



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



In the matter of:)
)
-----) ISCR Case No. 10-03290
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: Darin M. Groteboer, Esquire

May 24, 2011

Decision

MOGUL, Martin H., Administrative Judge:

On September 27, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E for Applicant. 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.

On October 25, 2010, Applicant replied to the SOR (RSOR) in writing, and she requested a hearing before an Administrative Judge. I received the case assignment on December 16, 2010. DOHA issued a notice of hearing on January 11, 2011, and I convened the hearing as scheduled on January 24, 2011. The Government offered Exhibits 1 through 3, which were received without objection. Applicant testified on her own behalf and submitted Exhibits A through C at the time of hearing, which were also received without objection. DOHA received the transcript of the hearing (Tr) on February 3, 2011. I granted Applicant's request to keep the record open until February

7, 2011, to submit additional documents, and several additional documents were received, identified collectively as Exhibit D, and entered into evidence without objection. Based upon a review of the exhibits, and the testimony of Applicant, eligibility for access to classified information is denied.

Findings of Fact

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 35 years old. She is unmarried and has no children. She received a Bachelor's degree in Electrical Engineering in 1998. Applicant is employed by a defense contractor, and she seeks a DoD security clearance in connection with her employment in the defense sector. At the hearing, Applicant confirmed that she has held some form of security clearance from 2003 until 2009, when it was suspended. She underwent two polygraph exams in 2008, and has had two subject interviews, either both in 2007, or one in 2007 and one in 2008, and a final subject interview in 2010. (Tr at 22-25.)

Guideline E, Personal Conduct

The Government alleges that Applicant is ineligible for clearance because she exhibited conduct involving questionable judgement, lack of candor, dishonesty or unwillingness to comply with rules and regulations.

1.a. It is alleged in the SOR that Applicant used marijuana in at least May 2006, after she had been granted access to a special program in about August 2003, and after she had signed drug statements on about May 19, 2003, August 14, 2003, and May 17, 2005. In her RSOR, Applicant admitted this allegation although she was not certain as to the date she received her special program access.

Applicant testified that she use marijuana on two occasions, once in the 1990s and once between December 2005 and May 2006, she was not sure exactly when. She was at a club with friends at the time. (Tr at 26-29.) She no longer goes to clubs with friends, and she indicated that she has no desire to use marijuana in the future. (Tr at 32-33.) Exhibit 3 revealed that the three drug statements acknowledge that any illegal use of drugs is a basis of ineligibility for Special Security access.

1.b. It is alleged in the SOR that Applicant used marijuana in at least May 2006, after she had been granted a Top Secret security clearance in about September 2004. In her RSOR, Applicant admitted this allegation although she was not certain as to the date she received her Top Secret security clearance.

1.c. It is alleged in the SOR that Applicant used Ecstasy in at least December 2004, after she had been granted access to a special program in about August 2003, and after she had signed drug statements on about May 19, 2003, and August 14, 2003. In her RSOR, Applicant admitted this allegation although she was not certain as

to the date she received her special program access. Applicant testified that she only used Ecstasy on one occasion, also when she was at a club with friends.

1.d. It is alleged in the SOR that Applicant used Ecstasy in at least December 2004, after she had been granted a Top Secret security clearance in about September 2004. In her RSOR, Applicant admitted this allegation although she was not certain as to the date she received her Top Secret security clearance.

1.e. It is alleged in the SOR that Applicant had her special program access with another United States Government agency revoked in about December 2008 due to the information alleged in 1.a., and 1.c., above. In her RSOR, Applicant admitted this allegation.

1.f. It is alleged in the SOR that Applicant falsified material facts in a Security Clearance Application (SCA) executed by Applicant on July 14, 2009. (Exhibit 1.) Question 23 a of the SCA. asks, "In the last 7 years, have you illegally used any controlled substance, . . . ?" Applicant answered "Yes" and listed that she had used marijuana one time in May 2003; whereas she deliberately failed to list that she had used marijuana in at least May 2006 and Ecstasy in at least December 2004, as set forth in subparagraphs 1.a., 1.b., 1.c., and 1.d., above. In her RSOR, Applicant admitted that she had given the answer alleged in the SOR, but she denied that she had falsified material facts on the SCA by failing to list her marijuana use in May 2006.

Applicant testified that she had completed two SCAs before the one that is the subject of the SOR, in December 2007 and August 2008, and that on those she had identified correctly that she used marijuana one time in 2006. She stated that she did not have either previous SCA when she completed the most current SCA on July 2009, and she inadvertently identified her past marijuana use as May 2003 rather than May 2006. (Tr at 30-32.) Exhibits A and B are the SCAs completed by Applicant on August 26, 2008, and December 7, 2007, respectively. On both of them, Applicant does identify that she used marijuana one time in May 2006.

1.g. It is alleged in the SOR that Applicant falsified material facts in a Security Clearance Application (SCA) executed by Applicant on July 14, 2009. (Exhibit 1.) Question 23 b of the SCA. asks, "Have you EVER illegally used a controlled substance, while possessing a security clearance, . . . or while in a position directly and immediately affecting the public safety?" Applicant answered "Yes" and listed that she had used marijuana one time on May 2003; whereas she deliberately failed to list that she had used marijuana in at least May 2006 and Ecstasy in at least December 2004, as set forth in subparagraphs 1.a., 1.b., 1.c., and 1.d., above. In her RSOR, Applicant admitted that she had given the answer alleged in the SOR, but she denied that she had falsified material facts on the SCA by failing to list her marijuana use in May 2006.

