



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



In the matter of:)
)
 REDACTED) ISCR Case No. 13-01346
)
 Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

07/02/2014

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant established her eligibility for continued access to classified information. She mitigated the drug involvement and personal conduct security concerns. In 2011, she used marijuana after being diagnosed with a life threatening disease. Over the past three years, her illness and life-extending medical treatment have taken an untold toll on her body, but she has not used marijuana or other illegal drug to cope with her situation. Applicant established that she will not engage in illicit drug use in the future. She revealed her marijuana use on her current security clearance application, fully cooperated with the background investigation, and demonstrated that she will continue to properly handle and safeguard classified information. Clearance is granted.

Statement of the Case

On February 6, 2014, the Department of Defense (DOD), in accordance with DOD Directive 5220.6, as amended (Directive), issued Applicant a Statement of Reasons (SOR), alleging security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). On February 15, 2014, Applicant answered the SOR and requested a hearing to establish her continued eligibility for access to classified information (Answer).

On April 3, 2014, Department Counsel indicated the Government was ready to proceed with a hearing in the case. On April 22, 2014, a notice was issued scheduling the hearing for May 15, 2014. The hearing was held as scheduled. Department Counsel offered Government Exhibits (Gx.) 1 – 7, which were admitted into evidence without objection. Applicant testified and requested additional time post hearing to submit matters in support of her case. She timely submitted Applicant's Exhibit (Ax.) A, which was admitted without objection. The hearing transcript (Tr.) was received on May 28, 2014, and the record closed on May 30, 2014.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following findings of fact:

Applicant, 52, started working for her current employer in about 1994. She started as a janitor, "cleaning toilets and things like that," and worked her way up to her current position of senior field technician, building and repairing equipment for DOD. (Tr. at 39-40) She was first granted a security clearance in 1997. (Tr. at 35-36) Applicant's supervisor speaks favorably about her work, professionalism, and honesty. (Ax. A)

Applicant divorced when she was relatively young. She raised her child primarily on her own. He is now an adult and is serving in the U.S. military. She was diagnosed with breast cancer about three years ago. The cancer has metastasized and is stage IV. (Tr. at 28, 37-38, 42-44)

Applicant admits she used marijuana in 2001. She was going through therapy to deal with childhood trauma and thought the marijuana would help her cope with her situation. She omitted her drug use when she submitted her 2002 security clearance application (SCA). She also omitted her drug use on the SCA she submitted in October 2007 (2007 SCA). At the time, Applicant mistakenly thought her marijuana use was more than seven years old and did not need to be listed. A month after submitting her 2007 SCA, Applicant sat down for a security clearance interview. She voluntarily revealed and fully discussed her marijuana use in 2001. Her security clearance was subsequently renewed. (Tr. at 28-35; Gx. 1, Gx. 2, Gx. 5)

Applicant did not use marijuana or other illegal drugs from 2001 to 2011. She used marijuana in 2011, after being diagnosed with late stage cancer. She used marijuana to deal with the pain and mental anguish of the disease. Applicant has not used marijuana or other illegal drugs since 2011. (Tr. at 32; Answer; Gx. 5 – 6)

Applicant submitted a SCA for her current periodic reinvestigation in 2013 (2013 SCA). In response to relevant questions about her past drug use, Applicant disclosed her marijuana use in 2011. She was subsequently interviewed and sent an interrogatory asking about her past drug use. She fully cooperated and again admitted her past

marijuana use.¹ She has disclosed her past drug use and past dishonesty to her employer. Her supervisor does not condone her past conduct, but continues to support her request for a security clearance. (Tr. at 37-39, Gx. 4 – 5; Ax. A)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are only eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry*, § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant’s eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a common sense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an 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.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.² However, as the Appeal Board, has unequivocally stated there is no *per se* rule in security clearance cases requiring disqualification. Instead, a judge must decide each case based on its own merits.³

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. The Government reposes a high degree of

¹ Applicant mistakenly wrote she used marijuana in 2007 and 2011 in her interrogatory response. She credibly explained this was a mistake and she meant to write 2001 and 2011. (Tr. at 29, 35-37) All the other evidence supports Applicant’s admission that she only used marijuana in 2001 and 2011. Accordingly, I have resolved this conflict in the evidence, and find that Applicant did not use marijuana in 2007, as alleged in SOR ¶ 1.b.

² See also, ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (“Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.”)

³ ISCR Case No. 11-12202 at 5 (App. Bd. June 23, 2014).

trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an 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.⁴

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.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

Analysis

Guideline H, Drug Involvement

The security concern regarding illegal drug involvement is set forth at AG ¶ 24:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

Applicant's marijuana use in 2001 and 2011 raises the drug involvement concern and establishes the following disqualifying conditions:

AG ¶ 25(a): any drug abuse;⁵ and

AG ¶ 25(g): any illegal drug use after being granted a security clearance.

The guideline also sets forth a number of conditions that could mitigate the drug involvement concern. I have considered all the mitigating conditions and only the following were potentially raised by the evidence:

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;

⁴ ISCR Case No. 11-13626 (App. Bd. Nov. 7, 2013) (security clearance determinations require administrative judges to make predictive judgments about an individual's ability and willingness to protect and safeguard classified information). See *also*, ISCR Case No. 11-12202 at 5 (The “Adjudicative Guidelines are designed to *predict*. The prediction in nonsecurity violation cases is made by identifying and then evaluating behaviors or circumstances that have an articulable nexus to the ability or willingness to safeguard classified information.”) (emphasis in original).

⁵ The Directive defines “drug abuse” as the “illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.” See AG ¶ 24(b).

AG ¶ 26(b): a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant's two instances of marijuana use occurred when she experienced life-altering circumstances. She has not used marijuana or other illegal drugs in three years. The passage of time since an individual used an illegal drug(s) may, depending on the facts and circumstances, support a conclusion that the individual will not abuse drugs in the future. Applicant's drug use occurred while she was holding a security clearance and, under such circumstances, the passage of three years *alone* is insufficient to mitigate the drug involvement concern.⁶ However, the facts and circumstances of this case are not simply limited to the passage of time. During the past three years, Applicant has suffered extreme physical pain and excruciating mental and emotional trauma as a result of her illness and medical treatments to prolong her life. Applicant did not turn to marijuana or other illegal drug to alleviate her condition. In light of Applicant's conduct over the past three years, it is clearly evident that her past marijuana use were isolated incidents that will not be repeated.

Furthermore, Applicant voluntarily revealed her marijuana use on her 2013 SCA. She did so with full knowledge that such disclosure could place her employment and, more importantly, her employer-provided medical insurance at risk. Notwithstanding the possible consequences of her disclosure, Applicant revealed the adverse information because she recognized that non-disclose might be seen as a potential area of vulnerability. She eliminated this potential vulnerability by disclosing the adverse information on her SCA and to her employer. Additionally, after having an opportunity to question Applicant and observe her demeanor in close quarters while she testified, I found her credible and resolute in her commitment to remain drug free.⁷ Accordingly, I find that AG ¶¶ 26(a) and 26(b) apply.

Guideline E, Personal Conduct

The personal conduct concern is set forth at 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 information. Of special interest is any failure to provide truthful

⁶ See, e.g., ISCR Case No. 11-00193 (App. Bd. Jan. 24, 2012) (the passage of two years since applicant used marijuana to alleviate a medical condition was insufficient to mitigate drug involvement concern because use occurred while holding a security clearance).

⁷ Applicant's hearing was held in a conference room and she was seated no more than an arms-length away, which allowed me to closely observe her demeanor while she testified.

and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant falsified her 2002 SCA when she omitted her marijuana use in 2001. Such conduct raises the Guideline E security concern and establishes the disqualifying condition at AG ¶ 16(a), “deliberate 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities.”

The guideline also sets forth several conditions that could potentially mitigate the personal conduct concern and the following were potentially raised by the evidence:

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

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; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant corrected the omission during her 2007 security clearance interview. Such belated disclosure was not sufficiently close in time to be considered “prompt” and, thus, AG ¶ 17(a) does not apply. However, twelve years have passed since Applicant submitted her 2002 SCA.⁸ More importantly, by revealing her recent marijuana use on her current SCA, Applicant demonstrated that she will reveal adverse information no matter the potential personal cost. After revealing her recent drug use, Applicant fully cooperated with the ensuing security clearance investigation.

Also, as explained above, by voluntarily revealing her drug use, Applicant eliminated the conduct as a potential source of undue pressure or coercion. In light of the passage of time, the voluntary disclosure of recent drug use, and full cooperation with the security clearance process, I find that Applicant mitigated the serious security concerns raised by her past conduct. After considering all the evidence and having an opportunity to both question Applicant and observe her demeanor while testifying, I have no concerns about her current judgment, reliability, and trustworthiness. AG ¶¶ 17(c) and 17(e) apply.

⁸ Applicant did not deliberately falsify her 2007 SCA. She genuinely believed her marijuana use was more than seven years old and did not need to be listed. Furthermore, a month after submitting her 2007 SCA, Applicant immediately and voluntarily corrected the omission during her clearance interview.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).⁹

Applicant has been employed in the defense industry for approximately 20 years. She has held a clearance throughout the majority of those 20 years without issue. She started out with her employer cleaning toilets and worked her way up to her current position building prototypes and repairing equipment for DOD. She did all this while raising a child on her own. She is a mentor to others at her job.

Considering Applicant's background it is quite baffling that she would engage in conduct that she knows is inconsistent with the requirements of holding and maintaining a security clearance, especially after similar issues were raised during her previous security clearance investigation. However, Applicant's recent drug use took place at what was clearly the lowest point in her life. Over the past three years, Applicant has faced her cancer and the required medical treatments without using marijuana or engaging in other conduct raising a security concern. She is genuinely remorseful for her past conduct and committed to supporting the mission of the DOD.

After considering all the evidence, including Applicant's long track record of properly handling and safeguarding classified information, I find that her past security significant conduct was an aberration and not a true reflection of her character. Applicant's decision to reveal her drug use on her current security clearance application demonstrates that she is willing to put her security obligations over her own interest. By doing so, Applicant established that she can continue to be entrusted with classified information. Overall, the record evidence leaves me with no doubts about Applicant's eligibility for access to classified information.¹⁰

Formal Findings

I make the following formal findings regarding the SOR allegations:

Paragraph 1, Guideline H (Drug Involvement)

FOR APPLICANT

Subparagraphs 1.a – 1.d:

For Applicant

⁹ The adjudicative factors are: (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.

¹⁰ In reaching this conclusion I have considered the heavy burden standard and that any doubts raised by the evidence must be decided in favor of national security.

Paragraph 2, Guideline E (Personal Conduct)

FOR APPLICANT

Subparagraphs 2.a – 2.d:

For Applicant

Conclusion

In light of the record evidence and for the foregoing reasons, it is clearly consistent with the national interest to grant Applicant continued access to classified information. Applicant's request for a security clearance is granted.

Francisco Mendez
Administrative Judge