



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



In the matter of:

)	
)	ISCR Case No. 10-02330
)	
Applicant for Security Clearance)	

Appearances

For Government: Gregg A. Cervi, Esquire, Department Counsel
For Applicant: *Pro se*

September 9, 2011

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the written record in this case, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. Her eligibility for a security clearance is denied.

Statement of Case

Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) on September 9, 2009. On November 22, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. DOHA acted 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 on December 27, 2010, and March 8, 2011. With her Answer, Applicant requested a decision on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on May 31, 2011. The FORM contained documents identified as Items 1 through 9. On June 8, 2011, DOHA forwarded a copy of the FORM to Applicant, with instructions to submit any additional information or objections or both within 30 days of receipt. Applicant received the file on June 24, 2011. She did not submit any information or file any objections within the required time period. On August 17, 2011, the case was assigned to me for a decision.

Procedural Matters

The record establishes that DOHA sent Applicant two sets of interrogatories. The first set posed several questions about Applicant's drug use history. Applicant responded to this set of interrogatories with a notarized signed statement dated May 31, 2010 (Item 7). The second set forwarded to Applicant contained the OPM investigator's report of her November 30, 2009, personal subject interview and asked her to review the report for accuracy. Applicant reviewed the report and responded to DOHA's request with a notarized statement, dated August 23, 2010, which adopted the investigator's summary as accurately reflecting her interview (Item 6). SOR ¶ 2.d. references Applicant's response to questions about her drug use history. However, the allegation incorrectly identifies the date Applicant replied to the interrogatories as August 23, 2010, when, in fact, she replied to interrogatories about her drug use history on May 31, 2010. In the FORM, which was sent to Applicant, Department Counsel correctly identified Applicant's responses about her drug use history as signed and notarized on May 31, 2010. See FORM at 4. Accordingly, I amend the allegation at SOR ¶ 2.d. to conform with the record evidence by striking the date "August 23, 2010" and substituting instead the date "May 31, 2010."

Findings of Fact

The SOR contains two allegations of disqualifying conduct under Guideline H, Drug Involvement (SOR ¶¶ 1.a. and 1.b.) and four allegations of disqualifying conduct under Guideline E, Personal Conduct (¶¶ 2.a. through 2.d.). In her Answer to the SOR, Applicant admitted the six allegations in the SOR. Applicant's admissions are accepted as findings of fact. (Item 1; Item 4.)

Applicant is 27 years old, divorced, and the mother of a six-year-old daughter. She enlisted in the U.S. military in December 2003. From May 2004 until May 2005, she was stationed in an Asian country. From February 2007 until February 2008, she was deployed overseas. She received an honorable discharge in 2008. Since April 2009, she has been employed as a senior field service technician by a federal contractor. She seeks renewal of her security clearance. (Item 5; Item 6; Item 7.)

In December 2005, during her active duty military service, Applicant was awarded a security clearance. In 2004, while her security eligibility was being investigated, Applicant provided a signed, sworn statement to a special agent of the

Defense Security Service. In this statement, Applicant admitted marijuana use from November 2000 until February 2003. In February and March 2008, after returning from her military deployment overseas, Applicant again used marijuana. The SOR alleges at ¶ 1.a. that Applicant used marijuana, with varying frequency, from November 2000 to March 2008. SOR ¶ 1.b. alleges that Applicant used marijuana after she was granted a security clearance in December 2005. (Item 1; Item 5; Item 6; Item 8; Item 9.)

On September 9, 2009, Applicant completed an e-QIP. Section 23a on the e-QIP asks the following question: "In the last 7 years, have you illegally used any controlled substance, for example, cocaine, crack cocaine, THC (marijuana, hashish, etc.), narcotics (opium, morphine, codeine, heroin, etc.), stimulants (amphetamines, speed, crystal methamphetamine, Ecstasy, ketamine, etc.), depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), steroids, inhalants (toluene, amyl nitrate, etc.), or prescription drugs (including painkillers)? Use of a controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with or otherwise consuming any controlled substance." Applicant responded "No" to question 23a. The SOR alleges at ¶ 2.a. that Applicant deliberately failed to list her use of marijuana from February 2003 until March 2008. (Item 1; Item 5 at 40, italics in original omitted.)

Section 23b on the e-QIP that Applicant completed on September 9, 2009 asks: "Have you EVER illegally used a controlled substance while possessing a security clearance, while employed as a law enforcement officer, prosecutor, or courtroom official, or while in a position directly and immediately affecting the public safety?" Applicant responded "No" to Section 23b. The SOR alleges at ¶ 2.b. that Applicant deliberately failed to list that she used marijuana after she had been granted a security clearance in December 2005. (Item 1; Item 5 at 40; emphasis in original)

Applicant was interviewed about her illegal drug use by an authorized investigator from the U.S. Office of Personnel Management (OPM) in November 2009.¹ In the personal subject interview, as summarized by the investigator, Applicant stated that she had failed to list her illegal drug use in February and March 2008 on her e-QIP. She further stated that her 2008 use of marijuana was her first and only use of marijuana, and she had no intention of using illegal drugs in the future. The SOR alleges at ¶ 2.c. that Applicant deliberately failed to disclose to the investigator that she had used marijuana between 2000 and 2003. (Item 1; Item 6 at 4-5.)

In May 2010, in response to DOHA interrogatories about her past use of illegal drugs, Applicant provided a signed and notarized statement in which she asserted that she experimented with marijuana two times before she went to military boot camp in 2003. She stated: "I have not used marijuana since the last time which was November 2003 time frame. I do not use any type of drug." DOHA asked the following question:

¹ On August 23, 2010, in response to DOHA interrogatories, Applicant confirmed the accuracy of the information in the investigator's report. (Item 6 at 8.)

“(8) On what date did you last use narcotics, dangerous drugs, psychoactive or controlled substances, to include marijuana or hashish?” Applicant responded: “November 2003 (end).” The SOR alleges at ¶ 2.d. that Applicant deliberately failed to list that she used marijuana through at least March 2008. (Item 1; Item 7.)

To her answer to the SOR, Applicant appended the following statement, addressed “to whom it may concern”:

Yes, I do admit to the wrongful information that I had provided but I did clearly tell the investigator that I was very unsure about the time frame I provided her with. I do understand if you need to take my security clearance away from me. I am a very trustworthy person. I have not and will not ever put any DOD or government agency in harm’s way with knowing secured information. I do take my job seriously and I will protect any and all classified information I come in contact with. Thank you for your time.

(Item 4 at 5.)

Burden of Proof

The Government has the initial burden of proving controverted facts alleged in the SOR. The responsibility then shifts to the applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant then bears the burden of persuasion. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President 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. *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant’s 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.

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge applies these guidelines 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.

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 in obtaining 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 protect classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. AG ¶ 24(a) defines drugs as “mood and behavior altering substances.” The definition of drugs includes “(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.” 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.”

Through Applicant's admissions, the record establishes that she used marijuana, at various times, from 2000 until March 2008. Moreover, she used marijuana after being granted a security clearance in December 2005. This behavior casts doubt on her reliability, trustworthiness, and good judgment. It also raises security concerns about her ability or willingness to comply with laws, rules, and regulations. I conclude that Applicant's illegal drug use and her use of marijuana after being granted a security clearance raise security concerns under AG ¶¶ 25(a) and 25(g). AG ¶ 25(a) reads: "any drug abuse [as defined at AG ¶ 24(b)]." AG ¶ 25(g) reads: "any illegal drug use after being granted a security clearance."

Two Guideline H mitigating conditions might apply to the facts of Applicant's case. If Applicant's drug use happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on her current reliability, trustworthiness, or good judgment, then AG ¶ 26(a) might be applicable in mitigation. If Applicant demonstrated an intent not to abuse any drugs in the future by (1) disassociation from drug-using associates and contacts, (2) changing or avoiding the environment where drugs were used, (3) abstaining from drug use for an appropriate period, or (4) signing a statement of intent with the automatic revocation of her security clearance for any violation, then AG ¶ 26(b) might be applicable.

Applicant's last use of marijuana was in March 2008, approximately 3½ years ago, after she was granted a security clearance for duties she carried out as a member of the U.S. military. Applicant's past illegal drug use continues to cast doubt on her current reliability, trustworthiness, and good judgment. Moreover, Applicant provided no information to demonstrate her intent not to abuse drugs in the future. She failed to provide documentation establishing that she had abstained from drug use for an appropriate period or that she had disassociated from those with whom she had used drugs in the past. She failed to demonstrate that she had changed her conduct to avoid environments where drugs are used. She did not provide a signed statement of her intent not to abuse drugs in the future, with automatic revocation of her security clearance for any violation.

Applicant's illegal drug use occurred periodically over a period of eight years, suggesting a lifestyle choice that went beyond curiosity and experimentation. Insufficient time has elapsed to demonstrate whether she will abstain from illegal drug use in the future. I conclude that AG ¶ 26(a) and AG ¶ 26(b) do not apply in mitigation to the facts of Applicant's case.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful

and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant's personal conduct raises security concerns under AG ¶¶ 16(a) and 16(b). AG ¶ 16(a) reads: "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities." AG ¶ 16(b) reads: "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative."

In her answer to the SOR, Applicant admitted deliberately falsifying her answers to Sections 23a and 23b on the e-QIP she executed in September 2009. She also admitted deliberately falsifying material facts when she told an authorized investigator in a November 2009 personal security interview that she had used marijuana only once in 2008 and failed to disclose that she had used marijuana from 2000 to 2003. Additionally, Applicant admitted falsifying a DOHA interrogatory in May 2010 when she stated that she last used illegal drugs in November 2003 and deliberately failed to list her use of marijuana in March 2008. Applicant provided no credible explanation for her falsifications. I conclude that none of the Guideline E mitigating conditions applies to the facts of Applicant's case.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an 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.

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 raised by the written record in this case. When she executed her e-QIP in 2009, Applicant was not candid about her illegal drug use and

her marijuana use after being granted a security clearance. She was not candid about her illegal drug use when she was interviewed by an authorized investigator or when responding to DOHA interrogatories. Applicant's lack of candor raises serious security concerns about her reliability, trustworthiness, and judgment.

Applicant requested a decision on the written record. She did not file objections or provide additional information in response to the FORM. The written record is sparse. Moreover, Applicant failed to meet her burden of persuasion in mitigating the Government's allegations under the drug involvement and personal conduct adjudicative guidelines. Overall, the record evidence in this case leaves me with questions and doubts about Applicant's 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:	AGAINST APPLICANT
Subparagraphs 1.a. and 1.b.:	Against Applicant
Paragraph 2, Personal Conduct:	AGAINST APPLICANT
Subparagraphs 2.a. - 2.d.:	Against Applicant

Conclusion

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

Joan Caton Anthony
Administrative Judge