



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 15-01905
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrea M. Corrales, Esq., Department Counsel
For Applicant: *Pro se*

01/31/2017

Decision

BORGSTROM, Eric H., Administrative Judge:

Applicant did not mitigate the drug involvement and personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On October 17, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement, and Guideline E, personal conduct. The action was taken under Executive Order (EO) 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) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on November 9, 2015, and she elected to have the case decided on the written record in lieu of a hearing. On March 22, 2016, the Government submitted its file of relevant material (FORM) and provided a complete copy to Applicant. Applicant received the FORM on March 28, 2016. Applicant was afforded an opportunity to respond to the FORM within 30 days of its receipt and to file

objections and submit material to refute, extenuate, or mitigate the security concerns. She did not provide any response. The case was assigned to me on December 15, 2016.

Procedural Issues

In the FORM, Department Counsel references FORM Items 1-5. FORM Item 5 is an unauthenticated summary of a May 6, 2014 interview with a government background investigator. In the FORM, Department Counsel advised Applicant that she could object to FORM Item 5 and it would not be admitted, or that she could make corrections, additions, deletions, and update the document to make it accurate. Applicant was informed that her failure to respond to the FORM or to raise any objections could be constituted as a waiver, and the evidence would be considered by me. Applicant failed to respond to the FORM, and she raised no objections. Given the Government's advisement and Applicant's education and work experience, I find her waiver to be knowing and intelligent.¹ Therefore, FORM Item 5 is admitted into evidence as Government Exhibit 5.

FORM Items 3 and 4, an April 2014 security clearance application (SCA) and an October 2008 SCA, respectively, are admitted into evidence as Government Exhibits 3 and 4, without objection.²

Findings of Fact

Applicant is 35 years old. She received a bachelor's degree in May 2003 and a master's degree in August 2009. She has been employed by a DOD contractor since May 2004.³

Applicant first submitted an SCA in October 2008, and she was granted a security clearance in May 2009. On her October 2008 SCA, Applicant admitted that she had used marijuana on about ten occasions between March 2006 and May 2006.⁴ Pursuant to her security officer, Applicant's clearance was "inactive" from November 2012 to May 2014;⁵ however, no further information was provided to clarify whether Applicant was simply not actively using her security clearance or whether it had been administratively terminated.

¹ See ISCR Case No. 15-05252 at 3 (App. Bd. Apr. 13, 2016)(Applicant's waiver of the authentication element must be knowing and intelligent. The Judge's exclusion of the Report of Interview, containing mitigating evidence, was found to be error following an applicant's appeal.).

² See ISCR Case No. 14-06781 at 3 (App. Bd. Dec. 16, 2016)(By not responding to the Government's FORM, "Applicant waived any objection he might have had to this document.").

³ Item 3.

⁴ Item 4 at 27.

⁵ Item 2 at 5.

In April 2014, Applicant submitted her second SCA, wherein she admitted using marijuana between December 2005 and June 2013 on a “handful” of occasions. Section 23 of the SCA, in pertinent part, reads, “Have you EVER illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed.”⁶ She denied ever using marijuana while possessing a security clearance.⁷

During her May 2014 security interview, Applicant stated that she used marijuana approximately five to ten times between December 2005 and June 2013. She further admitted that she had forgotten to list her most current use, in early 2014, at a friend’s house. She reiterated that she never used marijuana while possessing a security clearance.⁸

In her November 2015 response to the SOR, Applicant admitted that she had used marijuana between December 2005 and early 2014, and she admitted that she continued to associate with illegal drug users. She denied that she ever used illegal drugs while possessing a security clearance, and she denied that she falsified her response to Section 23 on her April 2014 SCA.⁹

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching 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.

The protection of the national security is the paramount consideration. As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard

⁶ Item 3 at 26.

⁷ Item 3 at 26.

⁸ Item 5 at 5,

⁹ Item 2 (Of note, in response to the SOR, Applicant first admitted SOR ¶ 1.a. – with the last marijuana use of “early 2014” – but later stated that her last use was June 2013).

indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁰ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

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.” The applicant has the ultimate burden of persuasion to obtain a favorable security 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. 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 of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be “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

The concern under this guideline is set out in 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.” Drugs are defined in AG ¶ 24(a)(1) as “[d]rugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens).”

Disqualifying conditions under this guideline include:

AG ¶ 25(a): any drug abuse, defined in AG ¶ 24(b) as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction”; and

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

¹⁰ *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988). See *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

Between December 2005 and early 2014, Applicant used marijuana on at least ten occasions. Thus, AG ¶ 25(a) applies.

AG ¶ 25(g) is not limited to persons holding an active clearance. After having been granted a security clearance in May 2009, Applicant used marijuana on at least two occasions – in June 2013 and early 2014. Applicant’s evidence that her clearance was “inactive” between November 2012 and May 2014, is ambiguous. Even if she was working on an unclassified project, she retained a security clearance. Even if Applicant’s clearance had been administratively terminated in November 2012, she remained eligible for a security clearance without reinvestigation until November 2014. Notwithstanding any ambiguity about the status of Applicant’s clearance at the time of her 2013-14 drug use, AG ¶ 25(g) applies upon “any illegal drug use **after** being granted a security clearance,”¹¹ because her illegal drug use occurred subsequent to the grant of her security clearance in 2009.

