



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



In the matter of:)	
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)	ISCR Case No. 10-04160
)	
Applicant for Security Clearance)	

Appearances

For Government: Pamela C. Benson, Esquire, Department Counsel
For Applicant: Darin Groteboer, Esquire

November 16, 2011

Decision

HOWE, Philip S., Administrative Judge:

Applicant submitted her first electronic Security Clearance Application on August 24, 2009 (SF 86; e-QIP). On January 19, 2010, Applicant submitted her second e-QIP. On December 30, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). 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 on September 1, 2006.

Applicant acknowledged receipt of the SOR on January 5, 2011. She answered the SOR in writing on January 19, 2011, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on March 14, 2011, and I received the case assignment on March 16, 2011. DOHA issued a Notice of Hearing on July 26, 2011, for a hearing on August 10, 2011. That hearing was cancelled

at the request of Applicant on August 9, 2011. The second hearing date was set by a Notice of Hearing issued on August 22, 2011, and I convened the hearing as scheduled on September 7, 2011. The Government offered Exhibits 1 through 6, which were received without objection. Applicant testified and submitted Exhibits A through H, without objection. DOHA received the transcript of the hearing (Tr.) on September 15, 2011. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Motion to Amend SOR

Department Counsel moved to amend the SOR by changing the year date in Subparagraph 2.a from “2010” to “2009.” (Tr. 8) Applicant and her counsel had no objection to the amendment. I granted the motion to amend.

Findings of Fact

In her Answer to the SOR, Applicant admitted all factual allegations the SOR. Those admissions are incorporated in the findings of fact.

Applicant is 26 years old, married in 2010, and employed as a security guard by a defense contractor. Applicant’s job started on September 7, 2009. Her income from this job is about \$40,000 annually. (Tr. 9-20, 45, 46, 51, 74; Exhibits 1 and 6)

Applicant attended college from August 2003 to May 2007, when she graduated. She smoked marijuana from the fall of 2003 to October 2008. She ceased using it then. Applicant testified smoking marijuana made her sleepy and created unpleasant physical reactions in the later years of her use. Applicant smoked marijuana in college with friends at parties about every two or three months. She never smoked marijuana at work or before going to her job. Applicant does not plan on smoking marijuana in the future. She submitted a written statement to that effect and it was marked as an exhibit. Applicant has not used other illegal drugs. She never tested positive for illegal drugs in scheduled urinalysis tests at work. When Applicant smoked marijuana after her college graduation, it was with college friends. She never purchased, sold, or grew marijuana. Applicant does not associate with the people with whom she formerly smoked marijuana. (Tr. 23-31; Exhibits A, B, F-H)

Applicant admits she falsified her answer to Question 23 on the two e-QIP forms in August 2009 and January 2010 when she denied using controlled substance, including marijuana, in the previous seven years, which would have included her college years. Applicant intended to falsify her answer because she was afraid she would lose her job if she admitted her past marijuana use. She falsified her answers because she thought no one would find out about it because it occurred when she was in college and she “had a chip on her shoulder.” (Tr. 32-43, 54-70, 82; Exhibits 1-6)

During the first investigative interview on February 8, 2010, she thought her use would eventually be discovered so she should disclose it at that time. The February 8, 2010, interview with the government investigator was her first disclosure about her marijuana use. The investigator told Applicant he had a law enforcement report that showed a February 2008 “Quick Hire Automatic Disqualifier: Drug Violation – Use of marijuana during the last three years or extensively.” Applicant denied any knowledge of any arrest or conviction for marijuana involvement at any time after admitting to the investigator she did use marijuana in college. (Tr. 32-43, 54-70, 82; Exhibits 1-6)

Applicant had a second security interview with a government investigator, a different person from the first interview, on February 26, 2010. She had two interviews because she completed two e-QIPs and the interviews were not coordinated. The first interview resulted from the August 2009 e-QIP for a secret clearance and the second interview followed the January 2010 e-QIP submission for a top secret clearance. She admitted to the second investigator her marijuana use as she did to the first investigator. That admission came after she answered the investigator’s question about whether her written answer to Question 23 on the e-QIP was negative to any controlled substance use. Applicant thought the investigator was asking to confirm what she physically wrote on the form, not that it was factually true. Applicant then proceeded to disclose to the second investigator what she told the first investigator. Applicant testified her falsification began to “weigh on” her conscience and created anxiety for her daily about whether she could retain her job. She stated getting older and married has made her more conscious of being trustworthy. (Tr. 32-43, 54-70, 82; Exhibits 1-6)

Applicant told her supervisor about her previous marijuana use two weeks after the second government interview. Applicant’s supervisor also knows about the falsification of the Question 23 answers on the two e-QIP forms. According to Applicant, her supervisor considers the incidents to be in the past and have not affected her work performance. The hearing process has not affected Applicant’s duty performance. Applicant has never been reprimanded by her current employer. (Tr. 36-41)

Applicant’s supervisor submitted a written statement, describing Applicant as “dependable and responsible.” Applicant has a professional attitude and demeanor when working. She never misses work or is tardy for her duty assignments. Another security agent submitted a statement describing Applicant as “capable, dependable and honest.” A third statement describes Applicant’s hard work ethic and dependability. Applicant was promoted at work based on her duty performance. The third writer described Applicant’s growing maturity and trustworthiness during the four years they have worked together. (Exhibits C-E)

Applicant testified forthrightly and honestly about her past marijuana use. She candidly discussed the two falsifications and reasons why she made them on the e-QIPs. Her contrite attitude was visibly sincere. Applicant submitted a written statement of intent that she will not use illegal drugs again. If she were to use them, she consented to the automatic revocation of her security clearance. The criminal record check did not reveal any arrests for convictions against Applicant. (Exhibits 5 and A)

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 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 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to illegal drugs:

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.

