



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



In the matter of:)	
)	
)	ISCR Case No. 23-02381
)	
Applicant for Security Clearance)	

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

05/02/2024

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant did not mitigate the drug involvement and substance misuse security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On October 30, 2023, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse). The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; 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 submitted a response to the SOR (Answer) on December 1, 2023, and elected to have the case decided on the written record in lieu of a hearing. The Government's written case was submitted on January 3, 2024. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the

security concerns. Applicant received the FORM on January 12, 2024, and she responded on January 18, 2024 (FORM Response). The case was assigned to me on April 1, 2024. The Government's documents identified as Items 1 through 8 and Applicant's FORM Response are admitted in evidence without objection.

Findings of Fact

Applicant admitted both SOR allegations in her Answer, with explanations. She is 36 years old. She is married and does not have any children. (Items 1, 3-4, 7)

Applicant graduated from high school in 2006. She attended college from 2006 to 2012 but did not earn a degree. She enlisted in the U.S. Navy in July 2013 and was discharged under other than honorable (OTH) conditions in September 2022 for misconduct – commission of a serious offense. She has since worked as an engineer analyst for her employer, a defense contractor. She was granted eligibility for a security clearance in 2013 while serving in the Navy. (Items 4-8)

When Applicant enlisted in the Navy, she signed a "Drug and Alcohol Abuse Statement of Understanding," in which she acknowledged the Navy's zero tolerance policy toward drug and alcohol abuse. In March 2014, she signed a non-disclosure agreement (NDA) after she was granted eligibility for a security clearance. From about March 2022 to June 2022, she purchased and used products containing tetrahydrocannabinol (THC), the active ingredient in marijuana, while holding a sensitive position. (SOR ¶ 1.a) She failed a urinalysis test in about March 2022 when she tested positive for THC. (SOR ¶ 1.b) (Items 1, 3-5, 7-8)

In June 2022, nonjudicial punishment (NJP) was imposed on Applicant for violation of UCMJ Article 92, failure to obey a lawful general order, by wrongfully using THC eight (THC 8). She was placed on restriction for 45 days with 15 days suspended for six months, extra duty for 45 days with 15 days suspended for six months, reduction in paygrade from E-5 to E-4, and forfeiture of \$500 for two months. She was also discharged from the Navy under OTH conditions for misconduct. (SOR ¶ 1.b; Items 1, 3-5, 7-8)

Military records reflect that Applicant tested positive for THC 8 at 50 ng/mL from a urinalysis conducted in March 2022. During the disciplinary review board, she explained she did not want to reenlist but her spouse, who is in the military, convinced her to do so. She stated she started to feel alone and decided to use cannabidiol (CBD) in hopes of getting kicked out of the Navy. During executive officer's inquiry, she explained she was going through a lot and felt overwhelmed. She also acknowledged that her actions set a very poor example for the junior sailors in her department. (Item 7)

Applicant disclosed information about her positive drug test and her consequent Navy discharge during her July 2023 interview with an authorized DOD background investigator and in her October 2023 response to interrogatories. In contrast to the explanations she provided during her Navy disciplinary proceedings, she claimed she was suffering from joint pain and attempted to self-medicate to avoid having to take

prescription medication by using CBD edibles. She bought the CBD edibles, which were advertised for pain relief, at local smoke shops off base and she took them daily from about March 2022 to June 2022. She indicated she did not believe the edibles contained enough THC to test positive on a drug test and she is aware that the use of marijuana is federally prohibited. After testing positive for THC on her urinalysis test, she stated she researched the ingredients in the CBD edibles and learned they contained 0.3% THC, or “a low[-]grade THC.” She indicated this was the first time she engaged in the use of any drugs, she did not use any edibles after she was notified of her positive drug test results in June 2022, she had no future intent to use drugs, and she does not associate with individuals who use illegal substances. (Item 5)

Applicant signed a statement of intent to abstain from all illegal drug involvement and that any violation would be grounds for the revocation of her national security eligibility. She expressed remorse for her conduct. (FORM Response)

Applicant’s evaluation reports and counseling records for the periods from March 2014 to March 15, 2022, reflected that she was an exemplary sailor. She received the National Defense Service Medal in July 2013, the Good Conduct Medal for service from October 2013 to October 2019, the Navy and Marine Corps Overseas Service Ribbon for service from September 2018 to September 2020, and the Navy and Marine Corps Achievement Medal recognizing her service from September 2018 to September 2021. Her evaluation reports and counseling records from March 2022 to August 2022 reflect her June 2022 NJP and consequent OTH discharge from the Navy, noting that she “failed to align with Navy regulations and failed to uphold Navy core values.” (Items 5, 7)

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.” 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

Guideline H, Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern pertaining to drug involvement and substance misuse as:

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant: “(a) any substance misuse . . . ;” “(b) testing positive for an illegal drug;” “(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;” and “(f) any illegal drug use while granted access to classified information or holding a sensitive position.”

Applicant used CBD edibles containing THC from March 2022 to June 2022, while holding a sensitive position in the Navy, and she tested positive for THC in March 2022. AG ¶¶ 25(a), 25(b), 25(c), and 25(f) are established.

AG ¶ 26 provides the following potentially relevant mitigating conditions:

(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:

(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.

Applicant provided a signed statement of intent to abstain from all illegal drug involvement and that any violation would be grounds for the revocation of her national security eligibility. AG ¶ 26(b)(3) partially applies. However, she has not yet established a pattern of abstinence since her last use in June 2022 of CBD edibles containing THC and her consequent positive drug test. In addition, the conflicting explanations she provided during the military disciplinary review board, executive officer's inquiry, and her background interview about the circumstances surrounding her decision to use CBD edibles containing THC continues to cast doubt about her current reliability, trustworthiness, and judgment. More time is necessary to establish her future abstinence from marijuana use and possession. None of the mitigating conditions are established.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The 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.

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. I considered the potentially disqualifying and mitigating conditions in light of all the facts and

circumstances surrounding this case. I have incorporated my comments under Guideline H in this whole-person analysis. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the drug involvement and substance misuse security 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, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Candace Le'i Garcia
Administrative Judge