



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



In the matter of:)
)
 [REDACTED]) ISCR Case No. 22-02571
)
 Applicant for Security Clearance)

Appearances

For Government: Jenny Bayer, Esq., Department Counsel
For Applicant: *Pro se*

10/18/2023

Decision

MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing on July 25, 2022 (EQIP). On February 14, 2023, the Defense Counterintelligence and Security Agency (DCSA), formerly the Department of Defense Consolidated Adjudications Facility, sent her a Statement of Reasons (SOR) alleging security concerns under Guideline H. The DCSA acted 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 adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on February 17, 2023, and requested a decision based on the written record in lieu of a hearing. On May 10, 2023, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including

pleadings and evidentiary documents identified as Items 1 through 5. She was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government's evidence. She received the FORM on May 23, 2023, but she did not respond to the FORM or object to the Government's evidence. The case was assigned to me on September 28, 2023.

Evidentiary Matters

Items 1 and 2 contain the pleadings in the case. Items 3 through 5 are admitted into evidence. Although Item 5 was not authenticated as required by Directive ¶ E3.1.20, I conclude that Applicant waived any objection to Item 5. The Government included in the FORM a prominent notice advising Applicant of her right to object to the admissibility of Item 5 on the ground that it was not authenticated. Applicant was also notified that if she did not raise an objection to Item 5 in her response to the FORM, or if she did not respond to the FORM, she could be considered to have waived any such objection, and that Item 5 could be considered as evidence in her case.

Findings of Fact

Applicant, age 51, is unmarried with a minor child. She received her bachelor's degree in 2007. She worked as a detective for a large metropolitan city police department in State A from 1993 to 2013. Since 2013, she has been self-employed as a private investigator. She relocated her residence from State A to State B in 2016. In June 2021, she was hired into a contract investigator position by the defense contractor who sponsored her EQIP. The record did not address whether Applicant either submitted to a preemployment drug test or was advised of a drug-free policy upon hire. DCSA granted her interim eligibility for a secret clearance on August 8, 2022. As of September 27, 2022, she had not yet begun employment in the position for which eligibility was granted. (Items 3-5)

Applicant did not disclose any drug use on her July 25, 2022 EQIP. She answered "No" to all questions in "Section 23 – Illegal Use of Drugs or Drug Activity," including whether she had illegally used any drugs or controlled substances within the last seven years, while possessing a security clearance, or while employed as a law enforcement officer. The opening paragraph of Section 23 noted that all questions pertained to the illegal use of drugs or controlled substances "in accordance with Federal laws, even though permissible under state laws." The question about "illegal use of drugs or controlled substances" in Section 23 noted, "Use of a drug or controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with or otherwise consuming any drug or controlled substance." (Item 3)

During Applicant's September 27, 2022 security clearance interview (SI), she self-reported that she experimented with marijuana twice after completing the EQIP, on an unspecified date in July 2022, and on an unspecified date in September 2022. On each occasion, she inhaled one hit of marijuana from a vaping pen supplied by a friend while attending a concert. She attributed her decision to use marijuana to the fact that it is legal in State B. She claimed that, on the occasions when she used marijuana, she was not

aware that its use remains illegal under federal law. She maintained that she never used any other illegal drugs or marijuana on any other occasions. She professed an intent not to use marijuana in the future because it could affect her security clearance. (Item 2, 5)

Although not explicitly stated, information in the record implied that both concerts Applicant attended were in State B. In her Answer, she reiterated that, to the best of her knowledge, her marijuana use was legal under State B law. The Government did not proffer evidence to the contrary. She maintained that she would never have used marijuana had she known that its use was illegal under federal law. The record did not indicate when or how she acquired that knowledge. (Items 5)

Policies

“[N]o one has a ‘right’ to a security clearance.” (*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” (*Egan* at 527). The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” (EO 10865 § 2).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” (EO 10865 § 7). Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. (*Egan* at 531). “Substantial evidence”

is “more than a scintilla but less than a preponderance.” (See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994)). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. (ISCR Case No. 92-1106 at 3 (App. Bd. Oct. 7, 1993)). Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. (Directive ¶ E3.1.15). An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005)).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002)). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” (*Egan* at 531; AG ¶ 2(b)).

Analysis

Guideline H: Drug Involvement and Substance Misuse

The concern under this guideline 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. *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’s marijuana use in July and September 2022 establishes the following disqualifying conditions set forth under this guideline in AG ¶ 25 this guideline:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The SOR did not allege facts to establish the disqualifying condition set forth in AG ¶ 25 (f) (any illegal drug use while granted access to classified information or holding a sensitive position). Although Applicant was granted interim eligibility for a security clearance in August 2022, the record did not establish that she was either working in a sensitive position or had otherwise been granted access to classified information when she used marijuana.

I considered all the factors set forth in AG ¶ 26 that could mitigate the concern under this guideline and find the following warrant some discussion:

(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 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.

I *sua sponte* took administrative notice of the following facts relevant to the parties' respective positions: 1) recreational possession and use of up to 1.5 ounces of marijuana by adults over the age of 21 has been legal in State B since July 2021; 2) marijuana remains a Schedule I controlled substance under federal law; 3) changes in the laws pertaining to marijuana by states, territories, and the District of Columbia do not alter the AG; and 4) federal marijuana laws supersede state marijuana laws.

I also considered the October 2014 guidance issued by the Director of National Intelligence (DNI) which advised, "[a]n individual's disregard of federal law concerning the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations." The DNI updated its guidance in December 2021 to reaffirm that federal law remains unchanged with respect to marijuana use, possession, production, and distribution; and that individuals who hold security clearances or occupy a sensitive position within the federal government are currently prohibited by law from using controlled substances, such as marijuana, on or off-duty. The updated guidance made clear that prior recreational marijuana use by an individual applying for a security clearance or national security position might be relevant to adjudications, but not determinative. The guidance instructed federal agencies to adjudicate each potential applicant through a "whole-person concept" by evaluating multiple variables in an individual's life to determine whether past marijuana use raises a security concern and whether that concern has been mitigated.

Applicant's two-time use of marijuana could be considered innocuous in any other context since it was legal in her home state. However, in evaluating security worthiness, her decision to use marijuana at all is problematic. Further exacerbating the concern are the timing and circumstances of her marijuana use, especially as a former law enforcement officer. She chose to use marijuana for the first time within days of completing an EQIP that contained plain language placing her on notice of the security concerns associated with drug use, regardless of its legality under state law. I am troubled by her claimed ignorance, at the time she used marijuana, that its use remains illegal under federal law, particularly given her law enforcement background.

Whether or not Applicant knew at the time she used marijuana, she has since acknowledged that marijuana use is both illegal under federal law and incompatible with maintaining a security clearance. However, she cited the potential impact on her security clearance, and not its illegality, as her motivation to abstain from future marijuana use. She did not provide the signed statement of intent described in AG ¶ 26(b)(3).

Without having an opportunity to observe Applicant's demeanor and ask questions, I am unable to assess her credibility. Considering the record as a whole, I am unable to conclude that her marijuana use is unlikely to recur. I also have doubts about her reliability, trustworthiness, and judgment, and her willingness to comply with laws, rules, and regulations. Accordingly, I conclude that she failed to meet her burden to establish mitigation sufficient to overcome the recency and circumstances of her marijuana use. Neither AG ¶¶ 26(a) nor 26(b) are established.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. In evaluating the relevance of an individual's conduct, an 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.

I have incorporated my comments under Guideline H in my whole-person analysis, and considered the factors in AG ¶ 2(d) and the DNI's December 2021 guidance. After weighing the disqualifying and mitigating conditions under Guideline H and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated her marijuana use. Accordingly, Applicant has not carried her burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

Formal Findings

Formal findings 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

Conclusion

I conclude that it is not clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge