



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



In the matter of:)
)
) ISCR Case No. 18-00093
)
Applicant for Security Clearance)

Appearances

For Government: Kelly Folks, Esq., Department Counsel
For Applicant: Eric A. Eisen, Esq.

12/26/2018

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the drug involvement and substance misuse security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On January 24, 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. Applicant responded to the SOR on February 24, 2018, and requested a hearing before an administrative judge.

The case was assigned to another administrative judge on August 3, 2018, and reassigned to me on October 2, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 7, 2018, scheduling the hearing for November 14, 2018. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through G, which were admitted without objection.

Findings of Fact

Applicant is a 36-year-old employee of a defense contractor. She has worked for defense contractors since 2010. She seeks to retain a security clearance, which she has held since 2011. She has a bachelor's degree, which was awarded in 2014, and a master's degree, which was awarded in 2009. She is married with an infant child.¹

Applicant smoked marijuana about five to seven times from 2001 to 2008. She was in college and graduate school at the time. She reported her marijuana use on the Questionnaire for National Security Positions (SF 86) she submitted in September 2010. During her background interview in October 2010, she stated that she regretted using marijuana and she did not intend to use marijuana or any other illegal drug in the future.²

Applicant had surgery in 2013. She was in considerable pain and was prescribed narcotic painkillers. She had side effects from the narcotics, including constipation, headaches, vomiting, and a "fuzzy" head. She had another surgery in October 2015. She was again prescribed opioid painkillers. She completed the course of narcotics prescribed to her, but she was still in a great deal of pain. A friend offered her some marijuana for her pain. Applicant lives in a jurisdiction that permitted medical and recreational marijuana use. She chose to accept the marijuana from the friend because she received it immediately without having to wait for it to be prescribed by a doctor. Applicant used the marijuana over the course of a few weeks to alleviate her pain.³

Applicant knew that her marijuana use was against federal law and contrary to her company's and DOD's policies, even though it was not illegal in her jurisdiction and even if it had been prescribed by a doctor. However, she did not realize the full ramifications of her actions.⁴

Applicant reported her marijuana use on the SF 86 she submitted in February 2016 and during her background interview in September 2017. She provided a signed statement of intent to abstain from all illegal drug use with the acknowledgment that any future involvement with illegal drugs would be grounds for revocation of her security clearance. She credibly testified that she will not use any illegal drugs, including marijuana for pain management, in the future.⁵

Applicant submitted documents and letters attesting to her excellent job performance and strong moral character. She is praised for her professionalism,

¹ Tr. at 15-18, 25-29; GE 1; AE A, D.

² Tr. at 25, 32-33; GE 2-4; AE

³ Tr. at 20-26, 33-39; Applicant's response to SOR; GE 1, 2; AE E.

⁴ Tr. at 25-26, 30-32, 36-37; Applicant's response to SOR.

⁵ Tr. at 37-40; GE 1, 2; AE F.

judgment, loyalty, dependability, honesty, leadership, trustworthiness, work ethic, reliability, and integrity.⁶

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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. 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."

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.

⁶ AE B, C, G.

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 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 several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);

- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant possessed and used marijuana sporadically from 2001 through 2008, and again over the course of a few weeks in October 2015. She has held a security clearance since 2011. AG ¶¶ 25(a), 25(c), and 25(f) are applicable.

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; 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 experimented with marijuana while she was in college and graduate school. During her background interview in 2010, she stated that she regretted using marijuana and she did not intend to use marijuana or any other illegal drug in the future. She abstained from 2008 until she used marijuana to alleviate her pain in 2015. She knew that her marijuana use was against federal law and contrary to her company's and DOD's policies, even though it was not illegal under local law and even if it had been prescribed by a doctor. However, she did not realize the full ramifications of her actions. Having gone through this process, I am convinced that she does now.

Applicant provided a signed statement of intent to abstain from all illegal drug use with the acknowledgment that any future involvement with illegal drugs would be grounds for revocation of her security clearance. She credibly testified that she will not use any illegal drugs, including marijuana for pain management, in the future. She fully disclosed her drug use on her SF 86 and during her background investigation, which bolsters her credibility. I find that Applicant has abstained from illegal drug use for an appropriate period, and that illegal drug use is unlikely to recur. AG ¶¶ 26(a) and 26(b) are 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(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 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 the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline H in my whole-person analysis. I also considered Applicant's strong character evidence.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the drug involvement and substance misuse 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:	For Applicant
Subparagraphs 1.a-1.b:	For Applicant

Conclusion

It is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Edward W. Loughran
Administrative Judge