



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 08-09698
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Stephanie Hess, Esquire, Department Counsel  
For Applicant: Dan Cron, Esquire

February 18, 2010

**Decision**

LYNCH, Noreen, Administrative Judge:

Applicant submitted a Security Clearance Application (SF 86) on April 16, 2008. On May 11, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H (Drug Involvement), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) 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 requested a hearing before an administrative judge. I received the case assignment on September 18, 2009. DOHA issued a notice of hearing on October 5, 2009, and I convened the hearing as scheduled on October 27, 2009. The Government offered Exhibits (GE 1-8), which were received without objection. Applicant testified on her own behalf and presented the testimony of six witnesses. She also provided an

expert witness during a second session of the hearing on December 11, 2009. Applicant offered Exhibits (AE A-D) which were admitted into the record without objection. DOHA received the first transcript on November 5, 2009. The second transcript was received on December 18, 2009. Based upon a review of the record, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Findings of Fact**

In her Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a through 1.g of the SOR. She also admitted the allegations in ¶¶ 2.a through 2.d with explanations concerning her use of alcohol. Applicant denied allegation ¶ 3.a.

Applicant is a 56-year-old employee of a defense contractor. She graduated from high school in 1971. She is divorced and has four children (Tr. 104). She has worked in a professional capacity for more than 30 years. She has been with her current employer since April 2008 (GE 1).

Applicant admits using crack cocaine in 1987 until at least November 1988. She was divorcing her husband after an abusive marriage in 1987, and this was a stressful time in her life. She was befriended by a coworker who introduced her to crack cocaine (Tr. 105). Applicant and her friend used the illegal drug on weekends. She admits an immediate addiction to cocaine (Tr. 108).

The coworker with whom Applicant used cocaine was embezzling money from their employer. Applicant was recruited into a fraudulent scheme. Applicant also began to write checks and submitted false, fictitious, and fraudulent claims for medical and health insurance benefits. She obtained payments from checks she cashed (GE 6).

Applicant was arrested in November 1988, and charged with conspiracy to commit embezzlement from an employee benefit plan, a felony (GE 5). She pleaded guilty and was sentenced to five years supervised probation, drug and alcohol counseling, and restitution in the amount of \$27,934 (GE 4). The reason she stole from her employer was she said she needed this money to support her crack cocaine addiction. She was cooperative with the criminal investigation, and agreed to testify against two coworkers who were involved in the thefts (Tr. 110).

In November 1988, Applicant sought intensive outpatient treatment and was diagnosed as a crack-cocaine addict. Applicant attended approximately 32 weeks of group counseling (GE 7). She attended some Alcohol Anonymous (AA) groups for women, although Applicant did not have a problem with alcohol. There were few Narcotics Anonymous (NA) groups available at the time and Applicant needed to attend a support group for her recovery (Tr. 116).

In June 1990 until at least April 1991, Applicant received care from a psychologist for her drug addiction. She attended 36 psychotherapy sessions (GE 8). The therapist reports that she was motivated to remain drug-free. She was extremely

conscientious in her attendance. The therapist initially described Applicant as insecure and prone to have relationships with men who treat her badly, abuse her, or take advantage of her. In his report, the therapist noted that Applicant's involvement with the fraudulent scheme was a function of her basic personality structure, combined with impaired judgment secondary to cocaine use. The therapist was optimistic she would remain drug free because she opined that Applicant is a moral, responsible person.

From 2000 until at least May 2007, Applicant admits using marijuana. She was dating someone who was growing marijuana (Tr. 127). She smoked the illegal drug when he brought it to her house. She was arrested in May 2007, when the police discovered a small amount of marijuana that she had in her vehicle (Tr. 128). She decided at that point not to use it any longer. She had concerns about health issues. She no longer associates with her boyfriend who was using marijuana (Tr. 131).

Applicant was in her car and was stopped at a routine police checkpoint in 2007. Her son was driving the car but when he saw the checkpoint ahead, he told Applicant he did not have a driver's license and he was scared he would get into trouble. She decided to switch to the driver's seat (Tr. 133). When the police stopped the car, they smelled marijuana. She told the police that there was some in her backpack (Tr. 133). She also had an open container in the vehicle. Applicant had a bottle of whiskey that had been opened (GE 2). She took it from her home for the trip but had not consumed any in the car.

As a result of the May 2007 arrest, Applicant was charged with (1) possession marijuana, (2) possession paraphernalia, and (3) open container. She pleaded guilty and was sentenced to four days in jail, placed on one year of probation, ordered to attend a drug and alcohol awareness course and fined (GE 2). Applicant successfully completed her probation in May 2008.

In June 2008, Applicant was interviewed by an Office of Personnel Management (OPM) investigator (GE 2). The investigator questioned her about the May 2007 arrest concerning marijuana and the open container charge. Applicant discussed her treatment from May 2007. She was not questioned about any other incidents (Tr. 157). She was candid and forthcoming during the interview.

In February 2009, Applicant completed a set of DOHA interrogatories (GE 3). She disclosed her use of cocaine in 1988, and her subsequent treatment program. She also listed the 2007 arrest for possession of marijuana and the disposition of the case. She acknowledged that she drinks alcohol but only once in a while. She stated that she does not drink to the point of intoxication. She elaborated that she submits to random drug or alcohol testing at work.

At the hearing, Applicant explained that she has never received therapy or treatment for *alcohol* abuse or dependency. She tried to retrieve records from the treatment center to prove that she was treated for her crack-cocaine addiction and not for alcohol. She was credible in her testimony that she has never had any problems with alcohol. Her current alcohol use is minimal at best. She does not drink by herself (Tr.

136). Applicant also testified credibly that she has not drunk alcohol to intoxication since 1999 (Tr. 138). She explained that she was shocked to see allegations about alcohol abuse on the SOR. Other than the open container issue in 2007, Applicant had no legal problems or personal problems with alcohol.

Applicant's brother testified that Applicant worked for him in 2007. Applicant's brother, a physician with training in alcohol counseling and treatment, believes that Applicant does not have any alcohol consumption problems. She lived with his family for sometime, and he describes her as a social drinker (Tr. 43). He never discussed Applicant's marijuana use with her (Tr. 41).

Applicant's sister-in-law describes Applicant as trustworthy. She has never observed a problem with Applicant's use of alcohol in the social setting or in her home. She trusts Applicant to watch her children (Tr. 59).

Applicant's former senior manager/supervisor testified by telephone on behalf of Applicant. He describes Applicant as one of the most reliable people on his team. Applicant worked for him in the 1990s. He is trained in areas of drug recognition in the workplace and has never observed any indication of a problem with alcohol.

A coworker who has known Applicant for 25 years describes Applicant as reliable. She had no knowledge of Applicant's use of cocaine or marijuana. She socialized with Applicant and never saw any alcohol consumption problems (Tr. 93).

A current coworker describes Applicant as a dedicated and diligent worker, who is an outstanding performer (Tr. 98). He had training while in the military concerning drug and alcohol abuse. He has never seen any indication of such problems. He has observed Applicant in social settings and saw her have one drink. He recommends Applicant for a clearance.

Applicant's current supervisor describes Applicant as a hard worker. He has never observed any problems with Applicant. He describes her drinking as "social." He recommends her for a security clearance (Tr. 53).

In 2009, Applicant was evaluated by a psychiatrist who testified as an expert witness at her hearing. The psychiatrist saw Applicant over a three-month period (Tr. 19). Applicant received a clinical evaluation. He also made multiple phone contacts with Applicant on a random basis. The psychiatrist found Applicant rehabilitated as to the cocaine use. He also opined that Applicant did not have any signs of alcohol abuse (Tr. 38). In fact, he was emphatic that, in his professional opinion, she has never had any issue with alcohol abuse. He gave a diagnosis of adjustment reaction with anxiety and depression (Tr.73).

The expert testified that he was not concerned about the open container in her car in 2007. She was not drinking, she was not stopped due to erratic driving, and there was no sign that she had used alcohol earlier in the day.

According to the expert, Applicant's use of marijuana was casual. He did not believe it was addictive for Applicant because she only used it with her boyfriend. She spent time in jail, and he believes that she clearly does not want to use it again. He believes sufficient time has passed to say that, with a high degree of certainty, she is not likely to use marijuana again. Nor does he recommend any treatment. He also elaborated on the fact that the security clearance process is stressful and Applicant has not shown any signs of reverting to any illegal drug at this time.

Applicant's performance evaluations consistently rate her as meeting expectations. She exceeds expectations in a few areas (AE B). She has successfully completed 27 training courses (AE A).

### **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 required 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny 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 "[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

The security concern for drug involvement is set out in AG & 24:

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.

The guideline notes several conditions that could raise security concerns. Under AG & 25(a), Any drug abuse<sup>1</sup> is potentially disqualifying. Under AG ¶ 25(c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia” is also potentially disqualifying.<sup>2</sup> Applicant admitted her use of marijuana in varying amounts and frequency spanning a period from about 2000 until May 2007 when she was arrested. She also admitted using crack-cocaine in 1987 and 1988.

Under ¶ AG 25(d) “diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence” and AG 25(e) “evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program”, are applicable.

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<sup>1</sup>AG ¶ 24(b) defines “drug abuse” as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

<sup>2</sup>AG ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including:

(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.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substance. See Sch. I(c)(9). See *also Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I); *United States v. Crawford*, 449 F.3d 860, 861 (8<sup>th</sup> Cir. 2006). Cocaine is a Sch. II Controlled Substance. See Sch. II(a)(4) (cocaine).

Applicant received intensive outpatient treatment for an addiction to crack cocaine from 1988 until 1991. She attended NA groups during that time. These disqualifying conditions apply in this case.

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement. Under AG ¶ 26(a), the disqualifying condition may be mitigated where the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.® 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. If the evidence shows a significant period has passed without evidence of misconduct, then the administrative judge considers whether that period demonstrates changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.

Applicant's last illegal drug use was in May 2007, when she was arrested for the possession of marijuana. She was a mature adult. She used marijuana as a result of the influence of her then boyfriend. She smoked the marijuana for almost seven years on a weekly basis. She had not used any other illegal drug since the cocaine in 1988. She had already received treatment for crack-cocaine addiction. She had attended NA meetings and was aware of the issues involved in illegal drug use. She was yet again influenced by someone to use an illegal substance. This shows poor judgment and lack of trustworthiness.

Under all the circumstances, security concerns cannot be alleviated without the passage of more time and because doubts about her current reliability, trustworthiness, or good judgment are not sufficiently resolved. Despite her good intentions, Applicant ended her marijuana use in May 2007 when she was arrested. Her motivations to stop using illegal drugs are evident. She understands the adverse effects from drug abuse. She successfully completed one drug program and did not use any illegal substance for several years. However, she has not shown a sufficient track record of refraining from marijuana use to authorize her access to classified information.

### **Guideline G, Alcohol Consumption**

AG ¶ 21 expresses the security concern pertaining to alcohol consumption, "Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness."

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying, "(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent."

Applicant was charged with possession of an open container of alcohol in her vehicle in May 2007. This is the only incident involving alcohol. Applicant drinks on a social basis. She does not drink to the point of intoxication. She has never received a diagnosis of alcohol abuse or dependence. She was credible that she was never treated for abuse of alcohol. Applicant has taken responsibility for her past excessive alcohol consumption.

AG ¶ 23 provides conditions that could mitigate security concerns:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);

(c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and

(d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Applicant has an outstanding work record spanning 30 years. She is recommended for her fine work. She had a single, isolated alcohol-related incident. It is unlikely to recur. Applicant has mitigated the alcohol consumption concerns under AG ¶ 23(a).

### **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. Under AG ¶ 16(a), a disqualifying condition exists when there is “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 eligibility or trustworthiness, or award fiduciary responsibilities.” Under AG ¶ 16(b), a disqualifying condition exists when “deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.” Applicant was credible that she did not mislead the investigator in her interview in 2008. The investigator asked her questions about her use of marijuana and the 2007 arrest. She did not avoid any discussion of her cocaine use or treatment 20 years ago. She was candid and forthcoming. She did not falsify any material facts regarding treatment or counseling. AG ¶ 16(a) and (b) do not apply.

### **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 relevant 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 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 and conclude that they are not sufficient to overcome the government’s case. Applicant is a mature, well-educated professional. She has a good employment record. She received treatment for crack cocaine and never used this illegal drug after her treatment in 1991. She disclosed her use of crack cocaine and her use of marijuana from 2000 until 2007. She stopped using marijuana in May 2007. She is a hard worker who has raised her family as a single parent. She is loyal to the United States. There is no proof that Applicant used any

illegal drugs at work. She was credible in her statement that she would not use marijuana in the future.

Applicant used crack cocaine with a coworker in 1987 and 1988. This led to involvement with an embezzeling scheme to defraud her employer. She cooperated with the authorities but was convicted of conspiracy to defraud. She decided to use marijuana in 2000 with her boyfriend who grew the illegal substance. She was again influenced to use an illegal drug after many years. She used marijuana at least once a week for a period of seven years. She was arrested in May 2007 for possession of marijuana. She has not received any drug treatment for her marijuana use. Her poor judgment placed her at risk and she had a misdemeanor level conviction for possession of marijuana and drug paraphernalia.

In conclusion, I am impressed with Applicant's sincerity and commitment to refrain from using illegal drugs. If she continues to abstain from illegal drug use, and avoids any other conduct that raises a security concern, a security clearance might be eventually approved for her.

After weighing the disqualifying and mitigating conditions, and all the fact and circumstances, in the context of the whole person, I conclude she has not mitigated the security concerns pertaining to drug involvement at this time. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility, judgment, and suitability for a security clearance.

### **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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	For Applicant

Paragraph 3, Guideline E: FOR APPLICANT

Subparagraph 3.a: For Applicant

**Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Noreen A. Lynch  
Administrative Judge