



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



In the matter of:)
)
) ISCR Case No. 22-01722
)
Applicant for Security Clearance)

Appearances

For Government: Cynthia, Ruckno, Esq., Department Counsel
For Applicant: Daniel P. Meyer, Esq.

05/03/2024

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant has provided sufficient evidence to mitigate the national security concern arising from her drug involvement and substance misuse. Applicant’s eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted her security clearance application (SCA) on September 7, 2021. On November 14, 2022, the Department of Defense (DOD) sent Applicant a Statement of Reasons (SOR) alleging that her circumstances raised security concerns under Guideline H (drug involvement and substance misuse). This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). The *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on June 8, 2017, apply here.

Applicant answered the SOR on November 15, 2022 (Answer) and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 23, 2023. The case was assigned to me on September 8, 2023. On March 1, 2024, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted in person on April 4, 2024. I convened the hearing as scheduled. Government Exhibits (GE) 1 through 4 were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through H and Hearing Exhibit 1 (Brief of Applicant's Counsel), which were admitted without objection. DOHA received the transcript (Tr.) on April 16, 2024.

Findings of Fact

Applicant is 29 years old, never married, and has had a cohabitant since June 2021. They own a townhouse together. Applicant has a degree in Chemical Engineering (May 2016) and is enrolled in a Master's in Business Administration program that she will complete in December 2024. Since July 2021, she has worked for a defense contractor. Between October 2016 and July 2021, she worked for two defense contractors. She was granted a Secret clearance in October 2017 by DOD and eligibility for a Public Trust position by another government agency (AGA) in March 2020. (GE 1; Tr. 18-19.) She now seeks eligibility for a Top Secret clearance. (Tr. 42.)

Under Guideline H, the SOR alleged that Applicant used marijuana from about June 2020 to about August 2021 on approximately five occasions after being granted access to classified information. (SOR ¶ 1.) She admitted the allegation. (Answer.)

Applicant completed her first SCA on October 31, 2016. (GE 3.) GE 3, page 27, asked about illegal use of drugs. She responded in the negative. She completed her second SCA on November 15, 2019. (GE 2.) GE 2, page 16, asked about illegal use of drugs. She responded in the negative. She completed her most recent SCA on September 7, 2021. (GE 1.) GE 1, pages 35-37, asked about illegal use of drugs. She responded that: "Tried it once when legalized in [Jurisdiction # 1]. When [Jurisdiction # 2] legalized it, I consumed it 4x." She gave the first use as in June 2020 and her second use as in August 2021.

At hearing, Applicant testified first about her family life. Her family is her mother and a younger brother who is 27 years old. Her father died of cancer when she was 21 and a junior in college. Her mother works for a minimum wage. She knew right away that she was the breadwinner and would have to go to work as soon as she graduated. As the head of the household, she managed her family finances. Her father left a rental property that she also managed. Upon graduation, her job opportunities were limited. There were many "tech jobs and government contracting" jobs but "nothing of chemical engineering of the sorts." A neighbor referred her to the neighbor's company, and "that's how [she] got into [her] career as an IT Project Management Professional." (Tr. 19.)

Applicant testified about her overall orientation in DOD personnel security programs. She did not really receive any training on her clearance program at all: "It was

just fill out the forms, and that was it, and wait for the process to begin. It was mostly to ensure that you're a U.S. citizen, that you don't have foreign contacts that can make me look like a spy, or any financial problems, and never covered any personal conduct such as marijuana use." (Tr. 20-21.)

Applicant testified about her first use of marijuana, in June 2020. She was at a friend's party in U.S. Jurisdiction #1, where marijuana was legal. She met acquaintances who were using marijuana. She was ignorant about "the fact that marijuana is federally illegal." "So, in that environment, we're all trying to have a good time. So I was being agreeable and pressured socially to use marijuana." (Tr. 21.) Her second use of marijuana was also at a party, in August 2021 in U.S. Jurisdiction #2, where marijuana was legal. She "didn't think it was harmful . . . so that's how those incidents happen." (Tr. 21-22.)

Applicant testified about how she learned that marijuana was federally illegal. While applying for her current clearance [September 2021], her company facility security officer (FSO) "helped review [her] application before submission . . . and educated [her] about marijuana use as a contractor." That was when she learned that marijuana use was federally illegal. Her first application was in 2016. (Tr.22-24.)

Applicant first got a clearance in 2016 at a previous company that was very small with less than ten employees. "[I] was probably the first young employee going through their first clearance, so maybe they didn't mention to me . . . you shouldn't be doing marijuana." Now she is working for a different company that: "[H]ad more experience as an FSO. That is their only role. So they did a better job educating me about what to do – and what not to do when I have a clearance or going through for a clearance." (Tr. 25-26.)

Applicant testified how her life has changed since 2021. She was younger then, living with her family, liked to go out more often, and hang out with friends. But she bought a townhouse with her current significant other and does not really hang out with people outside of work and a small group of friends. She avoids people and environments where drug misuse could happen. She no longer associates with acquaintances who use marijuana. Her current friends do not use or get involved with marijuana or any type of drugs. Her cohabitant and friends are aware of her work and clearance situation. (Tr. 26-28.)

Applicant testified that she understood her Statement of Intent not to use: Any future drug misuse would make her ineligible for a clearance, and a current clearance could be revoked. (Tr. 28.) AE H is Applicant's Statement of Intent Not To Abuse Any Drugs dated March 31, 2024. AE C is a Declaration of Applicant dated March 21, 2024, that describes a Statement of Intent she signed on October 5, 2022. That Statement is attached as part of GE 4.

Applicant testified about why she wants to maintain her eligibility for access to classified information with Government. She answered that she has worked for three different Government agencies, military, civilian, and intelligence. She takes pride in and

values her work and her contributions to this country. She realizes the seriousness and the nature and extent her conduct. She has abstained since 2021. (Tr. 29-30.)

Applicant testified about her SCA in October 2016, which was for a Secret clearance. This was her very first SCA. It was very long, and she made sure she filled it out thoroughly. She recalled the questions about drug use. She did not know how many, but there were "a lot." She agreed that use of drugs was not compatible with a clearance. (Tr. 31-32.)

Applicant testified about her first job. She did not have to do any screening like a drug test. Her employer did not have a drug policy that she was aware of. (Tr. 32-33.)

Applicant confirmed that her first use of marijuana was in Jurisdiction #1. She did not recall when she first learned that marijuana was legal in Jurisdiction #1; she just knew it was. It did not occur to her at all to inquire whether it was legal in Jurisdiction #1 and was permissible for her to use it as a clearance holder. She is not a legal expert and assumed that if it was legal in Jurisdiction # 1, it was legal anywhere in Jurisdiction # 1. She was 25 when she first used marijuana. (Tr.33-34.)

Applicant testified about her first employment position. She was asked whether she received any sort of training on having a clearance. She answered "Not at all." She worked there from 2016 to 2021, and no one ever sent her emails or communications saying "even though it's legal in [Jurisdiction \$1] it's not legal for you." (Tr. 34.)

Applicant testified about the two incidents where she used marijuana. The marijuana was there at a party. Someone brought it in. Those present were acquaintances of mutual friends, not friends of hers. They just offered it to her, and she "didn't think twice about it." At the time, she was not worried that the marijuana could have been laced with something. (Tr. 35.)

Applicant testified that the people she now socializes with do not use marijuana to her knowledge. Her cohabitant does not use marijuana. She's worked for her current employer for two years and nine months. It does not have any sort of drug testing as part of the onboarding process. It does not have any sort of drug free workplace policy that she is aware of. (Tr 35-36.)

Applicant testified about the materials she works with in her current position. The materials she works with are stamped with FOUO [For Official Use Only]. She does not now work with any Secret or classified information. FOUO is now called CUI [Controlled Unclassified Information]. She now works only with CUI, because she does not have the Top Secret clearance she needs. In previous employment positions, she did, however, work with Secret and Confidential information. (Tr. 40-42.)

Applicant testified that she signed a nondisclosure agreement with her current employer in July 2021 respecting classified information. She also testified that she had annual training in need-to-know. She does not work inside a secure facility, because she

does not have a clearance to go inside it. She works in an unclassified area next to the secure facility. (Tr. 42-44.)

Applicant testified about the April 1, 2024 ASAM Criteria's Strength-based Multidimensional Assessment by Ms. Alpha Bravo, Licensed Professional Counselor, National Certified Counselor (Assessment) (AE G). This was her first time with a counselor or a therapist. She found Ms. Bravo online and then contacted a local clinic which referred her to Ms. Bravo, who specialized in substance abuse. Ms. Bravo saw many patients with cases like hers, those who worked for the federal Government and experienced problems like hers. Ms. Bravo looked to be in her 30s or 40s and had perhaps at least 10 years of experience with a wide range of expertise. (Tr. 38-39.)

Applicant scheduled an assessment with Ms. Bravo. They met in Ms. Bravo's office for about a half an hour. (Tr. 38-39.) Ms. Bravo educated her about substance abuse, not limited to marijuana but alcohol as well. She was also educated about mental health. Ms. Bravo conducted an assessment of her mental well-being and whether or not she had a substance abuse disorder. Ms. Bravo stated in her assessment that she did not have a mental health disorder nor a substance abuse disorder. (Tr. 29.)

Ms. Bravo's Assessment reached the following conclusions:

After my evaluation and discussion with Applicant, it is to the best of my knowledge that the circumstances which contributed to her previous marijuana use were related to recreational use and not a substance abuse disorder . . . Additionally, Applicant shared that she has a positive support system and exhibits a strong ability to navigate challenges that present themselves. She currently does not meet the criteria for any DSM-V diagnoses; therefore, my recommendation is for Applicant to continue with the pursuit of her career goals.¹ (AE G.)

Applicant submitted five Declarations of Support as character references. (AE D.) The Declarants have known her from as far back as 2006 and as currently as 2022. They have known her on personal, professional, and educational levels, and in some cases in more than one of those environments. They uniformly attest to her as being responsible, reliable, trustworthy, with integrity and sound judgment.

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).

¹ Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V).

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines. These 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.

Analysis

Guideline H: Drug Involvement and Substance Misuse

Under AG H, illegal drug use may raise questions about a person's ability or willingness to comply with laws, rules, and regulations. AG ¶ 24 sets forth the concern, as follows:

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.

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions:

AG ¶ 25(a) any substance misuse (see above definition); and

AG ¶ 25(f) any illegal drug use while granted access to classified information or holding a sensitive position.

The potentially applicable mitigating conditions here are quoted below:

AG ¶ 26(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

AG ¶ 26(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.

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.

Applicant admitted in her most recent SCA that she used marijuana once at a social gathering in June 2020 and four times at a social gathering in August 2021. She also admitted in her Answer the sole SOR allegation, including that her usage was "after being granted access to classified information." And at hearing, she testified that during previous employments she worked with Secret and Confidential materials. Therefore, AG ¶ 25(a) applies. The question is whether any mitigating conditions apply.

I considered mitigating condition AG ¶ 26(a). In Applicant's prior defense contractor employments, she did not receive much training on the DOD security clearance programs. They focused on U.S. citizenship, foreign contacts, and financial problems. Marijuana use was never covered at all. It was with that lack of information that she used marijuana in the first instance in June 2020 in a jurisdiction where marijuana was legal. It was a social gathering, and she was offered the marijuana by an acquaintance of a mutual friend. At that time, she did not know that marijuana was federally illegal. It was a similar circumstance in August 2021, when she used marijuana a second time, at a social gathering in a jurisdiction where marijuana was also legal.

In fact, she first learned that marijuana was federally illegal only when her current FSO reviewed her most recent SCA (September 2021). As expected from a trained chemical engineer, she quantified her first use as "once" and her second use as "4x." She is not a serial drug user and has no history of any prior illegal drug use. The record shows, her marijuana use was minimal and infrequent, is highly unlikely to recur, and does not cast doubt on her suitability for a national security clearance. Her marijuana use is mitigated by AG ¶ 26(a).

I considered mitigating condition AG ¶ 26(b). Applicant has satisfied the threshold requirement. She acknowledged her drug use in her SCA, in her Answer, and in her testimony during the hearing. She also testified that she no longer associates with drug using individuals. Applicant testified that the people she now socializes with do not use marijuana to her knowledge. Her cohabitant does not use marijuana. She submitted two signed statements that comport with AG ¶ 26(b)(3). Her marijuana use is mitigated by AG ¶ 26(b).

The SOR did not plead that Applicant engaged in "illegal drug use *while granted access to classified information.*" (Emphasis added.) Therefore, AG ¶ 26(f) does not apply. In any event, in ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022), the Appeal Board held that access to classified information has two elements in addition to eligibility. They are that: (1) an applicant must have signed a nondisclosure agreement (NDA); and (2) an applicant must have a need-to-know (NTK). Here, she has signed an NDA and has taken NTK training, but she is not allowed to work with classified information. She works only with CUI, because she lacks the necessary security clearance. Nor can she enter her employer's secure facility, because she lacks the required clearance. She does not currently have access to classified information. Thus, the record would not support an AG ¶ 26(f) allegation.

Whole-Person Concept

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. 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.

I have incorporated my comments under Guideline H in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under that guideline and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by drug involvement and substance misuse.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H	FOR APPLICANT
Subparagraph 1.a:	For Applicant

Conclusion

I conclude that it is clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Clearance is granted.

Philip J. Katauskas
Administrative Judge