



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



In the matter of:

)
)
)
)
)

ISCR Case No. 17-03447

Applicant for Security Clearance

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: Francis J. Flanagan, Esq.

08/02/2018

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant used marijuana approximately 11 times between July 2011 and February 2016 after she had been granted a secret clearance. She disclosed her drug involvement on her May 2016 security clearance application, but she has yet to demonstrate that she understands the importance of complying with her security responsibilities. Clearance is denied.

Statement of the Case

On October 27, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing a security concern under Guideline H, drug involvement and substance misuse, which explained why it was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for her. The DOD CAF took the action 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 National Security Adjudicative Guidelines (AG) effective June 8, 2017, to all adjudications for national security eligibility or eligibility to hold a sensitive position.

On November 15, 2017, Applicant answered the SOR allegation and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On January 9, 2018, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On January 11, 2018, I scheduled a hearing for February 7, 2018. On January 22, 2018, Counsel for Applicant entered his appearance and requested a continuance to give him time to prepare his representation. On January 23, 2018, I cancelled the hearing for February 7, 2018, with no objection from the Government. On February 27, 2018, I rescheduled the hearing for March 21, 2018.

I convened the hearing as scheduled. Two Government exhibits (GEs 1-2) and four Applicant exhibits (AEs A-D) were admitted into evidence without objection. A December 11, 2017 letter forwarding discovery of the then proposed GEs to Applicant and a list of the GEs were incorporated in the record as hearing exhibits I and II respectively, but not admitted as evidence. Applicant testified, as reflected in a transcript (Tr.) received on March 28, 2018.

I held the record open until April 4, 2018, for post-hearing submissions from Applicant. No documents were received and so the record closed on that date.

Findings of Fact

The SOR alleges that Applicant used marijuana from July 2011 to February 2016 after being granted a security clearance in August 2006 (SOR ¶ 1.a). When Applicant responded to the SOR allegation, she admitted the drug involvement as alleged, but she also indicated that her use was in a small quantity and at very infrequent intervals, and also that she had not accessed sensitive information since late 2006. She added that she was no longer associated with the persons involved in her marijuana use, and that she intended to abstain from any future drug involvement. She expressed regret about her decision to use marijuana and indicated that, in hindsight, she realizes that she should have reported her marijuana use immediately after the first incident. (Answer.)

After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 45-year-old senior manufacturing engineer. She has a bachelor's degree in industrial engineering awarded in December 1997. She is not married but has been in a cohabitant relationship since approximately August 2002. She owns her home, which has served as her and her cohabitant's residence since approximately September 2003. (GEs 1-2, Tr. 19-20, 27.)

In 1999, Applicant began working as a temporary contract employee for her current employer, a defense contractor. Her intention was to pay for graduate studies that she then did not complete. She became a direct hire in June 2000. Applicant passed drug screens taken when she began working as a contract employee and again when she was hired as a full-time employee. (Tr. 32.)

Applicant was granted a secret clearance in August 2006, after completing a security clearance application in May 2006 on which she was asked about any illegal drug involvement. (Tr. 28.) She was working in a test laboratory and the software was classified. She has not handled classified information since then. (Tr. 39.)

On May 31, 2016, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) to renew her security clearance needed to be a backup manufacturing engineer for a classified program. (Tr. 39.) She responded affirmatively to an inquiry concerning any illegal use of a drug or controlled substance in the last seven years and indicated that she had used "THC" recreationally approximately 11 times from July 2011 and February 2016. She answered "Yes" to whether that drug use occurred while possessing a security clearance, but "No" regarding any intention to use the drug in the future. She added the following:

Do not intend to use in the future due to a couple of instances of allergic type reactions (i.e., runny nose, sneezing, itchy eyes). I am unsure if the allergic reaction was caused by marijuana, however symptoms manifested immediately after use.

Applicant responded "No" to an inquiry concerning any illegal purchase, manufacture, cultivation, trafficking, production, transfer, shipping, receiving, handling or sale of any drug or controlled substance. (GE 1; Tr. 29.)

On July 21, 2017, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). She disclosed that her marijuana use was with her cohabitant significant other and others whose names she could not recall. She used the drug in the homes of the other people, and it was there when she arrived. She indicated that she used marijuana because she wanted to try it, but she stopped because it did not work for her. Applicant denied any intention to use marijuana in the future. (GE 2.)

On March 20, 2018, Applicant executed an affidavit expressing her intention to abstain from all drug involvement and substance misuse and acknowledging that any future drug involvement would be grounds to revoke her security clearance eligibility. (AE A.) At her hearing on March 21, 2018, Applicant testified on direct examination that she did not realize she was placing her continued employment with the defense contractor at risk by using marijuana while she held a security clearance until she was faced with the SF 86 inquiry in 2016. She had considered responding negatively to the drug inquiry because she already put her marijuana use behind her, but telling the truth was the right thing to do. (Tr. 24.) As for the circumstances of her marijuana use, Applicant indicated that all her use occurred at the same house while socializing with friends of one of her significant other's friends. She explained that she initially went there with the purpose of playing volleyball but was then offered marijuana. (Tr. 26, 33.) No pressure was placed on her to smoke the drug then or on ten subsequent occasions. (Tr. 37.)

After Applicant used marijuana in February 2016, she discussed with her significant other whether they should maintain these social ties, given marijuana's illegality. The last

time that they went there, which was “probably” in February 2016, she said to him, “Do we really like these people?” She has not been to the home or associated with the persons since then. To her knowledge, neither has her significant other. She does not believe her significant other currently uses any marijuana, but she is not certain. He had used marijuana regularly when he was in high school. (Tr. 34.) She has not seen him use marijuana or smelled it on him. Shortly after Applicant completed her May 2016 SF 86, she states that told her significant other that she cannot have anything to do with marijuana. Applicant expressed her intention to have absolutely no involvement with marijuana in the future. (Tr. 33-39.)

Applicant knew marijuana use was illegal under federal law when she used it. (Tr. 28.) Asked why she decided to try using marijuana at age 38, Applicant responded, “It was a stupid decision. I had no reason to try it. I really had no interest to try it.” She testified that she did not consider when she first used marijuana in 2011 that she might be putting her job at risk because she had not handled classified information since 2006, and so it was not at the forefront of her mind. She also acknowledged that she knew her employer had a drug-free workplace policy and would not condone marijuana use. (Tr. 30-31.) When asked to explain her repeated use of marijuana despite that knowledge, Applicant responded that her marijuana use was “very, very, very minimal.”¹ (Tr. 31.) Applicant also acknowledged that she knew using marijuana with a security clearance would be grounds to revoke her security clearance eligibility (Tr. 30), although she later testified that, if her security clearance had been at the forefront of her mind, it would not have happened. (Tr. 38.)

Applicant likes her job with the defense contractor. (Tr. 21.) In terms of her work performance, she has met or exceeded the requirements of her position. She has consistently shown initiative, commitment, technical skill, and an ability to get work done, at times in demanding conditions. Her attention to detail and excellent program support have made her a valued team member. A highly-motivated hard worker, stress management has been an issue for her since at least 2004, although she has made some improvements in balancing workload and time management in recent years. (AE D.)

Character References

A longtime close friend of both Applicant and her significant other provided a character reference for Applicant. A registered nurse, she lives nearby and visits them a few times a week. She considers Applicant to be “one of the most intelligent, sincere, committed, and honest people [she has] ever had the privilege to know.” In her opinion,

¹ When asked why she repeatedly used marijuana knowing that she could jeopardize her job and her clearance, Applicant responded:

Many of the times when I did use it, I don’t believe I consumed enough to really even feel an effect from it. I have a lot of food allergies so I’ve become very accustomed to very carefully trying things. It could be something minuscule in it that would lead me to days of stomach discomfort and not being able to leave. So it was very, very, very minimal. (Tr. 31.)

Applicant is “brutally honest, almost honest to a fault.” She has never known Applicant to sacrifice her integrity. (AE B.)

Another friend, who has known Applicant since they were high school juniors, has had periodic contact with her for the past 30 years. He attests “without question that [Applicant] is one of the most trustworthy and self-aware persons [he has] known.” He considers her to be “honest, often to a fault.” (AE C.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 the adjudicative process. The administrative judge’s overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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. 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 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 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. Section 7 of EO 10865 provides that 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 concerns about drug involvement and substance misuse are set forth 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 used marijuana approximately 11 times between July 2011 and February 2016 at social gatherings with the same “friends of a friend” of her significant other. She held a DOD secret clearance when she used marijuana. Disqualifying conditions AG ¶ 25(a), “any substance misuse (see above definition),” and AG ¶ 25(f), “any illegal drug use while granted access to classified information or holding a sensitive position,” apply. Whereas Applicant never purchased marijuana, and there is no evidence that she contributed any money towards its cost, the security concerns addressed in AG ¶ 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” are not well established.

