



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



In the matter of:)	
)	
)	ISCR Case No. 10-04345
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro se*

May 4, 2011

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant abused marijuana in high school. She abstained while serving in the U.S. military from March 1996 to February 2005, but resumed smoking after she was given the drug at a concert by a friend in July 2005. She continued to smoke marijuana until late November 2009 on sporadic occasions when socializing with friends or her neighbors. Applicant has not used marijuana since she began working for a defense contractor, and she intends no future involvement. Clearance granted.

Statement of the Case

On September 20, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H (Drug Involvement), which provided the basis for its preliminary decision to deny her a security clearance.¹ DOHA took action under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended;

¹ Applicant’s middle name was misspelled in the SOR.

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 answered the SOR allegations on October 8, 2010, and requested a hearing. On January 4, 2011, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On January 6, 2011, I scheduled a hearing for January 25, 2011.

I convened the hearing as scheduled. Two Government exhibits (Ex. 1-2) and two Applicant exhibits (Ex. A-B) were entered into evidence. Applicant testified, as reflected in a transcript (Tr.) received on February 2, 2011.

Findings of Fact

The SOR alleged that Applicant used marijuana from about July 2005 to at least December 2009 (SOR 1.a). In her answer to the SOR, Applicant admitted the use of marijuana as alleged. She also executed a statement of her intent not to abuse any drug in the future with the understanding that her clearance would be automatically revoked for any abuse. Applicant's admission is incorporated as a finding of fact. After considering the pleadings, exhibits, and transcript, I make the following additional findings of fact.

Applicant is a 32-year old facilities and safety coordinator for a defense contractor. She has worked for her current employer since January 2010. (Ex. 1.) Applicant seeks a security clearance for unescorted access to a building where classified material is kept. (Tr. 21.) She has been married since January 2003. (Ex. 1; Tr. 24.) As of January 2011, her spouse was unemployed. (Tr. 16.)

Applicant smoked marijuana while she was in high school. (Tr. 27.) After graduation, Applicant served in the United States military as a reservist from March 1996 to January 21, 2004. (Tr. 25.) She worked in the civilian sector as a facilities site planner starting in February 1998. (Ex. 1.) In January 2004, she was ordered to active duty. From February 2, 2004 to February 1, 2005, Applicant was deployed to the Middle East, where she served as a platoon sergeant in a combat engineer battalion. Applicant's military duties did not require her to have access to classified information. (Tr. 27.) Applicant excelled in her military duties, and she was given an Army Commendation Medal for exceptional meritorious service while deployed. (Ex. B; Tr. 17.) After she returned from deployment, she was "stop lossed." (Ex. 1.) On February 26, 2005, she was awarded an honorable discharge. (Ex. B.) She resumed her civilian employment and part-time studies at a local community college. (Tr. 26.) She earned her associate's degree in August 2006. (Ex. 1.)

Applicant abstained from illegal drug use while she was in the military. She knew the Department of Defense does not condone illicit substance abuse. (Tr. 27, 34.) Around July 2005, Applicant succumbed to peer pressure, and she smoked marijuana while at a concert with some friends. (Tr. 27.) She continued to smoke marijuana on occasion within this small-knit circle of female friends, with whom she had close relations since their

freshman year of high school in 1992. Applicant's friends shared their marijuana with her at a few concerts, a nightclub, and once at a tourist venue. (Ex. 2; Tr. 28.) Once or twice each between June 2008 and December 2008, and June 2009 and November 26, 2009, Applicant also smoked marijuana with her neighbors while sitting around campfires with them. Applicant's spouse was present during those occasions, but he did not use any marijuana. The marijuana was always given to her by her neighbors or her friends. Applicant never purchased the illegal drug herself. (Ex. 2.)

Applicant did not allow her recreational drug use to interfere with her job performance or her education. In May 2007, she earned her bachelor's degree in business management, and in June 2009, her master's degree in facilities management. (Ex. 1; Tr. 17.) In October 2009, Applicant was laid off when her employer for the past 11 years closed its plant. Applicant was unemployed from November 2009 to early January 2010, when she began working for her present employer. (Ex. 1; Tr. 26.)

On January 19, 2010, Applicant executed an Electronic Questionnaire for Investigations Processing (e-QIP). She listed as character references two of the close friends with whom she had smoked marijuana. Applicant responded affirmatively to question 23.a concerning any illegal drug use in the last seven years, and she disclosed "Sporadic Usage for Recreational Purposes" of marijuana from about July 2005 to December 2009. She also answered "Yes" to question 23.c concerning any illegal drug possession, purchase, manufacture, trafficking, production, transfer, shipping, receiving, handling, or sale of any controlled substance in the last seven years. (Ex. 1.)

On March 29, 2010, Applicant was interviewed by an investigator for the Office of Personnel Management (OPM), who reported that Applicant began using marijuana in around June 2005 with her friends out of boredom and peer pressure. The drug became associated with having fun and going to concerts. She estimated her use at once or twice every other month between 2005 and 2009. But when she gave specifics, she recalled more limited use at three concerts, which were held in 2005, 2006 or 2007, and July or August 2008, and two other occasions where she "might" have used marijuana in a car with her friends. Applicant also indicated that she smoked marijuana with her neighbors once or twice each year in 2008 and 2009, with a last use on November 26, 2009, with her neighbors at their campfire. Applicant maintained that she stopped using illegal drugs because her current job was important to her, and she denied any intent to use any marijuana or other illicit substance in the future. She acknowledged she still had contact with the three friends who had shared marijuana with her. She had contact with one friend about once a month and with the others around three times a year. Applicant was living in the same neighborhood, and had contact once every few months with the neighbors who shared their marijuana with her in 2008 and 2009. Applicant declined to provide last names for her friends or neighbors. Applicant denied any purchase of the illegal drug herself, and attributed her positive response to question 23.c on the e-QIP to her belief that the holding of a marijuana joint and passing it to another person constituted trafficking. (Ex. 2.)

On March 30, 2010, Applicant was contacted by the investigator to clarify her continued contact with her friends and to provide contact information for her neighbors.

Applicant declined to disclose the information. (Ex. 2.) In July 2010, Applicant had the opportunity to review the investigator's report of the interview and subsequent request for contact information. She affirmed that the investigator accurately reported the information she had provided, and she made no changes. (Ex. 2.)

On October 5, 2010, Applicant submitted to a urinalysis test that was negative for illegal drugs. (Ex. A.) In her October 8, 2010 response to the SOR, Applicant executed a statement of her intent not to use any illegal drug in the future "in any manner at any point while holding a security clearance or otherwise" with the understanding that her clearance would be automatically revoked for any violation. She expressed a commitment to "voluntarily and immediately" notify the U.S. Government of any violation of this intent to abstain from all illegal drug involvement. She volunteered to submit to random drug screens, blood or urine, by a party of the Government's choosing. With her spouse currently unemployed, Applicant indicated that the job was very important to her, and she avowed to put her drug use behind her.

At her January 2011 hearing on her security clearance eligibility, Applicant denied any use of marijuana since she smoked the drug with her neighbors in late November 2009. She testified on direct examination that she had stopped socializing with the friends with whom she smoked marijuana in the past because she realized it is not in her best interest to be with them. (Tr. 17.) On cross-examination, Applicant explained that she was not as close as she had been with her old friends ("Now that the children have come into their lives, priorities change. I have pursued schooling. They have pursued having children. So I guess our paths just didn't cross and we went on our own ways."). (Tr. 28.) However, Applicant later acknowledged that she continues to see these friends on "very slight occasions, maybe a birthday party," although she is careful not to put herself in situations that could involve illegal drug use. (Tr. 31.) When asked on cross-examination how often she used marijuana between July 2005 and 2009, Applicant responded, "I mean, I can't even count on one hand, because it was so minimal . . . I would say between three and five times." (Tr. 28.) As for the circumstances of that use, Applicant testified that she smoked marijuana at the concert in July 2005, "other concerts, nightclub, went to a few concerts and then [a tourist venue]. And then the last time being in '09 at a campfire." (Tr. 28.) Applicant expressed a willingness to submit to further drug testing, urine or hair sample analysis, to prove her abstention since November 2009. (Tr. 18.) Applicant was not asked about, and did not offer to explain, the discrepancy between her previously reported abuse of marijuana once or twice every other month from around June 2005 to late November 2009 and her present account of use on a handful of occasions.

Applicant's spouse does not use illegal drugs. He was present when Applicant smoked marijuana with the neighbors in November 2009. She testified that her spouse "does not like when I do activities such as that." (Ex. 2; Tr. 33.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). 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 required to be considered 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. 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 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 that 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

Drug Involvement

The security concern for drug involvement is set out in AG ¶ 24:

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.

Under AG ¶ 24(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),² and
- (2) inhalants and other similar substances.

Under AG ¶ 24(b), drug abuse is defined as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." As for the potentially disqualifying conditions, AG ¶ 25(a), "any drug abuse," applies because of Applicant's abuse of marijuana from around July 2005 to November 26, 2009. Applicant also used marijuana in high school, although that dated use was not alleged, perhaps because the Government may not have known about it until Applicant's hearing. There is discrepant information in the record concerning the frequency of Applicant's marijuana use since 2005. The investigator for OPM reported the frequency of her marijuana use as once or twice every other month, which over the 4.5 years, would total two dozen times or more. Yet, Applicant then detailed to the investigator involvement that did not approach that level: at three concerts held between 2005 and July or August 2008; on two other occasions in a car en route to a nightclub or dinner; and once or twice each in 2008 and 2009 with her neighbors. Applicant did not contest the accuracy of the investigator's report when given the opportunity, and there was no effort to explain the discrepancy at her hearing. Even so, her abuse of marijuana was likely more extensive than the three to five times that she acknowledged at her hearing.

AG ¶ 25(c), "illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia," applies only in that she had physical custody of marijuana on the occasions that she smoked it. The evidence does not establish that she ever bought or otherwise procured marijuana, provided it to others, or kept it around to smoke at a later time with friends or neighbors.

AG ¶ 26(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" does not apply to relatively recent substance abuse. Applicant applied for her security clearance little more than a month after her last use of marijuana. Concerning whether AG ¶ 26(b), "a demonstrated intent not to abuse any drugs in the future," is established, Applicant has not completely terminated her relationships with those friends with whom she smoked marijuana in the past. She continues to see these friends on occasions like birthday

²Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substance.

celebrations. Applicant is still a neighbor of the couple with whom she smoked marijuana in 2008 and 2009 at campfires. AG ¶ 26(b)(1), “disassociation from drug-using associates and contacts,” does not apply. However, her socialization with her friends and neighbors has been less frequent and no longer involves any drug abuse. She is careful to avoid putting herself in situations where drugs may be present. AG ¶ 26(b)(2), “changing or avoiding the environment where drugs were used,” applies. It provides some guarantee against recurrence of relapse, given she never sought out or purchased marijuana. As of her hearing, Applicant had been free of illegal drugs for around 13 months. During that time, she had submitted to a urinalysis which was negative for illicit substances. As evidence of a demonstrated intent not to abuse drugs in the future, it falls a bit short of “an appropriate period of abstinence” required for mitigation under AG ¶ 26(b)(3) in light of her relapse into repeated marijuana abuse after she had abstained from 1996 to about July 2005. However, whereas Applicant has committed herself in writing to abstain from all illegal drugs, AG ¶ 25(b)(4), “a signed statement of intent with automatic revocation of clearance for any violation,” applies.

Although not explicitly addressed in the mitigating factors, Applicant’s willingness to submit to random urinalysis, blood, or hair sample screens to confirm her abstention, is an important factor in her favor. She is not likely to have volunteered for such testing if she was actively abusing illegal drugs or intended any future use. Applicant is not likely to jeopardize the job that she needs to support herself and her unemployed spouse by using marijuana or any other illegal drug in the future.

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 her conduct and all relevant circumstances in light of 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.

In making the overall commonsense determination required under AG ¶ 2(c), I have to consider Applicant’s poor judgment in using illegal drugs, and the evidence of some minimization on her part when she testified about her marijuana use. That said, the Government chose not to allege any concerns related to falsification or concealment of information. Applicant put the Government on notice of her then very recent involvement with marijuana when she applied for a security clearance. She demonstrated an ability to abstain from marijuana in the past when it was required of her while she was in the service.

While her illegal drug use is not to be condoned, it was recreational and certainly of a low priority. After her deployment, Applicant focused on her career. She earned her bachelor's and master's degrees while working full-time. Applicant is not likely to jeopardize her defense contractor employment, which she needs to support herself and her spouse, by engaging in prohibited drug activity in the future.

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 of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Elizabeth M. Matchinski
Administrative Judge