



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



In the matter of:)	
)	
)	ISCR Case No. 22-02601
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: Kristin Figueroa-Contreras, Esq.

11/15/2023

Decision

BENSON, Pamela, C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H (Drug Involvement and Substance Misuse), and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on July 29, 2022. On February 9, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. The action was taken under Executive Order (EO) 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 adjudicative guidelines (AG) effective on June 8, 2017.

On April 26, 2023, Applicant answered the SOR and requested a hearing before an administrative judge. (Answer) The case was assigned to me on May 26, 2023. The

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 18, 2023, setting the hearing for September 13, 2023. The hearing was held as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 and 2, and a Hearing Exhibit (HE) 1; I admitted all proffered exhibits into evidence without objection. Applicant testified, and a witness testified on her behalf. DOHA received the hearing transcript (Tr.) on September 20, 2023.

Findings of Fact

Applicant admitted she used marijuana on one occasion in about the spring of 2020, SOR ¶ 1.a, and she denied both allegations of falsification of her 2022 SCA, SOR ¶¶ 2.a and 2.b, in her Answer to the SOR. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact:

Applicant is 32 years old. She has been married to her husband since June 2017. She does not have any children. She earned a bachelor's degree in computer science in December 2013. In August 2016, she received a certificate in information accessibility and design policy. She was previously employed by a government contractor from June 2017 to February 2021 as a web developer. She has possessed a secret security clearance since 2018. In February 2021, she was hired by her current employer, also a government contractor, that sold the contract to another federal contractor in September 2022. She discovered that she needed a top secret security clearance for her current position as software engineer, and she completed an SCA on July 29, 2022. (Tr. 14-17, 31; GE 1, GE 2)

Drug Involvement and Falsification

In her July 2022 SCA, Applicant stated that she inadvertently failed to disclose, as required, that she had used marijuana on one occasion in about the spring of 2020, which was during the time she possessed a secret DOD security clearance. She testified at the hearing that when she completed the SCA online in July 2022, it took her about a week to update all of the detailed information. After it was completed, she submitted the SCA and then she printed it out. Although she had admitted she had thoroughly reviewed the form online for accuracy and completeness, it was not until after she had printed out the SCA that she realized that she had gotten an address wrong, and she had incorrectly answered two of the illegal drug questions. She did not disclose her one-time use of marijuana in 2020 while possessing a DOD security clearance because it had completely slipped her mind. (Tr. 15-20, 28; GE 1, GE 2) When her attorney asked her how her one-time use of marijuana could have been momentarily forgotten, Applicant stated:

Well, it's like if -- if anyone asks me, I'm not in -- I'm not in the kind of social circles to -- around people that do that kind of thing all the time. So if anyone asked if I smoke or whatever, no, I don't. That's not for me.

That's not something I have -- I do or have done. I mean, I have to reconcile that in my mind of, yes, I did do that once, and that was a mistake and not something I plan to repeat. (Tr. 20)

When Applicant realized she had incorrectly answered the drug questions, she immediately called her best friend and asked her what she should do about it. After some discussion, Applicant decided she would correct her mistake when she participated in her background subject interview with an authorized DOD investigator on September 20, 2022. Applicant started off the interview by providing clarification about her physical location/updated address. She did not disclose her omitted drug information until the investigator questioned her about illegal drug use. After the enquiry from the investigator, Applicant admitted she had used marijuana once during the spring of 2020 when she shared a joint with her husband, and she took "about two puffs." She stated that her spouse regularly uses marijuana, and he had applied for a medical marijuana card. She told the investigator that he uses marijuana on a weekly basis, but he had expressed interest in stopping marijuana use because he wanted to obtain a U.S. Coast Guard's captain's license. She admitted that she had also drank a couple of alcoholic drinks at the time she tried the marijuana. She was not certain if she held a secret security clearance at the time, and she did not report her drug use to her employer because she was not aware that she was required to do so. She clarified to the investigator that she had overlooked the drug questions because the SCA online had previously populated the answers from her previous SCA, and she had only briefly looked over the 2022 SCA before submitting it. (Tr. 21-25; GE 2)

During the hearing, Applicant admitted that her state of residence had legalized the recreational use of marijuana in 2020. At the age of 29, she had taken one puff of marijuana in approximately the spring of 2020 with her spouse and regretted her decision immediately. She had never used marijuana, or any other illegal drug, before or after that incident. She also denied telling the investigator during her background interview that she was not certain she possessed a security clearance during the time she had used marijuana. (Tr. 24-25, 32)

During cross-examination, Applicant stated that when she applied for the top secret security clearance by submitting the July 2022 SCA, she discovered from her employer that she was to undergo a polygraph examination. She was fully aware that marijuana was illegal under federal law and incompatible with individuals who possessed DOD security clearances. Even though she had never tried marijuana before, she was asked to explain why, at the age of 29 and while possessing a DOD security clearance, she decided to try marijuana for the first time. Applicant admitted that it was a "minor lapse in judgment" and that she had consumed two alcoholic beverages beforehand. She also stated that even though she spent an extensive amount of time completing the SCA, when she read over the drug questions, her one-time use of marijuana did not come to mind. She did not immediately report her omissions to the facility security officer (FSO), because at the time, she was not even aware of an FSO. She admitted that her program supervisor had emailed her about the necessity of completing a new SCA, but she did not report her SCA omissions to her

program manager either. She denied that she was aware that she was supposed to report any illegal drug use to her employer while possessing a security clearance, but she readily admitted that she had received annual security briefings and was certain this topic was discussed during those briefings. (Tr. 31-44)

I questioned Applicant about some inconsistent statements she had made to the background investigator and during the hearing. She had told the investigator during her September 2022 interview that she had overlooked the drug questions on the 2022 SCA because the online application had automatically populated previous answers she had reported on an earlier SCA she had submitted. She had also told the investigator that she had only briefly reviewed the July 2022 SCA before she submitted it. Her testimony was that she had taken a week to prepare her 2022 SCA and she had specifically answered the drug questions with a negative response because she did not recall, at that time, that she had used marijuana in 2020 or while possessing a security clearance. Applicant admitted she had told the investigator that information but also acknowledged that the drug questions on her 2022 SCA did not automatically populate – she had to specifically answer the illegal drug questions. (Tr. 42-47)

Applicant testified that her husband did not get a medical marijuana card, but he had obtained marijuana for recreational use legally in 2020. She said he had used marijuana on a weekly basis until “a couple of months ago” because he recently decided to apply for a captain’s license. After Applicant admitted that her husband stopped his regular use of marijuana in June or July 2023, Department Counsel questioned her why she failed to indicate her husband’s regular use of marijuana on the February 2023 interrogatory question – “8. Do you associate with individuals who use marijuana, any product containing THC, or any illegal drug(s)?” Applicant had answered this question “No.” Applicant then testified that she was not certain of the dates of her husband’s marijuana use, but that in September 2022, at the time of her background interview, he was using marijuana weekly, by February 2023, the time she completed the interrogatories, he had quit, and then sometime afterwards he resumed using marijuana until June or July 2023, when he quit again. She said the longest time he has refrained from using marijuana was six months. Applicant provided a signed statement of intent to abstain from all illegal drug involvement and substance misuse when she submitted her interrogatory response in February 2023. (Tr. 47-59; GE 2)

Applicant stated that she had told her best friend that she had used marijuana on one occasion in 2020. Her best friend testified that she met Applicant on a camping trip in September 2021. Since that time, they have become best friends and talk to each other every day. She recalled Applicant had called her in a panic when she received the email that she was to have a background interview with an investigator, and after reviewing the July 2022 SCA, she realized that she had not listed her one-time illegal drug use on the application because she had thought it had occurred outside the question’s scope of time. The witness was interviewed during Applicant’s security clearance investigation and had reported to the investigator that Applicant had used marijuana once in college. During the hearing, the witness said she speculated that

Applicant's use of marijuana had occurred during her college years. (Tr. 25, 61-72, 77-80)

Policies

When evaluating an applicant's suitability for a security clearance, 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 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 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.

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

The security concern relating to the guideline for drug involvement and substance misuse is set out 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.

AG ¶ 25 provides 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,"; and "(f) any illegal drug use while granted access to classified information or holding a sensitive position." The record establishes AG ¶¶ 25(a) and 25(c).

The guideline also includes conditions that could mitigate security concerns arising from drug involvement and substance misuse. The following mitigating conditions under AG ¶ 26 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; and

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions 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 being 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.

None of the mitigating conditions fully apply. Applicant did provide a signed statement of intent to abstain from all illegal drug involvement and substance misuse. This signed statement of intent does not hold much value after considering Applicant's inconsistent statements. She had claimed initially during her background interview that the 2022 SCA was populated with information from her previous submission of an SCA, and that was the reason why she did not respond correctly to the drug questions. She told the investigator that she briefly reviewed the SCA before submitting it. During the hearing she testified that she had taken a full week to update her 2022 SCA, and that she had carefully reviewed the application for accuracy and completeness. She specifically omitted her one-time use of marijuana during the spring of 2020 and while possessing a security clearance because it had not crossed her mind. Her best friend testified that Applicant had told her she did not disclose her one-time use of marijuana because she had thought it had occurred outside the scope of the SCA question. These inconsistent statements support a finding that Applicant is not a credible witness.

Applicant's use of marijuana casts doubts on her current reliability, trustworthiness, good judgment, ability or willingness to comply with laws, rules, and regulations, and suitability to hold a clearance, especially because her marijuana use occurred when she was a mature adult and possessed a security clearance. She was aware of the federal government's policy against illegal drug use, and the adverse security consequences for such use. Nevertheless, she made the poor decision to try marijuana with her husband, who may or may not be a regular user of marijuana. Applicant failed to mitigate the drug involvement and substance misuse security concerns.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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 describes a condition that could raise security concerns and may be disqualifying. The following disqualifying condition is potentially applicable:

(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.

Applicant deliberately falsified her July 2022 SCA by intentionally failing to disclose her 2020 use of marijuana while holding a DOD security clearance. Although not alleged in the SOR, during her September 2022 background interview, Applicant disclosed her one-time use of marijuana during the spring of 2020, but she has provided inconsistent information about why she failed to disclose this information on her 2022 SCA. The record evidence shows that AG ¶¶ 16(a) applies.

AG ¶ 17 provides conditions that could mitigate security concerns in this case:

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

(c) the offense is so minor or so much time has passed, or the behavior is so infrequent, or 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 mitigating conditions apply. Applicant denied that she falsified her 2022 SCA because (1) the drug information was prepopulated on the 2022 SCA and she briefly reviewed the SCA before submitting it; (2) she specifically answered the drug questions "No" because she did not recall that she had used marijuana one time in 2020, or that she used it while possessing a secret security clearance; or (3) she did not disclose her 2020 use of marijuana while possessing a security clearance because she thought her use occurred outside the scope of the drug question. Applicant's inconsistent statements demonstrate that she was less than candid when she submitted her 2022 SCA responses, and that she deliberately misled or made false statements to the government investigator, to her best friend, or during her hearing about why she failed to disclose her 2020 marijuana use while possessing a security clearance on the SCA.

Also, Applicant's failure to immediately report her omissions to her FSO or program manager and deciding to wait until she was interviewed by a DOD authorized investigator does not demonstrate a prompt, good-faith effort to correct her previous omissions. Applicant has established a pattern of dishonesty, which casts doubt on her reliability, trustworthiness, and overall good judgment. The personal conduct security concerns are not mitigated.

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), 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 Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

Applicant's use of marijuana while holding a security clearance places a heavy burden on her to establish mitigation. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See Dorfmont, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

After considering the record as a whole, and the circumstances surrounding Applicant's one-time use of marijuana, I conclude that she has not met her heavy burden of proof and persuasion due to her testimony and other record statements replete with inconsistencies. She is not a credible, reliable, or trustworthy source. She was fully aware of the federal government's policy against illegal drug use, and the adverse security consequences for such use. Despite being a mature adult possessing a secret security clearance, she made the poor decision to use marijuana with her husband in 2020. Her pattern of dishonesty continues to cast doubt on her reliability and trustworthiness. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H and Guideline E.

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

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraphs 2.a and 2.b: 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 security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge