



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



In the matter of: )  
)  
) ISCR Case No. 10-10087  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Eric Borgstrom, Esq., Department Counsel  
For Applicant: *Pro se*

September 21, 2011

**Decision**

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the Drug Involvement, Criminal Conduct, and Personal Conduct concerns. She used marijuana on several occasions from 2007 to 2010. She used marijuana after twice being arrested and convicted for illegal drug possession. Her last use of marijuana occurred after she signed her employer’s drug policy, which prohibits its employees from using illegal drugs. Applicant also falsified her security questionnaire by failing to disclose the full extent of her past drug involvement and tax debts. Clearance is denied.

**Procedural History**

On April 21, 2011, the Defense Office of Hearings and Appeals (DOHA) made a preliminary determination to deny Applicant access to classified information.<sup>1</sup> The basis for this decision is set forth in a Statement of Reasons (SOR), which alleges security

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<sup>1</sup> This action was taken pursuant to 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) implemented by the Department of Defense on September 1, 2006.

concerns under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct).

Applicant responded to the SOR on May 26, 2011 (Answer). She admitted the factual allegations under Guidelines H and J. She denied the seven allegations under Guideline E, and requested a hearing.

Department Counsel filed its ready-to-proceed on May 28, 2011. After coordinating with the parties, I scheduled the hearing for July 21, 2011. As a time management tool, I issued a prehearing order requiring the parties to serve one another and me their anticipated exhibits prior to the hearing. (Hearing Exhibit II).

At hearing, Department Counsel offered six exhibits, which were marked and admitted into evidence as Government Exhibits (GE) 1 through 6. Applicant offered four exhibits, which were marked and admitted into evidence as Applicant's Exhibits (AE) A through D. Applicant testified on her own behalf. I kept the record open to provide the parties an opportunity to submit additional matters for my consideration. Applicant submitted AE E through H in a timely fashion and they were admitted into evidence. The transcript was received on July 29, 2011.

### **Findings of Fact**

Applicant is 25 years old, single, with no children. She graduated from high school in 2004 and attended college from 2004 to 2007. She has been employed by her present employer, a government contractor, as an information technology specialist since 2006. She is a good worker and recently received a pay raise due to her work performance. In her spare time, Applicant operates a cat rescue association. (Tr. at 21-25; GE 1; AE A – C; AE F and G).

Applicant used marijuana once in 2004. She used marijuana on several occasions between 2007 and January 2010. Applicant's marijuana use generally occurred in social settings where others were passing around the drug and she freely decided to use it. She was arrested in 2008 and 2009 for illegal drug involvement, and was subsequently convicted, on both occasions, for the illegal possession of marijuana. She used marijuana following both arrests and convictions. In 2009, Applicant signed her company's employee handbook, which contains the company's drug policy prohibiting its employees from using illegal drugs. She was fully aware of her company's anti-drug policy when she used marijuana in January 2010. Applicant testified that she no longer associates with those who use illegal drugs and promises not to use illegal drugs in the future. (Tr. at 40-42, 50-52; Answer; GE 5 at 150-152; GE 6).

On June 4, 2010, Applicant submitted a security clearance application (SCA). In response to relevant questions regarding her police record and past illegal drug use, Applicant revealed the two arrests for marijuana possession in 2008 and 2009. She did not disclose the full extent of her marijuana use, including her use just six months earlier in January 2010. At hearing, Applicant claimed she did not falsify her SCA when she

failed to disclose the full extent of her illegal drug use. She testified that her failure to disclose was due to “laziness” and that there was “no intent to hide” the full extent of her drug use. (GE 1 at 36-39; Tr. at 46-50).

Applicant also failed to disclose federal and state tax debts on her SCA. She was embarrassed about these debts and was concerned it would raise questions about her accountability, as well as her ability to receive a security clearance. At hearing, Applicant claimed her failure to disclose her tax debts was not a deliberate falsification, because she did not believe she was required disclose this adverse information as she had started to resolve these debts. Applicant did not start paying back her delinquent tax debts until after she submitted her SCA. (GE 1 at 40-43; Tr. at 52-60).

Applicant also did not list medical treatment she received between 2005 and 2008 in response to questions about her mental and emotional health. She did not disclose these treatments because they were for a physical ailment, not a mental or emotional condition. (GE 1 at 36; GE 6 at 126; Tr. at 60-65).

Applicant had previously filled out an application for a public trust position in 2006. This application asked whether she had used any illegal drugs in the preceding year. Applicant responded “no” because she had not used marijuana in 2005. (GE 2 at 4; Tr. at 65-66).

### **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 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 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 the 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 EO 10865 provides that adverse 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**

The security concern regarding illegal drug involvement is set forth at AG ¶ 24 as follows:

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.

The guideline notes several disqualifying conditions that could raise a security concern under AG ¶ 25. Applicant's use of marijuana and conviction for illegal marijuana possession establishes AG ¶¶ 25(a), “any drug abuse,” and 25(c), “illegal drug possession . . . or possession of drug paraphernalia.”

AG ¶ 26 sets forth a number of conditions that could mitigate the Guideline H concern. The following mitigating conditions warrant discussion:

(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 marijuana use did not occur under unusual circumstances. She used it in social settings where others passed the drug around and she was free to use it or not. There was no pressure or coercion involved. She continued to use marijuana after twice being arrested and convicted for illegal drug involvement. Her last use of marijuana in January 2010 occurred after she signed and was fully aware of her employer's policy prohibiting the illegal use of drugs by its employees. Although Applicant promises not to use illegal drugs in the future and claims to no longer associate with those who use drugs, based on her long history of illegal drug use and use of marijuana after knowing it was prohibited by her employer, I am not convinced that her illegal drug involvement will not recur. AG ¶¶ 26(a) and (b) do not apply. Applicant failed to mitigate the drug involvement concern. See *generally*, ISCR Case No. 10-06480 (App. Bd. Aug. 19, 2011).

### **Guideline J, Criminal Conduct**

Applicant's illegal drug involvement also raises the criminal conduct concern that is addressed at AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

I have incorporated my Guideline H analysis herein and, for similar reasons, find against Applicant under Guideline J.<sup>2</sup> Applicant's conviction for illegal marijuana possession establishes AG ¶¶ 31(a), "a single serious crime or multiple lesser offenses."<sup>3</sup> Applicant's inability to keep her recent promise to her employer not to use illegal drugs and her continued use after twice being convicted for her involvement with illegal drugs, undercuts her promise not to engage in this type of criminal behavior in the future. Her illegal drug involvement – her last use of marijuana occurring less than two

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<sup>2</sup> ISCR Case No. 06-21537 at 5 (App. Bd. Feb. 21, 2008) ("the Directive does not provide that if conduct raises a disqualifying condition under a specific guideline, then that conduct is precluded from consideration under any other guideline. . . . an applicant's behavior may have security significance under more than one Guideline.").

<sup>3</sup> The Government elected to cross-allege Applicant's arrest and convictions under Guideline J, but not Applicant's illegal marijuana use. I will only consider Applicant's drug arrests and convictions in addressing the disqualifying conditions under Guideline J. However, as Applicant was on notice that her criminal conduct, including illegal drug use, was at issue, I will consider this adverse information in assessing the evidence in mitigation and extenuation, as well as under the "whole-person" concept. ISCR Case No. 09-08108 at 5-6 (App. Bd. Feb. 15, 2011); ISCR Case No. 09-06770 (App. Bd. Nov. 8, 2002); ISCR Case No. 01-07656 (App. Bd. Aug. 29, 2002).

years ago – continues to cast doubt on her current reliability, trustworthiness, and judgment. Accordingly none of the mitigating conditions under Guideline J apply. Applicant failed to mitigate the criminal conduct concern.

### **Guideline E, Personal Conduct**

The personal conduct 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.

The guideline notes several disqualifying conditions that could raise a security concern under AG ¶ 16. I have considered all the disqualifying conditions and find that only AG ¶ 16(a)<sup>4</sup> warrants discussion.

The security clearance process is contingent upon the honesty of all applicants seeking access to classified information, and begins with the answers provided in the SCA. An applicant should err on the side of over-inclusiveness and, when in doubt, disclose any potential derogatory information that is responsive to a question in the application. However, the omission of material, adverse information standing alone is not enough to establish that an applicant intentionally falsified their SCA. Instead, an administrative judge must examine the facts and circumstances surrounding the omission to determine an applicant's true intent.<sup>5</sup>

Applicant intentionally falsified her SCA, when she omitted the extent of her drug use and delinquent tax debts, as alleged in SOR, ¶¶ 3.b – 3.f. She was fully aware of her delinquent federal and state taxes when she submitted her SCA. Applicant failed to disclose this adverse financial information because she was concerned it would raise questions about her accountability and ability to receive a security clearance. Similarly, Applicant was fully aware of the extent of her illegal drug use and decided only to disclose the two drug-related arrests from 2008 and 2009. I do not find Applicant's explanations for failing to disclose the full extent of her illegal drug involvement and adverse tax information credible. I find against Applicant as to SOR, ¶¶ 3.b – 3.f.

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<sup>4</sup> 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.

<sup>5</sup> ISCR Case No. 07-16511 at 4 (App. Bd. Dec. 4, 2009) ("In the case of an omission in a SCA or some other document, the Government's burden of production requires more than merely showing that the omission occurred. Rather, the Government must present substantial evidence that the omission was deliberate.").

However, Applicant did not falsify her SCA when she did not reveal her prior medical treatment in response to a question about her past mental health counseling, as alleged in SOR, ¶ 3.a. Although there is some evidence in the record that the treatment Applicant received was, in part, due to anxiety, the overwhelming record evidence supports her position that the treatment was for a physical ailment, not mental. I find in Applicant's favor as to SOR, ¶ 3.a. Further, as there was no evidence presented that Applicant used marijuana the year before she submitted her 2006 application for a position of trust, I find in her favor as to SOR, ¶ 3.g.<sup>6</sup>

AG ¶ 17 sets forth several conditions that could potentially mitigate the Personal Conduct security concern. I have considered all the mitigating conditions under AG ¶ 17, but only AG ¶ 17 (a)<sup>7</sup> merits discussion. An applicant who deliberately falsifies their SCA commits an "offense that strikes at the very heart of the security clearance process." ISCR Case No. 09-01652 at 7 (App. Bd. Aug. 8, 2011). In this case, Applicant not only falsified her SCA, but continues to deny her misconduct. Applicant's dishonesty on the SCA, and continued failure to admit such dishonesty, calls into question her reliability, trustworthiness, and ability to protect classified information. AG ¶ 17(a) does not apply. Applicant failed to mitigate the personal conduct 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).<sup>8</sup> I have considered and given due weight to all the favorable and extenuating factors in this case. Applicant is a good worker and is devoted to saving stray cats. However, this favorable evidence, as well as the other mitigating record evidence, does not outweigh the security concerns at issue.

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<sup>6</sup> See ISCR Case No. 02-24452 (Appeal Board reversed because judge impermissibly found that applicant had used illegal drugs on the basis of unfavorable credibility determination and not independent evidence. The Board held: "An applicant does not have the burden of disproving a controverted fact; rather the burden of proving controverted facts falls on Department Counsel. If an applicant has not admitted to engaging in specific acts of misconduct, and if there is no record evidence in that regard, then a Judge has no rational basis to find such misconduct occurred. A Judge's disbelief of the applicant's testimony cannot relieve Department Counsel of its burden of proof, nor can it impose a burden of disproof on the applicant.").

<sup>7</sup> The individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the fact.

<sup>8</sup> (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.

### **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.d:	Against Applicant
Paragraph 2, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraphs 3.b – 3.f:	Against Applicant
Subparagraph 3.g:	For Applicant

### **Conclusion**

In light of the record evidence and for all of 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 denied.

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Francisco Mendez  
Administrative Judge