



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



In the matter of:)
)
) ISCR Case No. 23-00639
)
Applicant for Security Clearance)

Appearances

For Government: Daniel P. O’Reilley, Esq., Department Counsel
For Applicant: *Pro se*

06/13/2024

Decision

HALE, Charles C., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 31, 2022. The Department of Defense (DoD) sent her a Statement of Reasons (SOR) dated May 12, 2023, alleging security concerns under Guideline H. The DoD acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, National Security Adjudicative Guidelines (December 10, 2016).

Applicant answered the SOR on May 19, 2023, and requested a decision on the written record without a hearing. Department Counsel issued the Government’s file of relevant material (FORM) on June 28, 2023, including documents identified as Items 1 through 4. Applicant submitted a Response that was received on August 17, 2023, which

include Applicant exhibits (AE), an undated statement, (AE A), a drug test (urine) dated July 26, 2023 (AE B), a drug test (hair) dated August 7, 2023 (AE C), state government email cancelling her medical marijuana card dated July 24, 2023 (AE D), a character letter from work colleague (AE E), and a letter from her treating therapist dated August 11, 2023 (AE F). The case was transferred to me from another Administrative Judge on June 10, 2024.

The SOR, Applicant's Answer (FORM Items 1 and 2), and her August 2023 Response are the pleadings in the case. FORM Items 3 and 4 and AE A through AE F are admitted into evidence without objection.

Findings of Fact

Applicant is a 32-year-old employee of a defense contractor. She has never held a security clearance. She divorced after six years of marriage in July 2022. She earned a bachelor's degree in 2010. (Item 3.)

In Applicant's Answer to SOR ¶¶ 1.a-1.c, she admits the allegations with explanations.

SOR ¶ 1.a alleges that from about October 2011, until at least April 2023, Applicant used marijuana with varying frequency and that she intended to continue to use marijuana in the future. SOR ¶ 1.b alleges Applicant from November 2020 until about April 2023, purchased marijuana on various occasions. Given the overlapping periods, the allegations are addressed together. Applicant in her security clearance interview told the investigator her marijuana use prior to November 2020 was with friends and her spouse. She did not personally purchase the marijuana but would contribute to someone else's purchase. During this period of her life, she described it as common amongst her friends. After November 2020 she obtained a medical marijuana card. (Item 4 at 5.) She used marijuana to treat PTSD, depression, and anxiety related to her position in a rehabilitative center as a physical therapist assistant. During the time period, November 2020 until about April 2023, she had a medical marijuana card and made her purchases at a state-approved marijuana dispensary. She used the marijuana to treat her PTSD, depression, anxiety, and ADHD. The PTSD developed from her position as a physical therapist assistant at a rehabilitative center and the deaths she dealt with during the COVID pandemic. She has stopped marijuana use because of the security clearance application process and sought a different treatment plan.

Applicant has changed her social situation by her divorce and a move to a new city, which resulted in removing people from her life that used marijuana. With her divorce and move, she removed herself from the environment where marijuana had been commonplace and there had been pressure to fit in. Her friend network has changed because of her move. She no longer has that pressure and has no further contact with them. She had her medical marijuana card canceled on July 24, 2023. (Item 3; Item 4 at 5-6; AE D; Answer; Response.)

Applicant states in her Answer that since starting treatment with a mental health therapist at the end of April 2023 she has not used marijuana and does not intend to return to the use of marijuana. She notes the current treatment plan with her therapist is working well and has provided her with other symptom management techniques and options. She has been meeting with her therapist and affirms her intent to continue to meet with this healthcare provider on a weekly basis to continue with her treatment. (Answer; Response; AE F.) Her therapist notes Applicant has utilized recommended tools and coping strategies to lessen stress and help with overall functioning. She notes Applicant has recognized that her past decisions on using marijuana have hindered the possibility of her getting a security clearance and she has now prioritized her job and does not want anything to get in the way of it. (AE F.) After Applicant's move to her current city, she has experienced a significant improvement in her mental health. It has further improved with her ongoing treatment, and she no longer uses marijuana as a medication. (Answer; Response.) Her divorce also improved her mental health, and she is now in a stable relationship.

Applicant offered two negative drug tests to demonstrate that she has stopped using marijuana. One was a urine test collected on July 25, 2023. (AE B.) The other test was a hair test obtained on August 4, 2023. (AE C.)

SOR ¶ 1.c alleges from about August 2021 until about April 2023, Applicant was employed by a business that sells marijuana. She admits the allegation and voluntarily disclosed her work at the marijuana dispensary on her SCA. She worked the front desk and checked identification at the dispensary. (Item 3; Item 4 at 12.)

Applicant submitted a letter of reference from her current foreman. He cites her positive attitude and readiness to work. He describes her as "by far" his most dedicated employee on his roster. (AE C.)

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*, 484 U.S. 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*, 484 U.S. at 531.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The 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 in her SCA and Answer are sufficient to raise the following disqualifying conditions under this guideline: AG ¶ 25:

(a): any substance misuse (see above definition); and

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

Applicant possessed and used marijuana. AG ¶¶ 25(a) and 25(c) are applicable. The question of whether her employment by a business that sells marijuana generates any drug involvement disqualifying conditions is more difficult. Her employer and its employees directly handled, possessed, and sold marijuana, and it facilitated its distribution in a state where the cannabis industry was legal under state law, but heavily regulated and illegal under federal law. While the federal government would never seek to prosecute Applicant, her employer, or any of its employees, they violated federal law as a principal (aider and abettor, accomplice, accessory, co-conspirator). AG ¶ 25(c) is applicable.

