



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 10-07685
)	
Applicant for Security Clearance)	

Appearances

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

10/24/2012

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the Drug Involvement and Personal Conduct concerns. She used marijuana while possessing a security clearance and failed to disclose this adverse information on her security clearance application (SCA). She only revealed the adverse information after being repeatedly questioned by a government investigator. Clearance is denied.

Procedural History

On June 7, 2012, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a Statement of Reasons (SOR), notifying her that it was unable to grant her a clearance because information from her background investigation raised the security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct).¹ On July 18, 2012, Applicant answered the SOR and requested a hearing before an administrative judge to present evidence to establish her eligibility for a clearance.

¹ DOHA took this action under Executive Order (EO) 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) implemented by the Department of Defense on September 1, 2006.

On August 23, 2012, Department Counsel indicated the Government was ready to proceed with a hearing. I was assigned the case on August 30, 2012 and, after coordinating with the parties, scheduled the hearing for October 2, 2012.

At hearing, Department Counsel offered Government Exhibits (GE) 1 through 5, which were admitted without objection. Applicant testified and offered Applicant's Exhibit (AE) A, which was also admitted without objection. At the conclusion of the hearing, I left the record open to provide the parties an opportunity to submit additional matters for my consideration. Department Counsel offered a security clearance application, signed by Applicant on August 16, 2009 (2009 SCA), which was marked GE 6. Applicant submitted her latest performance evaluation, a recent award and commendation from her job, and a character letter that were collectively marked AE B. These exhibits were also admitted without objection. The transcript (Tr.) was received on October 10, 2012.

Findings of Fact

Applicant is 34 years old. She has a bachelor's degree in sports medicine, is involved in her community, and is looking forward to going back to school to continue her education. She has been working as a government contractor since 2007. She was rated "outstanding" on her most recent performance evaluation and has been recognized for her exceptional work. (Tr. at 22-23, 49-50; GE 1; GE 3; GE 5; AE B)

Applicant used marijuana on three separate occasions between 1995 and 2006. These uses occurred prior to applying for a security clearance and took place in social settings where others were also using marijuana. (Tr. at 25-28, GE 2 – 3; GE 5; AE A)

Applicant applied for a security clearance in January 2008. On her initial SCA, Applicant was asked whether she had used any illegal drugs in the past seven years. She revealed her prior use of marijuana. Two months later, in March 2008, she was granted a security clearance. (Tr. at 22-25, 33; GE 3; GE 5)

In October 2008, Applicant went over to her brother's home to walk his dog. Applicant knew her brother used marijuana and he had left some marijuana out. Applicant took the marijuana and used it. She was by herself when she used the marijuana and denies using marijuana since this incident. Applicant's brother is still involved with marijuana, but she has made certain to leave his home whenever she has seen it there. (Tr. at 31-34, 36-37, 46-49; GE 2) Applicant's employer, at the time, had a "zero tolerance policy for use of illegal substances." (GE 4, Q. 13) Applicant was aware that her use of marijuana was incompatible with holding a security clearance. (Tr. at 33)

In August 2009, as part of her request for access to Sensitive Compartmented Information (SCI), Applicant submitted her 2009 SCA. Applicant was again asked whether she had used any illegal drugs in the past seven years. She was also asked whether she had ever used illegal drugs while possessing a security clearance. Applicant disclosed her marijuana use between 1995 and 2006, but not her most recent use ten months earlier while holding a security clearance. (Tr. at 28; GE 6 at 8)

Applicant ascribes her failure to disclose her 2008 drug use to mere oversight and forgetfulness. (Tr. at 34-40)

In November 2009, Applicant was interviewed by another government agency as part of her request for SCI access. The interview involved a polygraph examination and questions posed by a polygraph examiner. Applicant did not reveal her 2008 drug use when initially questioned. She only revealed the information after being repeatedly questioned by the polygraph examiner. (Tr. at 30-34, 40-46; GE 5) At hearing, Applicant claimed that, when initially questioned, she simply forgot about having used marijuana while holding a clearance, as it was an “insignificant situation.” (Tr. at 44)

In April 2010, Applicant was denied SCI access by the other government agency (OGA). The OGA’s denial was based on Applicant’s use of marijuana while holding a clearance and her dishonesty “regarding this drug use on her security forms, and initially during her security interview.” (GE 5; Tr. at 35-36)

In June 2010, Applicant submitted her latest SCA. She listed her October 2008 marijuana use while holding a clearance on the application. (GE 1; Tr. at 28-30)

In August 2010, Applicant provided an affidavit to the Office of Personnel Management (OPM) explaining her 2008 drug use and her subsequent disclosure of such use during the polygraph-assisted interview by the OGA. Applicant stated under oath, in her own handwriting, that she revealed her 2008 drug use when initially questioned by the polygraph examiner. (GE 2)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the 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 Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, 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.” Directive ¶ E3.1.15. An

applicant has the ultimate burden of persuasion to obtain a favorable security decision. In resolving this ultimate question, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b).

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, because “[n]o coercive policing could replace the self-discipline and integrity of the person entrusted with the nation’s secrets as the most effective means of protecting them.” AG ¶ 1.

Decisions regarding an applicant’s suitability 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.

Analysis

Guideline H, Drug Involvement

The security concern for illegal drug involvement is set forth at 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.

Applicant’s use of marijuana while possessing a security clearance raises this concern and establishes the following disqualifying conditions under AG ¶ 25:

- (a) any drug abuse; and
- (g) any illegal drug use after being granted a security clearance.

AG ¶ 26 sets forth a number of conditions that could mitigate the drug involvement concern. The relevant mitigating conditions are:

- (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; and

(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; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant's use of marijuana while possessing a security clearance occurred four years ago. However, this was not a mere lapse in judgment by a young adult who decides to experiment with marijuana for the first time. Applicant had previously used marijuana while in college and after college. Her employer had a "zero tolerance" policy towards illegal drug use and she had been granted a clearance just seven months earlier.² Furthermore, but for the OGA's polygraph-assisted interview, Applicant would not have revealed this adverse information.³ Under such circumstances, none of the mitigating conditions apply. Applicant's past drug use remains a security concern.

Guideline E, Personal Conduct

The personal conduct security concern is set forth at AG ¶ 15:

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.

Applicant's use of marijuana after being granted a security clearance raises this concern because it calls into question her judgment and willingness to comply with rules and regulations. It also establishes disqualifying condition AG ¶ 16(c).⁴

² See ISCR Case No. 07-00852 at 4 (App. Bd. May 27, 2008) ("Applicant's having used marijuana despite his employer's policy against such activity, and his use after submitting his SCA, raise serious questions about his judgment and, therefore, his fitness for a clearance."). See also ISCR Case No. 11-00391 at 3 (App. Bd. Dec. 1, 2011) (Applicant's use of marijuana while possessing a security clearance and after being informed such use was incompatible with his continued employment, "could suggest to a reasonable person that Applicant lacks a sufficient willingness to follow rules as to justify entrusting him with national security information"); ISCR Case No. 10-06480 (App. Bd. Aug. 19, 2011) (four year old marijuana use not mitigated, because use occurred while holding a security clearance).

³ See ISCR Case No. 07-14127 at 4 (App. Bd. Aug. 12, 2010) ("The record provides no reason to believe that, had the polygraph not occurred, Applicant would still have admitted his drug history. The burden is on Applicant to establish matters in mitigation.")

⁴ Credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not safeguard protected information.

Applicant's omission of her 2008 marijuana use from her 2009 SCA also raises the personal conduct concern and the applicability of disqualifying condition AG ¶ 16(a).⁵ However, the omission of material, adverse information standing alone is not enough to establish that an individual intentionally falsified their SCA. Instead, an administrative judge must examine the facts and circumstances surrounding the omission to determine an individual's true intent.⁶ Applicant's marijuana use in 2008 occurred just ten months before she submitted her 2009 SCA. She had filled out a similar application the year before, which also asked her whether she had used any illegal drugs in the past seven years. Furthermore, in her 2009 SCA, Applicant was asked whether she had ever used illegal drugs while possessing a security clearance. Under the circumstances, it is implausible that an individual in Applicant's shoes would honestly forget about their marijuana use while holding a clearance just ten months earlier and in violation of their company's "zero tolerance" policy; yet, at the same time, recall uses from the mid to late 1990s. Additionally, Applicant's failure to initially reveal her 2008 drug use when questioned by the polygraph examiner and her less than candid statement to OPM, where she falsely claims that she revealed her drug use upon initially being questioned by the examiner, casts further doubt on her credibility.⁷ Thus, I find that Applicant falsified her 2009 SCA when she failed to disclose her 2008 drug use while holding a security clearance.⁸

AG ¶ 17 sets forth several conditions that could potentially mitigate the personal conduct concern. I have considered all the mitigating conditions under AG ¶ 17 and find that none apply. I incorporate my Guideline H analysis herein and for similar reasons find that Applicant failed to meet her burden to mitigate the personal conduct concern. Additionally, I considered Applicant's disclosure of her 2008 marijuana use on her most recent SCA. However, such disclosure only occurred after she revealed the adverse information during the polygraph-assisted interview and only after being repeatedly questioned by the polygraph examiner. Under such circumstances, Applicant's disclosure of this adverse information on her most SCA was not a prompt, good-faith

⁵ 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.

⁶ See generally ISCR Case No. 02-12586 (App. Bd. Jan. 25, 2005); ISCR Case No. 02-15935 (Appl. Bd. Oct. 15, 2003).

⁷ Applicant's dishonesty during her OGA interview and misleading statement to OPM were not alleged, and I only considered them in assessing Applicant's case in mitigation and her overall credibility. ISCR Case No. 07-16653 (App. Bd. May 1, 2012).

⁸ I gave no weight to Applicant's assertion that she was told by the polygraph examiner that her polygraph results were inconclusive. I only considered Applicant's statements during the polygraph-assisted interview, and gave those statements and the timing of her admissions to drug use while holding a clearance the weight I thought appropriate. ISCR Case No. 11-03452 at 3 (App. Bd. June 6, 2012); ISCR Case No. 02-12199 (App. Bd. Apr. 3, 2006); ISCR Case No. 02-31428 at 4 (App. Bd. Jan. 20, 2006).

effort to correct her prior deliberate omission.⁹ Applicant failed to mitigate the concerns raised by her personal conduct and such conduct remains a concern.

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 the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).¹⁰ I gave due consideration to all the favorable and extenuating factors in this case, including Applicant's employment record and community service. However, this favorable evidence, as well as the other mitigating record evidence, does not outweigh the security concerns at issue.

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against Applicant

Conclusion

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is hereby denied.

Francisco Mendez
Administrative Judge

⁹ See AG ¶ 17(a).

¹⁰ The non-exhaustive list of factors are: (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.