



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



In the matter of:)
)
) ISCR Case No. 17-04387
)
Applicant for Security Clearance)

Appearances

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

09/24/2018

Decision

CERVI, Gregg A., Administrative Judge:

Applicant failed to mitigate the drug involvement and substance misuse and personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant completed a Questionnaire for National Security Positions (SF 86)¹ on September 5, 2017. On January 29, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, Drug Involvement and Substance Misuse, and Guideline E, Personal Conduct.²

¹ Also known as a Security Clearance Application (SCA).

² The DOD CAF acted under Executive Order (Exec. Or.) 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 revised adjudicative guidelines (AG) effective on June 8, 2017.

Applicant answered the SOR and elected to have the case decided on the written record in lieu of a hearing. The Government's written brief with supporting documents, known as the File of Relevant Material (FORM), was submitted by Department Counsel on March 7, 2018.

A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM and filed Applicant's exhibit (AE) A in response. Government's exhibits (GE) 1 to 4 and AE A are admitted into evidence. The case was assigned to me on July 25, 2018.

Findings of Fact

Applicant is a 28-year-old interior designer employed by a defense contractor since February 2013. She received a bachelor's degree in 2012. She is unmarried and has not previously held a security clearance.

The SOR alleges Applicant used marijuana from 2006 to 2017; cocaine from 2010 to 2017; Adderall without a prescription from 2011 to 2017; and ecstasy from 2012 to 2015. It also cross-alleges these allegations under Guideline E. Applicant admitted the SOR allegations and vowed to cease all future use.

Applicant reported her history of illegal drug use in her SCA. She began using marijuana in high school, but increased the frequency of use to about once per month after graduating from college and securing employment. She used cocaine a few times per year to 2017, ecstasy about two times between 2012 and 2015, and Adderall about five to six times with friends while at parties. She stopped illegal drug use about two months before completing her SCA to obtain a security clearance. Although Applicant stated her intent to cease all further illegal drug use, she has not sought drug counseling and she continues to associate with friends with whom she most recently used marijuana.

Applicant admits to her "questionable decisions" and vowed to not use illegal substances again. She discussed passing a professional licensing exam and work she has recently accomplished. She also said that she has taken up a physically-fit lifestyle and lost weight.

Law and Policies

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 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(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.

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 clearance decision.³ In *Department of Navy v. Egan*⁴, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.⁵

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." It is well-established law that no one has a right to a security clearance. As noted by the Supreme Court in *Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." 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.⁶

The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive and classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive or classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive or 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).

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan.27, 1995).

⁴ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

⁵ *Egan*, 484 U.S. at 531.

⁶ *Egan*, 484 U.S. at 531.

Analysis

Guideline H: Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is set out 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.

The guideline notes conditions that could raise security concerns under AG ¶ 25. The disqualifying condition potentially applicable in this case includes:

(a) any substance misuse (see above definition).

Applicant has a long history of illegal drug use from 2006 to 2017. Disqualifying condition AG ¶ 25 (a) applies.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially 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;

(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;

(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; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant's history of illegal drug use included use up to two months before completing her SCA to obtain a security clearance. Her use included marijuana, cocaine, ecstasy, and Adderall, including drug use while working for a government contractor.

Although Applicant may still be considered a young adult, her history of illegal drug use is recent and continued for five years after graduating from college, with increased use after graduating. She stopped her use to obtain a security clearance, but a college graduate and working professional seeking a security clearance is expected to follow laws against illegal drug use, support a drug-free workplace, and have a history of good judgment. Her use of illegal drugs until 2017 does not display the judgment expected of an adult, and insufficient time has passed since she abstained. Applicant has not sought or received drug counseling, she continues to associate with friends that use marijuana, and did not submit a signed statement of intent to abstain from all drug involvement and substance misuse per the Directive. She expressed an understanding of the Government's concerns with her past drug use and vowed to cease all future use, but there has been insufficient time since her last drug use and a change in lifestyle to warrant application of mitigating credit.

Applicant's history of illegal drug use and failure to submit convincing evidence in mitigation, raise serious questions about her willingness to comply with rules and regulations, and her overall maturity and judgment.

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 or sensitive information.

The relevant disqualifying condition under AG ¶16 is:

(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, may affect the person's personal, professional, or community standing.

Applicant's history of illegal drug use as noted in the findings of fact, invokes an assessment of questionable judgment and personal conduct that creates a vulnerability to exploitation, manipulation, and duress. AG ¶ (e) applies.

Conditions that could mitigate personal conduct security concerns are provided under AG ¶ 17. The following are potentially applicable:

(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

Applicant's history of illegal drug use, taken as a whole, shows a pattern of unmitigated conduct that has not ceased long enough to apply mitigating credit. Despite her recent claims of abstinence, Applicant's judgment remains questionable until she can show a significant change in lifestyle for a credible period of time. Based on the same analysis under Guideline H, above, I find no mitigating conditions under Guideline E fully applicable.

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. I considered all of the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated the evidence, my findings of fact, and comments under Guidelines H and E in this whole-person analysis.

Applicant's history of recent illegal drug use without convincing evidence in mitigation, leaves me with serious questions about her future intent and willingness to follow rules and regulations.

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
Subparagraphs 1.a and 1.d:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

Gregg A. Cervi
Administrative Judge