The Government established a case for disqualification. Accordingly, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts.¹² An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.¹³ The following mitigating conditions are potentially relevant:

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;

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; and (4) a signed statement of intent with automatic revocation of clearance for any violation;

The first prong of AG ¶ 26(a) (“happened so long ago”) focuses on whether the drug involvement was recent. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.”¹⁴

¹¹ AG ¶ 25(g)(emphasis added).

¹² Directive ¶ E3.1.15.

¹³ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

¹⁴ ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

In the present case, Applicant's admitted drug use – December 2005 to early 2014 – occurred while employed as a DOD contractor. Although Applicant's most recent drug use may have occurred while she was not actively handling classified information, it occurred after she had been granted a clearance. Having been granted a security clearance in 2009, Applicant's obligation to safeguard any classified information she presumably accessed persisted even after her clearance was no longer "active." Such conduct not only was illegal and violated DOD policies, but it also represented a breach of trust bestowed upon those entrusted with safeguarding classified information. Applicant has not presented evidence of changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. Because her conduct casts doubts on her reliability and judgment, AG ¶ 26(a) does not apply.

Applicant has not expressed an intent to cease contacts with her drug-using acquaintances or submitted a signed statement of intent to cease further illegal drug use. Applicant's last use of marijuana was early 2014. As of her March 2016 response to the SOR, her period of abstinence from illegal drug use was about two years. Applicant has not provided any explanation as to what prompted her to use illegal drugs in June 2013 and in early 2014 after apparently having not used illegal drugs since 2006. Given Applicant's drug use after a seven-year period of abstinence, without further explanation, the evidence is insufficient to conclude that she has established an "appropriate period of abstinence." Taken together, Applicant has not provided sufficient evidence of changed circumstances, disassociation from drug-using acquaintances, an appropriate period of abstinence, or a signed statement of intent to establish AG ¶ 26(b).

Because Applicant has not sufficiently demonstrated an intent not to abuse drugs in the future and because her illegal drug use after having been granted a security clearance casts doubts as to her judgment and reliability, I find that drug involvement concerns remain.

Guideline E, Personal Conduct

The concern under this guideline is set out in 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 and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Under Guideline E, the SOR alleges a falsification and Applicant's ongoing contacts with drug-using acquaintances. As to the falsification, the relevant disqualifying condition requires 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.”¹⁵ When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant’s state of mind at the time of the omission.¹⁶

On her April 2014 SCA, Applicant listed her May 2009 security clearance and her illegal drug use between December 2005 and June 2013; however, she denied ever having used illegal drugs while possessing a security clearance. In her response to the SOR, Applicant provided documentation from her security officer listing that her clearance was “inactive” from November 2012 to May 2014. The ambiguity of the “inactive clearance” precludes me from concluding that Applicant correctly answered Section 23 regarding drug use while possessing a clearance. Nonetheless, this record evidence, coupled with her drug use admissions on the same page within the same SCA, sufficiently rebut the conclusion that Applicant deliberately falsified this response. Because the Government did not establish Applicant’s intent to falsify her security clearance application, AG ¶ 16(a) does not apply.

Personal conduct security concerns may also arise when the Government establishes an applicant’s “association with persons involved in criminal activity,” under AG ¶ 16(g). Here, Applicant’s ongoing contacts with drug-using acquaintances raise concerns about her reliability and good judgment. Therefore, AG ¶ 16(g) applies.

The following mitigating condition is potentially relevant:

AG ¶ 17(g): association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual’s reliability, trustworthiness, or willingness to comply with rules and regulations.

Here, given the established disqualifying conduct, AG ¶ 17(g) is the only potentially applicable personal conduct mitigating condition. In her SOR response, Applicant explained that she has “a few acquaintances who occasionally use marijuana, but no one that [she] sees on a consistent basis.”¹⁷ The evidence does not indicate whether these acquaintances use illegal drugs in Applicant’s presence or whether she has reduced her contacts with these individuals. Similarly, because there is no record evidence as to what circumstances prompted Applicant’s drug use in 2013 and 2014, it is unknown whether these contacts with drug-using acquaintances triggered Applicant’s own drug use. Given the limited information as to Applicant’s most recent drug use and her contacts with those drug-using acquaintances, I conclude that AG ¶ 17(g) does not apply.

¹⁵ AG ¶ 16(a).

¹⁶ See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

¹⁷ Item 2 at 4.

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 relevant circumstances. The administrative judge should 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.

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 light of all the facts, I have considered the potentially disqualifying and mitigating conditions. I have incorporated my comments under Guidelines H and E and the factors in AG ¶ 2(c) in this whole-person analysis.

Applicant was provided an opportunity in her SOR response and in response to the Government's FORM to provide mitigating evidence. Although Applicant's drug use may not have been frequent, it occurred while she was employed as a DOD contractor, and her 2013-14 drug use occurred after she had been entrusted with access to classified information. Active clearance or not, that conduct constituted a breach of trust, for which Applicant has not provided sufficient information to explain the circumstances that triggered her uses in 2013 and 2014 and why such circumstances are unlikely to recur. As a result, the totality of the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the drug involvement and personal conduct security concerns.

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.:	For Applicant

Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a.	For Applicant
Subparagraph 2.b.	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.

Eric H. Borgstrom
Administrative Judge