Applicant conceded that she did not include her Ecstasy usage on any of the three SCAs that she completed, and that she only revealed it when she underwent a polygraph exam. She stated that after she revealed her usage of Ecstasy during the polygraph exam in 2008, she had not remembered it when she completed the SCA in

2007 and 2008, and she promptly forgot it, and therefore did not include it on her 2009 SCA. (Tr at 36-40.)

Also, Applicant gave no reason for failing to inform the Government on the previous 2007 and 2008 SCAs that she had used illegal drugs while holding a security clearance. (Exhibits B and C.) Clearly, Applicant used marijuana and Ecstasy during the period that she possessed a security clearance, and I find it to be a willful misrepresentation of a material fact that she denied this on her 2007 and 2008 SCAs.

1.h. It is alleged in the SOR that in a Subject Interview, on February 15, 2010, Applicant stated to an authorized investigator that she had used marijuana one time in about December 2005, but she deliberately failed to disclose that she used Ecstasy in at least December 2004, as set forth in subparagraphs 1.c., and 1.d., above. In her RSOR, Applicant admitted that she had given the answer alleged in the SOR to an authorized investigator, but she denied that she deliberately failed to disclose material facts.

Applicant testified that she also forgot about the Ecstasy during the subject interview, and that was why she did not reveal it to the investigator. (Tr at 40-41.) I find the only time Applicant ever acknowledged and revealed her Ecstasy usage was during a polygraph examination.

1.i. It is alleged in the SOR that Applicant falsified material facts in a Security Clearance Application (SCA) executed by Applicant on July 14, 2009. (Exhibit 1.) Question 25 b of the SCA. asks, "To your knowledge, have you ever had a clearance or access authorization denied, suspended, or revoked; or been disbarred from Government employment?" Applicant answered "No." She deliberately failed to disclose that her special program access had been revoked by another United States Government agency in about December 2008, as set forth in subparagraph 1.e., above. In her RSOR, Applicant admitted that she had given the answer alleged in the SOR, but she denied that she had deliberately failed to disclose that her special program access with another United States Government agency had been revoked.

Applicant testified that, in November 2008, she received a phone call from security personnel, and since she had not been working on the special program for a year and a half, she was asked if she would voluntarily relinquish her access so another individual could have the access, since there were a finite number of spaces available. Applicant agreed, and thereafter voluntarily relinquished her access. She conceded that in December 2008, she received a letter indicating that her special access had been revoked, but she contended that since she believed she had voluntarily relinquished her access, this notification of revocation was not correct. Applicant testified that this was why she answered "No" to this question. (Tr at 41-44.)

Exhibit 3 includes the letter of notification, dated December 22, 2008, from the Senior Adjudication Officer, that informed Applicant her program access had been revoked. It did not just inform her that her access was revoked. Rather it went into great detail about the reasons for her revocation, including many of the factors that have been

cited in the SOR. They included: the fact that Applicant signed three drug statements acknowledging that any illegal use of drugs is a basis of ineligibility for Special Security access, yet during a polygraph examination on July 24, 2008, she revealed that she had used marijuana in December 2005 and Ecstasy in December 2004. Also, the letter stated that Applicant denied that she had ever used drugs while holding a security clearance on her December 2007 SCA, which is not accurate. After reviewing this letter, I do not find it credible or reasonable for Applicant to claim that she believed she voluntarily relinquish her access rather than had it revoked. Applicant should have revealed in the 2009 SCA that she had previously had a security clearance revoked.

Mitigation

Applicant submitted three positive character letters in Exhibit C. Applicant was described as honest and trustworthy, and someone who complies with rules and regulations. She also submitted her Performance Appraisals for 2004 through 2010, which were extremely laudatory. Her strengths included "Maintains a high work ethic," "Self-starter and self-motivated," and "Works independently with minimal supervision or instruction." (Exhibit D.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the 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 over-arching 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 "[any] 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, 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 as to 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 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 E, Personal Conduct

With respect to Guideline E, the evidence establishes that Applicant furnished to the Government incomplete, untruthful answers regarding her drug involvement on three SCAs that she executed in 2007, 2008, and 2009. Applicant failed to reveal her use of Ecstasy on any of the SCAs. Applicant also failed to reveal to a Government investigator her Ecstasy usage. In fact, the only time she revealed the Ecstasy usage was during a polygraph investigation. On the 2007 and 2008 SCAs, Applicant also did not reveal that she used illegal substances while holding a security clearance. On the 2009 SCA, she failed to reveal that she had a security access revoked. All of this was information Applicant knew or should have known. Additionally, Applicant’s drug usage, while holding a security clearance, shows questionable judgement and unreliability.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation’s secrets. When such an individual intentionally falsifies material facts or fails to furnish relevant information to a Government investigator, it is extremely difficult to conclude that she nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, I conclude that Applicant knowingly and willingly failed to give complete, honest answers regarding her drug usage to the Government on several SCAs and to a Government investigator.

In reviewing the disqualifying conditions under Guideline E, I conclude that, because of Applicant’s “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire,” ¶ 16(a) applies against Applicant.

I also find that ¶ 16(b) “deliberately providing false or misleading information concerning relevant facts to an employer, investigator . . .” applies against Applicant

because of her failure to inform the Government investigator of her Ecstasy usage. I find no mitigating conditions can be applied.

Applicant's conduct, considered as a whole, exhibits questionable judgement, unreliability, and a lack of candor. I resolve Guideline E against Applicant.

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. Based on all of the reasons cited above as to why the Disqualifying Conditions apply and no Mitigating Condition applies under Guideline E, I find that the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the security concerns.

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 E:

AGAINST APPLICANT

Subparagraphs 1.a.-1.i:

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.

Martin H. Mogul
Administrative Judge