



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



In the matter of: )  
)  
) ISCR Case No. 09-02839  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Gina L. Marine, Esquire, Richard A. Stevens, Esquire, Department  
Counsel  
For Applicant: Alan V. Edmunds. Esquire

March 31, 2011

**Decision**

MASON, Paul J., Administrative Judge:

Another administrative judge from the Defense Office of Hearings and Appeals (DOHA) issued her first decision in this case on February 23, 2010, granting Applicant's security clearance request. The DOHA Appeal Board issued a Remand Decision, dated May 17, 2010, instructing the judge to issue a new decision correcting certain errors. On July 30, 2010, the judge issued a Decision on Remand, granting Applicant's security clearance request. On October 29, 2010, the DOHA Appeal Board issued a second Remand Decision, with instructions for this case to be assigned another administrative judge. I was assigned the case on November 3, 2010. After a full review of the record, I find it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

## Statement of the Case

### Procedural History

1. Applicant completed and certified her Standard Form 86 (SCA) on February 4, 2009. She was interviewed by an investigator from the Office of Personnel Management (OPM) on March 18, 2009. A summary of this interview appears in her interrogatory answers dated June 30, 2009. Applicant agreed with (1) the investigator's summary and (2) that it could be used at a hearing to determine her security suitability. The interview summary is located inside Government's Exhibit (GE) 2.

2. On September 15, 2009, DOHA issued a Statement of Reasons (SOR) detailing security concerns under drug involvement (Guideline H). 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 adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

3. On September 25, 2009, Applicant furnished an answer to the SOR. She essentially admitted both allegations, but claimed under SOR 1.a that she used the drug infrequently and stopped using the drug after a one-time use in 2008. She denied SOR 1.b, declaring her intention to abstain from all future drug use. She attached a letter to her answer declaring an intention to abstain from future drug use, including a statement to have her security clearance revoked if she used drugs again. At the hearing on December 7, 2009, the government's two exhibits (GE 1 and GE 2) were entered into the record. AE A through AE Q were admitted in evidence on behalf of Applicant.

At the end of the hearing on December 7, 2009, the administrative judge kept the record open for additional documentary submissions. Applicant submitted AE R (negative drug test results dated December 10, 2009) in the time allowed for post-hearing submissions. Applicant's exhibits that were entered into the record through December 10, 2009, were AE A through AE R.

4. On February 23, 2010, the administrative judge rendered a favorable decision granting Applicant a security clearance.

5. On May 17, 2010, the DOHA Appeal Board ordered the case be remanded. They instructed the administrative judge to:

consider the conflicts in the evidence—specifically the Applicant's statement regarding possible future use at parties—when evaluating Applicant's

credibility and her more recent stated intent not to use marijuana or other drugs in the future. After taking these matters into consideration, the Judge should then address the viability of AG ¶26(b) as a basis for mitigation. Additionally, the Judge is instructed to evaluate the effect of character witnesses' lack of knowledge about Applicant's marijuana use when weighing the relative importance of the character statements to the overall use. The character witnesses' lack of knowledge as to Applicant's marijuana use and the government's corresponding security concern is not to be used to create inferences favorable to Applicant. (ISCR Case No. 09-02839 at 5 (App. Bd. May 17, 2010))

6. On June 2, 2010, the administrative judge issued *sue sponte* a Remand Order requesting Applicant obtain a drug test and furnish the test results by June 23, 2010. On June 4, 2010, Department Counsel filed a Motion to Rescind the Judge's Remand Order, arguing that the administrative judge had no authority to request a drug test. On June 10, 2010, Applicant filed a response to Department Counsel's remand motion arguing the Appeal Board's Remand Order (May 17, 2010) set no limitations on what portions of evidence the judge was to review, and the Remand Order would not lead to new evidence, but an updating of evidence. On June 14, 2010, Applicant filed a Motion to Re-Open the Record to update the record with test results from the date of the hearing. On June 15, 2010, Department Counsel filed a Motion Opposing Applicant's June 14, 2010 motion.

On June 17, 2010, the administrative judge rescinded her June 2, 2010 order and granted Applicant's June 14, 2010 motion to re-open. The administrative judge instructed Applicant to submit a sworn affidavit concerning her drug use since the December 7, 2009 hearing, and submit a new drug test report. Applicant furnished an affidavit (AE S, June 22, 2010) and negative drug test results (AE T, June 8, 2010), which became a part of the record.

7. On June 30, 2010, the administrative judge issued a Decision on Remand finding it clearly consistent with the national interest to grant Applicant's access to classified information. On June 30, 2010, Applicant's exhibits that were entered into the record were AE A through AE T.

