



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-11992
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Pamela C. Benson, Esquire, Department Counsel
For Applicant: *Pro Se*

February 24, 2010

Decision

HOWE, Philip S., Administrative Judge:

On September 5, 2008, Applicant submitted her electronic Security Clearance Application (SF 86)(e-QIP). On June 19, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J (Criminal Conduct) and H (Drug Involvement). 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 August 10, 2009. She originally answered the SOR in writing on July 20, 2009, and requested a hearing before an administrative judge. However, she failed to respond to the allegations in Paragraph 2, Guideline H, and she resubmitted a complete Answer on August 10, 2009, with her receipt. DOHA received the original request on July 23, 2009. It received the

resubmitted request on August 14, 2009. Department Counsel was prepared to proceed on September 30, 2009, and I received the case assignment on October 6, 2009. DOHA issued a Notice of Hearing on October 29, 2009, and I convened the hearing as scheduled on November 17, 2009. The Government offered Exhibits 1 through 4, which were received without objection. Applicant testified and submitted Exhibit A without objection. DOHA received the transcript of the hearing (Tr.) on November 25, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In her Answer to the SOR, dated July 20, 2009, Applicant admitted the factual allegations in the SOR. She also provided additional information to support her request for eligibility for a security clearance.

Applicant is 31 years old and has a six-year-old son. She works for a defense contractor in the logistic business as a customer service representative. She has been so employed for four years. She graduated from college in 2002. (Tr. 19, 20, 23, 24, 25)

Applicant took a weekend vacation in August 2008 with three female friends. She drank too much alcohol the evening of August 1, 2008. She met a man at a bar and they returned to the hotel room where the four women were staying. No one else was there. Applicant and her male companion engaged in sexual activity. Applicant fell asleep as a result of consuming the alcohol. The man departed later, leaving his marijuana in the room. She did not use any marijuana. The next day, August 2, 2008, the marijuana was discovered in the room by the cleaning staff. The police were called, and permission was given by the four women to have the room searched. The police found marijuana in the nightstand, a marijuana cigarette on a bench, and a cigarette paper on the floor beside a bed. After changing out of their bathing suits as the police allowed them to do, the four women were arrested. (Tr. 21, 26-33, 44; Exhibits 2-4)

Applicant and her three friends were charged with possession of marijuana under 100 grams and possession of drug paraphernalia. Applicant pled no contest to the charges, paid a fine of \$130, and received three days in jail, which was suspended. She did not receive probation. She had her driving license suspended for six months. She is currently pursuing a petition in the state court to have her record expunged, based on the advice given her by the sentencing judge. Two of the other women hired attorneys and the charges against them were dismissed. Applicant could not afford to hire an attorney at that time. The fourth woman pled no contest and received the same sentence as Applicant. (Tr. 22, 33-35; Exhibits 2-4)

Applicant denies using drugs because of her responsibilities as a working single mother. She has not participated in any drug program, nor was she ordered to do so. She has not participated in any alcohol treatment program, nor was she ordered to do so. Applicant continues to drink alcohol several times a year. She used marijuana twice in high school in 1994, which was given to her by a boyfriend. Applicant has not

engaged in such weekend trips or risky behavior since this one-time incident. Applicant's testimony about the events was direct, persuasive, and credible. (Tr. 19-22, 35, 39)

Applicant's employer submitted a statement on her behalf. The employer's vice president stated Applicant was hired in June 2005 and has been given greater responsibilities within the company since 2005. The company regards Applicant as a "valuable asset" and she "does not pose a risk for the Government." (Exhibit 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 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 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes five conditions that could raise a security concern and may be disqualifying. Two conditions are applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was charged in 2008 with possession of less than 100 grams of marijuana and possession of drug paraphernalia. Her three friends on that weekend trip were also charged with the same offenses. The marijuana was found in the hotel room where the four of them stayed over a weekend. There was also a male visitor of Applicant's acquaintance in the room for several hours the night before the marijuana was found by the cleaning staff. Applicant pled no contest to the charges and received a minimal sentence. One of her friends followed the same procedure and received the same sentence. The other two women hired attorneys who extricated them from the charges, which were eventually dismissed.

