

DATE: January 18, 2007

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 06-18665

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Daniel Crowley, Esq., Department Counsel

FOR APPLICANT

Kenneth Kumor, Esq., Personal Representative

SYNOPSIS

Applicant, a college graduate who is now 26 years old, used marijuana intermittently and habitually from 1994 to 2005. She asserted her last use of marijuana was in February 2005 and, after that use, she resolved not to use marijuana again. On November 3, 2004, Applicant executed a security clearance application (SF-86). She used marijuana approximately three times after executing and submitting her SF-86. Applicant failed to mitigate security concerns under Guidelines H and E. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On August 29, 2006, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision—security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on September 15, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on October 11, 2006. On December 11, 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. At the hearing, the Government offered two exhibits, which were identified as Exhibits (Ex.) 1 and 2 and entered in the record without objections. Applicant testified on her own behalf and offered six exhibits, identified as Ex. A through F, for admission to the record. Applicant's exhibits were admitted to the record without objections. At the conclusion of the evidence, I left the record open so that Applicant could provide a missing page from her Ex. C. Applicant timely provided the missing page, which was included in her Ex. C and admitted to the record without objections. DOHA received the transcript (Tr.) of the proceeding on December 21, 2006.

FINDINGS OF FACT

The SOR contains five allegations of disqualifying conduct under Guideline H, Drug Involvement, and two allegations of disqualifying conduct under Guideline E, Personal Conduct. In her answer to the SOR, Applicant denied the general applicability of Guidelines H and E to the facts of her case. She then denied four Guideline H allegations and admitted one. She admitted both allegations under Guideline E. Her admissions are incorporated as findings of fact.

Applicant is 26 years old, single, and, for the past two years, has been employed as a financial analyst by a government contractor. In May 2002, she was awarded a bachelor of arts degree with a major in psychology from a U.S. university. Her academic transcripts indicated she earned mostly Bs and As in her college studies. (Ex. 1; Ex. B.)

Applicant began using marijuana, which she knew was illegal, when she was 14 years old. She used marijuana approximately 50 times during her high school and college years. Applicant's heaviest use of marijuana occurred in high school, when she would sometimes use marijuana twice a week. At other times, months might pass between one use and another. As a college student, Applicant's use of marijuana followed a similar pattern. Sometimes she used the drug for two weekends in a row, and at other times she might not use it for several months. Applicant purchased marijuana twice in high school and once in college. She used marijuana for approximately three years after graduating from college. She has witnessed others in her social circle using marijuana within the last 6 to 12 months. Applicant has a close companion who uses marijuana. (Ex. 2; Tr. 30-31, 48, 51, 56, 58-59.)

Applicant completed a security clearance application (SF-86) on November 3, 2004. In response to Question 27 on the SF-86, she admitted using marijuana 50 times between approximately October 1997 and July 2004. (Ex. 1, Ex. 2.) Under the general remarks section of the SF-86, Applicant asserted she did not wish to excuse her use of marijuana, but she pointed out that most of her usage took place when she was in high school and college. (Ex. 2 at 7.)

In September 2005, Applicant was interviewed by an authorized investigator of the Department of Defense. The investigator asked her if she had used marijuana since completing her SF-86. She admitted using marijuana on three different occasions after executing and signing her SF-86. She told the investigator her last use of marijuana was in February 2005. When the investigator asked her if she would use marijuana in the future, she said she could not predict the future but could not foresee herself using marijuana in the future. At her hearing, Applicant stated she was nervous when questioned by the investigator. She said her intention never to use marijuana again did not come across as emphatically as she had hoped it would. She said she had no intention in September 2005 to use marijuana again when she was questioned by the investigator, and she had no present intention to ever use marijuana again. (Tr. 34-37, 47.)

On October 17, 2006, Applicant met with a clinical psychologist for a substance abuse evaluation. The clinical psychologist interviewed and evaluated Applicant. He issued a report, which included the following paragraph:

She reported to me that she began to smoke marijuana at the age of 14. She reported that she was caught with marijuana at summer camp and was grounded by her parents. She then stopped smoking for 18 months because she was involved with cheerleading and the debate team in high school and "I didn't care for the people who were using it and it makes you lazy." After that time, she reported that she used it "once every couple of months" during high school and occasionally during college. She reported that she has not smoked any marijuana in several years and the last time she smoked "it seemed stupid and I wanted to grow up." [Applicant] reports that she graduated from college with a 3.75 GPA [Grade Point Average] and she subsequently attended law school for a year. She was polite and cooperative during the interview and responded openly to all questions. (Ex. D at 1.)

Based on his assessment of Applicant's marijuana use and a negative drug test, the clinical psychologist concluded Applicant "does not have an ongoing substance abuse problem" and he made no recommendations for substance abuse education or treatment. (Ex. D at 1.) At her hearing, Applicant stated the clinical psychologist was inaccurate when he reported she told him she had not smoked any marijuana in several years. (Tr. 43.) Nothing in the record indicated Applicant had brought the alleged inaccuracy to the attention of the clinical psychologist or had asked him to correct his report or, if necessary, revise his evaluation.

Applicant did not believe her marijuana use affected her academic performance, her judgment, or her job performance. (Tr. 31.) She attributed her marijuana use to immaturity and irresponsibility. (Tr. 36, 56.) For the past 13 months, Applicant has participated in a community service program as a volunteer mentor and role model for an underprivileged high school student. (Ex. F; Tr. 44-47.) Applicant's supervisor praised her professionalism and trustworthiness. Her

performance appraisals for 2005 and 2006 indicated she exceeded her performance standards in many areas. (Ex. C.)

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 authorized the Secretary of Defense or his designee to grant applicants 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). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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 at 3.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. 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 an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Section 986(c)(2) of Title 10, United States Code, provides that the Department of Defense may not grant or renew a security clearance for an employee of a contractor of the Department of Defense if the employee is an unlawful user of, or is addicted to, a controlled substance as defined in section 102 of the Controlled Substances Act. (21 U.S.C. 802) The allegations in this case require that a determination be made regarding the applicability of Section 986(c)(2).

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines 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. 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 at 3.

CONCLUSIONS

Guideline H, Drug Involvement

In the SOR, DOHA alleged under Guideline H that Applicant used marijuana, with varying frequency from about 1997 to at least February 2005 (¶ 1.a.); that she used marijuana after executing a security clearance application on November 3, 2004 (¶ 1.b.); that she could not say she would not use marijuana in the future (¶ 1.c.); that she purchased marijuana (¶ 1.d.); and that the facts alleged in ¶¶ 1.a. and 1.c. disqualify Applicant under 10 U.S.C. § 986 from having a security clearance granted or renewed by the Department of Defense (¶ 1.e.)

The Government's concern with Guideline H conduct is that it raises questions regarding an individual's ability or willingness to protect classified information. Drug abuse or dependence may impair social or occupational functioning, thereby increasing the risk of an unauthorized disclosure of classified information. ¶ E2.A8.1.1.1.

Drugs are defined under Guideline H as mood and behavior-altering substances, including drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended, and inhalants and other similar substances. ¶¶ E2.A8.1.1.2., E2.A8.1.1.2.1., E2.A8.1.1.2.2. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. ¶ E2.A8.1.1.3. Marijuana, or cannabis, is

identified and listed in the Controlled Substances Act of 1970, as amended, as a controlled substance.

From Applicant's admissions, the Government has established a *prima facie* case that she purchased and used marijuana intermittently but habitually for over eight years between 1997 and at least February 2005, and that she used marijuana after executing a security clearance application in November 2004. Applicant has admitted Guideline H drug involvement specified in the SOR and identified as disqualifying under Disqualifying Condition (DC) E2.A8.1.2.1. and DC E2.A8.1.2.2. (3)

The record shows that Applicant's involvement with marijuana began when she was 14 years old and continued through her high school, college, and post-college years. By her own estimate, Applicant used marijuana approximately 50 times in high school and college. She used marijuana three times after completing her security clearance application in November 2004.

Applicant stated her last drug use occurred in February 2005, almost two years ago. Thus, her drug involvement was not recent, and, accordingly, Mitigating Condition (MC) E2.A8.1.3.1. (4) applies. However, Applicant's marijuana use, although sometimes sporadic and intermittent, was continual and spanned a period of approximately eight years of her adolescence and young adulthood. Thus, her drug involvement was neither isolated nor aberrational and represented a consistent and long-standing lifestyle choice. Therefore, MC E2.A8.1.3.2. (5) does not apply.

Applicant asserted several times at her hearing that she did not intend to use marijuana in the future. While this assertion appeared credible, Applicant provided no plan or rationale for abstaining from the use of marijuana and she continues to associate with people who use marijuana. Absent some clear demonstration of how she planned to abstain from marijuana use, and a measurable track record showing abstinence, Applicant failed to show that MC E2.A8.1.3.3. (6) is applicable.

According to her testimony, Applicant is not presently using marijuana and has not used marijuana since February 2005. An assessment by a clinical psychologist concluded she is not addicted to marijuana and does not require treatment or substance abuse education. Accordingly, she is neither at present an unlawful user nor addicted to a controlled substance as defined by section 102 of the Controlled Substances Act, and 10 U.S.C. § 986(c)(2) is inapplicable.

Guideline E - Personal Conduct

In the SOR, DOHA alleged Applicant raised concerns under Guideline E, Personal Conduct, when she used marijuana after executing a security clearance application in November 2004 and while knowing that the use of marijuana could affect her employment and clearance (§ 2.a.). DOHA also alleged Applicant, who was by then a college graduate, also used marijuana after remarking on her SF-86 that she did not wish to excuse her use of marijuana but wished to point out that most of her use occurred in her high school and college days (§ 2.b.). Guideline E conduct, which involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

With respect to the Guideline E conduct alleged in the SOR, the Government has established its case. The Government established, and Applicant admitted, that she used marijuana three times after executing her security clearance application. Knowing she was still using marijuana, Applicant asserted on her security clearance application that the majority of her usage occurred while in high school and college. At her hearing, Applicant stated she did not believe her use of marijuana affected her academic performance, her judgment, or her job performance, suggesting she was unaware of or ignored the fact that illegal involvement with drugs raises legitimate questions about an individual's willingness or ability to obey the law and to protect classified information.

Additionally, at her hearing, Applicant stated the clinical psychologist's report of his interview with her was inaccurate, and she denied telling him she had not used marijuana for several years. However, Applicant provided no evidence to resolve this discrepancy, which cast doubt on the reliability of the report and raised concerns about her credibility. The clinical psychologist was not called as a witness to discuss his interview with Applicant. Applicant's conduct raises concerns under Disqualifying Condition (DC) E2.A5.1.2.5. because it suggests a pattern of rule violation. Her

willingness to break rules and violate laws in her marijuana use suggests that, under some circumstances, she may put her interests before those of the Government.

As a young professional, Applicant continues to associate with individuals who use marijuana socially, thus exposing herself to the possibility of coercion, exploitation, or duress and ignoring the reality that illegal drug use is criminal behavior. Thus Mitigating Condition (MC) E2.A5.1.3.5. and MC E2.A5.1.3.7. (7) are inapplicable. No other Guideline E mitigating conditions apply.

Whole Person Analysis

Paragraph E2.2 of the Directive requires that the adjudicative process in a security clearance case not only assess conduct under the adjudicative guidelines, but it must also reflect a careful weighing of a number of variables known as the whole person concept. The factors to be considered in a whole person analysis include the nature, extent, and seriousness of the conduct (E2.2.1.1); the circumstances surrounding the conduct, to include knowledgeable participation (E2.2.1.2); the frequency and recency of the conduct (E2.2.1.3); the individual's age and maturity at the time of the conduct (E2.2.1.4.); the voluntariness of participation (E2.2.1.5.); the presence or absence of rehabilitation and other pertinent behavioral changes (E2.2.1.6); the motivation for the conduct (E2.2.1.7); the potential for pressure, coercion, exploitation, or duress (E2.2.1.8.); and, the likelihood for continuation or recurrence (E2.2.1.9).

Applicant voluntarily admitted her marijuana use in adolescence and college and after completing her security clearance application. It is unclear how forthcoming she was with the clinical psychologist who assessed her drug use and recounted it in his report.

Applicant is now 26 years old, a college graduate, and employed in a professional position with a defense contractor. For the last 13 months, she has served as a mentor and role model for an underprivileged high school student. She testified she has been aware since adolescence that marijuana use is illegal. Even so, she continued her use of marijuana throughout high school and college. She used marijuana after college, and she used marijuana while she knew she was under investigation for a security clearance.

Applicant attempted to minimize her illegal conduct by asserting her use of marijuana did not affect her judgment, academic record, or job performance. She testified she had not used marijuana since February 2005 and had no intention to use illegal drugs in the future. The report of the clinical psychologist tended to support her claims of abstinence. However, Applicant had no plan in place to ensure that she followed through on her intention. Additionally, she continues to associate with individuals who use illegal drugs, thus raising a concern she may be vulnerable to coercive efforts by others to cause her to use illegal drugs again.

I have reviewed and considered all of the evidence, and I have assessed Applicant's credibility and demeanor. After weighing the applicable Guideline H and E disqualifying and mitigating conditions, and after considering all relevant factors in the whole person analysis, I conclude Guideline H allegations 1.a., 1.b., and 1.d. against Applicant, and Guideline H allegations 1.c and 1.e. for the Applicant. I conclude Guideline E allegations 2.a. and 2.b. against Applicant.

In all adjudications, the protection of our national security is the paramount concern. Security clearance decisions are not intended to assign guilt or to impose further punishment for past transgressions. Rather, the objective of the security clearance process is the fair-minded, common sense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of his or her acts and omissions, including all disqualifying and mitigating conduct. Having done so, I conclude Applicant should not be entrusted with a security clearance. In reaching my decision, I have considered the evidence as a whole, including the appropriate factors and guidelines in Department of Defense Directive, 5220.6., as amended

FORMAL FINDINGS

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

Paragraph 1. Guideline H.: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2. Guideline E.: AGAINST APPLICANT

Subparagraph 2. a.: Against Applicant

Subparagraph 2.b.: Against Applicant

DECISION

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 or continue a security clearance for Applicant. Clearance is denied.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. DC E2.A8.1.2.1 reads, in pertinent part: "Any drug abuse." DC E2.A8.1.2.2. reads: "Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, and distribution."
4. MC E2.A8.1.3.1. reads: "The drug involvement was not recent."
5. MC E2.A8.1.3.2. reads: "The drug involvement was an isolated or aberrational event.'
6. MC E2.A8.1.3.3. reads: "A demonstrated intent not to abuse any drugs in the future."
7. MC E2.A5.1.3.5. reads: "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress." MC E2.A5.1.3.7. reads: "Association with persons involved in criminal activities has ceased."