8. On October 29, 2010, the Appeal Board remanded this case a second time, with instructions for the case to be assigned to another administrative judge for decision because the previous judge acted in a manner "that would lead a reasonable, disinterested person to question the fairness and impartiality of the administrative judge." The Appeal Board determined that:

the new decision should be based on the record as it existed at the time the Board ordered the first remand, if both parties consent. However, because

credibility may be an important issue in this case, if either party requests a new hearing, then the new judge should convene one expeditiously. ISCR Case No. 09-02389 at 4 (App. Bd. Oct. 29, 2010)

9. DOHA issued a Notice of Hearing on November 19, 2010, for a hearing on December 7, 2010. On December 2, 2010, Department Counsel filed a Motion to consider the evidence of record as it existed on May 17, 2010, the date of the DOHA Appeal Board's Remand Order.

On December 7, 2010, Applicant filed a list of proposed exhibits (AE P through AE U) to be entered into the record. Because the record already contains exhibits AE A through AE T, the proposed exhibits (AE P through AE U) have been re-labeled and entered into evidence as follows:

- i. AE P, Applicant's performance evaluation, was received in evidence at the hearing on December 7, 2009. The proposed AE P (two cover letters showing that the drug tests were served on the government and the judge) was withdrawn. (Tr. II, 12)
- ii. AE Q (medical evaluation) was entered into the record on December 7, 2009. The proposed AE Q is re-labeled and entered into the record as AE U (Applicant's affidavit dated June 22, 2010).
- iii. The proposed AE R (negative drug test results dated June 8, 2010) is re-labeled AE V.<sup>1</sup>
- iv. AE S (negative drug test results dated November 16, 2010) for is now AE W.
- v. AE T (2010 performance evaluation) is now AE X.
- vi. AE U (goal report for 2010) is now AE Y.

10. I am considering the evidence of record at the time it existed on May 17, 2010, the date of the DOHA Appeal Board's Remand. Because credibility could be an issue, the additional evidence I am considering is the testimony elicited from Applicant on December 7, 2010, and Applicant's Exhibits (AE) U through Y. Applicant's request to recall two of the

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<sup>1</sup> AE V is a copy of the same negative drug test results in AE T, collected and processed on June 8, 2010.

three witnesses who had testified at the first hearing was denied. The basis for my denial was the anticipated cumulation of testimony, and also the fact that character statements of the two witnesses (AE C, AE F) were entered into the record at the first hearing on December 7, 2009.

References to the first hearing transcript will be cited as Tr. I, followed by the page number. The second hearing transcript will be cited as Tr. II, followed by the page number. DOHA received the transcript (Tr.) Of the second hearing on December 16, 2010. The record closed on December 16, 2010.

### **Remand Findings of Fact**

Applicant is 50 years old and has two children, ages 21 and 19. She has been employed as an electrical engineer since May 1996. (GE 1) Her employment history includes working at a facility as an electrician in 1985 with a Q clearance received through the Department of Energy. (Tr. I, 61, 63) She understood the importance of not using drugs while working at the facility. (Tr. I, 64)

Applicant sporadically used marijuana since she was 14 years old. She never purchased or sold marijuana. (GE 2, interview) She engaged in limited marijuana use during her marriage from September 1982 to December 1999. (Tr. I, 62; Tr. II, 20-21) In an SCA she filled out in 1985 to work as an electrician for another contractor job, she admitted using marijuana. (Tr. I, 55-56, 62) In response to question 23A of her February 2009 SCA (drug involvement in the last 7 years), she answered "yes." In the comments area of drug involvement (SCA), Applicant indicated that from January 2001 to February 2009, she used marijuana "once or twice a year, very infrequent." (GE 1 at 10) In the reference section of her February 2009 SCA, Applicant identified her girlfriend as a reference.

In her interview with an OPM investigator in March 2009, Applicant indicated she took one or two "tokes" on a marijuana cigarette when she attended large parties at the home of her girlfriend (noted as a reference in the SCA), generally during the holidays. She also stated that under similar circumstances, she would take a toke in the future if she desired. (GE 2, interview) Applicant never smoked a full marijuana cigarette, nor attended parties at the friend's home to smoke marijuana. If offered, she may or may not smoke marijuana. She told the investigator that her infrequent marijuana use could be verified by a friend. (*Id.*) The record reflects the friend is Applicant's coworker. (AE G)

