



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



In the matter of:)	
)	
)	ISCR Case No. 09-07674
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: David Hayes, Esq., Department Counsel
For Applicant: *Pro se*

October 20, 2010

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, Drug Involvement. Applicant’s eligibility for a security clearance is denied.

On April 28, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on May 21, 2010, and requested a hearing before an administrative judge. The case was assigned to me on August 10, 2010. DOHA issued a Notice of Hearing on August 12, 2010. I convened the hearing as scheduled on September 9, 2010. The Government offered Exhibits (GE) 1 and 2. Applicant did not object and they were admitted. Applicant and a witness testified on her

behalf. Applicant offered Exhibits (AE) A through D, which were admitted without objections. DOHA received the hearing transcript (Tr.) on September 19, 2010.

Findings of Fact

Applicant denied the allegations in SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 26 years old. She is not married and has no children. She graduated from high school in 2002. She works as a security officer for a defense contractor.¹

Applicant admitted she used marijuana about ten times when she was in high school. She completed her security clearance application (SCA) on July 29, 2009. In response to question 23(a) which asked if, in the last 7 years, she had illegally used any controlled substance, to include marijuana, she answered "yes." The question went on to request she provide the dates of use/activity, type of controlled substance(s), and the frequency of the use. She listed she had used marijuana from "1/2009 to 6/2009." At her hearing, she denies that she used marijuana during these dates. She explained that she was nervous about completing the SCA and wanted to make sure she answered all of the questions honestly. She stated she completed the SCA on a computer and she wanted to finish it quickly so she could turn it in to the employer. She asked her cousin for help in completing the SCA. She stated she did not review her answers after completing the SCA. She further explained that she admits she used marijuana while in high school from about 1999 to 2000. She estimated the number of uses in high school as 10, but she is not sure of the exact number of times.²

When Applicant was interviewed by an OPM investigator on September 4, 2009, she did not review the SCA. She admitted drug use in 1998 when she was in high school. She has no idea why she said 1998. Her Facilities Security Officer (FSO) gave her a copy of her SCA, but she did not review it before her interview. After her interview, she realized there was an issue with the dates of her marijuana use. She stated that when she realized there was a mistake, she did not contact the FSO or anyone else to report the mistake. She did not do anything until she received the SOR seven months later. When she received the SOR, she states she then told her FSO that there were errors on her SCA.³

In about June 2009,⁴ as part of her employment application, Applicant was required to submit to a drug test. She took the test and the result was positive for marijuana. She stated she was told to sign a piece of paper which verified that

¹ Tr. 20-22.

² Tr. 18-20, 23-42.

³ Tr. 36-58.

⁴ The SOR alleges the test occurred in about July 2009. Applicant testified she took the test in June 2009. I find the difference in dates is not material.

marijuana was found in her system. When she arrived home, her father told her she should have asked for a retest. She did not seek a retest. She denies using illegal drugs prior to the test. She did not get the job she was seeking after she failed the drug test.⁵

Applicant believes the positive result is the product of second-hand smoke inhalation from being in the close vicinity for six months, of people who smoked marijuana. During the period of time prior to her drug test, she had been socializing with people who used drugs. She stated she associated with these people from March 2009 to August 2009. She would be at their houses for parties and there would be marijuana present and others would be smoking it. She also would ride in cars with people who smoked marijuana. She stated that leading up to her drug test, the majority of people she was associating with were using marijuana. She stated she decided not to use marijuana because she thought she would have to take a drug test. Prior to her drug test, she was with two people who were smoking marijuana outside of their vehicle. She was about ten feet away and they smoked a marijuana cigarette. She believes this could have caused her positive drug test result. She also recalls going through a car wash and remaining in the car wash with a group of people who were smoking marijuana. She asked them to extinguish the marijuana cigarette. Applicant stated she was in constant contact with her friends who used marijuana. She would see them throughout the week and on the weekends. After she tested positive for marijuana, she no longer associated with her friends who used the drug. She acknowledged she should have used better judgment regarding the company she associated with.⁶

Applicant's father testified on her behalf and acknowledged being aware that Applicant used marijuana in high school. He was present when she asked for help in completing her SCA. He verified that she does not associate with her high school friends any more. He did not review her SCA. He did not believe the friends Applicant associated with used drugs.⁷

Applicant provided character letters. She is described as having a good work ethic. Her professionalism and integrity while on duty has never been questioned. She is extremely knowledgeable and takes her responsibilities seriously. She has remarkable motivation and drive. She looks for new and positive opportunities. Applicant is considered dependable and her performance is stellar.⁸

Applicant provided the results of a drug test conducted on January 18, 2010. The results were negative.

⁵ Tr. 61, 73, 86-87, 94, 99-100.

⁶ Tr. 61-77, 79-89.

⁷ Tr. 73, 92-102.

⁸ AE A, B.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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 to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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.

I have considered all of the evidence in this case, and the disqualifying conditions under Drug Involvement AG ¶ 25, and especially considered the following:

:

- (a) any drug abuse; and
- (b) testing positive for illegal drug use;

Applicant tested positive for use of marijuana in July 2009. I find all of the above disqualifying conditions apply.

I have considered all of the evidence in this case, and the mitigating conditions under Drug Involvement AG ¶ 26, and especially considered the following:

- (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; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation;

Applicant used marijuana while she was in high school. In July 2009, she tested positive for marijuana. I did not find Applicant's testimony credible that she must have tested positive for marijuana due to second-hand smoke. She listed her recent drug use on her SCA. She stated she knew how important it was to complete the SCA honestly, yet when she became aware of what she now says is a mistake, she failed to address it with the FSO. She had opportunities to correct mistakes listed on her SCA and did not do so. She tested positive for marijuana use, which is consistent with her admission. I found Applicant's explanations for her mistakes and failure to correct them disingenuous. Applicant confirmed that she spent most of her time for several months in an environment where there was regular and heavy marijuana use. Her father testified that her friends did not use illegal drugs, which is inconsistent with her testimony. She

stated hours before she took her drug test, her friends were standing outside of a car smoking marijuana and she was nearby. It has been over a year since she tested positive for marijuana. However, I find that her actions cast doubt on her current reliability, trustworthiness and good judgment. Therefore, I find AG ¶ 26(a) does not apply.

The burden shifted to Applicant to mitigate the security concerns raised by her illegal drug use. She claims she no longer associates with her former friends. It appears since she tested positive for marijuana in July 2009, she has refrained from illegal drug use and she does not intend to use illegal drugs in the future. I find AG ¶ 26(b) applies.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant used marijuana when she was in high school. She listed on her SCA that she also used it from January 2009 to June 2009. She tested positive for marijuana use in July 2009. She is a young woman who made poor choices when she associated on a regular basis with friends who used drugs. Her choices could be attributed to youthful indiscretion. However, her explanations for how she incorrectly noted her past drug use on her SCA are not believable, nor is her explanation for how she tested positive for marijuana in July 2009. When considering the whole person, Applicant has not met her burden of persuasion. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the guideline for Drug Involvement.

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:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge