



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



In the matter of:)
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 -----) ISCR Case No. 14-01095
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)
 Applicant for Security Clearance)

Appearances

For Government: Jeff A Nagel, Esquire, Department Counsel
For Applicant: Alan Edmunds, Esquire

March 9, 2015

Decision

Synopsis

Applicant used and purchased marijuana one time in 2008 and ecstasy on two occasions in 1999, while holding a security clearance. She credibly testified, and she submitted a sworn personal statement, that she did not intend to use any illegal substance in the future. Applicant did not list her marijuana usage and purchase on a 2013 Security Clearance Application, but her omission was inadvertent, and when she met with a Government investigator approximately two weeks later, she revealed her drug usage without being confronted by the investigator. Mitigation has been shown. Clearance is granted.

MOGUL, Martin H., Administrative Judge:

On April 29, 2014, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H, and E for Applicant. The action was taken under Executive Order 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) (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On October 15, 2014, Applicant replied to the SOR (RSOR) in writing, and she requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on December 8, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 10, 2014, and the hearing was convened as scheduled on January 21, 2015. The Government offered Exhibits 1 and 2, which were received without objection. Applicant testified on her own behalf and submitted Exhibits A through Q, which were also admitted without objection. Three additional witnesses also testified on Applicant's behalf. DOHA received the transcript of the hearing (Tr) on January 30, 2015. Based upon a review of the pleadings, exhibits, and all the testimony, eligibility for access to classified information is granted.

Findings of Fact

After a complete and thorough review of the evidence in the record discussed above, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 38 years old. She is married for the second time, and she has one daughter. She has received two Master's degrees. Applicant has been employed as an Engineer by a defense contractor for more than 16 years, and she seeks a DoD security clearance in connection with her employment in the defense sector.

Paragraph 1 (Guideline H - Drug Involvement)

The Government alleges that Applicant has had a history of long-term serious drug involvement, which can raise questions about an individual's reliability and trustworthiness. The SOR lists two allegations (1.a. and 1.b.) under Adjudicative Guideline H.

1.a. The SOR alleges that in about December 2008, while holding a security clearance, Applicant purchased and used marijuana. Applicant admitted this allegation in her RSOR, and she wrote that she only used marijuana one time in December 2008. At the hearing, Applicant testified that she used the marijuana with three of her girlfriends. She only used it one time in 2008, and she has not used it since that time. She purchased the marijuana for the group because she had the cash. Applicant conceded that it was a mistake to use the marijuana. (Tr at 84-87.)

1.b. The SOR alleges that in about June 1999, while holding a security clearance, Applicant used ecstasy. Applicant admitted this allegation in her RSOR, and she wrote that she only used Ecstasy on two occasions in 1999, when she was 22 and had just graduated from college. Applicant testified that she used it with friends those two times. (Tr at 87.)

Paragraph 2 (Guideline E- Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because she engaged in conduct that exhibited questionable judgement, unreliability, unwillingness to comply with rules and regulations, and untrustworthiness.

2.a. Applicant executed a Security Clearance Application (SCA) on February 19, 2013. (Exhibit 1.) The SOR alleges that Applicant falsified material facts in response to the questions under "Section 23 - Illegal Use of Drugs," of the 2013 SCA by falsely alleging that she had never been involved with a drug or controlled substance **while possessing a security clearance** (emphasis added), other than previously listed. While Applicant answered, "Yes," to this question, she failed to disclose the information listed on the SOR as 1.a., above. Applicant denied this allegation in her RSOR.

2.b. The SOR alleges that Applicant falsified material facts in response to the questions under "Section 23 - Illegal Use of Drugs," of the 2013 SCA by falsely alleging that in the last seven years she had never been involved in the illegal use of illegal drugs or controlled substances, when in fact she failed to disclose the information listed on the SOR as 1.a., above. Applicant denied this allegation in her RSOR.

2.c. The SOR alleges that Applicant falsified material facts in response to the questions under "Section 23 - Illegal Use of Drugs," of the 2013 SCA by falsely alleging that in the last seven years she had never been involved in the illegal purchase, manufacture, cultivation, trafficking, or production of any drug or controlled substance, when in fact she failed to disclose the information listed on the SOR as 1.a., above. Applicant denied this allegation in her RSOR.

2.d. The SOR alleges that the conduct listed above as 1.a. and 1.b., above, can be considered adversely under Guideline E.

Applicant was interviewed by a Government investigator between March 1, 2013, as part of the security clearance process. Exhibit 2 is a copy of that Personal Subject Interview (PSI), and it shows that Applicant volunteered that she used marijuana on one time in December 2008, and she purchased the marijuana that she used for about \$40.

Applicant testified that previous to the period she completed the SCA, she had gone through a difficult time with her first husband, who was verbally abusive and she learned was having an affair, which ultimately led to a divorce. When she remarried it became necessary to take treatment for infertility, which she was undergoing when she completed the SCA. (Tr at 90-93.)

Applicant contends that she rushed through the SCA form, and because she had never used the electronic form of the SCA, in addition to her high level of anxiety due to injecting herself with hormones every day or two for her infertility, she made a number of mistakes on her SCA. She offered such examples of mistakes as omitting her high school and undergraduate education, omitting her email address, and indicating the wrong year for her mother-in-law's birthday. Applicant stated within an hour after

submitting her SCA, she realized that she had not listed her 2008 marijuana usage and purchase on her SCA, and she voluntarily furnished that information to the Government investigator. She testified that her omission was only due to an oversight, not an intentional lie to mislead the Government. She testified that she had always included the Ecstasy usage on previous SCAs, so she would have included her marijuana if she had thought about it. (Tr at 93-99, 131.)

Mitigation

Applicant credibly testified that under no circumstances would she ever use any illegal drugs in the future, even if she went through difficulties in her life. Among the reasons she gave for it were that she is in a different stage of her life as she is a mother and role-model for her child, she is in a happy relationship, she loves her job, and she wouldn't risk it for anything. (Tr at 102-103.) She signed a Statement of Intent in which she promised never to use illegal drugs again, nor "be around or involved with any one [sic] who uses illegal drugs." She also wrote, "Should there be any violation with regard to illegal drug use, I hereby consent to automatic revocation of my security clearance." (Exhibit D.)

Applicant underwent an examination by a Medical Doctor on October 9, 2014, in preparation for this security clearance hearing. (Exhibit A.) The doctor's diagnosis was that he believed the Applicant was "doing well and free of drug [sic] and alcohol." Applicant also underwent drug tests on October 3 and 9, and December 16, 2014. (Exhibits B and M.) The results were negative for any drugs in Applicant's system. Applicant also attended a number of Narcotics Anonymous meetings in 2014. (Exhibit C.)

Applicant submitted a number of documents establishing that she was undergoing a serious treatment for infertility during the period that she completed the SCA. (Exhibit E.) Finally, she submitted samples of numerous Performance Awards and Performance Evaluations that she received. (Exhibits I and J.)

As stated above, three additional witnesses testified on behalf of Applicant. They all know Applicant from her current employment. All three witnesses spoke in the most laudatory and positive terms about Applicant. They were all aware of the allegations in the SOR yet all believed that Applicant was "hard working, honest, reliable, and dependable." (Tr at 28-79.)

Applicant also submitted eight extremely complimentary character letters from individuals who have known Applicant in her professional career or her private life. (Exhibit L.) Applicant's attorney friend stated, "she has never been the type of person to make a misrepresentation, state a falsity, or even stretch the truth. In my opinion [Applicant] is a good, hardworking, trustworthy and honest person."

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for 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 applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to 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.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H - Drug Involvement

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 judgement and because it raises questions about a person's ability or willingness to comply with laws, rules and regulations.

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, specifically the use of marijuana in December 2008, while she was holding a security clearance, is of great concern, especially in light of her continued desire to have access to the nation's secrets. Applicant's overall conduct pertaining to her illegal substance abuse clearly falls within Drug Involvement ¶ 25(a) "any drug abuse" and (c) "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution." ¶ 25(g) is also applicable because of Applicant's "illegal drug use after being granted a security clearance."

However, I find credible her testimony and her written statement that she intends to abstain from using marijuana or any other illegal drug in the future. I also considered that with the exception of the brief usage of Ecstasy in June 1999, Applicant used an illegal drug on only one occasion and that was more than six years ago. I also considered Applicant's honesty in revealing her drug usage to the Government investigator. Finally, I considered the positive and laudatory testimony of the three witnesses and the character letters, which make Applicant's stated intentions to never use illegal drugs again more credible and convincing. Therefore, I conclude that ¶ 26(a) is applicable since "the behavior . . . was so infrequent" and "happened under such circumstances that it is unlikely to recur." Also, ¶ 26(b) "a demonstrated intent not to abuse any drugs in the future," including (3) "an appropriate period of abstinence," and (4) "a signed statement of intent with automatic revocation of clearance for any violation," is applicable and mitigating.

In this case, the Government has met its initial burden of proving that Applicant did use illegal drugs while holding a security clearance under Guideline H. Applicant, on the other hand, has introduced persuasive evidence in rebuttal, explanation, or mitigation, which is sufficient to overcome the Government's case against her. Accordingly, Guideline H of the SOR is concluded for Applicant.

Paragraph 2 (Guideline E - Personal Conduct)

With respect to Personal Conduct, the Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. If such an individual intentionally falsifies material facts or fails to furnish relevant information to the Government, it is extremely difficult to conclude that he or she nevertheless possesses the judgment, and honesty necessary for an individual given a clearance.

The Government alleges in this paragraph that Applicant is ineligible for clearance because she “failed to provide truthful and candid answers during the security clearance process.” The guideline notes several conditions that could raise security concerns and could potentially apply in this case. Because Applicant provided to the Government false and less than complete relevant information requested on a security clearance questionnaire, I find that Applicant’s conduct potentially supports disqualifying condition ¶ 16(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 . . . determine security clearance eligibility or trustworthiness”

However, I do find that Applicant’s conduct was not a knowing and wilful attempt to mislead the Government. As reviewed above, Applicant testified credibly that she did not list her one time marijuana usage and purchase, which was more than four years before she completed her 2013 SCA, because she did not think about it at the time she was completing the SCA. She did reveal her drug usage to a Government investigator shortly after completing her SCA, without being confronted about said drug usage. Therefore, mitigating condition ¶ 17(a) “the individual made a prompt, good faith effort to correct the omission . . . before being confronted with the facts.” is applicable. ¶ 17(c) also applies, because the behavior was infrequent and it is unlikely to recur, so it “does not cast doubt on the individual’s reliability, trustworthiness, or good judgement.” I, therefore, resolve Guideline E for 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 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Based on all of the reasons cited above as to why the mitigating conditions apply and are controlling under the Guidelines alleged, I find that the record evidence leaves me with no significant questions or doubts as to Applicant’s eligibility and suitability for a security clearance under the whole-person

concept. For all these reasons, I conclude Applicant has mitigated the security concerns under the whole-person concept.

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.-1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a.-2.d.:	For Applicant

Conclusion

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

Martin H. Mogul
Administrative Judge