



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



In the matter of:)
)
) ISCR Case No. 10-01588
)
)
Applicant for Security Clearance)

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: Elizabeth Newman, Esquire

January 31, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant voluntarily disclosed her illegal use of marijuana in her security clearance application (SCA), and was candid and forthcoming during the security clearance process. She has abstained from marijuana for 14 months and has made some promising behavioral lifestyle changes. Her outstanding academic and job performance suggest she is not likely to repeat her questionable behavior. She also signed a statement of intent with automatic revocation of clearance for any illegal drug violation. Clearance granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on November 16, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a

preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

On July 6, 2010, DOHA issued Applicant a Statement of Reasons (SOR), which specified the basis for its decision - security concerns addressed in the Directive under Guideline H (Drug Involvement) of the Adjudicative Guidelines (AG).²

On July 27, 2010, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. The case was assigned to me on August 25, 2010, to determine whether a clearance should be granted or denied. DOHA issued a notice of hearing on September 13, 2010. The hearing was convened as scheduled on October 7, 2010. The Government offered exhibits (GE) 1 through 4, which were admitted without objection. Applicant testified and submitted exhibits (AE) 1 through 5, which was admitted without objection. DOHA received the transcript of the hearing (Tr.) on October 18, 2010.

Findings of Fact

Applicant admitted the factual allegation under SOR ¶ 1.a. Her admission is incorporated as a finding of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 27-year-old associate scientist level two. She is single and has no children. From August 2001 until December 2005, she attended a well-known university graduating with a grade point average (GPA) of 3.78. In 2004, while a college student, Applicant completed a three-month internship at a military hospital. Because of her internship, she was required to submit an SCA, but her eligibility was not adjudicated.

After graduating from college, Applicant continued to work full-time as a scientist for several government contractors. In May 2010, she completed a master's degree in science at a prestigious U.S. university while maintaining a full-time job. Her GPA was 3.93.

Around September 2009, Applicant submitted a job application to work for another government contractor. The new position requires her to have access to classified information. On November 2009, she submitted an SCA and disclosed that she illegally used marijuana, with varying frequency, from about 2001 until September 2009. She started consuming marijuana at age 18, just before starting college. She illegally consumed marijuana approximately twice a year from 2001 until September

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

² Adjudication of this case is controlled by the AGs, implemented by the DOD on September 1, 2006.

2009. She used the marijuana in social settings with her high school and college friends. She knew that consuming marijuana was illegal, but at the time, she did not give too much thought to her actions. She viewed her use of marijuana “sort of casually.” Her last use of marijuana was in September 2009 during a bachelorette party with some of her friends.

Applicant stopped using marijuana when she applied for the new job and submitted her SCA. She stopped using marijuana not only because of her job application, but because she no longer wants that questionable behavior to be part of her life. She finally realized that her use of marijuana is not acceptable behavior for adults. She understands that marijuana use is not compatible with her possession of a security clearance and that her continued use of marijuana is detrimental to her professional development. After moving to her current state of residence in 2006, she stopped associating with her marijuana-using friends, except for one. She maintains regular contact with one high school friend with whom she used marijuana twice. (Tr. 45) She no longer consumes marijuana with her friend and does not attend places where she believes marijuana may be consumed.

Applicant disclosed her use of marijuana to her parents, grandparents, a former supervisor, and a co-worker. As part of her July 2010 answer to the SOR, Applicant submitted a sworn statement indicating her intent never to use marijuana again, with the understanding that her security clearance will be automatically revoked if she becomes involved in any illegal drug-related misconduct.

Applicant’s performance evaluations show she is considered to be dedicated and a hard worker. Her good performance as a scientist was recognized in her performance evaluations, merit pay increases, and awards. Applicant’s supervisor during the last three years stated that she consistently demonstrated reliability, integrity, and judgment. In his opinion, she is extremely dependable, and a person of integrity. He considers Applicant’s use of marijuana a “youthful indiscretion.”

Policies

The President of the United States has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that 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. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any expressed or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication that the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern about 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 illegal use of marijuana from 2001 until September 2009, triggers the applicability of two drug involvement disqualifying conditions: AG ¶ 25(a): "any drug abuse;"³ and AG ¶ 25(c): "illegal drug possession."

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

(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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements,

³ 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."

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.

without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant's recreational use of marijuana spans a lengthy period of time – from 2001 until September 2009. She illegally used marijuana approximately twice a year at social settings; thus, her use of marijuana was frequent. Her last use of marijuana was approximately 14 months before her hearing, and as such it could be considered somewhat remote. She has not participated in drug rehabilitation treatment, but she abstained from marijuana for 14 months.

Applicant voluntarily disclosed her drug use in her 2009 SCA, and she was candid and forthcoming during the security clearance process. She has expressed her intent not to use marijuana in the future, has disassociated herself, albeit partially, from her drug-using friends, and avoids environments where drugs could be used. Moreover, Applicant submitted a written statement of intent with automatic revocation of clearance if she were to use drugs again. Considering the totality of the circumstances, I find AG ¶ 26(b) applies. The remaining mitigating conditions are not applicable to the facts of this case.

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.

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. AG ¶ 2(c). I have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant was a stellar student in two well-recognized U.S. universities during both her undergraduate and graduate programs. She accomplished her graduate program with honors while maintaining a full-time job. She is considered to be a good employee and she has demonstrated great

potential while working as a scientist for several government contractors. Based on her character references' statements, Applicant demonstrated integrity and she is considered to be dependable, dedicated, and trustworthy. These factors show some responsibility, good judgment, and mitigation.

Applicant also made promising behavioral changes in her lifestyle showing that she has matured from being a college student to becoming a responsible, law-abiding adult. She now understands what it is required of her is she is to hold a security clearance. Moreover, her reliability and trustworthiness are not in question because she disclosed the extent of her marijuana abuse during the security clearance process. On balance, I find Applicant has demonstrated her eligibility 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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Eligibility for a security clearance is granted.

JUAN J. RIVERA
Administrative Judge