

SYNOPSIS

Applicant mitigated security concerns over her drug abuse as her marijuana use was not recent and ended in July 2005 with no intent for future use. Overall Applicant demonstrated good conduct in disclosing fully her prior marijuana use in her 2005 security clearance application. While the Government raised concerns over her troublesome conduct in her 2006 interview, she cooperating for the majority of the two-hour interview and voluntarily disclosed significant adverse information about her use of marijuana and her subsequent use in July 2005. When the investigator raised new questions at the end, I conclude Applicant misunderstood and did not terminate the interview. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on August 28, 2006. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.¹ The SOR alleges specific concerns over drug abuse (Guideline H). Applicant responded to these SOR allegations in an Answer notarized on September 13, 2006, where she requested a hearing.

Department Counsel on November 2, 2006, prepared a Ready to Proceed Memorandum and on November 7, 2006, the case was assigned to me. On November 14, 2006, a Notice of Hearing set the date for hearing on December 6, 2006. Because of a change in schedule, an Amended Notice of Hearing, issued November 30, 2006, moved the hearing to December 4, 2006, at a location near where Applicant works and lives. Applicant agreed she had sufficient notice to proceed on that date. (TR 8-9)

The Government called one witness, an investigator for the U.S. Investigation Services (USIS), a contractor for OPM. (TR 25-62) He also offered two exhibits which were admitted into evidence without objection. (Exhibits 1-2; TR 19-20, 46) The Government also offered five documents for Administrative/Official Notice; Exhibits I and V were accepted for Administrative Notice. Applicant objected to the relevance of Exhibits II, III, and IV as she had never been arrested; those documents were not accepted for Administrative Notice. (ANI-V; TR 20-25; 62-63; 106-107)

Applicant testified. With the Government's agreement, at the hearing I granted her seven additional days until December 11, 2006, to submit supplemental evidence. The Government was given a week to review the documents by December 18, 2006. (TR 76-77; 109) Subsequently, on December 5, 2006, she submitted Exhibits A, B, C, D.

On December 8, 2006, Department Counsel objected to exhibit B, an evaluation, because it was unsigned and Exhibit C, a reference letter, because it was unsigned. He had no objection to

¹ This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.

Exhibit D. Subsequently, I overruled his objections and admitted² all those exhibits; and the record closed on December 8, 2006. The transcript (TR) was received on November 28, 2006.

Motion to Amend the SOR

On October 31, 2006, Department Counsel moved to Amend the Statement of Reasons by adding a new allegation raising security concerns over Applicant's personal conduct (Guideline E) and alleged Applicant "failed to cooperate with an authorized investigator for the U.S. Office of Personnel Management" (OPM) on or about February 7, 2006, when she "declined to answer further questions" about her marijuana use and her underage alcohol use, and "terminated the interview."³ On November 8, 2006, Applicant responded and denied the allegation⁴ and provided additional explanation. Department Counsel provided a copy of the Amended SOR and her Answer on November 15, 2007

At the hearing Applicant objected to the Government's Motion to Amend the SOR. The Department Counsel asserted the right to Amend the SOR under paragraphs 10 and 13 of the Directive and argued he gave the Applicant sufficient time to respond to the motion, and she did respond. (TR 9-15; 16-17; 64) After the Applicant and the investigator completed their testimony, I accepted the Government's Motion to Amend the SOR over the objection of the Applicant who denied the allegation. (TR 80)

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due

² Although Exhibit B, her summer intern evaluation was unsigned, and Exhibit C, a recommendation for the MBA program was unsigned, I admitted them because Applicant reported that the signed copies of these documents were unavailable and because the evaluation was submitted on a corporate form which was an indicia of reliability. Further, the unsigned documents were consistent in tone with the commendations in Exhibit D, where the Government had no objection.

³ Department Counsel did not address if this Motion to Amend the SOR was under the old Directive or the new guidelines that went into effect at DOHA, September 1, 2007.

⁴ On November 8, 2006, Applicant replied to the Amended SOR and denied paragraph 2.a.; she stated, "I have never been dishonest at any point during this application process. I provided many details about my marijuana use, including the names of people I smoked marijuana with as well as who provided the marijuana when I could recall them. Late in the interview, after supplying many names and repeating my answers many times, I asked the investigator some questions about why she needed to know these individuals' names. When she was unable to explain it to me, I calmly replied that I didn't wish to give any more names. I don't believe I was uncooperative.

"In response to the final sentence of 'a' above, the investigator terminated the interview. As I recall, we were walking away from the table when I asked her a final question about why they wanted to know so much about my marijuana use when they didn't question me about any other illegal behavior. As an example, I stated underage alcohol consumption. The investigator then asked me if I had used alcohol when I was underage, and she began to sit back down as if to question me again. I replied honestly "yes" but did not sit down to restart the interview. It was my understanding that she had asked me all of the questions she intended to ask me, and that the interview had ended." (Answer to Amended SOR of November 8, 2006)

consideration of that evidence, I make the following Findings of Fact:

Applicant, 22 years old, has worked for Employer #1 in State #1 as a software engineer initially as an intern in summer 2005 from May to August 2005. She completed a SF-86 security clearance application in March 2005 before her summer internship, but she learned she was not granted an interim secret as she had admitted marijuana use. Applicant received an outstanding rating from her summer internship as her work was assessed as exemplary. She was evaluated as an outstanding team player, with excellent communication skills and outstanding technical skills. She was seen as having good interpersonal skills and a very good work ethic. Subsequently, she was offered a permanent job at the end of the summer. She has been a full-time employee from June 2006 to present. (Exhibit 1; Exhibits A, B, D; TR 75; 78; 80-81)

Shortly after she began her full-time employment, her supervisor provided a recommendation for graduate school where he commended her work. He stated he had so much confidence in her that he asked her to present a system design to an end-user audience even though new engineers usually do not make such presentations. (Exhibit C) In her short tenure, she was been recognized for her "exceptional performance" by "pride" certificates on five different occasions. (Exhibit D)

Applicant graduated from college in State #2 in May 2006. She is single, but is in a long-term relationship. (Exhibit 1; TR 76; 81) She is active in a community organization and mentors an eight year old girl. (TR 75) She was recently accepted into an Masters of Business Administration (MBA) university program and was to start classes in January 2007. (TR 105; Exhibits A, C)

Drugs and Personal Conduct

On her March 2005 Security Clearance Application (SF 86) Applicant voluntarily disclosed her use of marijuana twenty times from April 2000 to February 2005. She testified she used drugs in high school about 20 times and only used marijuana a few times in college. (Exhibit 1; TR 86-87) She disclosed her drug use on the SF 86 as she wanted to be 100% honest. (TR 104) Applicant testified took a drug test for her internship in February or March 2005 and passed it. (TR 84; 103)

The security interview in February 2006 had elements that the investigator and the Applicant viewed differently. Although she did not provide her notes, the contract investigator from U.S.I.S. authenticated her interview summary of the Personal Subject Interview (ROI). (Exhibit 2) Under OPM practice contract investigators do not take signed, sworn statements, so Applicant did not have an opportunity to review the the accuracy of the ROI before it was submitted. While the Applicant agreed to the admissibility of the ROI, she contested the accuracy of several of the statements reported in the ROI. (Exhibit 2; TR 61-62)

Applicant cooperated for the majority of the interview and provided significant adverse information about her drug use. Applicant admitted to the investigator that she used marijuana between 2000 and July 2005, but she has not used marijuana since then and has no intent for future use. (Answer; TR 74) The investigator remembered that the interview was lengthy as she followed procedures that required her to ask the Applicant O.P.M.'s "17 Guideline question" about each time Applicant had used drugs. Her objective was to resolve the issue of the drug use Applicant had previously disclosed in her SF 86. The investigator conceded that this repetition can seem "endless."

Both the investigator and the Applicant agreed that the Applicant showed she was “annoyed”⁵ with the investigator repeating the same 17 questions over each and every use of marijuana in high school and in college. The investigator testified that Applicant did volunteer in the interview her July 2005 marijuana use and also volunteered that she was the college campus president⁶ of the National Organization for the Reform of Marijuana (NORML) whose goal was to bring awareness to the legalization of marijuana. In her efforts to be honest Applicant disclosed she was the campus president of NORML; however, she did not state she was in favor of the legalization of marijuana. Although Applicant used marijuana again in July 2005, she has not used marijuana since then and has no intent for future use. (Answer; TR 67-73; 82-84; 92; 102-103) Applicant was never arrested for her drug use. (TR 92) None of her current friends use marijuana. (TR 76)

Applicant explained that the investigator repeatedly asked her about her future intent⁷ to use marijuana. However, Applicant disputed the accuracy of the report in the ROI. Applicant further clarified in her testimony that she did not then and does not now have any intention to use marijuana in the future. She has no intention of using marijuana again. (TR 66-67) While she was involved with NORML as a sophomore in college, she is no longer active in NORML. (TR 77-8) (SOR 1.a, 1.b, and 2.a.)

Half-way through the interview, the investigator stated that Applicant refused to disclose who was smoking marijuana with her in college at the state university. (TR 33, 35-36, 39-44) In Applicant’s view since she and the investigator were in a public setting, not in a private room, she was reluctant to reveal the name of her friend as she was “unsure about legal consequences for him” as she wanted to protect his rights and the investigator could not tell her why she needed the names. (TR 93-97) She did reveal the name of her college friend at the hearing as she then had a better understanding of the importance of giving all the information requested. She explained it was the lack of privacy in the interview room that led her to decline to reveal the name. (TR 99-100)

The investigator’s and Applicant’s views differed on how the interview ended. While the investigator did not recall how long the interview took, she remembered Applicant made an admission about underage alcohol use. When investigator then began to ask Applicant a series of questions about her alcohol use, Applicant left and “walked out” of the interview. (TR 47-58; 59-60) The Report of Investigation (ROI) concluded, “Subject refused to answer any further questions regarding alcohol use or any further questions regarding marijuana use.” (Exhibit 2)

On the other hand, Applicant remember the sequence of events differently. Applicant remembered the interview took approximately two hours. She viewed the interview as over when

⁵ Applicant conceded that the investigator’s technique of asking the same 17 questions about each of the times she used marijuana was annoying as her answer was the same for each time she used. (TR 100-101)

⁶ Applicant helped to found the local chapter of NORML when she was a sophomore in college. Her understanding was that NORML never advocated the illegal use of marijuana, simply that the laws be changed. (TR 88-90)

⁷ Applicant objected to the accuracy of the investigator’s summary statement in the ROI which reported that “Subject intends to smoke marijuana one or two times per year recreationally.” She conceded that when asked about future use of marijuana she did say, “yes, it’s possible, but I can’t imagine ever using it more than one or two times per year recreationally.” (Exhibit 2; TR 66)

she asked the interviewer why the focus had been on illegal drug use and not underage alcohol use. She believed that the investigator then “attempted to restart the interview.” (TR 74) Applicant explained she provided the names of all of her high school friends, but she did not provide any names of college friends who used marijuana to the investigator as she was unsure of potential legal consequences for them. She subsequently provided the name of one college friend at the hearing to demonstrate her willingness to cooperate. Applicant established that she was otherwise cooperative in providing relevant and material details. She admitted using marijuana in July 2005 after she submitted her SF 86. Applicant also challenged the accuracy of the ROI report which stated that the only reason for her not using marijuana was to pass a drug test. Applicant reported that was not her motivation as she had already passed a drug test before she began the internship with a defense contractor in summer 2005. At the time of the interview in February 2006 she was not planning to take a drug test and had no intent to use marijuana again. Applicant recalled the investigator put down her notebook and pen and, consequently, Applicant believed that the interview had ended. She did not understand that her mention of her underage use of alcohol would open up a new line⁸ of investigative inquiry. Also, Applicant remembered being in a room with other people so she believed she did not have complete privacy in the interview. (TR 67-73; 77; 82; 97-98; 99-102)

Thus, her failure to provide additional details about her underage drinking and her refusal to name a college friend in the interview do not clearly establish that Applicant failed to cooperate with an authorized investigator of OPM as alleged.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole, I weighed relevant Adjudication Guidelines as set forth below:

Guideline H - Drug Involvement

E.2.A.8.1.1. The Concern: Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

Guideline E - Personal Conduct

E2.A5.1.1. The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

⁸ On cross-examination she conceded that she did not allow the investigator to “restart the interview” based on her mention of having used alcohol when she was underaged. (TR 98-99)

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. The Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Guideline H - Drug Involvement

The Government established security concerns over her marijuana use in high school and college from 2000 to 2005 as well as security concerns over her decision to use marijuana again while she was an intern at a defense contractor in July 2005. As she had disclosed her high school and college drug use on her SF 86, she learned she was not granted an interim clearance as an intern. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. Her actions fall within conditions that could raise a security concern and may be disqualifying including: E2.A8.1.1.2.1. (any drug abuse). (SOR 1.a.) However, there was no evidence of any marijuana use since July 2005, no evidence of current drug use, or persuasive evidence of her intent for future use. Thus, the government failed to establish that she falls within the provisions of 10 U.S.C. Section 986, which would disqualify a current drug user for being granted a security clearance. (SOR 1.b., 1.c.) Her disclosure to the investigator she played a leadership role on her campus for NORML, an organization that questions the current drug laws, was not even alleged as a security concern in the SOR. Notably, her involvement was limited to her sophomore year in college, and she subsequently ended her involvement. Thus, that past involvement in college does not lessen her credibility in the current context.

Applicant mitigated⁹ security concerns over her prior use of marijuana as there is no evidence of recent use as she did not use drugs subsequent to July 2005. Thus, E2.A8.1.1.3.1. (The drug involvement was not recent.) applies. Further, Applicant credibly established that her intent is not to use any drugs in the future. Although exactly what she said to the investigator in February 2006 about her future intent is disputed, she credibly established that her current intent falls within MC 3: E2.A8.1.1.3.3. A demonstrated intent not to abuse any drugs in the future. I conclude that she provide sufficient evidence in mitigation especially when viewing her in the context of a “whole person.” She had an outstanding evaluation from her work as a summer intern which led to a permanent job offer. Her current supervisor demonstrated his confidence in her by his outstanding

⁹ **E2.A8.1.1.3. Conditions that could mitigate security concerns include:** E2.A8.1.1.3.1. The drug involvement was not recent; E2.A8.1.1.3.2. The drug involvement was an isolated or aberrational event; E2.A8.1.1.3.3. A demonstrated intent not to abuse any drugs in the future; E2.A8.1.1.3.4. Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable diagnosis by a credentialed medical professional.

recommendation of her to an MBA program where she was admitted. In addition, in her short tenure she has received five “pride” commendations for the quality of her work performance. She has matured and demonstrated her commitment to a drug-free lifestyle. Hence, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant under subparagraphs 1.a., 1.b. and 1.c. incorporated under SOR Paragraph 1.

Personal Conduct

The Government raised security concerns over Applicant’s Personal Conduct based on the importance of the fiduciary relationship the Government has with Applicant over the issue of access to classified information as the government has to rely on individuals to follow the rules. The Government alleged that Applicant “failed to cooperate” with the security clearance investigator for OPM when she was asked to provide “certain details” about her marijuana use between August 2002 and July 2005, including names of people with whom she smoked marijuana and the name of the person her provided her marijuana. Further, they alleged Applicant “ultimately declined to answer further questions” about her marijuana use and underage alcohol use, and terminated the interview. The government asserts that consequently her conduct fall within disqualifying condition 2: E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities and also that her conduct fell within Disqualifying Condition (DC) (5): E2.A5.1.2.5. A pattern of dishonesty or rule violations. While the Government amended the SOR to add this concern as a new allegation, Applicant denied the allegation. Certainly, the investigator who testified painted a bleak picture of the interview. However, Applicant disputed her conclusions in the ROI which she had not been given the opportunity to view. Applicant was not given an opportunity to provide a signed, sworn statement.

Indeed, in assessing her overall, I find it significant that Applicant voluntarily disclosed her use of marijuana twenty times from April 2000 to April 2005 on her March 2005 initial SF 86 as he wanted to be 100% honest. She also disclosed subsequent use of marijuana in July 2005 to the investigator and cooperated throughout the majority of the interview.

Thus, her failure to provide additional information to the investigator was over limited and minor issues. Notably, her underage drinking and her refusal to name a college friend in the interview were not alleged as security concerns. Thus, I do not conclude that her omission of this information was equivalent to her refusal to disclose relevant and material information to the investigator. Also, I note that Applicant disputed much of the investigator’s testimony and the accuracy of the ROI which Applicant had not been allowed to review before it was submitted to OPM

Significantly, Applicant fully disclosed all of her high school and college marijuana use on her SF 86, volunteered to the investigator her subsequent use of marijuana in July 2005, and also disclosed her college political involvement in NORML. Overall Applicant demonstrated her intent to comply with security requirements. She fully disclosed her high school use and the friends with whom she used. While Applicant may have shown annoyance at the repetition of the questions, refused to disclose one college friend with whom she used marijuana, and did not expand on her

underage drinking, these limited refusals do not amount to a failure to cooperate in the interview or a “deliberate” omission or concealment of relevant and material facts. In sum, the Government failed to establish a prima facie case of her demonstrated intent to falsify based on the ROI and agent testimony. Had a sworn statement been taken at the time of the interview, Applicant would have been allowed to review and to correct any misunderstandings.

To the extent that the adverse impression Applicant made on the investigator casts a shadow on Applicant’s personal conduct, I conclude that overall there is evidence of rehabilitation, positive behavior changes, and improved circumstances. Looking at Applicant as a whole person¹⁰ and considering the circumstances surrounding her conduct (E2.2.1.2), I resolve that Applicant provided sufficient evidence of good personal conduct based both on her disclosures in the SF 86 and on the significant adverse admissions over her drug use she volunteered in the interview. Further, I note under, E2.2.1.4.. Applicant’s young age at the time of the interview. Also in assessing under E.2.2.1.7. , the motivation for the conduct, I conclude that overall Applicant’s substantial disclosures lead me to conclude there was miscommunication between her and the investigator, not an intent to withhold relevant and material information. Now that she is out of college and understands more fully the importance of the security clearance, she has demonstrated enhanced maturity and growth both on the job as confirmed by her favorable evaluation as an intern, by her supervisor’s letter of reference to an MBA program, by her many commendations on the job, and by her conduct at the hearing where she made additional admissions and showed her willingness to cooperate fully.

Thus, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant under SOR Paragraph 2 under subparagraph 2.a.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

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| Paragraph 1. Guideline H: | FOR APPLICANT |
| Subparagraph 1.a.: | For Applicant |
| Subparagraph 1.b.: | For Applicant |
| Subparagraph 1.c.: | For Applicant |

¹⁰ In evaluating the relevance of an individual’s conduct, the adjudicator should consider the following factors: E.2.21.1. The nature, extent, and seriousness of the conduct; E2.2.1.2. The circumstances surrounding the conduct, to include knowledgeable participation; E2.2.1.3. The frequency and recency of the conduct; E2.2.1.4. The individual’s age and maturity at the time of the conduct; E2.2.1.5. The voluntariness of the participation; E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes; E2.2.1.7. The motivation for the conduct; E2.2.1.8. The potential for pressure, coercion, exploitation, or duress; and E2.2.1.9. The likelihood of continuation or recurrence. (E.2.2. Adjudication Process)

Paragraph 2. Guideline E:

FOR APPLICANT

Subparagraph 2.a.:

For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. Clearance is granted.

Kathryn Moen Braeman
Administrative Judge