE 5) was "Drug Abuse Adverse Action." GE 5 reflects that Applicant was on the distribution list. A memorandum from the

Headquarters of the State 1 ANG, dated October 29, 2020, (the October 2020 Memorandum or GE 7) states that Applicant enrolled in the State 1 ANG's Substance Abuse Program (SAP) on August 27, 2020, after testing positive for "an illegal substance" on July 27, 2020. The memorandum further reflects that she "successfully attended and participated in the required inpatient program." A May 8, 2023 memorandum from the State 1 ANG Joint Force Headquarters recites the details of Applicant's positive drug test, including her being "Flagged for drug abuse." and her successful completion of the substance abuse inpatient program, as set forth in GE 7. Applicant's positive test result for THC is substantial evidence of her use of marijuana prior to the test. (GE 4 through GE 8.)

On August 18, 2022, Applicant was interviewed by a U.S. Government investigator in connection with her 2021 security clearance application (GE 1). The investigator prepared a summary of Applicant's statements during the interview in a report (ROI). Applicant confirmed the accuracy of the report in her responses to DOHA's interrogatories. The ROI recites that Applicant denied in her interview that she had used marijuana prior to testing positive for THC in July 2020. She claimed that she was first advised about three months by her commander after the drug test that she tested positive and had to retest the next day. Applicant declined to retest because she said she had a family emergency and was unavailable the next day. She further asserted in the interview that this conversation about three weeks prior to her separation from the ANG, which was in October 2020. (GE 3 at 4.)

Applicant's interview statements are inconsistent with the Government's documentary evidence described above that she was advised in August 2020 that she was flagged for drug abuse and that she was required to participate in an inpatient substance abuse treatment program beginning on August 27, 2020, which she subsequently completed.

At the hearing, Applicant testified that she first learned about the positive drug test when her sergeant advised her of the test results just prior to her separation from the ANG. She denied that she had used marijuana prior to her drug test or at any other time since 2010. She testified that her sergeant told her to speak with their unit commander on October 18, 2020, for further instructions. She advised the commander that the test results were inaccurate due to a label mix up. She explained to the commander that new labels had to be printed during the testing process and that a mix up produced an erroneous positive test result for Applicant. She also claimed at the hearing that neither she nor anyone else taking a drug test at that time were asked to re-sign the new labels. Applicant made the additional assertions that the October 2020 Memorandum contained inaccurate information in that she never participated in the ANG's SAP. (Tr. at 13-14, 24-26, 29-30.)

Applicant further testified that her commander told her that she could file a complaint with the Inspector General (IG) and that she would receive paper copies of all of the relevant documentation. She said she filed a complaint electronically with the IG in

2020 about both the mistake in the drug test results and the inaccurate information in the October Memorandum. She did not produce a copy of her IG complaint at the hearing. She claimed that she followed up on her complaint several times, but she never heard further and did not receive paper copies of anything related to the drug test. Applicant also testified that prior to receiving the Government's evidence from Department Counsel in March 2023, she had never seen GE 6, the August 2020 DA 286. (Tr. at 14-15, 22, 25-27.)

Paragraph 2: Guideline E, Personal Conduct

The SOR sets forth three allegations under the Personal Conduct guideline. The Government alleged that Applicant has engaged in dishonest and unreliable conduct by falsifying responses to questions in her 2021 e-QIP and her 2014 e-QIP regarding her past use of illegal drugs. (SOR ¶¶ 2.a and 2.b.) The SOR also cross-alleged the allegation set forth in ¶ 1.a under Guideline H. (SOR ¶ 2.c.)

I make the following findings of fact with respect SOR allegation ¶¶ 2.a through 2.c:

Department Counsel submitted the 2021 e-QIP (GE 1) and an excerpt for the 2014 e-QIP (GE 2). In the 2021 e-QIP, Applicant responded in the negative to the question in Section 23 of that application about her drug use in the past seven years. The excerpt from Applicant's 2014 e-QIP are the pages of that application in which Section 23 appears. The SOR points to Applicant's failed drug test in July 2020 as evidence that she had used marijuana prior to the drug test and that her response to the seven-year drug question in Section 23 of the 2021 e-QIP was a deliberate falsification. In view of my finding above that her positive drug test was substantial evidence of Applicant having used marijuana prior to the test, I conclude that the Government has met its burden to establish its allegation that Applicant deliberately falsified her answers in Section 23 of the 2019 e-QIP. (GE 1 at 31-32.)

As stated, Department Counsel also submitted an excerpt of Applicant's 2014 e-QIP with her responses to Section 23 regarding drug use in the past seven years. Applicant answered these questions in the negative. During her 2022 background interview, she disclosed that she had use marijuana once in 2010 when she was a freshman in high school. She also wrote in the Answer that she had smoked marijuana in August 2010, which was the same high school incident. She blamed the non-disclosure of that drug use in the 2014 e-QIP on her recruiter, who she claimed filled out the form for her. She asserted in her Answer and at the hearing that she had advised the recruiter about her one-time prior use of marijuana, and he failed to note her response in the 2014 e-QIP. (Answer; Tr. at 18; GE 2 at 20-21; GE 3 at 5.)

