



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



In the matter of:)
)
) ISCR Case No. 22-00650
)
Applicant for Security Clearance)

Appearances

For Government: Brian L. Farrell, Esquire, Department Counsel
For Applicant: Stephen H. Jones, Esquire

03/15/2024

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant successfully mitigated the security concerns regarding drug involvement and substance misuse. Eligibility for a security clearance is granted.

Statement of the Case

On November 5, 2020, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On September 16, 2022, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS) issued a Statement of Reasons (SOR) to her under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016) (AG), effective June 8, 2017.

The SOR alleged security concerns under Guideline H (drug involvement and substance misuse) and detailed reasons why the DCSA CAS adjudicators were unable

to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn statement, dated October 7, 2022, Applicant responded to the SOR, and she requested a hearing before an administrative judge. The Government was prepared to proceed on January 6, 2023. The case was assigned to me on August 29, 2023. A Notice of Microsoft TEAMS Video Teleconference Hearing was issued on February 21, 2024, scheduling the hearing for March 4, 2024. I convened the hearing as scheduled.

During the hearing, Applicant testified. Government Exhibits (GE) 1 through GE 3, and Applicant Exhibits (AE) A through AE E were admitted into evidence without objection. The transcript (Tr.) was received on March 14, 2024. I kept the record open to enable the parties to supplement it with additional evidence. Applicant took advantage of that opportunity and timely submitted 3 documents which were admitted as AE F through AE H without objection. The record closed on March 8, 2024.

Findings of Fact

In her Answer to the SOR, Applicant admitted, without comments, both factual allegations pertaining to drug involvement and substance misuse (SOR ¶¶ 1.a. and 1.b.). Her admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Background

Applicant is a 54-year-old employee of a defense contractor. She has been serving as a logistic coordinator with her current employer since about December 2020. She was previously briefly employed by another employer as a data entry clerk. She is a 1987 high school graduate. She has never served with the U.S. military. She was granted a secret clearance in 2011. She was married in 1992 and divorced in 2002; remarried in 2004 and divorced in 2010; and remarried in 2015. She has no biological children.

Drug Involvement and Substance Misuse

On April 16, 2021, Applicant underwent a random employment-driven drug test. On April 26, 2021, a positive drug test revealed a detectable amount of marijuana metabolites. (GE 2; GE 3 at 3) Tetrahydrocannabinol (THC), known as marijuana, is a Schedule I Controlled Substance. (<https://www.dea.gov/drug-information/drug-scheduling>)

Applicant has a history of chronic pain in various parts of her body, predominately on her back, shoulders, hands, knees, and feet. Since May 2018, in an effort to address her pain, she has sought the professional services of a variety of medical specialists who independently either prescribed medications, gave her acupuncture, injections and

ablations, or did chiropractic adjustments. She has seen two chiropractors – whose specialty is examining and treating health conditions related to the bones, muscles, and musculoskeletal problems; two neurologists – whose specialty is the diagnosis, treatment, and management of conditions that affect the nervous system, including the spine; and a bone specialist or orthopedist – whose specialty is the diagnosis, treatment, prevention and rehabilitation of musculoskeletal conditions. She also went to a pain clinic, where they do comprehensive pain management to provide relief from symptoms. Initially, she was of the belief that she had not been officially diagnosed for any specific condition, and thought she was advised that her conditions could be chronic pain symptom, fibromyalgia, or neuropathy. Her medical records confirm several specific conditions, including degeneration of cervical intervertebral disc; inflammation of hip joint; restless leg syndrome; spinal stenosis; cervical spinal stenosis; cervical spondylosis; and insomnia. Treatments generally partially worked or worked for limited periods, thus motivating her to move to a different specialist. She was recently diagnosed with fibromyalgia, a condition for which pain is the principal symptom, and she is successfully being treated for it. (GE 2 at 2, 4; AE A; AE B; AE C; AE D; AE E; AE F; Tr. at 24-27)

A non-physician friend of a friend advised Applicant that marijuana would help her diminish her pain. (Tr. at 23) In early April 2021, with knowledge of her employer's no-drug policy and the illegality of marijuana use under federal law, Applicant purchased \$100 worth of marijuana from another friend (Tr. at 26, 31-32) – whom she initially chose not to identify.

Applicant's first marijuana use consisted of smoking a quarter of a marijuana cigarette and consuming two shots of whiskey or rum mixed with something with two friends in her garage shortly before going to bed. (Tr. at 34) She received immediate pain relief from that first use, which lasted around three hours and allowed her to sleep without pain. As a result of its effectiveness, she increased the frequency of her combined alcohol and marijuana use (with her friends) from once during the first week of her marijuana use to four times per week – for a total of eight or nine times – by the time she underwent the drug test later in April 2021. (Tr. at 37) Upon being notified informed her supervisor about her marijuana use. She ceased using marijuana. (GE 2 at 3) She no longer associates with her former marijuana-using friends. (Tr. at 34-35) She intends to avoid marijuana as long as it is federally illegal. (Tr. at 46)

Since her positive drug test in April 2021, Applicant has subsequently routinely been randomly tested by her employer in July 2021, October 2021, January 2022, April 2022, and January 2024. All such tests were negative for marijuana or other illegal substances. (AE G; AE H)

Applicant was interviewed by an investigator with the U.S. Office of Personnel Management (OPM) on November 15, 2021. She indicated that she was embarrassed about using marijuana but explained that she was in such pain that she took the risk to do so. She realized that the instant relief was not worth it. (GE 2 at 3) She disclosed her history of chronic pain and her efforts to eliminate or at least reduce it. During and after the hearing she remained completely candid and repentant about what she calls a "bad decision." (AE F)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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. The President has authorized the Secretary of Defense or his designee to grant an applicant 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.)

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.” “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)). “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 Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).)

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 as well. It is

because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials." (*Egan*, 484 U.S. at 531)

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." (See Exec. Or. 10865 § 7) Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

At the outset, I note I had ample opportunity to evaluate the demeanor of Applicant, observe her manner and deportment, appraise the way in which she responded to questions, assess her candor or evasiveness, read her statements, and listen to her testimony. It is my impression that her explanations regarding her drug involvement and substance misuse are consistent and have the solid resonance of truth.

Guideline H, Drug Involvement and Substance Misuse

The security concern relating to the guideline for Drug Involvement and Substance Abuse 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.

Furthermore, on October 25, 2014, the Director of National Intelligence (DNI) issued Memorandum ES 2014-00674, *Adherence to Federal Laws Prohibiting Marijuana Use*, which states:

[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 (Reference H and I). 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.

In addition, on December 21, 2021, the DNI issued Memorandum ES 2021-01529, *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*, which states in part:

[D]isregard 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. . . .

Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged 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 Standard Form 86 . . . , Questionnaire for National Security Positions.

The guideline notes some conditions under AG ¶ 25 that could raise security concerns in this case:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant was granted a security clearance in 2011. On April 16, 2021, she tested positive for marijuana. She admittedly used marijuana several times during the first half of April 2021 to eliminate or reduce her chronic pain. AG ¶¶ 25(a), 25(b), and 25(f) have been established.

The guideline also includes examples of conditions under AG ¶ 26 that could mitigate security concerns arising from Drug Involvement and Substance Misuse:

(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) and 26(b) apply. Applicant has a history of chronic pain in various parts of her body. To address her pain, she sought the professional services of a variety of medical specialists who independently treated her for several diagnosed medical conditions. They prescribed medications, gave her acupuncture, injections and ablations, or did chiropractic adjustments. Nothing really worked except partially or for limited periods, thus motivating her to move to a different specialist. She has several confirmed conditions, including degeneration of cervical intervertebral disc; inflammation of hip joint; restless leg syndrome; spinal stenosis; cervical spinal stenosis; cervical spondylosis; and insomnia. She recently reported that she has been diagnosed with fibromyalgia, a condition for which pain is a principal symptom, and she is successfully being treated for it. However, because none of her prior treatments permanently alleviated her chronic pain, desperate for relief, she accepted the advice of someone who suggested marijuana as a pain countermeasure. She obtained relief from her chronic pain during the brief two-week period in April 2021 when she smoked marijuana. She immediately reported her marijuana use to her supervisor upon being advised that she was required to submit to a random drug test. She never used marijuana again and does not plan to do so, so long as it is federally illegal.

Applicant has been abstinent since April 16, 2021 – nearly three years. She acknowledged that what she did was foolish even though the marijuana did diminish her pain. She has been candid about her marijuana use, disassociated from those with whom she used the marijuana, and pledged to abstain in the future. I conclude that the drug-related events of early April 2021 were nothing more than aberrant behavior by her. She did not use marijuana for recreational purposes. She used it briefly to self-medicate when her prior medical treatments had already failed to permanently alleviate her chronic pain. Applicant's actions no longer cast doubt on her current reliability, trustworthiness, and good judgment.

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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis. (See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006))

I have incorporated my comments under Guideline H in my whole-person analysis, and I have considered the factors in SEAD 4, App. A, ¶ 2(c) and ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline H and evaluating all the evidence in the context of the whole person, I conclude that Applicant proffered substantial mitigating evidence, which was more than sufficient to overcome the disqualifying conditions established under Guideline H.

Applicant acknowledges that what she did was foolish even though the marijuana did diminish her chronic pain. She has been candid about her marijuana use, disassociated from those with whom she used the marijuana, pledged to abstain in the future, and promised to do anything to keep her clearance and her job. Her drug-related events of early April 2021 – nearly three years ago – were nothing more than aberrant behavior by a person desperate to relieve her chronic pain. She did not use marijuana for recreational purposes but did use it briefly to self-medicate when all prior medical treatment had already failed her. She has been abstinent since April 16, 2021. Although her actions were a serious breach of her fiduciary duties while holding a security clearance, Applicant's relatively brief period of such actions of early April 2021 – which she immediately ceased – no longer cast doubt on her current reliability, trustworthiness, and good judgment.

Overall, the evidence leaves me without substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has successfully mitigated the security concerns arising from her drug involvement and substance abuse.

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:

FOR APPLICANT

Subparagraphs 1.a. and 1.b.:

For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

ROBERT ROBINSON GALES
Administrative Judge