



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



In the matter of:	)	
	)	
	)	ISCR Case No. 10-05477
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Braden F. Murphy, Esq., Department Counsel  
For Applicant: Amy Chan, Esq.

April 29, 2011

**Decision**

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HEINY, Claude R., Administrative Judge:

Between July 2008 and April 2010, Applicant smoked marijuana five to eight times. Applicant has rebutted or mitigated the security concerns under drug involvement. Clearance is granted.

**Statement of the Case**

Applicant contests the Defense Department's (DoD) intent to deny or revoke her eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) on November 24, 2010, detailing security concerns under Guideline H, drug involvement.

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<sup>1</sup> Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

On December 14, 2010, Applicant answered the SOR and requested a hearing. On March 2, 2011, I was assigned the case. On March 24, 2011, DOHA issued a Notice of Hearing for the hearing held on April 14, 2011.

The Government offered Exhibits (Ex.) 1 and 2, which were admitted into evidence without objection. Applicant testified and submitted Exhibits A through G, which were admitted into evidence without objection. On April 26, 2011, DOHA received the hearing transcript (Tr.).

### **Findings of Fact**

In Applicant's Answer to the SOR, she admitted the factual allegations, with explanations. I incorporate her admissions to the SOR allegations. After a thorough review of the pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 28-year-old senior technical designer who has worked for a defense contractor since 2009. She is seeking to obtain a security clearance. The president and CEO of her company was very pleased with her duty performance and stated her efforts were above and beyond what had been expected. (Ex. B) Her 2010 performance evaluation rated her as a "4," indicating her performance was good and had regularly exceeded the job requirements in terms of quality and quantity of work. (Ex. C, Tr. 24) She excels at her job, has a wealth of art, scripting, and design technical knowledge, and is an incredible asset to the company. (Ex. C) Her performance evaluation signed in February 2011 rated her as a "4," stating her work is "always of the highest quality, and she consistently produces results that are above expectations." (Ex. D)

The company's executive producer is very impressed with Applicant's drive, confidence, and her desire to constantly take on additional responsibilities. He rates her as an exemplary employee, well liked, and possessing great leadership qualities. (Ex. E, Tr. 24) The director of engineering states Applicant is a top-notch engineering talent, who has artistic talent combined with high technical skill. (Ex. F, Tr. 25)

At age 13, Applicant started working as a teacher's assistant for a family theater company. (Tr. 27) At age 16, she started working for a pizza company. In 2004, she obtained her associate's degree in computer animation. (Tr. 33) Following graduation, she did graphic design work and continued with some teaching education. (Tr. 34) She had an internship doing design work for a game company. (Tr. 34) She also worked developing software for a medical company. (Tr. 28, 34) In 2009, she started her current job with an annual salary of \$81,000. (Tr. 38)

Between early 2008 and April 2010, Applicant used marijuana five to eight times. (Tr. 30, 39) When she started, she and most of the employees had been laid off from their job due to business reasons. (Tr. 30) Additionally, she had ended a long-term relationship and started a new one. She was moving on to a new avenue of her life. (Tr.

30) Obviously, Applicant knew about marijuana, but had never been confronted with the possibility of using it. (Tr. 31) Even in college, she had never been around marijuana. (Tr. 39) Her use occurred sporadically over a two-year period. She has never purchased or grown marijuana. She intends never to use marijuana again and feels confident she knows what to do should she be offered marijuana in the future. (Tr. 45, 51)

In April 2010, Applicant listed her use on her 2010 Questionnaire for National Security Positions, Standard Form (SF) 86. (Ex. 1) She also revealed her usage during her May 2010 personal subject interview. (Ex. 2) Applicant's marijuana use would occur when she and her boyfriend, also a game designer, would meet with other friends. There was a subset of those friends who used marijuana. After smoking with this subset of friends a number of times, Applicant, her boyfriend, and a couple of other friends made a conscious decision to refrain from associating with that group of acquaintances in the future. She made it clear to this group that she was no longer interested in using marijuana. (Tr. 44)

Applicant's last use occurred at a party in 2010. She did not know it was marijuana until after she had smoked it. She, her boyfriend, and other friends would get together at parties and sometimes smoke tobacco in a "hookah" water pipe. (Tr. 43, 61) At times, other spices were mixed with the tobacco and people would attempt to guess the identity of the added ingredient. In April 2010, after smoking from the water pipe, it was announced the added ingredient was marijuana. (Tr. 41) This revelation upset Applicant as well as a number of the other party guests. (Tr. 61) She testified that last time she smoked marijuana intentionally was sometime in mid to late 2009. (Tr. 60)

Applicant provided a signed statement stating she understands marijuana use is wrong, unhealthy, and "not congruent with [her] outlook on life." (Ex. G) She stated she was sorry for her past usage and resolved never to do it again.

At age 20, Applicant took out a car loan, which she paid in full. (Tr. 22) In 2005, she had a credit card account, which was charged off. Applicant had moved and had not received the billing notice on the card. Once she discovered the unpaid debt, she paid it in full even though the company had written off the account. (Tr. 22)

## **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 must 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 interests of 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order (EO) 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**

AG ¶ 24 expresses the security concern pertaining to drug involvement: 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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying: (a) any drug abuse.

From July 2008 to April 2010, Applicant used marijuana five to eight times. The disqualifying condition in AG ¶ 25(a) applies.

AG ¶ 26 provides conditions that could mitigate security concerns:

(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;

Applicant's last intentional use of marijuana was in 2009, more than 16 months ago. Applicant realizes her usage was wrong and uncharacteristic of her behavior. Applicant does not intend to use illegal drugs in the future and signed a statement reflecting her intent. Although the statement did not state she would submit to drug testing and any drug use would result in the loss of her clearance, it did state her intent never to use marijuana again. The mitigating condition listed in AG ¶ 26(b)(4) applies.

Applicant has disassociated herself from those acquaintances who use marijuana. The mitigating conditions listed in AG ¶ 26(b)(1) and (2) apply.

Security concerns can be mitigated based on AG ¶ 26(a) by showing that the drug offenses happened so long ago, were so infrequent, or happened under such circumstances that they are unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment. There are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation."<sup>2</sup>

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<sup>2</sup> ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence

Applicant's last intentional marijuana use was more than 16 months ago. Her last use occurred in April 2010, but she was unaware that marijuana had been mixed with the tobacco until after she had smoked it. AG ¶ 26(a) fully applies, despite Applicant's last illegal drug use being relatively recent. Her overall illegal drug use lasted less than two years (July 2008 to April 2010), and involved five to eight uses of marijuana. AG ¶ 26(a) applies because her past drug use does not cast doubt on her current reliability, trustworthiness, or good judgment. Because of her abstention from drug use for more than 16 months, and her recognition of the adverse impact on her life of drug abuse, there is reasonable certitude that she will continue to abstain from drug use. I am confident her illegal drug use will not recur. Because she will not use illegal drugs in the future, confidence in her current reliability, trustworthiness, and good judgment, with respect to drug use, is restored.

AG ¶ 26(b) lists four ways Applicant can demonstrate her intent not to abuse illegal drugs in the future. She has disassociated from her drug-using associates and contacts. However, she still associates with her boyfriend, but he has also made a decision not to use marijuana in the future. She does not go out with friends if there is a possibility that those associates she knew used marijuana would be present. She has changed her life, and does not associate with the drug abusing associates from her past. AG ¶ 26(b) partially applies.

In conclusion, Applicant ended her knowing use of marijuana in 2009. Her motivations to stop using drugs are evident.<sup>3</sup> She understands the adverse results from

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of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

*Compare* ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

<sup>3</sup>Retention of a security clearance, potential criminal liability for possession of drugs and adverse health, employment, and personal effects resulting from drug use are among the strong motivations for remaining drug free.

drug abuse. She has shown or demonstrated a sufficient track record of no drug abuse to eliminate drug involvement as a bar to her access to classified information.

### **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 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 surrounding this case. There is considerable evidence supporting approval of her clearance. Applicant is a valued employee with excellent potential. She has been working since the age of 13. Her character is revealed by how she handled the charged-off credit card account. Due to a move, she was unaware the account had become delinquent, but when so informed she paid the account.

Applicant revealed her drug abuse on her security clearance application, during her May 2010 interview, and at her hearing. Applicant intentionally used illegal drugs from July 2008 to sometime in 2009. She no longer associates with drug-abusing acquaintances. Now that she is in the workforce, and in a job she really enjoys, the consequences of drug abuse will be much more severe. She knows the consequences should she again smoke marijuana. There is no evidence at her current employment of any disciplinary problems. There is no evidence of disloyalty or that she would intentionally violate national security. Her law-abiding character and good work performance shows responsibility, rehabilitation, and mitigation. Her coworkers, friends and supervisors support approval of her clearance. She was truthful and forthright in revealing her drug abuse on her security clearance application and during her May 2010 interview. I am satisfied that her current judgment, reliability, trustworthiness, and her current ability or willingness to comply with laws, rules and regulations show solid future potential for access to classified information.

Applicant's marijuana usage is fully mitigated for the reasons previously discussed. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude she has mitigated the security concerns pertaining to drug involvement.

### **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, Drug Involvement:                   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 interests of interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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CLAUDE R. HEINY II  
Administrative Judge