



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 14-05453
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: Justin Holbrook, Esq.

06/05/2015

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the drug involvement security concern. She abused marijuana and Adderall from 2000 to 2013. Her recent drug abuse occurred while she was employed by the federal government and after she went through a character hearing, where her past drug use was raised as a potential disqualifying issue for entry into the legal profession. In light of the circumstances of her recent drug abuse, insufficient time has passed to make an affirmative favorable finding that she will not engage in similar conduct in the future. Clearance is denied.

Procedural History

On November 18, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR), alleging that Applicant's conduct and circumstances raised security concerns under the drug involvement guideline.¹ Applicant answered the SOR and requested a hearing to establish her eligibility for access to classified information.

¹ This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines implemented by the Department of Defense on September 1, 2006.

On February 26, 2015, Department Counsel notified the Hearing Office that the Government was ready to proceed. On March 16, 2015, after coordinating with the parties, a notice was issued scheduling the hearing for March 24, 2015.² The hearing was held as scheduled. Department Counsel offered Applicant's security clearance application (SCA) as Government exhibit (Gx.) 1. Applicant testified and requested additional time post hearing to submit documentary evidence. I granted her request, and she timely submitted Ax. A, consisting of seven pages total. All exhibits were admitted into evidence without objection. The hearing transcript (Tr.) was received on April 1, 2015, and the record closed on April 17, 2015.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following findings of fact:³

Applicant, 29, is single with no children. She earned her undergraduate degree in 2008 and her law degree in 2011. She excelled in school and graduated at the top of her class in college and law school. She is admitted to practice law before the state bar of State X. After law school, Applicant worked for a time as a contract attorney and then, from April 2012 to November 2013, as a legislative aide to a member of the U.S. Congress. She has worked for her current employer since December 2013. Family members, friends, and supervisors attest to her excellent work performance, honesty, reliability, and conscientiousness in handling and safeguarding sensitive information. (Tr. at 15-19; Gx. 1 at 16; Ax. 1 at 2-7)

In 2014, Applicant's employer sponsored her for a security clearance and she submitted a SCA. In response to questions about past illegal drug use or abuse of prescription medication, Applicant voluntarily disclosed her past marijuana use and abuse of Adderall. She explained that she used marijuana, on approximately less than twenty occasions, between 2000 and 2013. Her marijuana use primarily took place when she was in school. Applicant admitted, however, that her last use of marijuana took place in about August 2013, when she was in a social setting with work colleagues and a younger colleague brought marijuana-laced brownies. She ate about half of the brownie, knowing it contained marijuana. (Tr. at 19-26, 34; Gx. 1 at 56)

Applicant's abuse of Adderall was far less extensive than her marijuana use. Applicant estimates she abused Adderall about four times between 2007 and 2013. She used Adderall that was prescribed for a friend. She used the drug primarily to help her stay awake and focused on her school work. She used Adderall on one occasion after graduating from law school. In about November 2013, while driving her friend's car, she used her friend's Adderall to stay awake. (Tr. at 27-30; Gx. 1 at 57-58)

² Applicant, through her counsel, waived the Directive's usual requirement that an individual should be afforded 15-day advance notice of a hearing. See Hearing Exhibit (Hx.) I; Tr. at 7-8.

³ In reaching my findings of fact, I have made only those inferences reasonably supported by the evidence and, where necessary, resolved any potential conflict raised by the evidence.

Applicant testified that she understood, at the time she completed her SCA, that her disclosure of her past drug use could result in the denial of her application. Notwithstanding this possibility, Applicant decided to reveal her past drug use because she wanted to be honest about her background, including her past poor decisions. She states that she has grown and matured since her last use of drug, and has no intent to use illegal drugs or abuse prescription medication in the future. She signed a statement, which reflects this intent and further states that any failure on her part to abide by this condition would result in the automatic revocation of any clearance that she was granted. (Tr. at 27, 32, 35-36; Ax. A at 1)

Applicant testified that she also disclosed her past drug use on her bar application. She was required to attend a character hearing before she would be allowed to sit for State X's bar exam. Applicant explained that the issue of her marijuana use and abuse of Adderall "came up" at the hearing. (Tr. at 31) She was allowed to sit for the bar exam and passed it in August 2011. She has not used illegal drugs or abused prescription medication since 2013. (Tr. at 17-18, 27, 30-33)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are only eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865 § 2.

When evaluating an applicant's eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, 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." Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See also ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) ("Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.").

