



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 23-00070
)
Applicant for Security Clearance)

Appearances

For Government: Patricia Lynch-Epps, Esq., Department Counsel
For Applicant: *Pro se*

02/01/2024

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to deny her eligibility for a security clearance to work in the defense industry. While the record does not contain sufficient evidence of intentional falsification, her long history of recreational marijuana use remains a concern. Clearance is denied.

Statement of the Case

On January 24, 2023, the DOD issued a Statement of Reasons (SOR) detailing security concerns under the drug involvement and substance misuse and personal conduct guidelines. This action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated 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*, implemented on June 8, 2017. DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant’s security clearance and

recommended that the case be submitted to an administrative judge for a determination whether to deny her security clearance.

Applicant answered the SOR and requested a decision without a hearing. (Government Exhibit (GE) 2) The Government submitted its written case, a file of relevant material (FORM), on March 30, 2023. She received a complete copy of the file of relevant material on April 3, 2023. In the FORM, the Government informed Applicant that it was offering the summaries of her two July 2022 subject interviews with a background investigator into evidence. The Government advised Applicant of her ability to object to, correct, add, delete, or update the information in the subject interview summary. The Government further advised her that failure to respond could result in a determination by the administrative judge that she waived any objection to the document's admissibility. She did not respond. Accordingly, the documents appended to the FORM, including the summary, are admitted as GE 1 through 5, without objection.

Findings of Fact

Applicant, 43, applied for access to classified information in June 2022. On the security clearance application, she indicated that she had not been previously investigated for or granted security clearance eligibility or access. However, in February 2015, she applied for public trust eligibility in connection with her work on a federal contract. It is unclear if the public trust eligibility application was adjudicated to completion. (GE 3,5)

On the February 2015 public trust application, she responded to 'Section 14: Illegal Drug Use,' that she had not used, possessed, supplied, or manufactured illegal drugs in the last year. (GE 5) On her June 2022 security clearance application, she disclosed in response to 'Section 23: Illegal Use of Drugs or Drug Activity,' that her first use of marijuana occurred in May 1998 and her last use occurred in November 2021. She provided the following information about the nature, frequency, and number of times she used the drug:

2018-2020: The recent use of marijuana was once a month, on a weekend, over a span of two years, starting around 2018 purchased from a dispensary in [City 1].

2020-2021: Since 2020, I had two small occurrences with an old friend. Since then, I have had nothing.

1998-2002: Before that, I had a very long break of ever using since college. I smoked marijuana in college and stopped before graduation as I was becoming a certified teacher. (GE 3)

Applicant's employment disclosures start in 2012. She worked on a federal contract between January 2015 and October 2018. Between October 2018 and October 2020, she worked as a science specialist at school. With respect to her future use of marijuana, she disclosed that she did not "condone this drug anymore." She no longer

considered the drug good for her personal health. She also indicated that she stopped using the drug in 2020 with the intent and the goal to work for the government. (GE 3)

A background investigator interviewed Applicant twice in July 2022. In the first interview, she confirmed the disclosures on her June 2022 security clearance application as correct. She explained that she used marijuana because she saw it as a healthier alternative to relieve stress as compared to alcohol, and because it was becoming legal in the state where she lived. In the second interview, she indicated her family and friends were aware of her marijuana use and that it could not be used as a point of exploitation or vulnerability. She also stated her intent to abstain from marijuana use in the future, and that she no longer associated with individuals who used illegal drugs. She did not make any changes or correction to her prior disclosures about her history of illegal drug use. (GE 4)

The SOR alleges that Applicant used marijuana between May 1998 and November 2021, as she disclosed on her June 2022 security clearance application. (SOR ¶ 2.a) The SOR also alleges that she intentionally falsified her February 2015 application for public trust eligibility by stating that she had not used illegal drugs within the year of the application. (SOR ¶ 1.a) She denied both allegations, explaining that she did not use marijuana in the year before she completed the public trust application. She also explained that her disclosures about her drug use on the security clearance application lacked specificity. She offered that she used the drug between 1998 to 2002, and again between 2018 to 2020. She explained that her use was infrequent and for spiritual and creative purposes for her yoga and art practices. She also indicated, for the first time, that the period of marijuana use she disclosed also had long period of abstinence, from 2002 to 2017 and again from 2020 to 2022. (GE 1-2)

Policies

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 to be 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, administrative judges apply the guidelines 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.

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 the 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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

Drug Involvement and Substance Misuse

Based on the disclosures on her June 2022 security clearance application and her confirmation of those disclosures in her first July 2022 subject interview, the SOR alleges that Applicant used marijuana with varying frequency between May 1998 and November 2021. The illegal use of controlled substances can raise questions about an individual’s reliability and trustworthiness 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) Applicant’s disclosures establish the Government’s *prima facie* case. The following disqualifying conditions apply:

AG ¶ 26(a) any substance misuse; and

AG ¶ 26(c) illegal possession of a controlled substance, including cultivation, processing manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

None of the applicable mitigating conditions apply. Even though Applicant’s last reported illegal drug use occurred in March 2021, the conduct is not mitigated by the passage of time. This period of abstinence is not sufficient given the recency and

circumstances of her drug use, which were purely recreational. Her statements that she will not use again are not credible. On her June 2022 security clearance application, Applicant provided two reasons for abstaining from future use of marijuana, becoming a teacher and her desire to obtain work on a federal contract. However, after attaining each of these goals, she resumed marijuana use. Based on her disclosures, she used marijuana after completing an application for public trust in February 2015 and while working on a federal contract between 2015 and 2018. She also used the drug between October 2018 and October 2020, when she worked in a school. The Applicant also resumed use of the drug after long periods of abstinence. Given her history of use, I cannot conclude that future use of marijuana is unlikely to recur.

Personal Conduct

The SOR alleges that Applicant intentionally falsified material facts on a February 2015 application for public trust eligibility when she indicated that she had not used or possessed illegal drugs in the year before completing the application. This disclosure seemingly conflicted with her disclosure on the June 2022 security clearance application that she used marijuana with varying frequency between May 1998 and November 2021. A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

The SOR allegation relies on the impermissible inference drawn when comparing the disclosures on Applicant's February 2015 and June 2022 applications. The inference assumes that she used marijuana with regular frequency during the disclosed time frame – an assumption that is directly refuted by the record. The SOR also relies on the assumption that if she used the drug between 1998 and 2021, she must have used the drug between 2014 and 2015. There is no evidence that the 2015 disclosure was not true. Accordingly, the falsification allegation is resolved in Applicant's favor.

Whole-person Concept

Based on the record, doubts remain about Applicant's current security worthiness. This decision is not changed by a consideration of the facts under the whole-person factors listed in AG ¶ 2(d). Given Applicant's long history of marijuana use, she failed to meet her burdens of persuasion and production to mitigate the alleged concerns.

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, Drug Involvement and Substance Misuse:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Personal Conduct:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for continued access to classified information is denied.

Nichole L. Noel
Administrative Judge