On June 30, 2009, Applicant notified DOHA in interrogatory answers that she agreed with the investigator's summary of her March 2009 interview, and made no additions or modifications to the interview summary. (GE 2) She agreed that the summary of the

interview could be admitted into evidence at a hearing to determine her suitability for a security clearance. (*Id.*)

During the hearing on December 7, 2009, Applicant explained she used marijuana at her girlfriend's house. Applicant recalled her last use of marijuana was "around the holidays, between Thanksgiving and Christmas for one time." (Tr. I, 53) Applicant testified the investigator asked the future drug use question vaguely, and she responded in a similar fashion: "well, I don't know. I don't think so." (Tr. I, 54) Her response does not appear in the March 2009 summary of interview. (GE 2, interview)

In her September 2009 answer to the SOR, Applicant stated she intended to abstain from all future drug use. She signed a separate letter of intent (attached to her answer) expressing an intent to never use marijuana and illegal drugs in the future, and consenting to a revocation of her security clearance for an infraction. (AE M)

Applicant decided to stop using marijuana because it was not a smart thing to do. (Tr. I, 54) At the hearing in December 2010, Applicant indicated she last saw her girlfriend (whose husband supplied the marijuana) in December 2008. (Tr. II, 24) At the hearing in December 2009, she indicated she last saw her girlfriend toward the end in February 2009. (Tr. I, 55, 58-59) When her children were younger, Applicant did not admit to them she used marijuana, but told them that she did not want them using marijuana. (Tr. I, 58) In March 2009, at the beginning of her current security investigation, and with a heightened degree of concern for her career, Applicant talked to her children even more emphatically about not using drugs. (Tr. I, 65-66)

In addition to her signed statement (including revocation) indicating she would not use drugs in the future (AE M, September 25, 2009), she provided an affidavit indicating she does not use drugs. (AE U, June 22, 2010) She took five random drug tests on September 24, 2009 (AE O), October 16, 2009 (AE N), December 10, 2009 (AE R), June 8, 2010 (AE V), and November 16, 2010 (AE W) All tests produced negative results. Applicant indicated she has not used marijuana since the December 2009 hearing, and has no intentions of using the drug in the future. (Tr. II, 15)

Applicant told three coworkers about her past drug use. The only information she provided to the first coworker was that she used marijuana. (Tr. I, 28). One coworker estimated Applicant's last use of marijuana was five years ago. (Tr. I, 40) One witness opined Applicant's last marijuana use was about two years ago, but he really did not know. (Tr. I, 49-50) Collectively, the three witnesses had little knowledge of Applicant's marijuana use. They still recommended her for a security clearance based on her professionalism and honesty. These coworkers also have character statements in the record (AE C, F, and K). Nine additional individuals submitted character statements praising Applicant's professionalism and honesty. None of the statements provided any indication that the

authors were aware of Applicant's past marijuana use. (AE A, B, D, E, G, H, I, J, and L) A licensed clinical health counselor evaluated Applicant on October 27, 2009. After a clinical interview and Applicant's completion of a questionnaire, counselor concluded that Applicant had no mental health issues, and she also concluded that Applicant's responses did not show current or past drug abuse problems. (AE Q; Tr. I, 67) There is no indication that the counselor had access to information from other sources regarding Applicant's drug use.

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. Each guideline lists potentially disqualifying conditions and mitigating conditions, which are required to be used to the extent they apply in evaluating an applicant's eligibility for access to classified information.

The administrative judge's ultimate goal is to reach a fair and impartial decision that is based on common sense. The decision should also include a careful, thorough evaluation of a number of variables known as the "whole-person concept" that brings together all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about the potential, rather than actual, risk of compromise of classified information.

Under Directive ¶ E3.I.14., the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.I.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 for obtaining a favorable security decision.

## **Analysis**

### **Drug Involvement**

Paragraph 24 of the AG sets forth the security concern attached 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.

Applicant's infrequent marijuana use since she was 14 years old falls within AG ¶ 25(a) (*any drug use*). Any drug use includes drug possession. AG ¶ 25(c) (*Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*) also applies.

AG ¶ 25(h) (*expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use*) applies based on Applicant's interview in March 2009. During that interview, Applicant indicated that if the marijuana was available at future parties of a girlfriend, she would use the marijuana if she wanted. Using illegal drugs regardless of the frequency raises questions about a person's judgment and her ability to comply with the law. AG ¶ 25(h) applies.

On June 30, 2009, three months after her interview, Applicant provided interrogatory answers to the Government in which she agreed with the February 2009 interview summary prepared by the investigator. She also agreed that the summary could be used as evidence in a security clearance hearing to determine her security clearance suitability. Agreeing with her February 2009 intention to use marijuana under certain circumstances constitutes more evidence of poor judgment under AG ¶ 25(h). The Government has established a case under the drug involvement guideline.

