



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
)  
) ISCR Case No. 08-09699  
SSN: )  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Francisco Mendez, Esquire, Department Counsel  
For Applicant: *Pro Se*

July 29, 2009

**Decision**

HENRY, Mary E., Administrative Judge:

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

Applicant submitted her Electronic Questionnaires for Investigations Processing (e-QIP) (Security Clearance Application (SF 86)) on July 29, 2008. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H on March 17, 2009. 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 March 24, 2009. She answered the SOR in writing on April 10, 2009, and requested a hearing before an administrative judge. DOHA received the request on April 13, 2009. Department Counsel was prepared to proceed on May 14, 2009, and I received the case assignment on May 15, 2009. DOHA issued a notice of hearing on May 27, 2009, and I convened the hearing as scheduled on June 18, 2009. The government offered two exhibits (GE) 1 and 2, which were received and admitted into evidence without objection. Applicant and one witness testified on her behalf. She submitted two exhibits (AE) A and B, which were received and admitted into evidence without objection. The record closed on June 18, 2009. DOHA received the transcript of the hearing (Tr.) on June 25, 2009.

### **Findings of Fact**

In her Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a and 1.b of the SOR, with explanations. She also provided additional information to support her request for eligibility for a security clearance.

Applicant, who is 23 years old, started working for a Department of Defense contractor on June 30, 2008 as a business development analyst. Her current supervisor praises her work skills, honesty, and integrity. She advises that Applicant's hiring drug screen was negative.<sup>1</sup>

Applicant graduated from high school in 2004 and received a bachelor's degree in business marketing. She is single and currently lives with her parents.<sup>2</sup>

When Applicant completed her e-QIP, she acknowledged using marijuana between 2003 and 2008. Applicant began experimenting with marijuana while a high school student. Her high school boyfriend asked her if she wanted to smoke marijuana. She decided to try it. She smoked marijuana with him twice. When she ended this relationship, she continued to smoke marijuana occasionally at the homes of friends.<sup>3</sup>

In college, Applicant increased her marijuana usage. As a freshman, she smoked marijuana four or five times a month, usually with her roommate, who was also her best friend. She stated that they smoked marijuana to ease boredom and for entertainment. During her sophomore and junior years of college, Applicant increased her marijuana usage to eight to ten times a month. In her senior year of college, she began decreasing her marijuana usage as she was moving into the job market and away from her college life. She last used marijuana on May 8, 2008 with her then boyfriend to celebrate the completion of college.<sup>4</sup>

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<sup>1</sup>GE 1; AE B; Tr. 22-23.

<sup>2</sup>GE 1; Tr. 22-23.

<sup>3</sup>GE 1; Tr. 24.

<sup>4</sup>Tr. 24-26, 33.

Applicant has no intent to use marijuana in the future because the school environment is different from her present environment. She describes her marijuana use as a phase in school life. She has no plans to revisit that part of her life. Her career and her family are her current focus. On April 10, 2009, she signed an automatic revocation letter should she violate the Directive.<sup>5</sup>

Friends or her college boyfriend provided most of the marijuana she smoked. Occasionally, she provided her boyfriend with money to purchase marijuana for their use. She did not actually purchase any marijuana from any drug dealer. She never used any other illegal drugs. When offered other illegal drugs, she said “no” and left the room.<sup>6</sup>

Applicant denied habitual use of marijuana when she completed her e-QIP. Upon reflection at the hearing, she acknowledged that she habitually used marijuana in college. Her college boyfriend is no longer in her life. Except for her best friend, she no longer associates with her college friends who used marijuana. Her best friend no longer smokes marijuana.<sup>7</sup>

A friend testified on Applicant’s behalf. Applicant’s good friend since seventh grade opined that Applicant is a very honest and trustworthy person with good integrity. Her friend knew about Applicant’s marijuana use in college and high school. She also knew that Applicant had not used marijuana since the spring of 2008. She stated that Applicant had her priorities straight and would not use marijuana after college. Because they are good friends, she knew Applicant no longer used marijuana.<sup>8</sup>

Another very long-time friend wrote a letter of recommendation on behalf of Applicant. She described Applicant as honest and candid. She stated Applicant does not lie, even when knowing negative consequences can occur for telling the truth. Applicant is a supportive, kind, and caring friend.<sup>9</sup>

## **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.

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<sup>5</sup>Response to SOR attachment; Tr. 26, 34.

<sup>6</sup>Tr. 26-27, 30.

<sup>7</sup>*Id.* at 27–28, 31-32.

<sup>8</sup>*Id.* 17-20.

<sup>9</sup>AE A.

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 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.<sup>10</sup>

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<sup>10</sup>After any decision, the losing party has a right to appeal the case to the Defense Office of Hearings and Appeals Appeal Board. The Appeal Board's review authority is limited to determining whether three tests are met:

E3.1.32.1. The Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge:

E3.1.32.2. The Administrative Judge adhered to the procedures required by E.O. 10865 (enclosure 1) and this Directive: or

E3.1.32.3. The Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law.

The Appeal Board does not conduct a "*de novo* determination", recognizing that its members have no opportunity to observe witnesses and make credibility determinations. The Supreme Court in *United States v. Raddatz*, 447 U.S. 667, 690 (1980) succinctly defined the phrase "*de novo* determination":

[This legal term] has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy. Thus, in *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 23 [(1974)], the Court had occasion to define "*de novo* proceeding" as a review that was "unfettered by any prejudice from the [prior] agency proceeding and free from any claim that the [agency's] determination is supported by substantial evidence." In *United States v. First City National Bank*, 386 U.S. 361,368 [(1967)], this Court observed that "review *de novo*" means "that the court should make an independent determination of the issues" and should not give any

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

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special weight to the [prior] determination of the administrative agency.

(Internal footnotes omitted). See ISCR Case No. 07-10396 (App. Bd., Oct. 2, 2008) and ISCR Case No. 07-07144 (App. Bd., Oct. 7, 2008). In ISCR Case No. 05-01820 (App. Bd. Dec 14, 2006), the Appeal Board criticized the administrative judge's analysis, supporting grant of a clearance for a Peoples Republic of China related Applicant, and then decided the case itself. Judge White's dissenting opinion cogently explains why credibility determinations and ultimately the decision whether to grant or deny a clearance should be left to the judge who makes witness credibility determinations. *Id.* at 5-7. See *also* ISCR Case No. 04-06386 at 10-11 (App. Bd. Aug. 25, 2006)(Harvey, J., dissenting) (discussing limitations on Appeal Board's authority to reverse hearing-level judicial decisions and recommending remand of cases to resolve material, prejudicial error) and ISCR Case No. 07-03307 (App. Bd. Sept. 29, 2008). Compliance with the Agency's rules and regulations is required. See *United States ex. rel. Acardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Lopez v. FAA*, 318 F.3d 242, 247-248 (D.C. Cir 2003); *Nickelson v. United States*, 284 F. Supp.2d 387, 390 (E.D. Va. 2003)(explaining standard of review).

(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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

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

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant used marijuana, an illegal drug, throughout her college years and occasionally in high school. Appellant gave her boyfriend money to purchase marijuana, but did not actually purchase it herself. Because she smoked marijuana, she possessed it. The government has established its case under these disqualifying conditions.

AG ¶ 26 provides conditions that could mitigate security concerns:

(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;

(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 no longer associates with her college boyfriend and her college friends with whom she generally used marijuana, except for her best friend. She is no longer in the college environment, but living at home with her parents and working in the business world, where marijuana use is not part of her everyday environment. She has not used marijuana in more than 13 months and does not intend to use it in the future. Her best friend also stopped using marijuana after college. Finally, she signed a statement of intent with automatic revocation of a clearance for any violation. She changed her lifestyle and looks forward to developing her career in the business world. She does not feel the need to spend her time smoking marijuana. She has mitigated the government's security concerns under AG ¶ 26(b). Because she has changed her daily

environment from college student life to the business world, her college use of marijuana is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment. AG ¶ 26(a) has some applicability.

### **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 commonsense judgment based upon careful consideration of the guidelines and the whole person concept. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. As a high school student, Applicant experimented with smoking marijuana on a few occasions. When she entered college, she began smoking marijuana on a more regular basis, sometimes out of boredom. (See AG ¶ 2(a)(4).) As a college senior, Applicant decided to reduce her marijuana use and to quit upon graduation. She realized that she would be entering the business world and this conduct needed to cease. She showed maturity by making this decision. She no longer associates with most of her college friends as their lives and residences are different. She continues to spend time with her best friend, who also stopped smoking marijuana now that she is out of college. Applicant also signed the automatic revocation, knowing that she can lose her clearance and job if she returns to smoking marijuana, another sign of her maturity. Her testimony about her decision to stop smoking marijuana and to focus on her career and family is credible. She made decisions in college which brought her to a hearing. She, however, has made

important decisions in the short time since her college graduation which reflect a good level of maturity and a move in the proper direction for the rest of her life.

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.

### **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

### **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.

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MARY E. HENRY  
Administrative Judge