



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 23-00495
)
 Applicant for Security Clearance)

Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: Eric R. Duncan, Esq.

05/21/2024

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 15, 2022. On June 6, 2023, the Defense Counterintelligence and Security Agency Consolidation Adjudication Services (DCSA CAS) sent her a Statement of Reasons (SOR) alleging security concerns under Guidelines H (Drug Involvement and Substance Misuse) and E (Personal Conduct) The DCSA CAS acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), which became effective on June 8, 2017.

Applicant answered the SOR on August 1, 2023, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 2, 2023, and the case was assigned to me on February 29, 2024. On March 11, 2024, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on April 23, 2024. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified, presented the testimony of four witnesses, and submitted Applicant's Exhibits (AX) A through M, which were admitted without objection. DOHA received the transcript (Tr.) on May 2, 2024.

Findings of Fact

In Applicant's answer to the SOR, she admitted the allegations in the SOR. Her admissions are incorporated in my findings of fact.

Applicant is a 26-year-old systems engineer employed by defense contractors since September 2019. In college, she majored in aerospace engineering and minored in mathematics. She received a bachelor's degree *cum laude* in May 2019. She received a security clearance in September 2019. She is currently pursuing a master's degree in systems engineering.

When Applicant submitted her SCA in April 2019, her answers to some of the questions were extensive and detailed. She listed all her full-time and part-time jobs while in college. (GX 2 at 14-20) She listed extensive foreign travel (GX 2 at 46-64) and numerous foreign friends and contacts (GX 2 at 27-43). She responded "No" to the question in Section 23 of the SCA, asking if she had illegally used any drugs or other controlled substances in the last seven years. (GX 2 at 68)

When Applicant submitted another SCA in June 2022, she disclosed that she used marijuana with varying frequency from about May 2016 to February 2022 and that she used ecstasy at least twice from May 2021 to at least August 2021, while granted access to classified information. (GX 1 at 81-82) In her response to the SOR, she admitted that she used ecstasy after she was granted access to classified information. She admitted that she used marijuana while in college during the summers but refrained from using it during the school year. She admitted that she used ecstasy twice in 2022, once at a party and once at a concert, because of curiosity and a desire for a new experience.

When Applicant was interviewed by a security investigator in August 2022, she told the investigator that she used marijuana and ecstasy with friends, including her current boyfriend. (GX 3 at 9-10) At the hearing, she estimated that she used marijuana 30 to 40 times during a six-year period. (Tr. 75) She last used marijuana in February 2022. (Tr. 88)

In Applicant's answer to the SOR, she stated that she was surprised and confused when she reviewed her 2019 SCA. She described her failure to disclose her drug use as an "oversight," and she attributed it to being young, naive, and afraid. At the hearing, she

testified that she was “genuinely surprised” when she saw her answer to the question about illegal drug use in her 2019 SCA.

At the hearing, Applicant admitted that she used illegal drugs while she had access to classified information. She also admitted that she knew she was required to self-report her illegal drug use. She explained that she believed her personal life and her professional life were “two completely different worlds,” and she was nervous about the implications of reporting her drug use because she knew she would lose her job. (Tr. 77)

Applicant has moved away from the college community where much of her drug use occurred. She occasionally associates with individuals with whom she previously used illegal substances, but she has informed them that she will not engage in any future illegal drug use. She testified that she has established a “hard boundary” with her friends, and she will excuse herself from any environment where illegal drugs are being used. (Tr. 82)

Applicant began dating her current boyfriend in 2017. They began living together in September 2022. (Tr. 86) She testified that her live-in boyfriend still uses marijuana, which is legal in the jurisdiction where they live, but that she has set a “hard boundary,” prohibiting him from keeping or using marijuana in the apartment, and her boyfriend has agreed to respect it. (Tr. 91-92)

On July 12, 2023, she submitted a statement of intent to refrain from using, purchasing, or being involved with illegal drugs, and she acknowledged that a future involvement in illegal drug use may be grounds for revocation or denial of national security eligibility. (AX I) At the hearing, she submitted negative drug test results from July 2023, November 2023, and March 2024. (AX J, K, and L) She also submitted a certificate reflecting her completion of a drug and alcohol awareness class (AX M)

A coworker who has known Applicant for about a year and holds a top secret clearance testified that Applicant’s commitment to protecting classified information is very strong, that she is dedicated to maintain protocol and knowledgeable in ways to control discussions to protect classified information. Applicant admitted to her that she had used drugs while holding a clearance. The coworker believed that it was a difficult conversation, and that Applicant was remorseful for her behavior. She believes that Applicant has learned from her mistakes, and that she can be trusted with classified information. (Tr. 18-26)

