



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



In the matter of:

Applicant for Security Clearance

)
)
)
)

ISCR Case No. 10-05977

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel

For Applicant: *Pro se*

June 22, 2011

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.

Statement of Case

Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) on April 14, 2010. On January 24, 2011, 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.

Applicant answered the SOR on February 17, 2011.¹ 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 March 22, 2011. The FORM contained documents identified as Items 1 through 5. On March 31, 2011, 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 April 4, 2011. She did not submit any information or file any objections within the required time period. On June 3, 2011, the case was assigned to me for a decision.

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, with varying frequency, from April 2007 to at least December 2009." SOR ¶ 1.b. alleges: "You used mushrooms,² with varying frequency, from approximately July 2008 to at least December 2008." SOR ¶ 1.c. alleges: "You used ecstasy, with varying frequency, from approximately June 2008 to at least September 2008." SOR ¶ 1.d. alleges: "You used cocaine, with varying frequency, from approximately July 2008 to at least August 2008." In her Answer to the SOR, Applicant admitted the four allegations in the SOR. Applicant's admissions are entered as findings of fact. (Item 1; Item 3.)

Applicant is 25 years old, never married, and has no children. She attended college from 2003 until 2009, when she graduated and received a degree of Bachelor of Science in Mechanical Engineering. Since April 2010, she has been employed as a mechanical engineer by a government contractor. She seeks a security clearance for the first time. (Item 5.)

In April 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 4 at 48-50; italics in original omitted.)

¹ In her Answer to the SOR, Applicant stated that she was including her 2010 performance review. However, that document was not included with her Answer as it appears in the FORM. I contacted Department Counsel, and he provided the missing document, which had been inadvertently omitted from the FORM. I marked Applicant's signed interim performance review, which covered the period from July 6, 2010 to December 9, 2010, as Hearing Exhibit (HE) 1 and admitted it to the record. (Item 3; HE 1.)

² "Mushrooms" is a commercial or street name for an hallucinogen identified as Psilocybin. See <http://www.nida.nih.gov/DrugPages/DrugsofAbuse.html>.

Applicant responded “Yes” to question 23a and provided additional information. Applicant reported that she used marijuana “outside of school and work, around 50 times” from April 2007 until December 2009.³ Applicant also reported that from June 2008 until about December 2008, she used mushrooms three times, Ecstasy four times, and cocaine twice. (Item 4 at 49-50.)

Applicant was interviewed about her illegal drug use by an authorized investigator from the U.S. Office of Personnel Management (OPM) in May 2010.⁴ In the personal subject interview, as summarized by the investigator, Applicant stated that she used marijuana “on a casual basis” about 50 times between April 2007 and December 2009. She stated that she smoked marijuana from a pipe that she shared with her friends at parties or weekend gatherings. She further stated that, in social settings, she was provided with marijuana, mushrooms, Ecstasy, and cocaine by individuals she could not identify, and she asserted that she used the illegal drugs out of curiosity and a desire to experiment. She claimed she did not develop any dependency on the illegal drugs she used, and she denied any drug use after December 2009. She said she no longer associates with the individuals with whom she used illegal drugs, and she stated she has no intention of using illegal drugs in the future. (Item 5 at 3-4.)

In her answer to the SOR, Applicant asserted that her drug use was infrequent and occurred in the past under circumstances that were unlikely to recur. She provided a copy of her employer’s drug and alcohol policy, issued February 1, 2011. Applicant stated that she had signed her employer’s drug and alcohol policy, and she further stated that she intended her signature on that document to be a statement of her intent to abstain from any future drug use, “with automatic revocation of clearance for any violation.”⁵ Applicant also stated that her past drug use did not cast doubt on her current reliability, trustworthiness, and good judgment. She has not had drug counseling or treatment. (Item 3; Item 5.)

Applicant provided a copy of her interim performance review, which covered the period from July 6, 2010 to December 9, 2010. Her manager included the following comment: “[Applicant] is new to the organization but coming up to speed very quickly. Her performance with manufacturing related tasks, including documentation and problem solving are very strong.” The manager’s role overview rating stated: “Met expectations.” (HE 1.)

³ On her e-QIP, Applicant reported that she was unemployed from August 2006 until September 2007. From September 2007 until June 2009, she was employed part-time by a firm as an engineering intern. She then worked full-time for the firm from June 2009 until assuming her present position in April 2010. (Item 4 at 18-21.)

⁴ On October 12, 2010, in response to DOHA interrogatories, Applicant confirmed the accuracy of the information in the investigator’s report. (Item 5 at 6.)

⁵ Applicant did not include a business record of her employer’s drug and alcohol policy containing her signature. (Item 3.)

Burden of Proof

The Government has the initial burden of proving controverted facts alleged in the SOR. The responsibility then shifts to the applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant then bears the burden of persuasion. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.

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.”

Through Applicant's admissions, the record establishes that she used marijuana, at least 50 times over a period of approximately 2½ years, from April 2007 until December 2009. She also used mushrooms, Ecstasy, and cocaine in 2008.

The record also establishes that Applicant, who is now 25 years old, used marijuana in her college years and after she began her professional career. As recently as December 2009, she continued to use marijuana. 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 1½ years ago. In May 2010, approximately one year ago, Applicant told an OPM investigator of her intent not to use illegal drugs in the future. She said she no longer associated with the individuals with whom she had used illegal drugs, and she expressed her willingness to sign a statement of intent with automatic revocation of her security clearance if she used illegal drugs in the future. She made similar assertions in her Answer to the SOR.

However, Applicant provided no information to demonstrate her intent not to abuse drugs in the future. She failed to provide documentation establishing that she had abstained from drug use for an appropriate period or that she had disassociated from those with whom she had used drugs in the past. While she asserted that she had changed her conduct to avoid environments where drugs are used, she failed to document this change in her conduct. She stated that she had signed her employer's drug and alcohol policy and considered herself bound to comply with it. In her statement, she also expressed 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 2½ years. She used illegal drugs as a young adult and after beginning her professional career. While her admitted use of mushrooms, Ecstasy, and cocaine occurred within a brief period in 2008, her marijuana use continued over a period of more than two years, suggesting a lifestyle choice that went beyond curiosity and experimentation. Insufficient time has elapsed to demonstrate whether she will carry out her intent to abstain from illegal drug use in the future. Additionally, she failed to provide documentation to support her assertions about abstinence, disassociation from drug-using associates, and avoiding environments where drugs were used. I conclude that AG ¶ 26(a) and AG ¶ 26(b) do not fully apply in mitigation to the facts of Applicant's 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 relevant facts and circumstances. 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. Additionally, while she expressed an intent not to use illegal drugs in the future, she failed to document specific actions to demonstrate her intent.

Applicant requested a decision on the written record. She did not file objections or provide additional information in response to the FORM. The written record in this case is sparse. Moreover, without an opportunity to question Applicant and to assess her credibility at a hearing, I am unable to conclude that she met her burden of persuasion in mitigating the Government's allegations under the drug involvement adjudicative guideline.

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 four 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.:	Against Applicant
Subparagraph 1.c.:	Against Applicant
Subparagraph 1.d.:	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.

Joan Caton Anthony
Administrative Judge