



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



In the matter of:)
)
) ISCR Case No. 20-02297
)
Applicant for Security Clearance)

Appearances

Government: Aubrey DeAngelis, Esq., Department Counsel
For Applicant: Daniel P. Meyer, Esq.

11/21/2023

Decision

Curry, Marc E., Administrative Judge:

Applicant failed to mitigate the personal conduct security concern. Clearance is denied.

Statement of the Case

On July 26, 2021, the Department of Defense Counterintelligence and Security Agency Consolidated Adjudications Services (CAS) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline E, personal conduct, and Guideline H, drug involvement. The SOR explained why the CAS was unable to find it was clearly consistent with the national interest to grant or continue her security clearance eligibility. The CAS took the action under Executive Order (EO) 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DOD on June 8, 2017.

On September 26, 2021, Applicant answered the SOR, admitting in part and denying in part, each allegation, and requested a decision on the written record. On July 25, 2022, Department Counsel prepared a file of relevant material (FORM). On July 29, 2022, Applicant filed a reply to the FORM. On August 5, 2022, the Government withdrew the SOR, and on October 13, 2022, the Government filed a new SOR, alleging only concerns under Guideline E. On November 29, 2022, Applicant answered the new SOR, admitting subparagraph 1.a and 1.c, and admitting in part, and denying, in part, subparagraphs 1.b, 1.d, and 1.e. She again requested a decision on the written record instead of a hearing.

On December 13, 2022, Department Counsel converted the case to a hearing, and on April 7, 2023, the case was assigned to me after having been assigned to another judge. On May 22, 2023, the hearing was scheduled for June 15, 2023. The hearing was held as scheduled. I considered 13 government exhibits, and five Applicant exhibits, together with Applicant's testimony. Also, I took administrative notice of Applicant's counsel's brief, marking and admitting it as Hearing Exhibit (HE) I. The transcript was received on June 30, 2023.

Findings of Fact

Applicant is a 33-year-old married woman with one child, an infant. She is a senior program analyst for a defense contractor. Her duties include serving as a transportation liaison between the United States and another country. She has worked in this position for three years. Previously, she worked for another company as a logistics analyst. (GE 1 at 7) Applicant is a 2012 graduate of an elite military academy. She later earned a master's degree of business administration. (Tr. 20)

When Applicant was in middle school, she was diagnosed with attention deficit hyperactivity disorder (ADHD). (Tr. 45) Her physician prescribed Adderall to help treat her condition. (GE 3 at 21) Its generic name is dextroamphetamine, and it is in the same family of drugs as amphetamine. (GE 1 at 27)

After Applicant was accepted into the military academy, officials reviewed her medical records and told her that ADHD was a disqualifying condition, and that she would need to obtain a waiver in order to continue taking her ADHD medication. (Tr. 47) Applicant did not pursue a waiver. Instead, she opted to quit taking the medicine and see how well she could function without it.

Subsequently, Applicant struggled in school. (Tr. 50) When she came home for winter break, she decided to resume her ADHD medication. Rather than go to a physician and get another diagnosis, however, she began taking pills left over from a bottle of medicine that she had been prescribed before starting college.

Shortly after returning to school from winter break, Applicant was administered a random drug test and tested positive for amphetamines. Pending a disciplinary

proceeding, Applicant spoke with her immediate supervisor who advised her not to disclose the circumstances surrounding her resumption of ADHD medicine. Instead, he told her to tell the officer in charge of the disciplinary proceeding that she received the ADHD medicine from a friend. (Tr. 28) Applicant took the advice of her superior officer, and she was subsequently punished with 60 days of room restriction with 30 days suspended. (Tr. 50)

Ultimately, Applicant was diagnosed again with ADHD and prescribed the medication. (Tr. 28, 47) This time, she obtained a waiver. She graduated from the military academy in 2012. (Tr. 20)

In response to interrogatories propounded in 2020, Applicant was asked to disclose any illegal drug use, including any prescription drug without a prescription. She disclosed her Adderall use but stated that she was first prescribed it in 2009 when she was 19, instead of earlier when she was in middle school, as was actually the case. (GE 8 at 9) In 2021, she provided a letter from her current physician setting forth the amount of Adderall prescribed per day and the length of time that the current physician has been monitoring her Adderall use. (GE 1 at 27)

In 2013, after graduating from college, Applicant deployed to a combat theater. (GE 11 at 1) While deployed, she served as the executive officer of a headquarters company of a support battalion. (Tr. 32) She served in this combat theater for approximately seven months.

After Applicant completed her combat tour of duty, she was transferred to an assignment in the United States. On July 4, 2014, while on leave, she celebrated Independence Day with her spouse, enjoying alcoholic drinks at several bars while strolling through the downtown area and enjoying the fireworks. A few days later, Applicant was administered a random drug test, and tested positive for nordazepam, oxazepam, and temazepam. These drugs are derivatives of Valium. Subsequently, she was charged under Article 112a of the Uniform Code of Military Justice (UCMJ) with wrongful use of a controlled substance. (GE 10 at 2) Applicant contended that she did not intentionally take these drugs, and that a man who brought her a drink during the 4th of July festivities must have spiked it. (These drugs are commonly known on the street as date rape drugs. (GE 1 at 41; 99-106; GE 8 at 2, 7)). Ultimately, she was found guilty and administratively separated with a general discharge under honorable conditions. (GE 11 at 1)

In March 2015, after leaving the armed services, Applicant took a private-sector job as a manufacturing supervisor. (GE 13 at 2) Before starting work, she signed a document acknowledging that the company had a drug and alcohol-free workplace policy. (GE 13 at 1) In May 2016, Applicant failed a randomly administered drug test, testing positive for marijuana, leading to her termination later that month. (GE 13 at 10) Applicant discussed this episode on two successive security clearance applications completed respectively in 2016 and 2021. On both applications, she explained that this was the first time she had ever tried marijuana and that she did not realize it was still illegal. (GE 6 at

34; GE 7 at 36-37) During a personal subject interview in 2017, when asked why she used marijuana, Applicant stated that she did not know. (GE 8 at 2) At the hearing, Applicant's explanation alternated between using marijuana to counteract the symptoms of post-traumatic stress syndrome after having tried a number of ineffective, prescribed medicines, and using marijuana not knowing that it was illegal in the state where she used it. (Tr. 31-32) She has no intent of using marijuana again. (AE F)

Applicant is highly respected on the job and her community. According to her supervisor, she has received numerous awards, all of which are testaments to her "work ethic, *esprit de corps*, courage, and honesty." (AE D at 9) According to one of Applicant's government customers, she is "a total joy" to be around. (AE D at 4) Also, Applicant is highly dedicated to volunteerism, serving in multiple local volunteer positions over the years, including a local citizen's advisory board, a local historical society, and an environmental organization where she assists with developing public community gardens. (AE C at 2, dated June 6, 2023, at 2-3; AE D at 15)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (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 required to be considered 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 overall 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. Under Directive ¶ E3.1.14, the Government must 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 applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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 *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline E: Personal Conduct

Under this guideline, “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.” (AG ¶ 15) Moreover, “of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.” (*Id.*) Subparagraph 1.a asserts, in essence, that Applicant intentionally failed to disclose her ADHD diagnosis before beginning class at the military academy in 2008 to circumvent its medical waiver process. Applicant admittedly falsified where she obtained the ADHD medication after failing a drug test in 2009, as alleged in SOR subparagraph 1.c. Also, in her 2020 response to DOHA interrogatories, she gave a response regarding when she began using Adderall that conflicted with other record evidence, as alleged in subparagraph 1.f. Consequently, the following disqualifying conditions under AG ¶ 16, as set forth below, are 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; and
- (b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

Applicant’s positive test for amphetamines while at the military academy and her subsequent punishment occurred 14 years ago when she was a teenager. Moreover, there was no intent to circumvent the waiver process; Applicant stopped taking her ADHD medicine when beginning college in a sincere attempt to ascertain whether she could

succeed without it. Moreover, regardless of whether she should have obtained a waiver before starting the medicine without a new prescription, she ultimately obtained an updated prescription, resumed the medication, and graduated. Under these circumstances, I conclude that Applicant did not intentionally withhold her ADHD diagnosis to the academy before entering, as alleged. Consequently, neither of the disqualifying conditions apply to the allegation set forth in subparagraph 1.a. I resolve this allegation in Applicant's favor.

Given the length of time that has elapsed since Applicant's Adderall use triggered a positive test for amphetamines, and the fact that she ultimately was re-prescribed Adderall to help with her schoolwork, I conclude that subparagraph 1.b no longer poses a security concern. I resolve this subparagraph in her favor.

After testing positive for amphetamines, Applicant falsely explained that she received the Adderall from a friend, rather than from a previous prescription, as alleged in subparagraph 1.c, but did so, based upon the advice of her supervisor. Consequently, although AG ¶ 16(a) applies to this subparagraph, it is mitigated by AG ¶ 17(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." I resolve subparagraph 1.c in Applicant's favor.

Applicant stated in her 2020 interrogatory response that she was prescribed Adderall in 2009 when she was 19, when in truth, she was prescribed Adderall when she was in middle school. In 2021, she provided a letter from her current physician setting forth the amount of Adderall prescribed per day and the length of time that the current physician has been monitoring her Adderall use. Under these circumstances, I conclude that Applicant did not intend to mislead the government when she responded to the interrogatory question in 2020. I resolve subparagraph 1.f in her favor.

The remaining SOR allegations remain problematic. Specifically, Applicant tested positive for marijuana on a random drug test administered by her employer in May 2016, less than 18 months after beginning the job and signing a waiver not to abuse drugs, and approximately a year after she had been administratively separated from the military after testing positive for drugs. AG ¶16(d)(3), "a pattern of rule violations," applies.

Applicant's testimony of how her marijuana use was prompted by her struggle with overcoming PTSD, and the ineffectiveness of other prescribed drugs to treat its symptoms was emotionally compelling; however, it was undercut by her incredible testimony that she was unaware that marijuana was illegal in the state where she used it, and her contradictory explanations provided during the investigative process, for using marijuana. Consequently, with the exception of the mitigating condition set forth in AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress," which applies because of her civic volunteerism, none of the other mitigating conditions apply.

Whole-Person Concept

In assessing the whole person, the administrative judge must consider the totality of Applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). Those factors are:

(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.

Applicant deserves credit for her extraordinary volunteerism and her strong work performance. These factors certainly weigh in her favor when assessing the presence of rehabilitation. Conversely, Applicant's testimony that she was unaware marijuana was illegal in the state where she used it in 2015 was not only incredible, it undercut other viable mitigating testimony, and created a lingering doubt concerning whether she should be granted a security clearance. Because any doubt must be resolved in favor of national security (AG ¶ 2(b)), I conclude that Applicant's security clearance application must be denied.

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 E:	AGAINST APPLICANT
Subparagraphs 1.a –1.c:	For Applicant
Subparagraphs 1.d – 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge