



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



In the matter of:

)	
)	ISCR Case No. 10-04964
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah A. Minster, Esquire, Department Counsel
For Applicant: *Pro se*

December 21, 2010

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. Her eligibility for a security clearance is denied.

Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) on March 12, 2010. On September 10, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement. 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.

DOHA received Applicant’s undated Answer to the SOR on October 1, 2010. 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 October 27, 2010. The FORM contained documents identified as Items 1 through 6. On October 28, 2010, DOHA forwarded a copy of the FORM to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the file on November 11, 2010. She timely provided two documents in response to the FORM. The Government did not object to Applicant's documents. On December 10, 2010, the case was assigned to me for a decision. I admitted the two documents that Applicant filed in response to the FORM as Applicant's Exhibits (AE) A and B.

Findings of Fact

The SOR contains four allegations of disqualifying conduct under Guideline H, Drug Involvement (SOR ¶¶ 1.a. through 1.d.). SOR ¶ 1.a. alleges: "You used marijuana, approximately twice a year, from December 2005 to at least December 2009." SOR ¶ 1.b. alleges: "You plan to continue using marijuana." SOR ¶ 1.c. alleges: "You used ecstasy one time in May 2007." SOR ¶ 1.d. alleges: "Due to the facts alleged in subparagraphs 1.a. and/or 1.b. above, 50 U.S.C. §435c disqualifies you from having a security clearance granted or renewed by the Department of Defense." In her Answer to the SOR, Applicant admitted the allegations at SOR ¶¶ 1.a. and 1.c. She denied the allegation at SOR ¶ 1.b. She neither admitted nor denied the allegation at SOR ¶ 1.d.¹ Applicant's admissions are entered as findings of fact. (Item 1; Item 4.)

Applicant is 25 years old, never married, and has no children. Since September 2007, she has been employed as a graduate fellow by a government contractor. She seeks a security clearance for the first time. (Item 5.)

In 2006, Applicant graduated from college with honors and received a Bachelor of Science degree. In her Answer to the SOR, she described her character and academic achievements as follows:

More generally, I would like to attest to my own good judgment and reliability by pointing out that I am a high-achieving young person with strong drive and motivation. I graduated college early with honors, secured a job directly out of college at one of the most prestigious corporate law firms in the United States, and then was accepted to a competitive doctoral program. At 25, I have fulfilled the requirements for a Master's degree, and I am in the process of completing a dissertation for PhD, something which very few young people can boast. My achievements would not have been possible if [it] were not for my good judgment at a young age, as well as reliability and responsibility.

(Item 4 at 2; Item 5.)

¹ SOR ¶ 1.d. is not an allegation *per se*. Instead, it is a legal conclusion reached by assuming the truth of facts alleged at SOR ¶¶ 1.a. and 1.b. I interpret Applicant's failure to respond to SOR allegation 1.d. as a denial.

On March 12, 2010, 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. "(Item 5 at 44; italics in original omitted.)

Applicant responded "Yes" to question 23a and provided additional information. Applicant reported that she used marijuana from about December 2005 to "Present." Applicant also reported that in about May 2007, she used MDMA (ecstasy) once with her sister and a friend. Of her marijuana use, she stated: "Occasionally use with sister when traveling home for holidays. Always used within confines of family dwelling, never in public – always with family. Approximate number of uses is somewhere between 5 – 15." (Item 5 at 45.)

Applicant was interviewed about her illegal drug use by an authorized investigator from the U.S. Office of Personnel Management (OPM) on April 9, 2010.² In the personal subject interview, as summarized by the investigator, Applicant stated that she used marijuana two times a year "from 12/5 to the present." She explained that she smoked marijuana from a glass pipe with her sister when she returned to her family home for holidays. She told the investigator that after smoking marijuana she experienced an intense body high that was a positive experience. She reported that she experimented with ecstasy in the company of her sister and experienced negative side effects. Applicant stated that her last use of marijuana was in December 2009. Additionally, Applicant stated that she had no plans to use marijuana more than two times a year, and she also had no plans to stop using marijuana. However, she told the investigator she would stop using the drug "in order to keep a job or security clearance." (Item 7 at 4.)

In her answer to the SOR, Applicant stated that she told the investigator that she "had no current plans to discontinue" her marijuana use. She further explained that she never actively sought to acquire marijuana. Applicant then provided the following description of her illegal drug use:

Regarding my use of marijuana in subparagraph (a) of the [SOR], as well as my use of ecstasy in subparagraph (c) of the [SOR], while I do not deny these statements, I do not believe that this should be a cause for security concern. I have only ever used marijuana, or ecstasy on the one case, in the presence of my close family or long-time friend(s). Although I have

² On July 21, 2010, in response to DOHA interrogatories, Applicant confirmed the accuracy of the information in the investigator's report. (Item 6 at 3-4.)

been offered the use of marijuana before by strangers or people that I do not know very well, I have refused on these occasions precisely because I did not know the individuals to a degree sufficient to earn my trust, or was not in a private, controllable environment. I believe this is indicative of my good judgment in assessing the situation.

(Item 4 at 1.)

In her answer to the SOR, Applicant also stated that she intended to stop using marijuana and would also “abstain from any and all drugs fitting the description given in Guideline H, paragraph 24, subparagraph(a)(1) & (2) of the Directive.” She also stated her willingness to sign a formal statement indicating her willingness to abstain from drugs. However, she did not provide such a statement with her answer. (Item 4 at 2.)