AG ¶ 26(a) provides for mitigation when the drug involvement and substance misuse “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.” Applicant’s marijuana use on 11 occasions over 4.5 years may reasonably be considered as infrequent, but her last use in February 2016 was recent as of her May 2016 SF 86. Moreover, the circumstances under which her marijuana use occurred, with her significant other at house parties with friends of his friend, were not so unusual as to implicate AG ¶ 26(a).

AG ¶ 26(b) provides for mitigation when an individual acknowledges his or her drug involvement and has no intention of future drug activity:

(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 submits that she has been drug free since February 2016; that she has not associated with the persons with whom she smoked marijuana since February 2016; and that she has no intention of using any illegal drug in the future. Her stated reason for ceasing her marijuana use is primarily that she had unpleasant affects from using marijuana in a couple of instances and does not see any benefit to be gained from using marijuana again. She provided the statement of intent to abstain required under AG ¶ 26(b)(3).

There is no evidence to suggest that Applicant's marijuana use was other than recreational, on sporadic occasions, and in a social context that no longer exists. She did not purchase marijuana or possess the drug other than when she used it at house parties with the same people, whom she has not seen since February 2016. When asked whether the drug was freely provided to her and her significant other at those parties, Applicant responded, "It was there." She had abstained for over two years as of her hearing.

However, AG ¶ 26(b) is not fully established in some aspects. Applicant is not certain whether her significant other has stopped using marijuana. He was apparently a regular user of marijuana in high school, and her drug use occurred while socializing with him and people she met through him. She has told him that she cannot use marijuana any longer, although she provided no corroboration. Applicant admits that she used marijuana "in small quantities at infrequent intervals," but she did not provide a consistent, credible explanation for why she repeatedly used marijuana as a mature adult while she held a security clearance. She testified that she had no interest in trying it and yet also that no one pressured her to use it. She reports having had unpleasant effects that she associated with marijuana and deriving no benefit from the drug, but she continued to use the drug beyond a couple of occasions. Applicant asserts that she first realized the risk to her clearance and job when she was faced with the SF 86 inquiry in 2016. However, she admitted on cross-examination that she had completed a security clearance application ten years earlier and was asked then about any illegal drug use. She had also taken two drug screens for her job in 1999 and 2000. It is inconceivable that she did not realize before her recent SF 86 that she risked her clearance and her job by engaging in prohibited drug activity. Applicant knew marijuana was illegal and contrary to her employer's drug-free workplace policy. Applicant has not met her burden of mitigating the serious doubts about her judgment and reliability caused by her marijuana use while possessing a security clearance.

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 her conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(d).² In making the overall commonsense determination required under AG ¶ 2(c), Applicant's contributions to her employer weigh in her favor. She has met, and in some years exceeded her job requirements. She is valued by her team for her knowledge and dedication. Her candor on her SF 86 about her drug involvement is also viewed positively. However, neither her work contributions nor her candor about her drug involvement on her latest SF 86 entitle her to a security clearance. The DOD might not have learned about Applicant's drug use from another source, but the Government can reasonably expect persons granted security clearance to comply with their obligations. Applicant was entrusted with a security clearance based on certain criteria and conditions, including that she abide by the drug laws and remain abstinent from illegal drugs while maintaining her security clearance. Applicant was also obligated to report any transgressions as soon as practicable. See ISCR Case No. 11-12165 (App. Bd. Jan. 29, 2014). Applicant indicates that, in hindsight, she realizes she should have reported her marijuana use immediately after she first used marijuana in 2011. Yet, she is either unwilling to acknowledge or does not understand her security responsibilities. When asked why she repeatedly used marijuana knowing that she could jeopardize her job and clearance, she responded that she did not believe she consumed enough marijuana to feel an effect.

Security clearance decisions are not intended to punish applicants for past transgressions. Yet it is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). The Government must be able to rely on those persons granted security clearance eligibility to fulfill their responsibilities consistent with laws, regulations, and policies, and without regard to their personal interests. For the reasons discussed, Applicant has raised enough doubt in that regard to where I am unable to conclude that it is clearly consistent with the national interest to continue her eligibility for a security clearance.

Formal Finding

Formal finding for or against Applicant on the allegation set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, is:

² The factors under AG ¶ 2(d) are as follows:

(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.

Paragraph 1, Guideline H:

AGAINST APPLICANT

Subparagraph 1.a:

Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge