



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



In the matter of:)
)
) ISCR Case No. 17-00671
)
Applicant for Security Clearance)

Appearances

For Government: Benjamin Dorsey, Esq., Department Counsel
For Applicant: John Berry, Esq.

06/22/2018

DECISION

LYNCH, Noreen A., Administrative Judge:

Applicant mitigated the security concerns arising under Guideline H, Drug Involvement and Substance Misuse. She did not mitigate the security concerns under Guideline E, Personal Conduct. Eligibility for access to classified information is denied.

Statement of the Case

On May 1, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement and Substance Misuse 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 effective within the DOD on September 1, 2006.

Applicant answered the SOR in writing (Answer) on May 13, 2017. She requested a hearing before an administrative judge. The case was assigned to me on December 4,

2017. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on March 22, 2018, for a hearing on May 31, 2018. The hearing was held as scheduled. The Government offered Government Exhibits 1 and 2, which were admitted without objection. (GX 1-2). Applicant testified on her own behalf and presented two witnesses. She submitted Applicant Exhibits (AX) A through L, which were admitted into the record without objection. DOHA received the transcript of the hearing (Tr.) on June 8, 2018.

The SOR in this case was issued under the adjudicative guidelines that came into effect within the DOD on September 1, 2006. Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (December 10, 2016), implements new adjudicative guidelines, effective June 8, 2017. All national security eligibility decisions¹ issued on or after June 8, 2017, are to be decided using the new *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), as implemented in Appendix A of SEAD 4. I considered the previous adjudicative guidelines, as well as the new AG, in adjudicating Applicant's national security eligibility. My decision would be the same under either set of guidelines, although this decision is issued pursuant to the new AG.

Findings of Fact

Applicant is 25 years old. She graduated from high school in 2011 and received two undergraduate degrees in 2015. She has never held a security clearance. (GX 1) She has been employed with her current employer since 2015, as a program analyst. (Tr. 18) Currently, she is working abroad on a company contract. Her significant other lives with her. She completed her security clearance application (SCA) in December 2015. On her SCA, she disclosed her use of marijuana and other illegal drugs such as cocaine and ecstasy from approximately 2008 to 2015. (GX 1)

The SOR alleges that Applicant used and purchased marijuana with varying frequency from about 2008 to July 2015; that she was charged with marijuana possession of two ounces or less and possession of drug paraphernalia in October 2011; that she used Ecstasy and purchased Ecstasy with varying frequency from about June 2001 to May 2015; that she purchased and used cocaine with varying frequency from about December 2011 to May 2015; that she sold prescription medication from about May 2013 to May 2015; and that she used the prescription medication Xanax, not prescribed to her in May 2016. Applicant admitted all the allegations. Under personal conduct, the allegations from drug use were cross alleged; additionally, it is alleged that in May 2012 she was responsible for theft at the University Bookstore and disciplined by the Dean; and finally that she shoplifted on various occasions from at least 2012 to August 2016.

Applicant explained that her prior drug use occurred during a period of immaturity and experimentation in her life (during high school and college.) She stated that it does not affect her current lifestyle. She feels negatively towards these actions and has no

¹ SEAD 4 ¶ D.7 defines "National Security Eligibility" as, "Eligibility for access to classified information or eligibility to hold a sensitive position, to include access to sensitive compartmented information, restricted data, and controlled or special access program information."

intention of taking part in any unlawful action in the future. (GX 2) She signed a statement of intent to never use illegal drugs again. She also admitted that she sold prescription pills for \$5 to other students who wanted to concentrate for their exams. (GX 2) She took a pre-employment drug test in 2015. (AX K)

During her 2016 subject interview, Applicant stated that she and her friends would smoke marijuana out of a pot and occasionally purchase marijuana. She received a citation for possession of marijuana from two undercover campus police who saw the Applicant and her friend and confiscated the marijuana. She claimed responsibility and was written a citation for the possession of marijuana and paraphernalia. She attended court and pled guilty. She completed 16 hours of community service. (GX 2) She estimates that she smoked marijuana maybe 50 times to have fun with her friends. She stated that it was the college culture. This was between 2008 and 2015. She explained that she only sold to her friends. She has never received counseling for the marijuana use. She quit smoking because she knew she was going to work for an employer that prohibited drugs. (GX 2 at 5) On her initial application for employment, she did not list the incidents of illegal drug use because she believed she did not have to list it. (GX 2)

As to Ecstasy, she stated that she used it five times or less. Her last use was in 2015. She used with her ex-boyfriend for experimentation and at concerts. She obtained the drug by purchasing it from friends. She stated that it would heighten the music experience. (GX 2)

Applicant used cocaine for the first time in 2011. (Tr. 28) She reported that she would purchase it and snort it while at parties with friends. She believes it was less than ten times. She never attended counseling or rehabilitation for the use. (GX 2) The last use was in 2015. She also purchased the cocaine on certain occasions.

Applicant sold her prescription medication from approximately 2013 to May 2015. (Tr. 28) At first she would give it away to students who asked, but then she sold it as she realized that she had to pay for her prescription. The students considered them study drugs. She now realizes that was wrong. (Tr. 29)

Applicant used a prescription drug, Xanax, which was not prescribed to her in May 2016. She was given the prescription medication by a family member to help her sleep on a long flight. (Tr. 30) She usually has anxiety when flying and honestly did not believe it was illegal to take the prescription medication from her family. (Tr. 30)

At the hearing, Applicant explained her varying roles in the company. She performs very well, earning the highest rating in 2017. She is working abroad with a team to help with an important project. (Tr. 23)

Applicant submitted seven character references from individuals. She also provided her performance reviews from 2016 and 2017. (AX A, B) Each attests to her professionalism and commitment to work. She has been trustworthy and reliable and

understands that she has made mistakes in the past. (AX C-I and L) One letter made reference to knowledge of the SOR.

Applicant's first supervisor testified at the hearing that he has known her since 2015. He is the Director of Operations. He hired her for her position out of 17 possible candidates. (Tr. 52) He described her as a high performer with strong integrity. She has been rated at the top of the scale. Applicant informed the witness of her prior drug use and the shoplifting issues. (Tr. 55) He believes that despite that, she is worthy of a security clearance. He believes in forgiving youthful mistakes.

Applicant's significant other testified at the hearing. He has known Applicant since childhood. He now resides with her abroad. He states that she is an extremely hard worker. She is career oriented. He is aware of the SOR allegations. He began dating her seriously in 2016 and he has not seen any evidence of shoplifting or illegal drug use. (Tr. 61) Since she is working with people on a focused team project who have security clearances, those are the people she socializes with. She avoids drug use at all costs. (Tr. 62) He believes she has a lot of remorse about the drug and shoplifting issues that brought her to the hearing today. (AX D)

Applicant testified that she was immature and did not think of long-term consequences. She did not think about how using illegal drugs might affect her and for that she is regretful. (Tr. 25) Applicant explained that in college she only used with her friends and because these things were common, it did not register that it was illegal. She noted that she made sure to stop before her employment. (Tr. 26). She admits she executed poor decision making and takes full responsibility. She also explained that she sold her prescription medication because it was part of the environment. She now realizes that it is wrong. As to the use of Xanax, a family member gave her some so that she could sleep on a long flight. (Tr. 29) She has never received counseling.

Under Guideline E, SOR 2.a, the allegations are cross-alleged. However, SOR 2.b. and 2.c allege that in 2012 Applicant was found responsible for theft at the college bookstore in May 2012 and that she has shoplifted on various occasions from at least 2012 to August 2016.

As to SOR 2.b, Applicant took a bottle of water from the college bookstore. (Tr. 31) She was disciplined by the Dean when it was discovered. (Tr. 30) She had no good reason for taking the item. She could have paid for it. She stated that she has no excuse for it and she stands embarrassed. (Tr. 30) She did not list any information about shoplifting on her SCA. As to 2.c, Applicant admitted that she shoplifted on various occasions from at least 2012 to 2016. She believes it was about ten times. (Tr. 32) Applicant admitted that they were all small items such as chap stick, lipstick, and eye drops. She knows shoplifting is illegal and is sorry. (Tr. 33) She stated that it was impulsive, immature, and dumb.