In October 2014, the Director of National Intelligence (DNI) issued a memorandum entitled "*Adherence to Federal Laws Prohibiting Marijuana Use*," (2014 DNI Memo) which makes clear that changes in the laws pertaining to marijuana by the various states, territories, and the District of Columbia do not alter the existing National Security Adjudicative Guidelines, and that Federal law supersedes state laws on this issue:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines. . . . An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

The DOHA Appeal Board has cited the 2014 DNI memo in holding that "state laws allowing for the legal use of marijuana in some limited circumstances do not pre-empt

provisions of the Industrial Security Program, and the Department of Defense is not bound by the status of an applicant's conduct under state law when adjudicating that individual's eligibility for access to classified information." ISCR Case No. 14-03734 at 3-4 (App. Bd. Feb. 18, 2016).

The current National Security Adjudicative Guidelines went into effect on June 8, 2017, after the 2014 DNI memo was issued. Nevertheless, the principle continues to apply.

Moreover, on December 21, 2021, DNI Avril D. Haynes issued a memorandum entitled, "*Security Executive 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.*" (2021 DNI Memo) The memo incorporates the AGs (at reference B) and the 2014 DNI memo (at reference G) among various other relevant Federal laws, executive orders, and memoranda. I take administrative notice of the 2021 DNI memo here, given its relevance to this case, its reliance on the AGs, and its recency.

The 2021 DNI memo specifically notes that "under policy set forth in SEAD 4's adjudicative guidelines, the illegal use or misuse of controlled substances can raise security concerns about an individual's reliability and trustworthiness to access classified information or to hold a sensitive position, as well as their ability or willingness to comply with laws, rules, and regulations." Thus, consistent with these references, the AGs indicate that "disregard of federal law pertaining to marijuana remains relevant, but not determinative, to adjudications of eligibility for access to classified information or eligibility to hold a sensitive position." (2021 DNI Memo.)

The following mitigating conditions are potentially applicable under 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

(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.

AG ¶ 26(a) is established for SOR ¶¶ 1.a - 1.c. There is no evidence in the record that Applicant understood her use to be problematic at the time. She had never held a security clearance and has aggressively changed her life to remove herself from an

environment where marijuana was present and sought alternative treatment for her PTSD and other mental health issues. The Appeal Board has noted that:

Applicants cannot be expected to be constitutional law experts or versed in the concept of Federal supremacy. The ambiguity between state and Federal drug laws and the ensuing confusion was addressed by the Security Executive Agent in December 2021 in “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” (SecEA Clarifying Guidance). Relevant to the topic of notice, the Guidance encourages employers “to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the [SCA].” SecEA Guidance at 2. Implicit in this guidance is the recognition that the SCA itself no longer puts applicants on notice and that employers should affirmatively be providing notice to prospective employees. The SecEA’s guidance to employers, however, cannot be presumed to have been followed. See ISCR Case No. 23-02476 at 5 (App. Bd. May 1, 2024).

Applicant’s use of marijuana occurred over two distinct periods. Her use prior to November 2020 was with friends and her spouse and after November 2020, when she had a medical marijuana card and used marijuana to treat PTSD. The change in her environment is significant for both periods. She has changed her treatment program, had her medical marijuana canceled, and she quit her position. Her admitted ignorance of the law under these specific facts shows a rational connection for the choices she has made by canceling her medical marijuana card, submitting to two drug tests, and seeking an alternative treatment program. Her actions reflect her reliability, trustworthiness, good judgment, and willingness to comply with laws, rules, or regulations. See ISCR Case No. 20-02974 at 6 (App. Bd. Feb. 1, 2022).

AG ¶ 26(b) is established for SOR ¶¶ 1.a - 1.c. Applicant voluntarily disclosed her actions on her SCA. She fully acknowledges her past actions. She moved and dissociated herself from drug-using friends and her former spouse. She quit her position at the marijuana dispensary. She submitted two types of drug tests, which were negative, to demonstrate she no longer uses marijuana. Her Response and observations of her therapist reflect Applicant’s understanding that any future involvement in marijuana is grounds for revocation of a security clearance.

I conclude that Applicant’s conduct no longer casts doubt on her reliability, trustworthiness, and good judgment. I find that she has abstained from illegal drug involvement for an appropriate period, and that illegal drug involvement is unlikely to recur. AG ¶¶ 26(a) and 26(b) are applicable.

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 Guideline H in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). I considered Applicant's admissions and explanations, including her explanation for why she started using marijuana. Applicant's statements in her SCA, security interview, and Response regarding her marijuana involvement reflect her recognition that she had to stop using marijuana and take control of her home environment. The drug tests she submitted, and her therapist's observations support her statements that she has changed her life. The observations of her foreman reflect she is motivated to make these behavioral changes. After weighing the disqualifying and mitigating conditions under Guideline H and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by her drug involvement.

Formal Findings

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

Paragraph 1, Guideline H: FOR APPLICANT

Subparagraphs 1.a-1.c: For Applicant

Conclusion

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

Charles C. Hale
Administrative Judge