



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



In the matter of:)	
)	
)	ISCR Case No. 23-00258
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

10/24/2023

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke her eligibility for access to classified information. She failed to mitigate the security concerns stemming from her drug involvement and substance misuse and personal conduct. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant submitted her most recent security clearance application (SCA) on December 3, 2021. The Department of Defense issued Applicant a Statement of Reasons (SOR) on February 23, 2023, detailing security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. The DOD acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017.

Applicant submitted an undated answer (Answer) to the SOR and elected a decision on the written record by an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On April 26, 2023, Department Counsel submitted the Government's file of relevant material (FORM), including documents identified as Items 1 through 18. DOHA sent the FORM to Applicant on April 27, 2023, who received the FORM on May 13, 2023. She was afforded 30 days after receiving the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not respond to the FORM. The SOR and the Answer (Items 1 and 4, respectively) are the pleadings in the case. Items 2 and 3 are administrative and have no probative value. Items 5 through 18 are admitted without objection. The case was assigned to me on September 6, 2023.

Findings of Fact

Applicant is 26 years old, unmarried, and has a daughter age four. She earned her associate's degree in February 2021. She joined the U.S. Army in August 2015, just shy of her 18th birthday. She left the Army in June 2019 with an Under Honorable Conditions discharge. Since August 2021, she has been employed by a defense contractor. (Items 16 and 17.)

Under Guideline H, the SOR alleged that Applicant: (a) used tetrahydrocannabinol (THC), the active component in marijuana, which remains an illegal drug under Federal law, from approximately May 2016 to at least June 2019; (b) used THC from approximately May 2016 to at least June 2019, while in possession of a security clearance; (c) failed a urinalysis test on June 11, 2019, testing positive for THC; (d) failed a urinalysis test on May 28, 2019, testing positive for THC; (e) failed a urinalysis test on May 16, 2016, testing positive for THC and; (f) received Non-Judicial Punishment in about June 2016, was found guilty of Wrongful Use of Marijuana-Detected by Urinalysis, and was punished by (1) a reduction in rank, (2) forfeiture of pay for two months (suspended), (3) extra duty for 45 days, restriction for 45 days, (4) referral to the Army Substance Abuse Program; and (5) an oral reprimand. (Item 1.) She admitted those allegations. (Item 4.) There is nothing in the record that Applicant signed a non-disclosure agreement (NDA) and had a "need-to-know (NTK) while serving in the Army.

Under Guideline E, the SOR alleged that Applicant: (a) falsified her December 3, 2021 SCA by deliberately failing to disclose the disqualifying information set forth in Guideline H, subparagraph 1.f. above; and (b) falsified her December 3, 2021 SCA by deliberately failing to disclose the disqualifying information set forth in Guideline H, subparagraphs 1.a. and 1.b. above. (Item 1.) She admitted those allegations. (Item 4.)

Applicant did not disclose her marijuana use in her December 3, 2021 SCA. (Item 17.) Nor did she disclose any marijuana use in her November 21, 2014 SCA. (Item 5.) The record does not show any factual bases that would support allegations of drug involvement or substance misuse before November 21, 2014.

In the FORM brief, Department Counsel amended SOR Guideline J to withdraw paragraph 3 and subparagraph 3.a. Those paragraphs were the crux of Guideline J. Therefore, Guideline J is not an issue in this case.

Law and Policies

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

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the adjudicative guidelines guidelines are flexible rules of law that apply together with common sense and the general factors of the whole-person concept. An administrative judge must consider all available and 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.”

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, then 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 in seeking a favorable security decision.

Discussion

Guideline H, Drug Involvement and Substance Abuse

Under AG H for drug use, suitability of an applicant may be questioned or put into doubt because drug use can both impair judgment and raise questions about a person’s ability or willingness to with laws, rules and regulations:

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.

Marijuana is a Schedule I controlled substance, and possession of it is regulated by the federal government under the Controlled Substances Act. 21 U.S.C. § 811 *et seq.* The knowing or intentional possession and use of any such substance is unlawful and punishable by imprisonment, a fine or both. 21 U.S.C. § 844. In an October 25, 2014 memorandum, the Director of National Intelligence affirmed that the use of marijuana is a security concern. James R. Clapper, Director of National Intelligence, Memorandum: *Adherence to Federal Laws Prohibiting Marijuana Use* (October 25, 2014). See also <http://www.dea.gov/druginfo/ds.shtml>

More recently, on December 21, 2021, the Director of National Intelligence signed the memorandum, *Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*. It emphasizes that federal law remains unchanged with respect to the illegal use, possession, production and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior medicinal or recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the “whole-person concept” stated under SEAD 4, to determine whether the applicant’s behavior raises a security concern that has not been mitigated.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug;
- (c) illegal possession of a controlled substance, including...purchase...; and
- (f) any illegal drug use while granted access to classified information.

