

DATE: September 12, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-26601

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant used marijuana once in high school and took two or three puffs of marijuana 13 years later at a party celebrating her engagement. In October 2002, she signed a security clearance application (SF 86) that she had submitted in handwritten form in October 2001 and electronic form in February 2002, without reviewing it or updating her negative answers to two questions about illegal use of controlled substances. Security concerns based on drug involvement and falsification of her SF 86 are mitigated. Clearance is granted.

STATEMENT OF THE CASE

On March 7, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). Under Guideline H, the SOR alleges Applicant used marijuana in 1990 and August 2002 (¶ 1.a.), she used marijuana while holding a top secret clearance (¶ 1.b.), and her eligibility for access to Sensitive Compartmented Information (SCI) was revoked based on the allegations in the SOR (¶ 1.c.). Under Guideline E, the SOR alleges Applicant deliberately failed to disclose her marijuana use on her security clearance application (SF 86) (¶¶ 2.a. and 2.b.).

Applicant answered the SOR in writing on March 19, 2005, admitted the allegations under Guideline H, admitted failing to disclose her marijuana use on her SF 86 but denied intentional falsification, and requested a hearing. The case was assigned to me on June 20, 2005. On June 24, 2005, DOHA issued a notice of hearing setting the case for July 18, 2005. The case was heard as scheduled. DOHA received the transcript (Tr.) on August 1, 2005.

FINDINGS OF FACT

Applicant's admissions in her answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

At the time the SOR was issued, Applicant had been employed as an administrative assistant for a defense contractor since August 2001. She previously had been employed as an access control officer for the U.S. Secret Service from March 1991 to August 2001. She was cleared for access to SCI in January 2002. She now works for another defense contractor. She is 34 years old and was married in April 2003.⁽¹⁾ Her friends and colleagues consider her trustworthy and responsible.⁽²⁾

In August 2002, at a party celebrating her engagement, Applicant took two or three puffs from a marijuana cigarette passed around by her now-husband's cousin. All the participants had been drinking substantial amounts of alcohol when the marijuana was introduced.⁽³⁾

Applicant was interviewed by a security investigator in February 2003. Applicant testified the investigator did not confront her with evidence of marijuana use. Instead, she simply asked a series of questions, one of which was "a drug question." Applicant responded by disclosing the August 2002 incident.⁽⁴⁾

In a signed sworn statement to a security investigator on October 30, 2003, Applicant admitted this incident and also admitted using marijuana one time while in high school. Applicant told the investigator she had no intention of using marijuana again.⁽⁵⁾ Applicant testified she has not used marijuana since August 2002.⁽⁶⁾ She was present at another gathering in September 2002, where marijuana was introduced by the same person, but she did not use it.⁽⁷⁾ She regretted her use of marijuana and was embarrassed by it.⁽⁸⁾

On May 20, 2003, Applicant's employer notified the Defense Security Service "one of our Government customers has revoked their access for one of our employees," identifying Applicant as the employee involved. The letter refers to Applicant's top secret clearance but does not mention access to SCI.⁽⁹⁾ Applicant testified her SCI access was withdrawn because of her August 2002 marijuana use.⁽¹⁰⁾ (Tr. 34).

Applicant signed an electronic version of the SF 86 on October 11, 2002. The document reflects a negative answer "no" to question 27, asking if she used any controlled substance in the last seven years, and question 28, asking if she had ever used a controlled substance while holding a security clearance.⁽¹¹⁾

Applicant denied intentionally falsifying her SF 86. She testified she executed a handwritten SF 86 in October 2001 and submitted it to her security office. In the spring of 2002, her security office asked her to complete an electronic version. In October 2002, her security office told her they could not find the signed copy of her electronic SF 86, and they printed another copy of the application and asked her to sign it. She signed the document without reviewing it or updating her negative answers to questions 27 and 28. In an interview with a security investigator in February 2003, she acknowledged her negative answers were incorrect. She testified she did not intentionally omit the information about her use of marijuana.⁽¹²⁾

POLICIES

"[N]o 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 occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely a determination that 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, that the applicant's personal or professional history includes conditions which disqualify, or may disqualify, the applicant from being eligible for access to classified information. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec 19, 2002); *see* 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 security clearance." ISCR Case No. 01-20700, *supra*. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline H: Drug Involvement

Under Guideline H, illegal involvement with drugs raises questions regarding an applicant'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. Directive ¶ E2.A8.1.1. Any illegal use of a controlled substance can raise a security concern and may be a disqualifying condition (DC 1). Directive ¶ E2.A8.2.1. Illegal drug possession also is a disqualifying condition (DC 2). Directive ¶ E2.A8.2.2. Applicant's admissions to security investigators and her testimony at the hearing establish DC 1 and DC 2.

Security concerns based on possession and use of marijuana can be mitigated by showing it was not recent (MC 1). Directive ¶ E2.A8.1.3.1. There are no "bright line" rules for determining when 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). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then the administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.* More than three years have passed since Applicant's use of marijuana. She has admitted her wrongdoing, expressed embarrassment and remorse, and asserted she has no intention of using marijuana again. I conclude MC 1 is established.

MC 2 applies if marijuana use "was an isolated or aberrational event." Directive ¶ E2.A8.3.2. The record reflects two widely-separated events. Applicant experimented with marijuana once in high school, when she was 17 years old, and took two or three puffs of a marijuana cigarette at a party in August 2002, when she was 31 years old. I conclude MC 2 is established.

MC 3 applies if an applicant has demonstrated intent not to abuse drugs in the future. Directive ¶ E2.A8.3.3. Applicant has stated her intent to avoid illegal drugs and has demonstrated her intent by not doing so since August 2002. I conclude MC 3 is established.

Applicant is not and has never been addicted or a chronic abuser of controlled substances. She has successfully held responsible government positions and a security clearance for more than 14 years. Her isolated use of marijuana occurred under circumstances where her judgement and inhibitions had been clouded by alcohol consumption. Recurrence is unlikely. I conclude Applicant has mitigated the security concern based on drug involvement.

Guideline E: Personal Conduct

Under Guideline E, conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the person may not properly safeguard classified information. Directive ¶ E2.A5.1.1. A disqualifying condition (DC 2) applies where there has been a deliberate omission or falsification of relevant and material facts from any personal security questionnaire. Directive ¶ E2.A5.1.2.2..

When a falsification allegation is controverted, a department counsel has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

After examining all the evidence, I found Applicant's explanation for her negative answers plausible. After hearing her testimony and observing her demeanor, I found her credible. I am satisfied she did not intentionally falsify her SF 86. I conclude DC 2 is not established.

FORMAL FINDINGS

The following are my findings as to each allegation in the SOR:

Paragraph 1. Guideline H (Drug Involvement): FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2. Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: 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 Applicant a security clearance. Clearance is granted.

LeRoy F. Foreman

Administrative Judge

2. Applicant's Exhibits A, B, and C.

3. Government Exhibit 2.

4. Tr. 57-58.

5. Government Exhibit 2.

6. Tr. 46.

7. Tr. 47.

8. Tr. 51.

9. Government Exhibit 3.

10. Tr. 34.

11. Government Exhibit 1.

12. Tr. 36-42.