AG ¶ 32 provides four conditions that could mitigate security concerns. Three of these conditions are applicable:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (c) evidence that the person did not commit the offense; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

The circumstances of Applicant's marijuana charges in 2008 occurred in unusual and unique circumstances. After drinking too much at a bar the night of August 1, 2008, she brought a stranger back to her hotel room for sexual activity on her weekend out with some female friends. She has not engaged in such weekend trips since then. She takes her responsibility for her son very seriously, and does not want to endanger herself or him with risky behavior as she did in 2008. It is unlikely to recur. That incident does not cast doubt on her reliability, trustworthiness, or good judgment as shown by her employer's very favorable comments about her work performance and advancements since 2005, and particularly after that event. AG ¶ 32 (a) applies.

There is evidence that five people had access to the hotel room where the marijuana was found in August 2008: Applicant, her three friends, and the stranger Applicant brought to the room. The marijuana and paraphernalia were found in three locations within the room. Applicant credibly testified that she did not use marijuana, taking her parental responsibilities seriously. There is doubt that Applicant knew what was happening because she was intoxicated that night and she fell asleep rapidly. It strains belief that Applicant would place marijuana around the hotel room where it could be found so easily by the cleaning staff. The other four people, who were in the room at various times, had an equal opportunity to place the marijuana in the room. Applicant and one of her friends pled no contest to the charges, so the culpability is divided at least two ways. AG ¶ 32 (c) applies because there is credible evidence Applicant may not have brought the marijuana into the room.

Applicant has not committed the same type of offense or any other criminal offense since August 2008. She seemed contrite and admitted her mistake at the hearing. She has a good employment record as shown by the character statement from her employer. AG ¶ 32 (d) applies.

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to illegal drugs:

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.

AG ¶ 25 describes eight conditions that could raise a security concern and may be disqualifying. Only one condition applies:

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

Applicant was charged with possession of less than 100 grams of marijuana and paraphernalia. She pled no contest to the charges because she could not afford an attorney.

AG ¶ 26 provides four conditions that could mitigate security concerns. Two conditions apply:

(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; and,

(3) an appropriate period of abstinence.

AG ¶ 26 (a) applies for the same reasons stated under the Guideline J, AG ¶ 32 (a) analysis, above. This was a one-time incident in Applicant's life, and has not been repeated. The fact that she was one of four persons registered in a hotel room where marijuana was found, after she and her friends were out swimming all day, does not cast doubt on Applicant's reliability, trustworthiness, or good judgment.

AG ¶ 26 (b) applies because Applicant has demonstrated an intent not to be placed in this type of situation again by not associating with these three other women again, not taking such weekend trips and associating with strange men she meets in bars on these weekends, and dedicating herself to her son and her job. She admitted that she needs to devote her time and energies to these tasks as a single mother. There

is also no evidence that she ever used marijuana in August 2008 or afterwards. No tests were conducted then or later. Applicant was in the vicinity of marijuana along with four other people who could have possessed it without Applicant knowing about it.

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 an 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.

AG ¶ 2 requires each case must be judged on its own merits. 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 was about 29 years old when this incident occurred. She made the decision to return to her hotel room with a stranger who had an equal chance with Applicant's three roommates to put marijuana in the hotel room. It was a one-time occurrence by Applicant. She has not repeated the conduct. Her employer knows about the incident so the potential for pressure, coercion, exploitation, or duress is very slight. There is no likelihood of continuation or recurrence based on the totality of Applicant's life and work history.

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 criminal conduct and drug involvement. I conclude the "whole-person" concept for Applicant.

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 J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraph 2.a:	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.

PHILIP S. HOWE
Administrative Judge