In response to the FORM, Applicant provided two documents. In one document, she reported that she had discussed her decision not to use marijuana or other illegal drugs with her sister. She stated that her sister supported her decision. In the second document, Applicant provided a notarized statement of intent not to use illegal drugs in the future. In her notarized statement, Applicant made clear her understanding that if she were granted a security clearance and then used illegal drugs, her security clearance would be immediately revoked. (Ex. A; Ex. B.)

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.”

The record shows that Applicant admitted the illegal use of marijuana, with varying frequency, for approximately four years, from 2005 to at least December 2009. The record also establishes that Applicant, who is now 25 years old, used marijuana in her college years, during her graduate study, and after she began her professional

career. In 2007, as a young professional, she used ecstasy with her sister, the same person with whom she used marijuana. As recently as December 2009, she continued to use marijuana. She justified her illegal conduct by claiming it occurred only within her parents' home with family members and close friends. When interviewed by an authorized investigator in April 2010, she indicated a willingness to continue her marijuana use. This conduct 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 raises security concerns under AG ¶¶ 25(a) and 25(c). AG ¶ 25(a) reads: "any drug abuse [as defined at AG ¶ 24(b)]." AG ¶ 25(c) reads: "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia."

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 claims her last use of marijuana was in December 2009, approximately one year ago. In April 2010, approximately nine months ago, Applicant told an OPM investigator of her intent to continue her marijuana use in the future. At that time, she said she would discontinue marijuana use if required to do so to keep a job or a security clearance. In response to the FORM, she provided a notarized statement of intent not to use illegal drugs in the future, and she affirmed her understanding that if she were to use illegal drugs in the future, her security clearance would be subject to revocation.

Applicant's relatively recent change of heart about her use of illegal drugs reflects positively on her. However, her defense of her drug use behavior focused on keeping it "private" and "occasional." It is not clear from the record that she understands that using marijuana, even in her home with family members and close friends, was illegal conduct. Her decision to stop her use of illegal drugs appears to be motivated by her awareness that she likely would not be awarded a security clearance if she continued her drug use.

In her December 3, 2010, response to the FORM, Applicant provided a notarized statement of her intent to stop using marijuana and all other illegal drugs. She acknowledged she could not dissociate from her primary drug-using companion, who was her sister and an immediate family member. She asserted, however, that she had discussed her decision to abstain from illegal drugs with her sister, and her sister supported her decision. She also provided a statement expressing her understanding

that if she were to use marijuana or any illegal drugs after being granted a security clearance, the clearance would be subject to immediate revocation.

Applicant's illegal drug use is recent and occurred periodically over a period of four years. Her explanation of the circumstances of her illegal drug use casts doubt on her current reliability, trustworthiness, and good judgment. Insufficient time has elapsed to demonstrate whether she will carry out her intent to abstain from illegal drug use in the future. I conclude that AG ¶ 26(a) and AG ¶ 26(b)(3) do not apply in mitigation to the facts of Applicant's case.

Applicant provided documentation to comply with AG ¶¶ 26(b)(1), 26(b)(2), and 26(b)(4). However, her decision to abstain from drugs is recent, and in April 2010, she claimed she "had no current plans to discontinue" her illegal drug use. She has not yet credibly demonstrated that she will not abuse illegal drugs in the future. I conclude that AG ¶¶ 26(b)(1), 26(b)(2), and 26(b)(4) apply only partially in mitigation to security concerns raised by the facts of Applicant's case.

SOR ¶ 1.d. alleges that Applicant is disqualified, as a matter of law, from security clearance eligibility because of her illegal drug use and her statement to an authorized investigator that she intended to continue her illegal drug use. The relevant statute in this case is 50 U.S.C. § 435c, which provides, in pertinent part, as follows: "After January 1, 2008, the head of a Federal agency may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance or an addict."

50 U.S.C. § 435(a)(2) defines federal contractor employees as among those individuals covered by the prohibition articulated in 50 U.S.C. § 435c. Applicant is an employee of a federal contractor. The record evidence does not support a conclusion that she is an addict. However, there is ample record evidence to establish that Applicant was an unlawful user of a controlled substance for at least four years, from December 2005 until December 2009. Applicant asserted that she last used an illegal drug in December 2009, and she had no intention to use illegal drugs in the future.

50 U.S.C. § 435c prohibits the head of a Federal agency from granting or renewing a security clearance "for a covered person who is an unlawful user of a controlled substance. . . ." The statute's use of the present tense is relevant. The plain meaning of the statute is that the prohibition applies to a current user of a controlled substance. In 2003 and 2005, DOHA's Appeal Board concluded that a nearly identical predecessor statute reflected the intent of Congress to preclude current drug users from holding security clearances, but it did not intend that past drug users were forever barred from being granted security clearances. See ISCR Case No. 01-20314 (App. Bd. Sep. 29, 2003); ISCR Case No. 03-25009 (App. Bd. Jun. 28, 2005).

The record in this case does not establish that Applicant is a current user of illegal drugs. I conclude that 50 U.S.C. § 435c does not apply in this 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. While Applicant was candid in revealing her drug abuse when she completed her e-QIP and when she was interviewed by an OPM investigator, she failed to credibly demonstrate that she would not return to drug use in the future. Moreover, she attempted to minimize the illegality and seriousness of her drug use by claiming that it occurred in her family home in the company of her sister and close friends. This raised concerns about her judgment, trustworthiness, and reliability.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising from her relatively recent involvement with illegal drugs.

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
Subparagraph 1.a.:	Against Applicant
Subparagraph 1.b.:	For Applicant
Subparagraph 1.c.:	Against Applicant

Subparagraph 1.d.:

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.

Joan Caton Anthony
Administrative Judge