



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 23-02208
)	
Applicant for Security Clearance)	

Appearances

For Government: Cassie Ford, Esq., Department Counsel
and Rhett Petcher, Esq., Department Counsel

For Applicant: *Pro se*

06/27/2024

Decision

FOREMAN, LeRoy F., 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 February 3, 2023. On October 31, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) sent her a Statement of Reasons (SOR) alleging security concerns under Guideline H. 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 November 1, 2023, and requested a hearing before an administrative judge. DCSA CAS returned her answer on November 20, 2023, because she had failed to admit or deny each allegation. Applicant admitted each allegation on November 21, 2023. Department Counsel was ready to proceed on January 22, 2024, and the case was assigned to me on April 2, 2024. On April 11, 2024, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on May 16, 2024. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. I kept the record open until May 24, 2024, to enable her to submit additional documentary evidence. She timely submitted AX E through H. DOHA received the transcript (Tr.) on May 24, 2024.

Amendment of SOR

On January 22, 2024, Department Counsel amended SOR ¶ 1.a, alleging that Applicant used marijuana with varying frequency from about February 2021 to about May 2023. The SOR was amended to allege marijuana use from about February 2021 to "at least October 2023." The SOR also was amended to withdraw SOR 1.b, alleging that Applicant used marijuana after completing her SCA. Applicant admitted SOR ¶ 1.a as amended. (Tr. 12)

Findings of Fact

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

Applicant is a 21-year-old production control planner employed by a defense contractor since August 15, 2023. She has never married and has no children. She graduated from high school in June 2020. She attended a community college from August to December 2022 but did not receive a degree. She has never held a security clearance.

At the hearing, Applicant testified that at age 17 she moved in with an "intimate cohabitant partner." Her SCA reflects that they lived together from November 2020 to February 2021. They separated after she was a victim of domestic violence. She testified that her partner smashed furniture in their apartment, smashed her cellphone, and struck her with a frying pan, and threatened her with a knife. She is concerned because she and her former partner both work in the same facility. (Tr. 27) She testified that she has a 30-year protective order against him. (Tr. 26-27).

Applicant testified that she had dealt with eight deaths in the past two years, involving close friends, family members, and a co-worker. (Tr. 22) In May 2023, her uncle, with whom she was very close, was killed when he was working underneath a car, and it fell on him. (Tr. 22)

Applicant disclosed in her SCA that she obtained a medical marijuana card and had used marijuana to treat post-traumatic stress disorder (PTSD) since 2021. She stated that the PTSD was the result of domestic violence, and that she smoked marijuana daily before bedtime to avoid night terrors. She stated that she stopped using marijuana in November 2022 because she found better coping mechanisms. She also stated that the smell of marijuana makes her physically ill. (GX 1 at 33)

In May 2023, Applicant told a security investigator that she stopped using marijuana in November 2022 but resumed using it in May 2023. (GX 2 at 8) In response to DOHA interrogatories in October 2023, she stated that she last used it on October 5, 2023, but she stopped using it because she started losing weight and became nauseous whenever she used it. (GX 2 at 10-11)

At the hearing, Applicant testified that she stopped using marijuana in November 2022, after she received a job offer from her current employer and was told that she would be tested for drugs in February 2023 (Tr. 20) She testified that she resumed using marijuana in May 2023 after her uncle was killed and she was unable to sleep without using marijuana. (Tr. 22)

Applicant denied the allegation in SOR ¶ 1.c, alleging that she intended to use marijuana in the future. At the hearing, she testified, "marijuana is not a concern for me anymore as I have medication that essentially does what the marijuana was doing for me." She declared that she understands that marijuana use is not consistent with holding a security clearance, and she has no hesitation about complying with federal law even if marijuana is legal in the state where she lives. (Tr. 34)

A mental health clinician treated Applicant from March to July 2021. He diagnosed her with PTSD, and they engaged in 13 treatment sessions. (AX F) A family violence victim advocate documented Applicant's individual counseling that began in February 2021 through April 2022. She stated that Applicant was actively involved in the case and articulated an understanding of the topics discussed during her counseling and the impact that intimate partner violence has had on her life. (AX G)

A licensed professional counselor (LPC) began treating Applicant in April 2023 and diagnosed her with PTSD. She noted that Applicant was using medical marijuana and found it helpful. (AX E) Another LPC employed in the family health center for Applicant's current employer began treating Applicant for anxiety and depression in April 2023. (AX G at 1) This LPC was aware that Applicant had been diagnosed with PTSD and had found that medical marijuana helped her cope with her symptoms. However, the LPC noted that Applicant stopped using marijuana in October 2023 due to her commitment to her job, and her PTSD symptoms returned. In November 2023, Applicant began treatment with Zoloft, which helped her cope with her symptoms. (Tr. 24) Psychological testing on May 1, 2024, reflected dramatic improvement in Applicant's level of anxiety and depression, as a result of using Zoloft. (AX G at 8,9) Applicant informed the LPC that she does not intend to use marijuana again. (AX G at 10)

Applicant's former supervisor at a fast-food restaurant has known Applicant since she was 16 years old. The former supervisor considers her self-motivated, hardworking, and trustworthy. (AX A) A senior production planner, who has worked with Applicant for about a year and has known her since she was ten years old, describes her as highly motivated, mechanically smart, intelligent, and kind. (AX B) Applicant's current supervisor for the past eight months noted that she began working as an independent production control planner after eight months of training, as compared to the normal training period of 12-18 months. He states, "Her character strength has made it easy to interact with our tough and sometimes intimidating customers of the operations team." (AX C) A coworker describes Applicant as a strong team member with a strong work ethic and "people skills." He describes her as "always a joy to be around and . . . an asset to our company for decades as she moves up the chain of command." (AX D)

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 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); and

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

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.

AG ¶ 26(a) is established. There is no evidence that Applicant's use of marijuana was recreational. She obtained a marijuana card from a jurisdiction where medical marijuana is legal, and she used it to deal with the traumatic events in her life that are not likely to recur. She has availed herself of her employer's family health center, followed medical advice, gained control of her mental health issues, and has become a trusted and respected employee. Her former use of medical marijuana does not cast doubt on her current reliability, trustworthiness, or good judgment.

AG ¶ 26(b) is partially established. Applicant has acknowledged her marijuana use, taken action to control her PTSD by legal means, and has refrained from marijuana use since October 2023. AG ¶ 26(b)(1) and (2) are not applicable, because Applicant's use of medical marijuana did not involve associating with recreational marijuana users. She has not provided the signed statement of intent in AG ¶ 26(b)(3), but her testimony at the hearing unequivocally declared her intent to abstain from illegal drug involvement and demonstrated her realization that illegal drug involvement is inconsistent holding a security clearance.

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). Applicant was candid, sincere, and credible at the hearing. She has benefited from counseling, gained control of her PTSD, and matured into a dedicated, talented, and respected employee. 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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Withdrawn
Subparagraph 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.

LeRoy F. Foreman
Administrative Judge