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. 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 an 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.⁴

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7.⁵ Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

Analysis

Guideline H, Drug Involvement

The security concern regarding illegal drug involvement is set forth at 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.

Applicant's marijuana use and abuse of Adderall from 2000 to 2013 raises the drug involvement concern. The record evidence establishes the disqualifying condition listed at AG ¶ 25(a), “any drug abuse.”⁶

The guideline also sets forth a number of conditions that could mitigate the drug involvement concern. I have considered all the mitigating conditions and only the following are relevant in this case:

⁴ Security clearance determinations are “not an exact science, but rather predicative judgments about a person's security suitability.” ISCR Case No. 01-25941 at 5 (App. Bd. May 7, 2004). An administrative judge is required to examine an individual's past history and current circumstances to make a predictive judgment about an individual's ability and willingness to protect and safeguard classified information. ISCR Case No. 11-12202; ISCR Case No. 11-13626 (App. Bd. Nov. 7, 2013).

⁵ See *also*, ISCR Case No. 11-13626 at 4 (App. Bd. July 25, 2014) (“an adverse decision under the Directive is not a determination that the applicant is disloyal. Rather, such a decision signifies that the applicant has engaged in conduct or has otherwise experienced circumstances that raise questions about his or her judgment and reliability.”).

⁶ The Directive defines “drug abuse” as the “illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.” See AG ¶ 24(b).

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

Applicant's last use of marijuana and abuse of Adderall occurred less than two years ago. Notwithstanding the short amount of time that has passed since her recent drug abuse,⁷ Applicant appeared sincere when she testified about her intent not to abuse drugs in the future. However, the circumstances under which her latest two instances of drug abuse occurred raise some doubt and questions about her ability and commitment to refrain from engaging in similar conduct in the future.⁸ Applicant's recent drug abuse took place after a character hearing, whose focus was to determine whether her past drug abuse disqualified her from gaining access to the legal profession. Despite the fact that Applicant's past drug use placed her professional aspirations in jeopardy, she decided to again abuse drugs just two years after being admitted as an attorney. She now seeks access to classified information less than two years after once again abusing drugs.

Additionally, Applicant's two recent incidents of drug abuse occurred while she was employed by the federal government. She described taking the marijuana-laced brownie from a "colleague . . . who was in a lower-level staff position."⁹ Her use of marijuana, an illegal drug, at a social event with fellow co-workers present raises unmitigated questions about her judgment and ability to follow rules and regulations. In light of Applicant's history of drug abuse, the recency of her drug abuse, and the circumstances under which the drug abuse took place, a lengthier period of abstinence is required before a favorable finding can be made that the security concerns raised by her conduct have been mitigated.¹⁰ AG ¶¶ 26(a) and 26(b) do not apply.

⁷ ISCR Case No. 11-09172 at 2-3 (App. Bd. Mar. 19, 2013) (Appeal Board has declined to adopt a bright-line rule regarding what constitutes "recent" and left such determination to the sound discretion of the hearing judge to determine based upon a review of the entire record).

⁸ ISCR Case No. 14-01669 at 3 (App. Bd. Feb. 9, 2015) ("It is not inconsistent for a Judge to find that an applicant's presentation is believable as far as it goes, yet insufficient to meet the applicant's burden of persuasion, viewed in light of the entire record.").

⁹ Tr. at 26.

¹⁰ ISCR Case No. 14-02203 at 3 (App. Bd. Mar. 30, 2015) ("length of time that would place an applicant's drug use sufficiently in the past so as to mitigate security concerns arising therefrom" left to sound discretion of the administrative judge).

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).¹¹ I gave due consideration to all the favorable and extenuating factors in this case, including Applicant's relative young age when the conduct occurred, her honesty in voluntarily disclosing her past drug use, and her favorable character references. Applicant's favorable evidence is substantial and may provide the basis for granting her eligibility for access to classified information at some future point. However, at this time, the favorable evidence is insufficient to outweigh the security concerns raised by her recent drug abuse, especially in light of the overarching standard in security clearance cases that requires any doubt raised by an individual's conduct and circumstances to be resolved in favor of national security.¹² Overall, the record evidence leaves me with doubts and questions about Applicant's eligibility for access to classified information.

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement)	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant

Conclusion

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant access to classified information at this time. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge

¹¹ The non-exhaustive list of factors are: (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.

¹² *Egan*; AG ¶ 2(b).