At the hearing, Applicant explained the non-disclosure of her drug use in 2010. She testified that she advised her recruiter of her drug use in high school, and he told her not to mention it or she would not be allowed to enlist. She reported that the recruiter told

her everything would be “fine” if she passed the drug test when she enlisted. She claimed that the recruiter prepared her 2014 e-QIP. She did admit that she signed the 2014 e-QIP under penalty of perjury for any deliberately false statements. (Tr. at 18-20.)

Policies

When evaluating an applicant’s suitability for national security eligibility, 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

Guideline H, Drug Involvement and Substance Misuse

The security concerns relating to the guideline for drug involvement and substance misuse are set out in AG ¶ 24, which reads as follows:

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 forth the following condition that could raise security concerns and may be disqualifying in this case:

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

As noted, the Government's evidence of Applicant's drug use is substantial evidence that she in fact used marijuana and establishes the disputed allegation in SOR 1.a and the potentially disqualifying condition set forth in AG ¶ 25(a). Applicant's denial of this allegation based upon a claim that her test sample was mislabeled is not credible and does not refute the documentary evidence in the record. Applicant's similar claim that she did not receive a copy of the August 2020 DA 286 in 2020 and her denial of the facts set forth in the October 2020 Memorandum regarding her participation and completion of the ANG inpatient SAP before she acknowledged receiving the August 2020 test results is also not credible. Accordingly, the Government's credible documentary evidence shifts the burden to Applicant to mitigate the security concerns raised by her conduct.

AG ¶ 26 contains the following two conditions that could mitigate the security concerns raised by Applicant drug use:

(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 the 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 the previous 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.

In light of Applicant's denial of using marijuana notwithstanding the positive test results for THC, neither of the above mitigating condition are applicable. Her behavior cast doubts on her current reliability, trustworthiness, and good judgment. The threshold requirement for the application of AG ¶ 26(b) is that Applicant acknowledge her drug involvement. She has not done so.

Guideline E, Personal Conduct

The security concerns relating to the guideline for personal conduct are set out in AG ¶ 15, which states:

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.

AG ¶ 16 lists the following two conditions that could raise security concerns and may be disqualifying 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.

The record evidence establishes that Applicant deliberately omitted two instances of drug use from her e-QIPs, first her 2010 marijuana use in her 2014 e-QIP and then her 2020 drug use in her 2021 e-QIP. As noted above, the record evidence of Applicant's positive drug test for THC established that she used marijuana in 2020. Applicant admits that she used marijuana in 2010. This evidence shifts the burden to Applicant to mitigate the security concerns raised by her omissions and her 2020 drug use.

The guideline includes the following three conditions in AG ¶ 17 that could mitigate the security concerns arising from Applicant's falsifications on the e-QIPs and her positive drug test:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirements to cooperate or provide the information, the individual cooperated fully and truthfully; and

(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.

None of the above mitigating conditions have been established. Applicant did not make a prompt good-faith effort to correct her omissions. In fact, she denied omitting

anything in her 2021 e-QIP as recently as the hearing in this case. Her admission in her 2022 background interview of her omission of her 2010 drug use was hardly prompt. Moreover, her admission was not in good faith since she denied making the decision to omit the information on her own, claiming that the recruiter filled out the 2014 e-QIP and provided a false negative answer to the past seven-years question about illegal drug use in Section 23.

Applicant's testimony that she was instructed by her recruiter to omit the information about her 2010 drug use lacked credibility, as did much of her testimony about other important facts. Throughout the hearing, Applicant showed a reluctance to accept any responsibility for her actions and found excuse after excuse to deny her responsibility. Her claim about her recruiter's instructions is a significant example of this pattern of behavior. Other examples are her claim that the drug test administrator in 2020 mislabeled her test sample; that she never received the August 2020 DA 268 in 2020; that she was not advised about the August 2020 positive drug test results until October 2020, just prior to her discharge; and that the October 2020 Memorandum contained false information about her participation and completion of the ANG mandatory inpatient SAP starting in August 2020 following her positive test for THC. Her unwillingness to be candid during her background investigation, in the Answer, and at the hearing casts doubt on her reliability, trustworthiness, and good judgment.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for national security eligibility 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 above whole-person factors and the potentially disqualifying and mitigating conditions, as well as the SecEA's Guidance, in light of all pertinent facts and circumstances surrounding this case. Applicant has not mitigated her drug use in July 2020 and positive drug test results. She also has not mitigated her falsifications in two

security clearance applications. Her testimony lacked credibility on the key issues in this case and she presented no documentation to support her version of the facts. I cannot conclude that Applicant will be any more candid in the future if her behavior is ever scrutinized for propriety. Overall, the record evidence raises questions and doubts 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a through 2.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 or continue Applicant's national security eligibility. Eligibility for access to classified information is denied.

JOHN BAYARD GLENDON
Administrative Judge