(a) Drugs are defined as mood and behavior altering substances, and include:

(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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes eight conditions that could raise a security concern and may be disqualifying. One disqualifying condition applies to the facts in this case:

(a) any drug abuse (see above definition).

Applicant admitted using marijuana from the fall of 2003 to October 2008. This usage occurred every two or three months while Applicant attended college and then following her graduation. She smoked marijuana with her friends on these occasions.

AG ¶ 26 provides four conditions that could mitigate security concerns. Two conditions might apply:

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

Applicant's last marijuana use was in October 2008, three years ago. She was in college when she used this controlled substance, an environment more conducive to social pressure to use illegal drugs. Her usage was only every two or three months at parties with friends. Applicant is no longer in college, but employed full-time at a good job in a different geographic location and has received strong recommendations from her supervisor. She is also married. Her marijuana use is unlikely to recur because of her maturing attitude. Her previous actions do not cast doubt on Applicant's current reliability, trustworthiness, or good judgment. AG ¶ 26 (a) applies.

Applicant demonstrated her intent not to use marijuana or any illegal drugs in the future. She submitted a signed statement of intent with automatic clearance revocation for any future illegal drug use. Applicant testified she does not associate with persons who use illegal drugs. She is no longer in college, having graduated four years ago. Her abstinence has been three years. AG ¶ 26 (b) applies.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes seven conditions that could raise a security concern and may be disqualifying. One condition applies to Applicant:

(a) 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.

Applicant admitted she falsified her answer to Question 23 on two e-QIP forms about her past marijuana use.

AG ¶ 17 provides seven conditions that could mitigate security concerns. One condition may apply:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant falsified her answer on two SF 86 forms filed with the government regarding her collegiate era drug use. After answering the question from the two government investigators about whether her answers on the two e-QIPs were true and accurate, Applicant disclosed her past drug use to the two government investigators in February 2010. The first investigator confronted Applicant with information from the background criminal record report that she used marijuana in the past. Applicant denied any criminal involvement, but then discussed her marijuana use in college with that investigator on February 8, 2010.

On February 26, 2010, Applicant repeated her disclosure about her marijuana use to the second investigator after acknowledging she physically wrote a negative answer to Question 23. She admitted she did not disclose the marijuana use on her two e-QIPs because she feared losing her job if she admitted her college and post-collegiate illegal drug use.

Applicant had to be confronted by the first investigator about her past marijuana use before she finally acknowledged her previous marijuana use. Applicant's conscience bothered her and she thought it might be discovered eventually, so she finally realized the value of full disclosure. Disclosure to the investigators was a stress reliever for Applicant. She disclosed later after the interviews her past actions to her supervisor, who has not penalized her for them. She now is comfortable making disclosure to her colleagues.

Applicant deliberately falsified her two e-QIP forms. She did not disclose her actions about her marijuana use before the government background interviews or at the start of the interviews before being asked any questions by the two government investigators. The positive step of full disclosure resulted from the government investigative interviews, not Applicant's independent action. Applicant may not falsify information in the future, but she has not met her burden of proof on that issue based on her past behavior. AG ¶ 17 (d) does not apply.

Applicant's past behavior of repeated falsifications make her vulnerable to exploitation, manipulation, or duress. AG ¶ 17 (e) does not apply.

None of the other mitigating conditions apply based on the facts in the 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 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.

AG ¶ 2(c) requires each case must be judged on its own merits. 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 facts and circumstances surrounding this case. Applicant's marijuana use was in a college environment situation. However, it occurred over four years in a repeated pattern. It started in college and ended a year after graduation. The pattern of falsification on her two e-QIP forms is serious. The marijuana use followed by the falsification about it was deliberate and continuous. Therefore, it is serious misconduct. Applicant was 24 when she completed the e-QIP forms. She was an adult but one who still thought she could evade culpability for her past actions by falsifying answers on official government forms that required honesty and full-disclosure.

The non-disclosures were done to protect Applicant's ability to obtain and keep employment in her home area. She made disclosures to the government investigators after being confronted with information about past marijuana use. Applicant knew she was wrong in committing the falsifications,

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from her Drug Involvement. Applicant has not mitigated the Personal Conduct security concerns. I conclude the "whole-person" concept against Applicant based on her repeated falsifications.

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

Paragraph 2, Guideline E: AGAINST APPLICANT

 Subparagraph 2.a: Against Applicant

 Subparagraph 2.b: Against Applicant

 Subparagraph 2.c: For 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.

PHILIP S. HOWE
Administrative Judge