In her subject interview, Applicant was confronted about the theft on the college campus. She walked out of a college bookstore with a water bottle and was confronted

by the campus police. The interview reflects that she was asked if she paid for the item, and she lied and told them it was hers. Tapes were reviewed and she was notified that she had to attend a one day course. (GX 2) She admitted that she did it for the thrill of it, and wanted to see if she could get away with it. She was asked when she started shop lifting and she could not recall the date but thought she had previously done it about five times, in places like Target. Applicant related that she had never been caught except at the campus bookstore. (GX 2) She elaborated that she only shoplifted when she was alone because she does not want to pay the high prices of the items. She admits that it is stupid. She always had enough money to pay for the items. Her intent is to stop because when talking to the investigator she was embarrassed. (GX 2 at 7) At the hearing, Applicant testified that she believed in the four year period in question, she shoplifted about ten times. (Tr.32)

Her career is important to her and she realizes that she is now mature and works with mature people who hold security clearances. She does not associate with the same people that she did in college. She provided a signed statement of intent.

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are 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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing 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. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the 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. Directive ¶ E3.1.15 states 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, 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. Decisions include, by necessity, consideration of the possible risk that an 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.

Finally, 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 and Substance Misuse

The security concern relating to the guideline for Drug Involvement and Substance Misuse is set forth at 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.

The guideline at AG ¶ 25 contains seven conditions that could raise a security concern and may be disqualifying. Two conditions are established:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant admitted all the allegations about illegal use and the purchase of such drugs as marijuana, Ecstasy, and Cocaine. She also sold her prescription drug to others for \$5 a pill. These incidents occurred between 2008 and 2016 with varying frequency. Therefore, AG ¶ 25 (a) and (c), are established.

The guideline at AG ¶ 26 contains four conditions that could mitigate security concerns. Two conditions may be applicable:

(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.

Applicant's last drug use was in 2015. She was in a college environment. She signed a letter of intent and has changed her friends and lifestyle. I find that sufficient time has transpired for mitigation in this case given the period of time in her life that she illegally used drugs. She disclosed this information on her SCA. She has mitigated the security concerns under this guideline.

GUIDELINE E: PERSONAL CONDUCT

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

16. Conditions that could raise a security concern and may be disqualifying include:

(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 national security eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing;

The allegations were cross alleged under 2.a and the discussion about the illegal drug use has been completed.

As to 2.b and 2.c, I find the shoplifting more troublesome. She lied to the campus police about taking the water bottle. She revealed this in her interview but did not seem bothered except for the embarrassment that it caused to now share this information. She continued to shoplift after the disciplinary action from the dean. Applicant did not disclose this information on her SCA. She admitted that she engaged in this behavior at least ten times. She also failed to disclose this information on her employment application.

17. Conditions that could mitigate security concerns include:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

I do not find that Applicant has mitigated the personal conduct with respect to the shoplifting. She did it for the thrill of it and after she was disciplined in 2012 while in college by the Dean. She at first denied the college incident. She continued the behavior for a number of years. She said that she had never been caught except for the one time at college. Theft is not a minor incident. She did not disclose the history of shoplifting on her applications. She has not examined the reasons for her shoplifting and it was recent. I doubt her judgment and reliability.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is respected by those who know her. She performs well at work. She is in a significant relationship. She disclosed her drug use on her SCA and to employers.

Applicant stopped illegal drug use because she was entering the work force and wanted a career. She disclosed the information on her SCA. She believes she is mature and would not use illegal drugs to jeopardize her career. She signed a letter of intent. As to the shoplifting, I find it very troubling. She lied at first, did not list it on her SCA and did it for the thrill of it. She continued to shoplift after the college incident, when she was disciplined by the Dean. There is a history of shoplifting. She was

embarrassed about having to share the information. I have doubts about her in this area and all doubts must be found in favor of the government.

I have significant reservations about Applicant's current reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2. It is not the purpose of security clearance adjudications to punish an applicant for past acts of misconduct. The purpose of the security clearance adjudication is to make "an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk."² In these cases, the degree of acceptable risk is less than that acceptable to mere access to employment.³ Applicant has proved herself an acceptable employee, but her actions, specifically her lack of candor and trustworthiness, make her an unacceptable security risk.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraph 1.a-1.i:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraphs 2.b-2.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 access to classified information. National security eligibility is denied.

Noreen A. Lynch
Administrative Judge

² AG ¶ 2(a).

³ See *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973).