SOR ¶¶ 1.a through 1.d alleged Applicant’s pattern of using marijuana from May 2016 to at least June 2019. The SOR also alleged three instances when she tested positive for marijuana use, in May 2016, May 2019, and June 2019. It also alleged that from May 2016 to June 2019, she used marijuana while possessing a security clearance. And finally it alleged that in June 2016, she was subjected to non-judicial punishment and found guilty of Wrongful Use of Marijuana-Detected by Urinalysis. Her punished included a reduction in rank, extra duty, and restriction for 45 days. Applicant unequivocally admitted those allegations.

Facts admitted by an applicant in an Answer to a SOR require s no further proof from the Government. ISCR Case No. 94-1159 at 4 (App. Bd. Dec. 4, 1995) (“any admissions [applicant] made to the SOR allegations . . . relieve Department Counsel of its burden of proof”); ; and Case No. 94-0569 at 4 and n.1 (App. Bd. Mar. 30, 1995) (“[a]n applicant’s admissions, whether testimonial or written, can provide a legal basis for an

Administrative Judge’s findings”). Applicant admitted facts that trigger disqualifying conditions AG ¶¶ 25(a) through (c).

The application of AG ¶ 25(d) warrants further discussion in light of recent Decisions by the Appeal Board. More specifically, the Board interpreted “any illegal drug use while granted access to classified information.” In ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022), the Appeal Board held:

Eligibility for access to classified information and the granting of access to classified material are not synonymous concepts. They are separate determinations. The issuance of a security clearance is a determination that an individual is eligible for access to classified national security information up to a certain level. Security clearance eligibility alone does not grant an individual access to classified materials. In order to gain access to specific classified materials, an individual must have not only eligibility (i.e., a security clearance), but also must have signed a nondisclosure agreement [NDA] and have a “need to know” [NTK]. See Executive Order 13526, dated December 29, 2009, at § 4.1. While an eligibility determination is generally made at the agency level and is subject to various regulatory due process requirements, an access determination is most often made at the local level without any due process guarantees. See *a/so* ISCR Case No. 22-01661 at 4 (App. Bd. Sep. 21, 2023 (applying the foregoing to a “sensitive position”).

The Board’s holding is that eligibility for access to classified information is not enough to establish AG ¶ 25(f), “any illegal drug use while granted access to classified information.” There is nothing in the record showing that Applicant signed a NDA and had a NTK, or any substantially similar evidence granting access to classified information. Therefore, AG ¶ 25(f) has not been established.

The next inquiry is whether Applicant’s marijuana use has been mitigated, The following four mitigating conditions under AG ¶ 26: for drug involvement and substance abuse may potentially apply.:

- (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 . . . her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence . . . ;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

I have considered mitigating condition AG ¶ 26(a). On this record, Applicant's use of marijuana began in May 2016. That is quite a while ago. It continued, however, at least until she was discharged from the Army in June 2019. Her three positive drug tests suggest that her use while in the Army was not infrequent. I find that AG ¶ 26(a) does not apply to her marijuana use while in the Army.

I have carefully reviewed the record and compared it to the plain language of AG ¶¶ 26(b) through (d). It is clear that the record does not contain facts that support those other three mitigating conditions.

Guideline E, Personal Conduct

In assessing an allegation of deliberate falsification, I consider not only the allegation and an applicant's answer but all relevant circumstances. AG ¶¶ 2(a) and (d)(1)-(9) (explaining the "whole-person" concept and factors). Under Guideline E for personal conduct, the concern is that "[c]onduct 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." A statement or omission is false or dishonest when it is made deliberately (knowingly and willfully).

In this case, the SOR alleged that Applicant falsified facts by failing to disclose her June 2016 non-judicial punishment in her December 3, 2021 SCA. The SOR also alleged that she falsified facts by failing to disclose in her December 3, 2021 SCA her use of marijuana from May 2016 to June 2019 while possessing a security clearance. She unequivocally admitted both allegations. Her omission of those relevant facts falls squarely within AG ¶ 16(a), which states in pertinent part:

[D]eliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations.

AG ¶ 17(a) states in pertinent part the only mitigating condition that might mitigate that disqualifying condition:

[The] individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.

Applicant tested positive for marijuana use three times while in the Army. She could have – and should have - admitted that drug use in her December 3, 2021 SCA. But she did not. Having reviewed the entire record, there are no facts that would support

mitigating condition AG ¶ 17(a). Nor are there any other mitigating conditions that apply here.

Whole-Person Concept

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. AG ¶¶ 2(a) and (d)(1)-(9) (explaining the “whole-person” concept and factors). In my analysis above, I considered the potentially disqualifying and mitigating conditions and the whole-person concept in light of all the facts and circumstances surrounding this case.

Applicant leaves me with questions about her eligibility and suitability for a security clearance. For these reason, I conclude that Applicant has not mitigated the security concerns arising under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct.

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is 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 H (Drug Involvement):	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c – 1.f:	Against Applicant
Paragraph 2, (Personal Conduct)	Against Applicant
Subparagraphs 2.a – 2.b:	Against Applicant
Paragraph 3 (Criminal Conduct)	Withdrawn
Subparagraph 3.a:	Withdrawn

Philip J. Katauskas
Administrative Judge