



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----, -----) ISCR Case No. 08-00912
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: J. Byron Holcomb, Esquire

June 29, 2009

Decision

WHITE, David M., Administrative Judge:

Applicant used cannabis with an older boyfriend during her late teenage years. When completing her security clearance application, her father, a career military intelligence professional, advised her to deny drug use based on her statement to him that she had tried marijuana a few times years earlier. She thereafter honestly admitted her use during the security clearance investigation, and there was no other evidence of it. She persuasively established her intent not to abuse any drugs in the future, and to honestly report security-related matters. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Applicant submitted her Electronic Questionnaires for Investigation Processing (e-QIP), on June 20, 2007. On December 16, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. 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 answered the SOR in writing (AR) on January 7, 2009, and requested a determination be made without a hearing. After receiving the resulting File of Relevant Materials for review and comment, she retained her above-listed counsel, who entered an appearance and requested a hearing before an administrative judge on her behalf on February 26, 2009. Department Counsel was ready to proceed on March 12, 2009, and the case was assigned to me on March 24, 2009. DOHA issued a Notice of Hearing on that same date setting the hearing for April 8, 2009. On March 27, 2009, I granted Applicant's continuance request, which Department Counsel did not oppose, due to operational commitments and travel issues. DOHA issued an Amended Notice of Hearing on March 30, 2009, and I convened the hearing as rescheduled on April 22, 2009. The Government offered exhibits (GE) 1 and 2, which were admitted without objection. The Government also requested that I take administrative notice of the facts that marijuana and hashish are controlled substances, providing hearing exhibits (HE) II, III, and IV in support. Applicant had no objection, except to the relevance of AE IV, and administrative notice was taken of those facts. Applicant and her father testified on her behalf, and she submitted exhibits (AE) A through G, which were admitted without objection. I granted Applicant's request to leave the record open until April 29, 2009, to permit submission of additional evidence. On April 28, 2009, Applicant and her counsel submitted the additional evidence, which was forwarded to me on April 30, 2009, by Department Counsel without objection to its consideration. The evidence was marked AE H, admitted, and the record was closed. DOHA received the transcript of the hearing (Tr.) on May 1, 2009.

Findings of Fact

In her answer to the SOR, Applicant admitted to the truth of SOR ¶¶ 1.a and 2.a, with some clarifications, and denied SOR ¶¶ 1.b and 2.b. Applicant's admissions, including those contained in her response to DOHA Interrogatories (GE 2), are incorporated in the following findings.

Applicant is a 24-year-old human resource representative and analyst assistant for a defense contractor supporting a major command staff overseas. She has worked for her present employer for about a year and a half, and worked as an administrative assistant for another contractor supporting a different part of that command staff for two years preceding that. While working for her former company in 2006, she applied for and was granted a Secret clearance, which is also required for her present duties. She later submitted the e-QIP currently pending adjudication when her former employer sought to upgrade her clearance to Top Secret so she could assume additional duties. It is not clear from the record whether her new position requires the higher clearance, but the information resulting in the present SOR was generated in connection with the second Office of Personnel Management (OPM) background investigation. (GE 1, GE 2, AE C.)

Applicant was born in the United States, but shortly thereafter moved with her parents, in connection with her father's military service, to the country where she presently lives. He is a military intelligence professional, who was stationed in that country throughout most of his active duty career and his subsequent Civil Service employment performing related functions. She attended DoD schools there through high school, and also took some college classes after graduating. Due to a series of circumstances beyond her control, she was taunted and teased by a number of her high school contemporaries and had a difficult social life. During the summer of 2002, when she was 17, she became involved with her first boyfriend, an older son of a senior officer on the base where she lived when he came home from college. Unknown to either of their parents, he was a regular cannabis user, either marijuana or hashish or both. Applicant smoked cannabis with him a few times during that summer, before he returned to the U.S. for college. She had previously taken one "hit" from a cigarette offered by a friend who told her it was "hash" in 2000. Applicant insists that she did not, and still does not know the difference between hashish and marijuana, and used the terms interchangeably. I use the term cannabis to describe her use of one or both substances, which I administratively notice are identified and listed in the Controlled Substances Act of 1970. She only smoked cannabis when she was with this boyfriend. She smoked cannabis with him from 6 to 12 times during a two-week trip they took together in the U.S. in May and June 2003. The following summer, 2004, the two of them traveled around a four-state area together for about two months after she went to see him for what was supposed to be a ten-day visit to his family. During that trip, they both smoked cannabis between three to seven days a week, multiple times a day. When she returned home from this trip, she had broken up with this boyfriend and never saw him again. (GE 2 at 13-14; AE E; AE F; Tr. at 119-123, 154-156, 158-165, 178-184.)

In June 2007, shortly after she submitted her most recent e-QIP, Applicant saw a friend who she had not seen in a while in a bar. He went outside to the deck and was smoking what appeared to be a tobacco cigarette when she approached him. She asked him for a "drag" and he gave her the cigarette. When she took the "drag," she realized that it was not tobacco, and became upset because she had determined never to use drugs again after her experience in the summer of 2004. She reported her anger to another friend, who took her home. She suspected that the cigarette contained cannabis, but was not positive. (GE 2 at 14; AR at 1; AE B; Tr. at 93-103.)

Applicant asked her father to assist her with completing her e-QIP due to his many years of experience with security matters and senior position. When they came to the question about drug use, she did not tell him about the extent of her prior cannabis use because she did not want to disappoint him or further irritate him about her relationship with her first boyfriend that had ended with her father angry about the extended visit. She merely told him she had experimented with marijuana a few times. He told her that because she was not a drug user and was not addicted to anything she should just put "No" as her answer concerning past drug use, which she did. (AR at 1; GE 2 at 14; Tr. at 83, 157-158.)

Applicant was interviewed by an OPM investigator on September 26, 2007. When asked about drugs, she “volunteered” all of the foregoing information about her prior drug use because “she had matured since 2004,” “wanted to do the right thing and she realized that not revealing the whole truth would have been wrong.” She further said that she “did not completely understand the process and now wanted to take the opportunity to be completely honest.” The investigator had no prior knowledge about any of this drug use, and there is no evidence of it except for Applicant’s initial admissions to the investigator and subsequent confirmations of those admissions. (GE 2 at 11-15; Tr. at 90-92.)

Applicant has ended her association with anyone involved with marijuana use or any other illegal drugs. Except for the use described above, she has never possessed cannabis, nor has she ever purchased or manufactured any drug. She recently married a non-commissioned officer on active duty who holds a Top Secret security clearance. He attested that she has no recent drug involvement whatsoever, and exhibits no desire to do so. Applicant’s supervisor stated that she received a sterling recommendation from her former boss, and had performed excellent work for him. He said, “she is diligent and totally reliable. She has a no-nonsense, by-the-book approach to her work and her handling of classified material. She has earned my complete trust and confidence.” He further said she “has made every effort to ‘come clean’ about her past. She has learned a lot from her mistakes and has done a phenomenal job turning her life around. I have no reservations whatsoever concerning her trustworthiness in matters of national security or personal integrity.” (GE 2 at 14-15; AE A; AE B; AE C; AE D; AR at 2.)

Applicant submitted a sworn written declaration of her intent never to abuse any controlled substance in the future, with an agreement to automatic revocation of her clearance for any violation. She also underwent an unanticipated urinalysis screening shortly before the hearing at her attorney’s request, with fully negative results. She has foresworn any future use of controlled substances, and learned hard lessons from her youthful bad judgement. Her father also testified to her great maturation and responsible behavior ever since 2004. (AE G; AE H; AR at 2; Tr. at 168-177.)

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(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in

the context 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 “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the 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.” Section 7 of Executive Order 10865 provides that “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.”

A person applying for access to classified information seeks to enter 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.

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.” AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Three disqualifying conditions that are potentially raised by the evidence in this case are: “(a) any drug abuse;” “(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;” and “(g) any illegal drug use after being granted a security clearance.” Applicant abused cannabis one time in 2000, several times in 2002 and 2003, and regularly over a two-month period in 2004 with her then-boyfriend who provided the drugs and encouraged her participation. This establishes security concerns

under AG ¶ 25(a). Her only possession was that necessarily required to use the drugs, so no additional security concerns are supported under AG ¶ 25(c). Finally, her 2007 “drag” on a cigarette she suspected contained cannabis was entirely unintentional since she believed it to be a tobacco cigarette and ceased using it as soon as she suspected otherwise. This would fall under the criminal defense of innocent ingestion, and therefore was not “illegal” drug use while she held a security clearance. Accordingly, AG ¶ 25(g) does not apply.

AG ¶ 26 provides conditions that an applicant could establish in order to mitigate security concerns. Mitigating conditions raised by this record include: “(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’s drug possession and use during 2000 to 2004 took place while she was young and a student, and most recently occurred almost 5 years ago. She stopped after breaking up with her first boyfriend, who pressured her to use the cannabis, and she successfully held a security clearance and responsible positions for more than three years thereafter. She is now married to an active duty service member with a top-level security clearance and neither of them have any interest in drug abuse. She has disassociated from any drug users, and signed a statement of intent with automatic revocation of clearance for any violation. Applicant met her burden of establishing that her drug use occurred under such circumstances that it is unlikely to recur and does not cast doubt on her current reliability, trustworthiness or good judgment (AG ¶ 26(a)). Applicant provided substantial evidence of her intent not to abuse drugs in the future, including her disassociation from drug-using contacts, her abstinence for almost five years, a recent negative urine screening, and her signed statement of intent with automatic revocation (AG ¶ 26(b)). This case did not involve abuse of prescription drugs, nor has any drug treatment program ever been prescribed for her, so neither AG ¶¶ 26 (c) nor (d) apply.

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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The condition raised by the evidence in this case is:

(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.

Applicant admittedly falsified her answer concerning prior drug use when completing her June 20, 2007, e-QIP.

AG ¶ 17 provides conditions that could mitigate security concerns raised under AG ¶ 16(a). Those conditions supported by the evidence in this case are:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the

stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant was never confronted with any facts about drug abuse, because the OPM investigator had no information concerning her past use. Applicant minimized, but did not entirely conceal, her past use of cannabis when discussing the e-QIP with her father. He is a high ranking, career military intelligence officer who advised her to falsify her answer by responding “No.” Her admitted use was not so substantially greater than what she admitted to her father at that time to render this advice more her fault than his. She certainly and reasonably considered him to be an authorized person to advise her concerning the security clearance process. When the OPM investigator made her aware of the requirement to provide full and truthful information, she did cooperate fully and truthfully. Accordingly, Applicant established mitigation under AG ¶¶ 17(a) and (b). She also convincingly testified that she now understands the importance of full disclosure and honesty in security-related matters, and of honesty with her father, so such falsification is unlikely to recur and no longer casts doubt on her reliability or judgment. This establishes further mitigation under AG ¶¶ 17 (c), (d), and (e).

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 established by the record evidence. 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. Applicant’s conduct of security concern involved relatively minor cannabis abuse with and initiated by a former boyfriend about five to seven years ago, and denying it on her e-QIP. She broke off the

relationship in the summer of 2004, and has never knowingly used drugs since. She is now married to an active duty service member, who holds a top-level security clearance. She is highly regarded by her supervisor and senior officials of the major command staff for whom she has been providing administrative support since February 2006. She was age 15 to 19 when her drug use occurred, and is now 24 and significantly more mature. Her e-QIP falsification was more recent, but significantly influenced by her father's improper, albeit well-meaning, advice not to report her youthful cannabis use. Her parents, husband, supervisor, and security personnel are now fully informed of her past drug use due to her volunteering of this information in connection with her security clearance investigation, thereby eliminating any vulnerability to coercion or duress. There is a minimal likelihood of recurrence of either drug abuse or falsification of security-related information.

Overall, the record evidence leaves me with no doubt as to Applicant's present eligibility and suitability for a security clearance. She has fully met her burden to mitigate the security concerns arising from her drug involvement 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 interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

DAVID M. WHITE
Administrative Judge