



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



In the matter of:)	
)	
)	ISCR Case No. 07-16934
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: John Bayard Glendon, Esquire, Department Counsel
For Applicant: Pro Se

September 26, 2008

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is granted.

Applicant submitted her Security Clearance Application (SF 86), on March 5, 2007. On June 6, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines E and H 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), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on June 10, 2008. She answered the SOR in writing on June 11, 2008, and requested a hearing before an administrative

judge. DOHA received the request on June 16, 2008. Department Counsel was prepared to proceed on June 30, 2008, and I received the case assignment on July 11, 2008. DOHA issued a notice of hearing on July 15, 2008, and I convened the hearing as scheduled on August 6, 2008. The government offered six exhibits (GE) 1 through 6, which were received and admitted into evidence without objection.¹ Applicant and one witness testified on her behalf. She submitted 11 exhibits (AE) A through K, which were received and admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on August 14, 2008. I held the record open until August 21, 2008, for Applicant to submit additional matters. On August 20, 2008, she submitted one additional document, AE L, which is marked and admitted without objection. The record closed on August 21, 2008.

Procedural and Evidentiary Rulings

Notice

At the hearing, Applicant indicated she received the hearing notice on July 30, 2008. (Tr. 8-9.) I advised Applicant of her right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived her right to 15 days notice. (Tr. 8-9.)

Findings of Fact

In her Answer to the SOR, dated June 11, 2008, Applicant denied the factual allegations of the SOR.²

Applicant, who is 52 years old, works as a business development director for a Department of Defense contractor. She has held this position for 19 months. Her employer requested that she apply for a security clearance. Applicant held a Q level clearance with the Nuclear Regulatory Commission (NRC) from 1980 until 1985 and a L or secret level clearance with the NRC from 2001 until 2003. Both clearances expired when her employment terminated. She followed all procedures for handling classified information during the times she held a clearance in the past.³

Applicant graduated from college in the 1970s with a bachelor's degree in health physics. She received her master's degree in health physics in 1980. She started working for the NRC in 1980. In 1985, she left the NRC for employment in the private sector, where she did not need a security clearance. In 1991, she started employment

¹Applicant initially objected to the admission of GE 3. Following testimony regarding this exhibit and the submission of GE 6, Applicant agreed to the admission of this evidence. Tr. 15-21, 35-50.

²Response to SOR, dated June 11, 2008.

³GE 1 (Applicant's security clearance application) at 2, 7, 27; AE L (Letter, dated August 20, 2008); Tr. 31, 45-46, 64-65.

with a national trade association. Ten years later, this employer promoted her to the Director of Security and requested her to apply for a NRC clearance, which she did.⁴

Applicant completed a SF-86 on April 13, 2001 for the NRC clearance. Following an investigation limited to a criminal background check and a credit check, the NRC granted Applicant a L level clearance on August 18, 2001. Sometime later, the NRC realized that this investigation was in error. The NRC did not request Applicant to complete a new SF-86. Instead, someone with access to the 2001 SF-86, dated the SF-86 for December 31, 2002 and resubmitted paperwork for a more extensive background investigation. Applicant did not sign this SF-86. Applicant's already granted clearance remained in effect. When the background investigation concluded in April 2003, the NRC granted her L level clearance again. On May 15, 2003, she ended her employment with the trade association. Her clearance terminated at the same time. Thereafter, Applicant worked in private industry until her current employment.⁵

Since graduating from college, Applicant and several college friends regularly visit with each other at different places in the United States. In June 2003, one visit occurred at the home of a friend near Applicant's college. Friends of this friend attended the gathering and brought with them marijuana. Applicant took one puff of the marijuana cigarette during this visit. She refused a second opportunity to take a puff on the marijuana cigarette during this visit.⁶

Applicant again used marijuana twice in November 2004 while watching a football game with her college friends. She has not used marijuana since this time. She told her friend that if her friends who use marijuana attend any of the gatherings, Applicant will not attend. Applicant occasionally smoked marijuana during social events in college, but did not smoke marijuana after college until 2003. She denies any other marijuana use.⁷

Applicant completed her current SF-86 in March 2007, one month after beginning her current employment. She answered "yes" to Question 24 a about her use of illegal controlled substances in the last seven years and stated that she used marijuana three times between January 2000 and January 2005. She estimated the time frame in which she used the marijuana. At the hearing and after careful review of the circumstances of her use with friends, she narrowed these times frames to June 2003 and November 2004. She answered "no" to Question 24 b about using illegal controlled substances

⁴Tr. 30-31.

⁵GE 2 (Applicant's 2001 security clearance application); GE 3 (Resubmitted SF-86 dated December 31, 2002); GE 5 (Closing transmittal for 2001 investigation); GE 6 (Closing transmittal for 2003 investigation); AE B (Letter, dated August 1, 2008) Tr. 35-50.

⁶AE A (Letter, dated July 31, 2008); Tr. 32, 74.

⁷AE C (2004 football schedule); AE D (Letter, dated July 22, 2008); Tr. 32, 52.

while employed as a law enforcement officer, prosecutor, or courtroom official, while holding a security clearance or in a public safety positions.⁸

In her 2001 SF-86, Applicant answered “no” to Question 24 a, b, and c regarding her use of illegal controlled substances. She initially answered “yes” to question 24 a because she thought the question asked for any use of illegal controlled substances since age 16 and she had used marijuana in college. She later reread the question and realized it asked for her use in the last seven years, so she changed her answer to “no” as she had not used any illegal controlled substances since college, over 20 years earlier.⁹

Applicant prepared and submitted a Statement of Intent at the hearing. She consents to the revocation of her security clearance for any violations as described under the Adjudicative Guideline H. She indicates an intent not to use marijuana or any other illegal substances in the future.¹⁰

Applicant provided six letters of recommendation from friends, her supervisors, and her brother-in-law. All are aware of her drug involvement issue in her security clearance application. All describe her as trustworthy, honest and reliable. Her work ethic is great and she is respected by her employers.¹¹

Applicant married 11 years ago. She has two step-sons, ages 21 and 17.¹²

Policies

When evaluating an Applicant’s suitability for a security clearance, the administrative judge must consider the revised 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 common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as

⁸GE 1, *supra* note 3, at 25; Tr. 57, 65 74-75.

⁹GE 2, *supra* note 5, at 8; Tr. 61-65.

¹⁰AE J (Statement of Intent); Tr. 57.

¹¹AE A, *supra* note 6, AE D, *supra* note 7; AE E (Letter, dated August 1, 2008); AE F (Letter, dated July 28, 2008); AE G (Letter, dated July 30, 2008); AE H (Letter, dated July 24, 2008).

¹²GE 1, *supra* note 3, at 12, 17-18.

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

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

(a) 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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

In this case, a security concern may arise under the following conditions set forth in AG ¶ 25, which may disqualify Applicant for a clearance:

(a) any drug abuse (see above definition); and

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

After she left her position with the trade association, Applicant used marijuana on three occasions in June 2003 and November 2004. She voluntarily provided this information. At the time she used marijuana, she did not hold a security clearance. The government has established its case under AG ¶ 25 (a).

As the government has established its case, Applicant must show that she has mitigated the government's concerns. Under AG ¶ 26, the following conditions could mitigate security concerns raised by Applicant's drug use.:

(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; and,

(4) a signed statement of intent with automatic revocation of clearance for any violation;

Applicant self-reported her use of marijuana in 2003 and 2004. Her family and friends are not users of marijuana so there is little likelihood that she will use marijuana when attending events with them. She has told one friend that if the individuals, who brought marijuana to the June 2003 get together, attend future events, she will not

come. She has also signed a letter of intent for an automatic revocation of her security clearance if she uses illegal drugs in the future. Applicant acknowledges that her decision to use marijuana, even only three times on two dates, showed a serious lapse in judgment. She realizes that she made a mistake and will not use marijuana or any other illegal controlled substance in the future. Her drug involvement does not impact on her current reliability, trustworthiness or good judgment because she will not use illegal drugs again. She has mitigated the government's security concerns under Guideline H.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(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;

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

(g) association with persons involved in criminal activity.

Applicant did not falsify her April 2001 and December 2002 SF-86 when she answered "no" to Question 24 about her past drug involvement because she did not use marijuana in the seven years prior to signing her 2001 SF-86 or the submission of the 2002 SF-86. Rather, an individual at the NRC did. Thus, Applicant did not falsify her answer. When she completed the 2001 SF-86, she correctly answered the question about her past drug use. Her testimony that she had not used marijuana since college until 2003 is credible. The government has not established that Applicant falsified her SF-86. Guideline E is found in favor of 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 common sense 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. As a college student and graduate student, Applicant used marijuana socially. Subsequent to her graduation in 1980, Applicant ceased all use of marijuana until 2003. At this time, she used marijuana once, a definite lapse in judgment. She again used marijuana on two occasions during a weekend get together with old college friends in 2004. She acknowledges she made a mistake. She will no longer associate with the individuals who use marijuana and has abstained from smoking marijuana for nearly four years. She has agreed to the revocation of her clearance if she becomes involved with marijuana in the future, an agreement which has serious consequences for her.

Applicant twice held security clearances without any violations of security procedures. She has never been involved in criminal conduct or other illegal activities. She is a valuable employee, who works hard and is highly respected by her employers. Friends, family and supervisors consider her honest, trustworthy and reliable. She works in the community and has raised two stepsons. She is an asset to her employer and her community. She has a stable family and work life. Her one marijuana use in 2003 and two marijuana uses in 2004 cannot be a source of improper pressure or duress. Of course, the issue is whether her use of marijuana four to five years ago raises concerns about her fitness to hold a security clearance. In light of the compelling mitigating information, her use of marijuana is insufficient to raise security concerns. (See AG ¶ 2(a)(1).)

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I

conclude Applicant mitigated the security concerns arising from her past drug use and personal conduct.

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

MARY E. HENRY
Administrative Judge