The two relevant mitigating conditions under ¶ 26 of the drug involvement guideline are: AG ¶ 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*); and, AG ¶ 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 are used, (3) an appropriate period of abstinence, and a signed statement of intent with automatic revocation of clearance for any violation*).

Applicant claims she stopped using marijuana in 2008 after a one-time use between Thanksgiving and Christmas 2008. However, Applicant did not fully express that claim until December 2009, after she had stated contradictory positions in February 2009 (SCA), March 2009 (interview) and June 2009 (interrogatory answers) about her drug use and future drug use. Applicant's conflicting positions undermine her overall credibility and prevent me from finding she terminated her drug use in 2008. Considering the evidence as a whole, Applicant's future intent to use drugs in certain situations continues to raise doubt regarding her current reliability and good judgment. AG ¶ 26(a) does not apply.

Applicant's statement in March 2009, and verification of that statement in June 2009 that she would continue to use drugs in certain future circumstances substantially diminishes the mitigating weight available to her under AG ¶ 26(b). The October 2009



medical report (AE Q) reflects that Applicant had a clinical interview with a counselor. In the questionnaire portion of report, she told the counselor she stopped using marijuana in 2008. The report has questionable probative value because the report does not indicate whether the counselor was aware of the information Applicant furnished to the Government in February, March and June 2009, about her marijuana use.

Applicant testified in December 2010 that in approximately December 2008 she stopped seeing her girlfriend with whom she used marijuana. Yet, at the hearing in December 2009, she indicated she stopped associating with her toward the end of February 2009. Furthermore, Applicant used her girlfriend as a reference in her February 2009 SCA. The record is unclear about whether Applicant has changed her environment where drugs are used. Had there been no evidence in March and June 2009 of an intention to use drugs in the future, then Applicant may have established an appropriate period of abstinence. Finally, Applicant's decision to forego all future drug use occurred less than three months after her June 30, 2009, interrogatory answers acknowledging that she would use marijuana under certain circumstances in the future. Because her answer and the affidavit were executed shortly after she received the SOR, it appears that Applicant changed her mind because she wanted to improve her chances of getting a security clearance, not because her drug use involved illegal conduct.

Applicant's character evidence has been thoroughly evaluated. Though the nine written references provide glowing appraisals of her professionalism and honesty, they furnish no probative value into nature, scope, and frequency of Applicant's drug use. While the testimony of the three witnesses indicated they were aware of Applicant's drug use, their corresponding references make no reference to Applicant's drug use. In light of Applicant's infrequent marijuana use since she was 14 years old, her marijuana use after holding a security clearance in 1985, and her recent conditional statements about future marijuana use, the more recent affidavit in June 2010 and negative drug test reports are insufficient to carry Applicant's ultimate burden of persuasion under the drug involvement guideline.

### **Whole-Person Concept**

In evaluating Applicant's security clearance worthiness, I have examined the evidence under the disqualifying and mitigating conditions of the drug involvement guideline. I have also weighed the circumstances within the context of nine variables known as the whole-person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors:

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 the participation was 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.

There are several pieces of evidence that weigh in Applicant's favor. She has worked as an engineer for her employer for 13 years. In that time, she has compiled a good job performance record and has earned the respect of her coworkers. The mitigating value of the written character statements is limited by the authors's lack of knowledge of Applicant's marijuana use.

Weighing against Applicant's favorable evidence is her lengthy drug use history and where and when she used the drug as she advanced in age. Given the fact she held a security clearance in the past from another agency, she should have known that security clearance obligations are an around-the clock responsibility, meaning a security clearance holder cannot use illegal drugs at work or non-work situations, regardless of time of day or the type of environment. Drug use is against the law and government policy. The fact that Applicant disclosed her infrequent drug use in February 2009 does not make it any less illegal. The fact that she stated her intention in March 2009, then reaffirmed her intention in June 2009 to use drugs in the future, demonstrates poor judgment. Having reviewed the evidence under the specific conditions in the context of whole person-person concept, including the evidence furnished by Applicant after May 17, 2010, she has not met her ultimate burden of persuasion under the drug involvement guideline.

### **Formal Findings**

Paragraph 1 (Guideline H):	AGAINST APPLICANT
Subparagraph 1.a	Against Applicant
Subparagraph 1.b	Against Applicant

### **Conclusion**

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

Paul J. Mason  
Administrative Judge