



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



In the matter of:)	
)	
)	ISCR Case No. 08-05385
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

May 26, 2010

Decision

METZ, John Grattan, Jr., Administrative Judge:

On 5 June 2009 the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H, Drug Involvement and E, Personal Conduct.¹ Applicant answered the SOR 30 June 2009, and requested a hearing. DOHA assigned the case to me 3 September 2009, and I convened a hearing 22 September 2009. DOHA received the transcript (Tr.) 30 September 2009.

¹DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive (DoD) 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the adjudicative guidelines (AG) effective within DoD on September 1, 2006.

Findings of Fact

Applicant admitted the SOR allegations, except for SOR 1.d and 2.a.² She is a 37-year-old sales manager employed by a defense contractor since May 2007. She does not currently hold a clearance, but appears to have held one 2001–June 2005.

Applicant first applied for a clearance in about June 1999 (GE 6). Her initial clearance application is not in the record, but she was interviewed by a government investigator in August 1999. During the interview, which was reduced to a sworn statement (GE 3), she disclosed that she had used marijuana, LSD, and cocaine during her college years and for about a year thereafter. The sworn statement supports a reasonable inference that she reported her drug abuse on the clearance application, because she amended her estimate of marijuana use.

Applicant used marijuana once or twice per month between 1989 and June 1994. She estimates she used it 50-55 times during that 4-5 years, in social settings (concerts, parties) with classmates and roommates. She never purchased marijuana, although she contributed \$5-10 to the purchase once or twice while in college. She did not use marijuana while she was home during summer breaks.

Applicant used LSD eight times between fall 1989 and spring 1993. The LSD was provided by college friends. She recalls using LSD in October 1989 at a rock concert, March 1990 at a rock concert, and late-summer 1990 at a fraternity party. She used occasionally at rock concerts the last few times she used it, the last time in March 1993.

Applicant used cocaine six times between December 1992 and April 1993 at parties with her boyfriend, who was a cocaine user and provided her the drug. She ended the relationship with this boyfriend because she realized that it was not the kind of lifestyle she wanted.

Applicant foreswore any future drug use during her August 1999 interview, stating that it was inconsistent with her personal and professional goals. Nevertheless, she later reported using marijuana twice between 1994 and January 2000. During an interview conducted by unsworn declaration in November 2007 (GE 4), she recalled using marijuana once after 1994 at a party, and once at a New Year's Eve party in December 1999. On both occasions, she took a puff on a marijuana cigarette as it was passed around the group. Her ex-husband, a marijuana user, was one of the group. At the time, Applicant did not think about the potential consequences of her marijuana use, but later regretted the use, and no longer associates with any of the people she used to party with.

²However, while Applicant admitted using marijuana (SOR 1.a) she specified that she did not use marijuana after 2000. And while she also admitted (SOR 2.b) that she did not disclose an agency denial of special access in June 2005 on her July 2007 clearance application, she asserted the affirmative defense that she was not aware of the denial until her subject interview in November 2007 (Answer, GE 4)

As a result of the June 1999 background investigation that closed in July 2001, Applicant obtained her clearance from DOHA in April 2002 (GE 6). She apparently held this clearance without incident until June 2004, when she changed employers. Her new employer required a different level of access, and while her June 1999 investigation was adequate for her interim clearance, the special access she needed required her to complete a new clearance application in June 2004 (GE 2) and undergo a polygraph examination by the government agency supported by her employer. GE 2 did not reflect any drug use by Applicant within the last seven years.³ She testified credibly (Tr. 53-54) that she relied on the advice of friends who had clearances in denying any drug use, but later realized that choice was “stupid.”

The polygraph examination was conducted in November 2004. The areas of inquiry were her failure to disclose any drug use on her June 2004 clearance application, and discussion of her drug use since 1994.

Applicant has consistently stated (GE 4, Answer, Tr. 30) that she has not used marijuana since the night in December 1999. She testified credibly that she told the examiner this during the polygraph. However, she was nervous because she knew she had falsified her clearance application, and during further questioning by the examiner she disclosed that she had continued to associate with her ex-husband and attend social events where marijuana was used, until May 2004. She did not believe there were any unresolved issues when the examination was over.

In April 2005, the contract Applicant was working on expired, and she went to work for a different company, one that did not require her to have a clearance (GE 1). In March 2005, the government agency’s security division issued its clearance decision, denying Applicant’s request for special access (GE 5).⁴ According to GE 6, the government agency issued a denial letter in June 2005 that was received by DOHA later that month. In July 2005, DOHA terminated Applicant’s clearances because of loss of jurisdiction. The entry noted that Applicant had terminated employment, and the adjudicative issue had not been resolved.

When Applicant completed her clearance application for her current job in July 2007 (GE 1), she said she had not used drugs in the last seven years (§24) and had never had a clearance denied or revoked (§26). The SOR alleges that Applicant’s answers were deliberately false, based on her purported disclosures recorded in GE 5, that she continued to use marijuana sporadically until May 2004. Applicant denies falsifying her application, credibly asserting that her last drug use was more than seven years ago, and that she never received any notification of the denial of her request for special access in June 2005. Nothing in GE 5 or 6 establishes that Applicant received notice of the agency decision. Indeed, reasonable inferences from GE 5 and 6 support

³The government did not allege this omission as a falsification in the SOR.

⁴GE 5 is the intra-agency decision document. It is not addressed to Applicant and does not contain the examiner’s notes or any of the materials generated during the polygraph examination.

her contention that she did not receive notice of the agency decision. The agency decision document was dated late March 2005. The letter to DOHA was dated mid-June 2005, not received by DOHA until late-June 2005, and not entered into the clearance database until July 2007. It is unlikely that any denial letter sent to Applicant or her employer was dated any earlier than mid-June 2005. Neither GE 5 nor 6 establish that the denial letter was sent to Applicant or her employer, and any letter sent to her employer would have been received after she left employment there, and moved to a position where she did not require a clearance.⁵

Policies

The adjudicative guidelines (AG) list factors to be considered in evaluating an applicant's suitability for access to classified information. Administrative judges must assess both disqualifying and mitigating conditions under each issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial commonsense consideration of the factors listed in AG ¶ 2(a). The presence or absence of a disqualifying or mitigating condition is not determinative for or against an applicant. However, specific adjudicative guidelines should be followed where a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guidelines are Guideline H (Drug Involvement) and Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does, it establishes a baseline case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, an applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgement,

⁵GE 6 provides additional support for this conclusion. DOHA records the agency denial of special access in April 2005, reported by the mid-June 2005 denial letter. However, DOHA also records loss of jurisdiction (which would occur when Applicant terminated employment) in July 2005. Allowing for reasonable administrative delay by the employer, Applicant's departure from the job in June 2005 may be inferred to have not been reported until July 2005. In addition, DOHA did not reestablish jurisdiction until July 2007, when Applicant submitted her most recent clearance application. Applicant's interim clearance was denied by DOHA in August 2007 based on the 2005 agency action, but an October 2007 entry that may be internally inconsistent (and may be a data entry error) reports a final agency appeal decision dated mid-June 2007 (vice 2005) based on Applicant choosing to not appeal the 2005 denial decision. As there is no evidence Applicant ever got notice of that decision, this may reflect nothing more than that the time for appeal expired without communication from Applicant—which would be consistent with her not receiving notice of the original decision.

reliability, and trustworthiness of those who must protect national interests as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an Applicant’s suitability for access in favor of the government.⁶

Analysis

The government established a case for disqualification under Guideline H, by demonstrating Applicant’s sporadic marijuana use between 1989 and December 1999.⁷ However, Applicant mitigated the security concerns. The issue in this case boils down to which is a more credible statement of Applicant’s drug abuse history: her multiple statements [sworn in August 1999 (GE 3), in her June 2009 Answer, and at hearing (Tr. 30); unsworn in November 2007 (GE 4)] or her purported statements made during a November 2004 polygraph examination (GE 5). Either she last used marijuana in December 1999, or she continued to use it until May 2004. I find her statements that she last used marijuana in December 1999 more credible. She has consistently stated since her interview in November 2007 that her last marijuana use was in December 1999. Those statements have now been subject to cross-examination at hearing, during which I found her testimony credible. Her purported statements during her November 2004 polygraph examination were recorded by the agency adjudicator, one step removed from the examination and its supporting documentation. Further, neither the polygraph examiner nor the adjudicator have been cross-examined, and Applicant did not have the opportunity to challenge the agency decision or the adjudicator’s or examiner’s documentation. Finally, Applicant’s statement that she reported being in the company of marijuana users and use until May 2004 provides a reasonable and plausible explanation for the contents of GE 5.

Having accepted Applicant’s statements of her last marijuana use, I find use mitigated by the age and infrequency of her marijuana use, the unlikelihood that the circumstances of her marijuana use will recur, and the fact that her use approximately 10 years ago does not cast doubt on her judgment, reliability, or trustworthiness.⁸ She has demonstrated intent to not abuse drugs in the future by her abstinence, her change in associates, and her change of social environments.⁹ Applicant is unlikely to use drugs in the future. Accordingly, I resolve Guideline H for Applicant.

⁶See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁷¶25.(a) any drug abuse ; (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

⁸¶ 26.(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 [Emphasis supplied];

⁹¶ 26.(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;

The government failed to establish a case for disqualification under Guideline E. Applicant denied using any illegal drugs after New Year's Eve 1999 [and thus more than the seven years called for on the July 2007 clearance application (GE 1)], and denied any knowledge of the denial of her request for special access (thus truthfully stating that to her knowledge she had never had a clearance or access denied or revoked). The government had the burden to establish that Applicant used marijuana after December 1999 and was aware of the agency decision on her request for special access in June 2005. Applicant credibly denied receiving any notice of the agency decision, and not only do the government exhibits fail to prove otherwise, they tend to confirm her statements. GE 5 is not addressed to Applicant, and while GE 6 indicates the existence of a June 2005 denial letter, the government has not produced that letter, so its contents and addressees (aside from DOHA) are unknown. GE 1 reflects, and GE 6, tends to corroborate, that Applicant first applied for a clearance in about June 1999. Her August 1999 sworn statement (GE 3) shows that she was investigated, that she disclosed her drug use on her clearance application, and thoroughly discussed her drug use. GE 6 shows the completion of her initial background investigation, and subsequent clearance. GE 1 and 2 show that she moved to a different job in June 2004, that required a polygraph examination, and GE 5 confirms Applicant's claim that the polygraph occurred. However, GE 1 shows, and GE 6 confirms, that Applicant left that job in about April 2005, before the results of GE 5 were sent to DOHA in June 2005. GE 6 confirms that DOHA lost jurisdiction over Applicant's clearance when she terminated the employment that required the clearance. That July 2005 entry reflects that the security issue was not resolved, and neither GE 5 nor 6 establish that Applicant was advised of the agency's denial of her request for special access. GE 6 also shows that DOHA did not reestablish jurisdiction over Applicant's clearance until her July 2007 application. GE 4, Applicant's answer, and her testimony (Tr. 30) establish that she first learned of the agency decision to deny her request for special access during her interview in November 2007. Neither GE 5 nor 6 contain any evidence to contradict that claim.

Regarding the extent and dates of Applicant's marijuana use, she has consistently and directly stated that her last use was December 1999. I found her testimony on this issue credible. The contrary evidence in GE 5 I find unpersuasive for several reasons. First, GE 5 is the intra-agency decisional document, and reflects the author's conclusions about what the polygraph examiner recorded as Applicant's disclosures. The supporting notes and materials are not in the record. Second, the record suggests that not only was Applicant not aware of any access decision made based on GE 5, she never had an opportunity to challenge the "fact" recorded by the examiner or contest the denial decision. Assuming all good-faith by the examiner and the absence of any motive to report Applicant's disclosures inaccurately, the fact remains that Applicant's suggestion that her admissions to attending social events when marijuana was used as late as May 2004 were misinterpreted by the examiner as indicating continued drug use by Applicant is reasonable. And without any opportunity to correct or contest the examiner's records, I will not find GE 5 conclusive evidence of drug use after December 1999 in the face of Applicant's consistent representations to the contrary. Having found that Applicant's answers to §§ 24 and 26 were truthful (as known to her at the time regarding §26), no case for disqualification because of

falsification has been made. The allegation (SOR 2.c) that Applicant used marijuana in December 1999 after submitting a clearance application in June 1999 is insufficient standing alone to establish poor judgment requiring denial of her clearance. I resolve Guideline E for Applicant. Nothing in the whole-person factors of AG ¶2(a) requires a different result.

Formal Findings

Paragraph 1. Guideline H: FOR APPLICANT

Subparagraph a-e: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph a-c: For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance granted.

JOHN GRATTAN METZ, JR
Administrative Judge