



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 14-01518
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

March 18, 2015

DECISION

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant submitted her Electronic Questionnaire for Investigations Processing (e-QIP), on April 28, 2011. (Item 5.) On September 25, 2014, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H (Drug Involvement). (Item 1.) The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR (Answer) in writing on October 30, 2014, and requested a decision by an administrative judge without a hearing. (Item 3.) Department Counsel submitted the Government's written File of Relevant Material (FORM) to Applicant on December 15, 2014. The FORM contained seven Items. Applicant acknowledged receipt of the FORM on January 2, 2015. She was given 30 days from receipt of the FORM to submit additional documentation. Applicant elected not to submit any additional information. The case was assigned to me on March 12, 2015.

Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Rulings on Evidence

Item 6 is a Report of Investigation (ROI) from the background investigation of Applicant. The five-page document is a summary of an interview of Applicant the Government conducted on December 31, 2013. An ROI may be received and considered as evidence when it is authenticated by a witness.¹ Although Applicant, who is representing herself, has not raised the issue via an objection, I am raising it *sua sponte*. While it is clear that Department Counsel is acting in good faith, having highlighted the issue in the FORM,² Exhibit 6 is not authenticated. Applicant's failure to reply to the FORM is not a knowing waiver of the rule.³ Accordingly, Item 6 is not admissible and is not considered in this Decision.

Findings of Fact

Applicant is 31 and single. She has no children. She possesses a bachelor's degree and is enrolled in a master's program. She enlisted in the Air Force in 2001 and served on active duty until 2007. She had a break in service from February 2007 to July 2008, and then served as a Air Force Reservist from July 2008 through December 2009, including a period of activation from October 2008 to September 2009. She received an honorable discharge. She was granted a secret security clearance in 2001 in connection with her military service. Applicant has worked for various defense contractors since her discharge from the Air Force. She submitted an e-QIP on April 28, 2011 (Item 5), and was granted a security clearance in July 2011 (Item 7.)

The Government alleges that Applicant is ineligible for a clearance because she used marijuana in May 2013. She subsequently failed a drug test in June 2013, administered by her employer, and was terminated. This marijuana use occurred after being granted a security clearance in July 2011. Applicant admitted to the allegations alleged in SOR ¶¶ 1.a through 1.c, with explanations. She indicated:

In about May 2013, [she] was not employed or in a position to access classified material. During that time, [she] used an illegal substance. In June 2013, an unexpected short notice employment opportunity with [Government Contractor] presented itself and [she] accepted. Consequently, the lasting effects of marijuana resulted in a 'failed' urinalysis and I was unable to deploy to [foreign country] for duty.

¹ Directive, Enclosure 3, ¶ E3.1.20; see ISCR Case No. 11-13999 (App. Bd. Feb. 3, 2014) (the Appeal Board restated existing case law that a properly authenticated report of investigation is admissible).

² Department Counsel Brief at 2, n. 1.

³ Wavier means "[t]he voluntary relinquishment or abandonment – express or implied – of a legal right or advantage; the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." *Black's Law Dictionary*, 1717 (Bryan A. Garner ed., 9th ed., West 2009).

As a result, I no longer socialize with the same people or within the same environment. In fact, since then I've completed another contract in [foreign country], graduated with my Bachelor's degree, enrolled for my [graduate degree], purchased a second home and am currently studying a second language. (Item 3.)

Applicant provided two character letters concerning the high quality of her professional performance, her track record with respect to handling sensitive information, and observation of security procedures. (Item 3.) I was unable to evaluate her credibility, demeanor, or character in person since she elected to have her case decided without a hearing.

Policies

Security clearance decisions are not made in a vacuum. When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used as appropriate in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), 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 decision. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, "The 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

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. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Security clearance decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or 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.

Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to Drug Involvement:

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.

I have considered all of the evidence in this case and the disqualifying conditions under AG ¶ 25, and the following are potentially applicable:

- (a) any drug abuse;
- (b) testing positive for illegal drug use; and
- (g) any illegal use after being granted a security clearance.

The Government presented sufficient information to support all of the factual allegations under Guideline H (SOR ¶¶ 1.a-1.c). Applicant used marijuana in May 2013 after being granted a security clearance in 2011. Her marijuana use was detected in a drug test administered by her employer, and her employment was then terminated. The facts established through the Government's evidence and through Applicant's admissions raise security concerns under all of the above disqualifying conditions.

I have reviewed all of the potentially mitigating conditions under AG ¶ 26, and especially considered the following:

(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) 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 admitted using marijuana in May 2013. Other than her admission, Applicant offered little evidence that would support mitigation under AG ¶¶ 26(a), or 26(b). She was a mature woman at the time of her drug use. She served in the Air Force since 2001, and was subsequently employed with Federal contractors. She should have been aware of the Federal laws pertaining to marijuana and the regulations relating to drug use while possessing a security clearance. Her marijuana use in 2013 continues to cast doubt on her current reliability, trustworthiness, and good judgment because her drug use was relatively recent. Further, she failed to demonstrate an intent not to abuse any drugs in the future. While she noted that she no longer associates with drug users, she did not explicitly state that she would forgo illegal substances in the future. No mitigating conditions have been established.

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 relevant circumstances. 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. The administrative judge must consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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 considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. The discussion under Guideline

H, above, applies here as well. Applicant served in the Air Force honorably from 2001 to 2009. She is respected by those that wrote letters on her behalf. However, Applicant's drug use was recent and occurred after obtaining a security clearance. She failed to provide sufficient mitigating information to overcome the adverse nature and seriousness of her conduct.

Under AG ¶ 2(a)(3), her conduct is recent. She failed to demonstrate that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, I also find that there is a potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is a likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from her drug involvement. Accordingly, the evidence supports denying her request for a security clearance.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Jennifer I. Goldstein
Administrative Judge