



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 12-04397

Appearances

For Government: Gina L. Marine, Esq., Department Counsel
For Applicant: David B. Hargraves, Esq.

10/31/2014

Decision

Harvey, Mark, Administrative Judge:

From April 2008 to August 2010, Applicant used marijuana about 10 times. She used marijuana while on leave or when she was not on active duty, but while she was eligible to have access to classified information. She served in combat in Afghanistan. She disclosed her drug use to security officials. She received counseling for post-traumatic stress disorder (PTSD), expressed remorse, and has refrained from illegal drug use for more than three years. Drug involvement security concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On July 12, 2006, and January 15, 2012, Applicant submitted Questionnaires for Investigations Processing (e-QIP) (SF 86). (GE 1, 3) On October 23, 2013, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guidelines H (drug involvement) and E (personal conduct). (Hearing Exhibit (HE) 2) The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and it recommended that her case be submitted to an administrative judge for a determination whether her clearance should be denied, granted, continued, or revoked. (HE 2)

On November 19, 2013, Applicant responded to the SOR and requested a hearing. (HE 3) On September 4, 2014, Department Counsel was ready to proceed on Applicant's case. On September 4, 2014, DOHA assigned Applicant's case to me. On September 29, 2014, DOHA issued a hearing notice, setting the hearing for October 9, 2014. (HE 1) Applicant's hearing was held as scheduled, using video teleconference. At the hearing, Department Counsel offered three exhibits, and Applicant offered 11 exhibits. (Tr. 14-15, 18-19; GE 1-3; AE A-K) There were no objections, and I admitted GE 1-3 and AE A-K. (Tr. 15, 20) On October 10, 2014, Applicant provided one exhibit, which was admitted without objection. (AE L) On October 20, 2014, I received the transcript of the hearing.

Procedural Issues

Applicant waived her right to 15 days' notice of the date, time and location of the hearing. (Tr. 12-13) I accepted her waiver and proceeded with her hearing. (Tr. 13)

Department Counsel made a motion to withdraw the SOR allegation under Guideline E. (Tr. 12) There was no objection, and I granted Department Counsel's motion. (Tr. 12)

Findings of Fact¹

Applicant's SOR response admitted all SOR allegations, and she provided some extenuating and mitigating information. (HE 3) Her admissions are accepted as factual findings.

Applicant is a 25-year-old security officer. (Tr. 21, 71; GE 1) In high school, she was in the choir and manager of the volleyball team. (Tr. 31) She also worked in a pizza establishment. She graduated from high school in 2007. She has never married, and she does not have any children. (Tr. 114)

Applicant joined the Army Reserve and went to basic training in June 2007. (Tr. 30, 33, 81) Her military occupational specialty (MOS) was truck driver. (Tr. 33) After basic training and advanced individual training, she left active duty and returned to her reserve unit, where she attended drills once a month. (Tr. 35, 82) From June 2009 to May 2010, she and her unit were deployed to Afghanistan. (Tr. 40-41) Her duties were as driver, gunner, and assistant gunner on a mine-resistant ambush-protected (MRAP)

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

vehicle. (Tr. 42-43) For three or four months, she worked in the battalion headquarters monitoring radios. (Tr. 44-45) At that time she believed she had a security clearance because she needed to have a Secret clearance to monitor and use the radios. (Tr. 45, 102) She was promoted from private first class (E-3) to specialist (E-4). (Tr. 46) She was awarded the Combat Action Badge (CAB), Army Achievement Medal (AAM) for service in Afghanistan, and a certificate of achievement. (Tr. 46; AE A-E) The CAB is for being in direct combat with the enemy. (Tr. 135-136) On one occasion, her convoy was attacked in an enemy ambush with small arms fire and improvised explosive devices (IED). (Tr. 48) On other occasions, there was enemy sniping at their vehicles. (Tr. 48) She left active service in June 2010, and she left the Army Reserve in 2013. (Tr. 79; AE A) She received an honorable discharge. (AE A)

Applicant attended college from 2010 to 2011. (Tr. 65-66) She had to stop attending college because her father had cancer. (Tr. 66-67) She assisted her father until he passed away in November 2012. (Tr. 67-68) She recently returned to college, and she is now a junior. (Tr. 71) She is majoring in speech therapy. (Tr. 71) In May 2014, she was employee of the month. (Tr. 72; AE K)

Applicant received an 80 percent disability rating from the Department of Veterans Affairs (VA). (Tr. 144) Thirty percent of her VA disability rating was for PTSD. (Tr. 145)

Marijuana Use

When Applicant completed her January 15, 2012 SF 86, she disclosed that she used marijuana from June 2008 to August 2010 on approximately four or five occasions "for experimentation." (GE 1) She indicated she used marijuana while holding a security clearance. (GE 1) The last time she used marijuana was when she was 21 years old. (Tr. 114)

Applicant used marijuana 3-4 times in the April to June of 2008 timeframe at a party or parties. (Tr. 50-51) She was consuming alcohol and used marijuana because of peer pressure. (Tr. 52) They were passing around a marijuana pipe, and she took about two puffs on the pipe as it went around the group. (Tr. 52)

Applicant used marijuana 3-4 times in the late summer of 2008. (Tr. 53-54) They were passing around a marijuana pipe at parties, and she took puffs on it. (Tr. 54) In December 2009, she was home on leave from Afghanistan. (Tr. 55) She used marijuana twice in one day. (Tr. 55-57) In July or August 2010, after she returned from Afghanistan, she used marijuana once or twice. (Tr. 57) After leaving Afghanistan, she left active duty. (Tr. 60) She did not use marijuana after August 2010. (Tr. 59) She was tested for illegal drug use while in the Army; however, the test results were negative. (Tr. 87-96)

From September 2010 until 2013, she drove a school bus. (Tr. 61-62) She was drug tested three times. (Tr. 62) Beginning in 2011, she was also employed as a security officer at the offices of the Internal Revenue Service (IRS), Social Security

Administration, Federal Bureau of Investigation (FBI), and the federal court building. (Tr. 63-64)

In total, Applicant used marijuana about ten times from April 2008 to August 2010. (Tr. 57-59) She never purchased marijuana or brought marijuana to parties. (Tr. 53-54, 56) On October 11, 2011, an Office of Personnel Management (OPM) investigator interviewed Applicant. Applicant told the OPM investigator that she did not remember precisely how many times she used marijuana. (Tr. 58-59)

Applicant does not associate with friends who currently use marijuana. (Tr. 60, 107-109, 114) She does not attend parties where marijuana is used. (Tr. 60) If a friend uses marijuana, she will terminate her relationship with the friend. (Tr. 109) She acknowledged that she knew her marijuana use was wrong at the time she used it. (Tr. 96-97) She wrongly thought that because she was not on duty that it was not connected to the Army. (Tr. 101) She also made some bad choices due to youth and immaturity. (Tr. 101, 107) She recognized that illegal drug use was destructive, and she committed to not using marijuana in the future. (Tr. 99-100)

Applicant received counseling for PTSD, stress from work, and stress from the responsibility of caring for her father. (Tr. 68) The Department of Veterans Affairs and a colonel, who is a chaplain in the Army National Guard, provided counseling to her. (Tr. 69-70) For three years, she received counseling from the colonel every one to two months, for a total of about 30 to 40 hours. (Tr. 132-133) The counseling helped her refrain from illegal drug use. (SOR response) The colonel said that she responded well to counseling. (Tr. 134) He described her as honest, determined, reliable, stable, and diligent. (Tr. 139-142) He does not believe she will resume her marijuana use, and he strongly supported reinstatement of her security clearance. (Tr. 137-138, 142; AE H)

Applicant has never been arrested, charged, or convicted of a drug-related offense or any other offense. (Tr. 24; GE 1) She promised that she would not resume using illegal drugs. (Tr. 72) She also provided a signed statement of intent not to use illegal drugs with automatic revocation of her security clearance for any violation of the Drug Involvement Guideline. (Tr. 72; AE L) She is drug-tested in her current employment. (Tr. 110) She is more mature and responsible now than she was when she was 21 years old. (Tr. 114)

Character Evidence

Applicant received a letter of commendation for her outstanding work as a bus driver for the school district from August 2010 to July 2013. (AE F) The letter notes she was drug tested four times, and all tests were negative for the use of illegal substances. (AE F) Her supervisor wrote a letter lauding her reliability and responsibility and recommending her for any position she may pursue. (AE G) A staff sergeant, who served with Applicant in the United States and Afghanistan, described her as crucial member of the team, who handles stress calmly and confidently. (AE I) He lauded her integrity, patriotism, dependability, diligence, and productivity. (AE I) A former Marine

Corps captain and retired highway patrol officer described Applicant as hard working, responsible, honest, and loyal. (AE J)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch 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). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon meeting the criteria contained in the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Adverse clearance decisions are made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995) § 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Drug Involvement

AG ¶ 24 articulates the security concern concerning drug involvement:

[u]se 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.

Three drug involvement disqualifying conditions in AG ¶¶ 25(a), 25(c), and 25(g) could raise a security concern and may be disqualifying in this case: “any drug abuse,”² “illegal drug possession,” and “any illegal drug use after being granted a security clearance.” These three disqualifying conditions apply because Applicant possessed and used marijuana from April 2008 to August 2010, on about 10 occasions.³ She used marijuana after being granted a Secret security clearance. She admitted her marijuana possession and use while holding a security clearance on her 2012 SF 86, to an OPM investigator, in her SOR response, and at her hearing.

AG ¶ 26 provides for potentially applicable drug involvement mitigating conditions:

(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;

²AG ¶ 24(b) 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.”

³AG ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). The illegal drug Applicant possessed and used (marijuana) is listed on Schedule I of Section 812(c) of Title 21.

- (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; and
 - (4) a signed statement of intent with automatic revocation of clearance for any violation.
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; 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.

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no “bright line” rules for determining when such conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant’s last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.”⁴ The passage of time

⁴ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge’s decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant’s last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant’s efforts at alcohol rehabilitation.”) (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board affirmed the administrative judge’s decision to revoke an applicant’s security clearance after considering the recency analysis of an administrative judge stating:

after ending marijuana use is not considered in isolation. Marijuana use after completing her 2006 SF 86 and while in the Army Reserve and on leave from Afghanistan makes that illegal drug use more significant than it would otherwise be for someone not holding a security clearance. See ISCR Case No. 06-18270 at 3 (App. Bd. Nov. 7, 2007) (marijuana use after completing an SF 86 “undercuts” favorable application of the drug involvement recency mitigating condition).

Applicant acknowledged that she possessed and used marijuana 10 times from April 2008 to August 2010. She recognized the adverse impact on her life of drug abuse. I accept Applicant’s statements in her 2012 SF 86, to an OPM investigator, in her SOR response, and at her hearing as credible. She intends to abstain from future drug possession and use. AG ¶ 26(a) applies to her illegal-drug-related conduct because it is not recent. While use of illegal drugs while holding a security clearance shows a profound lack of judgment, she was only 21 years old when she stopped using marijuana. I am confident that that future drug use is unlikely to recur and does not cast doubt on her current reliability, trustworthiness, or good judgment.⁵

Applicant demonstrated her intent not to abuse illegal drugs in the future. She has not used illegal drugs since August 2010; she has disassociated from drug-using associates and contacts; and she has avoided the environment where drugs were used. She provided a signed statement of intent not to use illegal drugs with automatic revocation of her security clearance for any violation of the Drug Involvement Guideline. AG ¶ 26(b) applies.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse drugs after being issued a prescription that is lawful under federal law. Marijuana was never lawfully prescribed for her under federal law. She did not provide proof of satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, and a favorable prognosis by a duly qualified medical professional.

In conclusion, Applicant possessed and used marijuana from April 2008 to August 2010, on about 10 occasions. She used marijuana while on leave or when she was not on active duty, but while she was eligible to have access to classified information. She

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

See also ISCR Case No. 02-10454 (App. Bd. Nov. 23, 2004) (sustaining denial of security clearance for Applicant who used marijuana five times while holding a security clearance with four years between most recent marijuana use and hearing).

⁵In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

disclosed her drug use to security officials. She received counseling for PTSD, expressed remorse, and has refrained from illegal drug use for more than three years. She credibly promised not to use illegal drugs in the future. The motivations to stop using illegal drugs are evident. She understands the adverse consequences from illegal drugs.⁶ Drug involvement concerns are mitigated. She has demonstrated a sufficient track record of no drug abuse to eliminate drug involvement as a bar to her access to classified information.

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 the 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 have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

The factors supporting revocation of Applicant's clearance are significant; however, they do not warrant revocation of her access to classified information. She used marijuana on about 10 occasions from April 2008 to August 2010. Her marijuana use was aggravated because she was eligible to have access to classified information when she used marijuana, and such marijuana use was imprudent, irresponsible, reckless, and improper. She did not complete a drug rehabilitation or counseling program. Her marijuana use up to 2010 "raises questions about [her] ability or willingness to comply with laws, rules, and regulations." AG ¶ 24.

The rationale for reinstatement of Applicant's access to classified information is more substantial. When she was 19 to 21 years old and somewhat immature, she used marijuana. She was forthright and candid in her SF 86, her OPM interview, her SOR response, and at her hearing about her marijuana use. She served in combat in

⁶Approval of a security clearance, potential criminal liability for possession of drugs and adverse health, employment, and personal effects resulting from drug use are among the strong motivations for remaining drug free.

Afghanistan and was awarded a CAB and AAM. She received counseling for PTSD; the VA awarded her an 80 percent disability rating; she expressed remorse; she does not associate with drug users; and she has refrained from marijuana use for more than three years. She is now 25 years old; has worked successfully in security for three years; and she has the maturity and trustworthiness to conscientiously comply with security requirements. She achieved some important employment goals, demonstrating her self-discipline, responsibility, and dedication. She served successfully as a bus driver, combat soldier, and security officer. Her supervisors and a National Guard colonel laud her contributions in the workplace and to her family. She is an honest, caring, diligent, and intelligent person. There is no evidence of any security violations. Applicant understands why her marijuana possession and use were improper, and she intends not to use illegal drugs in the future. She demonstrated her loyalty, patriotism, and trustworthiness through her service and contributions to the Army and to the Department of Defense as a contractor. I credit her with being sufficiently rehabilitated to entrust her with access to classified information.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude drug involvement concerns are mitigated. For the reasons stated, she is eligible for access to classified information.

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
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	WITHDRAWN
Subparagraph 2.a:	Withdrawn

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Mark Harvey
Administrative Judge