A senior officer of a major defense contractor testified that he met Applicant when he was running an elite hiring program that accepts only about one percent of applicants. He personally interviewed Applicant and monitored her while she was in the program, which required access to classified projects. He regarded her as one of the best participants in the program. He considers her a very honest and straightforward person. He believes that she is very remorseful for falsifying her SCA. He believes that she is not upset because she was caught, but because it affects people’s trust in her character. He

believes that she no longer has a college-student mentality and that she is now a mature career professional who has the interests of our nation at heart. (Tr. 33-50)

A former coworker who has held a clearance for 17 years testified that he worked with Applicant on classified projects and that she was very proactive in protecting classified information. He considered Applicant a “top performer,” a hard worker, detail-oriented, and “a joy to be around as a coworker.” He considered her trustworthy, honest, and forthcoming. When Applicant disclosed the issues regarding her security clearance, she was disappointed in herself and deeply regretted her mistakes. He has no doubts about her professional or personal judgment and would trust her to work again in a classified environment. (Tr. 111-19)

Applicant’s father is retired from a career in the health care business. He testified that Applicant was a hard worker and a dedicated athlete in college, with strong religious beliefs and “core middle class values.” He testified that he was “floored” when Applicant told him about her drug involvement. He believes that Applicant is remorseful, has matured, and has learned from her mistakes. (Tr. 55-62)

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.” *Id.* 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.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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.” Exec. Or. 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. See *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. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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. See 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.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The SOR alleges that Applicant used marijuana with varying frequency from about May 2016 until at least February 2022, including times when she was granted access to classified information. The security 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 admissions and the evidence submitted at the hearing establish the following disqualifying conditions under this guideline:

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

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

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

The following mitigating conditions are potentially applicable:

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.

The first prong of AG ¶ 26(a) (happened so long ago) focuses on whether the drug involvement was recent. There are no bright line rules for determining when conduct is recent. The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without any evidence of misconduct, then an administrative judge must determine whether that period of time demonstrates changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

The period of time from February 2022 until the present is a “significant period of time.” During that time, she submitted another SCA in June 2022, was interviewed by a security investigator in August 2022, received the SOR in June 2023, and has been awaiting the outcome of the hearing that was held on April 2024. In short, she has been living under a microscope while trying to overcome the security concerns raised by her drug abuse. She has also continued to associate with drug-using friends and living with her marijuana-using boyfriend. Under these circumstances, the period of time between

February 2022 until the present is not sufficient to warrant a finding of reform or rehabilitation. Based on the evidence, I conclude that Applicant's drug abuse was recent, frequent, and did not occur under circumstances making it unlikely to recur.

AG ¶ 26(b) is not fully established. Applicant provided a signed statement of intent in accordance with AG ¶ 26(b)(3) and she has changed her environment, moving from the college town where much of her drug abuse occurred, but she continues to associate with drug users, including her live-in boyfriend.

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified her 2019 e-QIP by answering "No" to the question whether, during the last seven years, she had used any illegal drugs or controlled substances. The security concern under this guideline is set out in AG ¶ 15:

Conduct 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

The relevant disqualifying condition is AG ¶ 16(a):

[D]eliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

Although Applicant admitted the allegation in SOR ¶ 2(a) in her response to the SOR, her admission was equivocal, describing her failure to disclose her drug use as an "oversight." At the hearing, she testified that she was "genuinely surprised" when she saw her answer to the question about illegal drug use in her 2019 SCA. These explanations for not disclosing her drug involvement are inconsistent with her careful and detailed responses to other questions in the SCA. I am satisfied that the documentary evidence and Applicant's reluctant and equivocal admissions are sufficient to establish AG ¶ 16(a).

The following mitigating conditions are potentially applicable:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances

that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

AG ¶ 17(a) is not established. Applicant's correction of her earlier omission was not prompt. While she was not confronted with the facts, she was confronted with the decision whether to continue "living a lie" or being truthful in her 2022 SCA. To her credit, she chose to be truthful.

AG ¶ 17(c) is not fully established. Applicant's falsification was arguably infrequent, but it was recent and did not happen under unique circumstances. It was not "minor." Intentional falsification of an SCA is a violation of 18 U.S.C. §1001, a serious offense punishable by up to five years in prison, and it "strikes at the heart of the security clearance process." ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.)

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. In applying the whole-person concept, an 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. 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 Guidelines H and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by her drug involvement and personal conduct.

Formal Findings

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

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant

