



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



In the matter of:)
)
-----) ISCR Case No. 13-00788
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel

For Applicant: Barry M. Sax, Esquire

February 14, 2014

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted her most recent Electronic Questionnaire for Investigation Processing (e-QIP) on October 31, 2012. (Government Exhibit 1.) On September 9, 2013, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H (Drug Involvement), G (Alcohol Consumption), and E (Personal Conduct) concerning Applicant. The action was taken under Executive Order (EO) 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 (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on October 4, 2013 (Answer), and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on November 4, 2013. This case was assigned to me on November 19, 2013. The Defense Office of Hearings and Appeals (DOHA) issued notices of hearing on November 20, and December 2, 2013. I convened the hearing as scheduled on December 17, 2013. The Government offered Government Exhibits 1 through 4, which

were admitted without objection. Applicant submitted Applicant Exhibits A through O, which were admitted without objection, called one witness, and testified on her own behalf. Applicant asked that the record remain open for the receipt of additional documents. DOHA received the transcript of the hearing (Tr.) on January 2, 2014. Applicant timely submitted Applicant Exhibit P, which was admitted without objection. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

Applicant is 54, and divorced. She is employed by a defense contractor as a contracts manager for a major defense program, and seeks to retain a security clearance in connection with her employment. Applicant admitted allegations 1.b, 1.c, 2.a, and 3.b of the SOR, with reservations. She admitted in part and denied in part allegation 1.a. She denied, or I view her responses as denials, allegations 3.a, 3.c, 3.d, and 3.e. Applicant's admissions are incorporated into the following findings of fact.

Paragraph 1 (Guideline H, Drug Involvement)

The Government alleges in this paragraph that Applicant is ineligible for clearance because she used illegal drugs.

1.a. Applicant admits using marijuana in the past, but denies that the dates alleged in the SOR are correct. She admitted in her testimony using marijuana two or three times in high school, then not using it again until 2010. According to Applicant she used marijuana three times in 2010 - once during the summer, once at Thanksgiving and last around Christmas 2010 when on a cruise. Applicant insists that she took at most only one puff of marijuana on each occasion. (Government Exhibit 3 at 4-6; Tr. 72-81, 106-114.)

Applicant further stated that she was undergoing a period of emotional difficulty in 2010 related to the recent deaths of both of her parents within six months of each other, in November 2009 and May 2010. In addition, Applicant stated that her own health issues, which began in 2008, and family problems also contributed to her emotional state. She stated to a DoD investigator, "I was going through a tough time in my life after the death of both my parents and I just wanted the pain to go away and I was told that smoking the marijuana would relax me, which it did." (Answer at 1-2; Government Exhibit 3 at 5-6.)¹

1.b. Applicant admits using marijuana after being granted a Secret security clearance in 2000 and again in 2008. (Tr. 81-84, 114.)

¹Government Exhibit 3 is the actual affidavit, signed and initialed by Applicant. A discussion between Applicant and Department Counsel concerning how this document was prepared is found in the Transcript at pages 132-134.

1.c. Applicant admits that she used marijuana after preparing and certifying a Questionnaire for National Security Positions on October 25, 2010. (Tr. 84-85.)

Paragraph 2 (Guideline G, Alcohol Consumption)

The Government alleges in this paragraph that Applicant is ineligible for clearance because she uses intoxicants to excess.

2.a. Applicant admits that she may have used alcohol to excess at the time she used marijuana in November and December 2010. As stated, this was during the period after her parents both died within six months of each other. (Tr. 85-87.)

Paragraph 3 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because she has made false statements to the Department of Defense during the clearance screening process. Applicant admits that she had false answers on her questionnaire, but denied there was an intent to deceive the Government.

3.a. Applicant filled out a Government questionnaire on October 25, 2010. (Government Exhibit 2.) Question 20c of that questionnaire required Applicant to set forth the foreign countries she had visited within the past seven years. The SOR alleges that Applicant falsified the questionnaire because she did not list a trip to Mexico, which she made in 2010. In fact, Applicant's trip occurred in December 2010, after the date the questionnaire was certified by Applicant. (Applicant Exhibit P; Tr. 135-138.) This allegation is found for Applicant.

3.b. Applicant responded, "Yes," to Question 23a of the same questionnaire, admitting that she had illegally used controlled substances within seven years of the date of the questionnaire. The question also contains a section for Applicants to set forth their drug use in detail. Applicant left this section blank, even though, by her own account, she had used marijuana within three months of filling out the questionnaire.

Applicant states that she did not intentionally falsify her answer. Rather, she states that she either misread the question, or was not properly prompted by a "drop-down" menu on the computerized form, or she was rushing through the process. She further stated, "It wasn't deliberate by any means to bypass that section of the SF-86 and not give you any detail. If I didn't want to give you any detail, I wouldn't have answered 'yes' intentionally." (Answer at 4; Tr. 90-91.)

The strength of these arguments, however, is undercut by a look at the document itself. Government Exhibit 2 shows at least two places where Applicant hand-wrote additional information on the final signed copy of the Questionnaire, specifically her date of birth at question 2, and the birthday of one of her daughters at question 18. So, a reasonable inference can be drawn that she read the questionnaire closely at the time she signed it.

3.c. Applicant answered, “No,” to Question 23b of the same questionnaire, which asks, “Have you EVER illegally used a controlled substance while possessing a security clearance; while employed as a law enforcement officer, prosecutor, or courtroom official; or while in a position directly and immediately affecting public safety?” (Emphasis in original.) This was a false answer to a relevant question about her drug use, since she had used marijuana in at least in July 2010, three months before the questionnaire was filled out, and at a time she held a security clearance.

Applicant states that she was confused by the question and read it as asking whether she had illegally used controlled substances while possessing a security clearance, WHILE AT THE SAME TIME being employed as a law enforcement officer, prosecutor, or courtroom official. In other words, she read the question as if the semi-colon between the first two clauses of the question did not exist. (Answer at 4; Tr. 91-92, 126-130.)

When questioned by me concerning this obviously strained reading of the question Applicant continued to insist that it was true. At this point she also stated that she is slightly dyslexic. Finally, Applicant stated, “[T]here is no gain for me to answer this question wrong purposely.” (Tr. 138-140.) The credibility and validity of these arguments is discussed further, below.

3.d. Applicant filled out a subsequent Government questionnaire on October 31, 2012. (Government Exhibit 1.) Question 23 again asks Applicant to set forth her illegal use of controlled substances within the last seven years. Applicant discussed in great detail the three drug use events in 2010 that she has consistently admitted.

The Government alleges that Applicant falsified this question because she did not set forth her entire drug abuse history. To find that Applicant did not falsify this application, I must find that she was truthful in stating the full extent of her marijuana usage. After considering all the evidence, I do not find her to be credible or truthful about the true extent of her drug use, as discussed below.

3.e. The Government alleges that Applicant falsified material facts during an interview conducted by an authorized investigator for the Department of Defense in December 2012. Further, the allegation is that Applicant also falsified a signed affidavit presented to the same investigator. I find validity in this allegation.

In reviewing the available evidence concerning her use of drugs, there are several contradictory statements. Applicant has maintained that she used marijuana three times in 2010, and that her use was, at most, an attempt to smoke marijuana and not a very successful one at that. (Tr. 78-79.) Yet, in Government Exhibit 1, she also states the following at page 31, “During a very fragile time in my life I used very poor judgment and smoked marijuana a few times. There is no pattern of frequency because this is not typical of my behavior. The nature of my use on these few occasion[s] was one of desperation during a very painful period in my life and was isolated to this period of my life.” Further, on page 32, “I have learned not to self medicate with any kind of drug and I no longer need to, I am all to aware of what harm [I] have caused myself and

I am determined not to ever again fall into the trap.”² I have examined all available evidence and am unable to make a specific finding as to the true nature and extent of Applicant’s drug use.³

Mitigation

Applicant is a highly respected and successful professional. Applicant’s supervisor, the manager of contracts and property for her employer, testified extensively on her behalf. His comments were very laudatory. (Tr. 26-66.)

She also submitted letters from co-workers and superiors. She is described as a person who “has a reputation of being [a] thorough and hard working person with a high level of integrity.” The writers all appear to have some knowledge of the specific allegations in the SOR, and indicate that they believe it to be an aberration. (Applicant Exhibits C, E, G through N.)

Applicant also submitted various performance appraisals and performance awards from her employer. (Applicant Exhibit O.) They show her to be a talented person with management skills.

Policies

Security clearance decisions are not made in a vacuum. 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 as appropriate 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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2(a) describing 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. In addition, the administrative judge may also rely on

²Applicant Exhibit A is letter dated May 31, 2011, from the Employee Assistance Program Consultant for Applicant’s employer. They met 14 times over three years from December 19, 2007. He states that their time together was primarily concerned with one of Applicant’s children and a work conflict issue in 2008. There is no statement that Applicant spoke with him about her emotional issues connected to her parents’ deaths, or her use of marijuana.

³Applicant Exhibits B, D, and F are communications from several of Applicant’s friends. They are concerned with the interviews the writers had with investigators from the Department of Defense. I have examined and considered all three of them in making my Findings of Fact.

his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order adverse to an applicant shall be a determination 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

Paragraph 1 (Guideline H - Drug Involvement)

The security concern relating to the guideline for Drug Involvement is set out in 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. Drugs are defined as mood and behavior altering substances, and include: (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; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under AG ¶ 25 and especially considered the following:

(a) any drug abuse; and

(g) any illegal drug use after being granted a security clearance.

Applicant admits using marijuana three times in 2010. She used marijuana while holding a security clearance, including within a month after certifying a Government questionnaire that asked about her drug use. As stated above, I am not convinced that Applicant's statements as to the extent and nature of her drug use are credible or correct. She states that she would merely hold the marijuana cigarette or pipe to her mouth and either not inhale, or attempt to do so unsuccessfully. However, she also states that she was using marijuana to self medicate, and that it's use would relax her. These are contradictory statements and I cannot find between them.

I have studied all of the mitigating conditions under AG ¶ 26 and especially considered the following:

(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) 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 offered insufficient evidence that would support mitigation under AG ¶¶ 26 (a), or (b). Under normal circumstances three years of abstinence could be enough. However, as stated, I remain uncertain as to the actual extent of Applicant's drug use due to her inconsistent description of it. Without that certainty, I cannot find that recurrence is unlikely, or that her conduct no longer casts doubt on her reliability, trustworthiness, or judgment. Paragraph 1 is found against Applicant.

Paragraph 2 (Guideline G - Alcohol Consumption)

The security concern relating to the guideline for Alcohol Consumption is set out in AG ¶ 21:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

Applicant admitted that she used alcohol while using marijuana in November and December 2010. Applicant denies that she has an alcohol problem, and there is no other evidence in the record to support this allegation.

The following disqualifying condition minimally applies to this case under AG ¶ 22:

(a) alcohol-related incidents away from work, such as driving while under the influence, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.

I have examined the potential mitigating conditions under this paragraph and find that one of them applies under AG ¶ 23:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness or good judgment.

In this case Applicant admits to two incidents of possibly drinking to excess, which may have had an impact on her use of marijuana. Under the particular circumstances of this case, the evidence is insufficient to show that she has an alcohol problem. Paragraph 2 is found for Applicant.

Paragraph 3 (Guideline E - Personal Conduct)

The security concern relating to Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules or regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

I have examined the disqualifying conditions under AG ¶ 16 and especially considered the following:

(a) deliberate omission, concealment, or falsification of relevant 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

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other government representative.

The following mitigating condition under AG ¶ 17 may apply to the facts of this case:

(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.

In order to determine whether Applicant was truthful in her interview, affidavit, and questionnaires, two separate but interlinked aspects of the case must be discussed. First, was Applicant truthful in setting forth the full extent of her drug use? Second, does her explanation as to how she filled out Government Exhibit 2, the 2010 questionnaire, make sense? In the following discussion it is also important to keep in mind that Applicant has the burdens of proof and persuasion.

Concerning Applicant's drug use, as discussed in detail above, I simply am unable to make a finding that her statements are entirely true. I will not restate my points here.

Next, Applicant's statements concerning how she filled out the questionnaire in 2010, both with regards to not stating when and where she used marijuana and denying using it while holding a security clearance, have been considered by me and found wanting. Applicant is obviously a person of above average intelligence, who is intimately involved with the written word in her job. Particularly with regards to question 23b, it is simply not credible for her to argue that she read that question in a way that is so totally at odds with a plain reading of it. That being the case, it is not possible to find that she was truthful in her 2012 questionnaire or during the interview with the investigator.

It may seem unduly harsh to find against Applicant with regards to drug use that is arguably very minor, and what can be seen as no more than errors of concentration on the questionnaire. However, it is Applicant's burden to mitigate the security significance of the conduct. When someone such as Applicant continually denies that she has engaged in the conduct, and basically uses tortured logic to support her

argument, it is not reasonable for me to say at the present time that she is eligible for a security clearance.

As stated above, allegation 3.a is found for Applicant. With that exception, Paragraph 3 is found against Applicant.

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 applicant's conduct and all the circumstances. 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. 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. In a nutshell, the Government expects and requires applicants to be truthful and accurate in their communications with it, especially concerning the use illegal substances. After reviewing all the evidence under the clearly consistent standard, I cannot find that Applicant has been truthful and accurate with the Government, or with me. Under AG ¶ 2(a)(3), Applicant's conduct is recent. Based on the state of the record, I cannot find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I find that there is the potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)), and that there is an unacceptable likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from her drug use, and personal conduct at this time.

On balance, it is concluded that Applicant has not successfully overcome the Government's case opposing her request for a DoD security clearance. Accordingly, the evidence supports a finding against Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1, and 3 of the Government's Statement of Reasons. As stated above, Paragraph 2 is found for Applicant.

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
Subparagraph 1.a.:	Against Applicant
Subparagraph 1.b.:	Against Applicant
Subparagraph 1.c.:	Against Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraph 2.a.:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a.:	For Applicant
Subparagraph 3.b.:	Against Applicant
Subparagraph 3.c.:	Against Applicant
Subparagraph 3.d.:	Against Applicant
Subparagraph 3.e.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge