



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



In the matter of:)
)
) ISCR Case No. 11-08714
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

1/28/2013

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the record, I conclude that Applicant mitigated security concerns under Guideline H, Drug Involvement, but she failed to mitigate security concerns under Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on August 27, 2007. On October 15, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within DOD for SORs issued after September 1, 2006.

Applicant’s notarized answer to the SOR was dated November 9, 2012. In her answer, she provided additional information, and she elected to have a hearing before

an administrative judge at the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on November 26, 2012. I convened a hearing on December 19, 2012, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced seven exhibits, which were marked Ex. 1 through 7 and entered in the record without objection. Applicant testified and called no other witnesses. She introduced four exhibits, which were identified and marked as Applicant's Ex. A through Ex. D and entered in the record without objection. DOHA received the hearing transcript (Tr.) on January 2, 2013.

Findings of Fact

The SOR contains two allegations of disqualifying conduct under Guideline H, Drug Involvement (SOR ¶¶ 1.a. and 1.b.), and eight allegations of disqualifying conduct under Guideline E, Personal Conduct (SOR ¶¶ 2.a., 2.b(i), 2b(ii), and 2c. through 2.g.). In her Answer to the SOR, Applicant admitted all allegations under both guidelines. Applicant's admissions are entered as findings of fact. (SOR; Answer to SOR.)

Applicant, who is 36 years old, married in 2003 and divorced in 2005. She is the mother of two young children, born to her and her fiancé, with whom she lives in a spouse-like relationship. Since 2006, she has been employed as a government contractor. Her current job title is information assurance analyst. (Ex.1; Tr. 26-30, 34-35.)

Applicant enlisted in a branch of the U.S. military reserve in 1998, when she was about 22 years old. In May 2006, after eight years of active reserve service, she received an honorable discharge. (Ex. 1; Tr. 31-34.)

Applicant was first awarded a security clearance in 2002, while serving in the active reserve. From that time until about 2010, she held secret and top secret level clearances, and she was also granted eligibility for access, when necessary, to sensitive compartmented information (SCI). (Ex. 1; Ex. 2; Tr. 33-35.)

Applicant began using marijuana while in high school. She estimated that her earliest use could have been in 1991. She used marijuana with her husband and when she was alone. From about 1994 until at least 2007, Applicant used marijuana about three times a week even though, from 2002 on, she held secret and top secret security clearances, with eligibility, on occasion, for access to SCI. Additionally, Applicant's marijuana use from 1998 to 2006 occurred while she served on active reserve duty in the military. She knew that illegal drug use by military personnel and government contractors holding security clearances was not permitted. The SOR alleges Applicant's illegal drug use while on active military duty and as a government contractor holding

security clearances with access to SCI at ¶¶ 1.a. and 1.b. and ¶¶ 2.f. and 2.g.¹ (Tr. 42-22.)

In 2002, Applicant completed a security clearance application. She failed to list her marijuana use from about 1994 through the date of her 2002 application. In 2002, during her military service, she was awarded a security clearance with eligibility for access to SCI. The SOR alleges at ¶ 2.e. that Applicant's failure to disclose her marijuana use was a deliberate falsification. Applicant admitted that her falsification was deliberate; she stated that she feared she would lose her job if she revealed her drug use (Ex. 2; Ex. 3; Tr. 50-51.)

Applicant used the illegal drug Ecstasy twice in 2002 or 2003.² In a July 2010 interview with an investigator from another federal government agency, Applicant stated that her Ecstasy use occurred in 2005 or 2006. At her hearing, Applicant was unable to recall precisely when she used Ecstasy, but stated she thought she used it before 2006, while she was still in the military. (Ex. 4; Ex. 5; Tr. 40-41.)

In 2004, Applicant completed a security clearance application. She failed to list her marijuana use from 1994 until the date of the 2004 application. She also failed to disclose her use of Ecstasy, which she told an authorized investigator occurred in 2002 or 2003. The SOR alleges at ¶ 1.d. that Applicant's failure to disclose her marijuana use and her Ecstasy use was a deliberate falsification. Applicant admitted that her falsification was deliberate. She said she feared she would lose her job if she revealed her illegal drug use. In 2004, during her military service, she was again granted a security clearance. (Ex. 2; Ex. 4; Tr. 50-51.)

In August 2007, as a government contractor, Applicant again completed a security clearance application. Section 24 on the security clearance application is identified as **Your Use of Illegal Drugs and Drug Activity**. The applicant is instructed as follows:

The following questions pertain to the illegal use of drugs or drug activity. You are required to answer the questions fully and truthfully, and your failure to do so could be grounds for an adverse employment decision or action against you, but neither your truthful responses nor information derived from your responses will be used as evidence against you in any subsequent criminal proceeding.

¹ The record establishes that Applicant was a member of the active reserve of one of the U.S. military services. In this capacity, she worked part-time, for one weekend a month, and for two weeks a year, she worked full-time. She was first granted a security clearance in 2002, while serving in the military reserve. After leaving military service in 2006, Applicant was employed by several defense contractors in positions requiring security clearances. (Ex. 1; Ex. 4; Ex. 5.)

² She admitted her use of Ecstasy in a February 2011 interview with an authorized investigator.

On August 27, 2007, Applicant completed Section 24a on the e-QIP, which reads as follows:

Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?

Applicant responded “No” to question 24a. The SOR alleges at ¶ 2.b(i) that Applicant deliberately failed to disclose that she used marijuana from about 1994 through at least February 2007. The SOR alleges at ¶ 2.b(ii) that Applicant failed to disclose that she used Ecstasy on two occasions in about 2003. (Ex. 1.)

Section 24b on the security clearance application that Applicant completed on August 27, 2007, asks: “Have you ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official, while possessing a security clearance, or while in a position directly and immediately affecting the public safety?” Applicant responded “No” to Section 24b. The SOR alleges at ¶ 2.c. that Applicant deliberately failed to disclose that she used marijuana regularly after being granted a security clearance in 2002 and after being granted a security clearance with eligibility for access to SCI in 2004. (Ex. 1.)

Applicant admitted that in her answers to Section 24a and 24b, she deliberately failed to disclose her marijuana use and her use of Ecstasy while holding security clearances. Again, she attributed her deceptive answers to her fear of losing her job. (Tr. 50-51.)

Applicant was interviewed several times by investigators from another federal government agency about her use of illegal drugs while holding a security clearance.³ In her first examination, in March 2010, she did not acknowledge her drug involvement. In a subsequent examination, she told the investigator that she had used marijuana from 1993 until 2003. She further stated that marijuana was the only illegal drug she had ever used. Under subsequent questioning, she admitted using Ecstasy one time in 2005. After still further questioning, she revealed she had used marijuana until 2007, and she had used Ecstasy twice in 2005 or 2006. (Ex. 5; Ex. 7; Tr. 37-42.)

Applicant expressed remorse for her drug involvement and her deception about her drug involvement. She stated that she had a miscarriage in 2007, which she attributed to her use of marijuana. Thereafter, she ceased using illegal drugs because

³ Applicant and Department Counsel stipulated that a Report of Investigation, summarizing Applicant’s interviews by another federal government agency on March 23, 2010, May 3, 2010, July 12, 2010, and August 16, 2010, would be admissible as evidence at her hearing, pursuant to Enclosure 3, ¶ E3.1.20, of the Directive. The Record of Investigation is marked as Ex. 5. Correspondence relating to the stipulation is marked as Ex. 6. The signed and dated stipulations of Applicant and Department Counsel are enclosed in the record and are marked as Ex. 7.

she wanted to become pregnant and bear healthy children. She has a four-year-old child and a ten-month-old child. She asserted that she no longer associates with individuals who use illegal drugs, and she stated she has no intent to use illegal drugs in the future. (Tr. 25-29, 45.)

Applicant underwent a voluntary substance abuse evaluation at a substance abuse counseling facility in July 2012. A counselor at the facility concluded: "Due to the results of [Applicant's] formal tests, and self-report, it does not appear that [she] has a substance abuse problem at this time." (Ex. A; Ex. B.)

Applicant also began weekly psychotherapy sessions in July 2012. Her counselor provided two summary statements based upon interviews with Applicant. Applicant stated that she initiated counseling "to show [a] good faith effort that I'm doing everything that I could possibly do." (Ex. C; Ex. D; Tr. 46-47.)

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 revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, 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 as to 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 or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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, about three times a week for at least 13 years, from approximately 1994 until 2007. She also used Ecstasy twice in about 2005 and 2006. Applicant used illegal drugs while holding high-level security clearances as an active reservist in the military and as a government contractor.

Applicant’s 13 years of illegal drug involvement 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 and her use of marijuana and Ecstasy after being granted at least three security clearances raise security concerns under AG ¶¶ 25(a) and 25(g). AG ¶ 25(a) reads: “any drug abuse [as defined at AG ¶ 24(b)].” AG ¶ 25(g) reads: “any illegal drug use after being granted a security clearance.”

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’s last use of marijuana was in 2007, more than five years ago. Her last use of Ecstasy was in 2006, more than six years ago. However, her marijuana use dated to at least 1994, and her use was frequent and ongoing until 2007. Since that time, Applicant has become a parent and is committed to a healthy family life. At present, she appears to possess good judgment about avoiding any future drug use. Moreover, she provided an assessment showing no current drug involvement and asserted her intent not to abuse drugs in the future. She testified credibly that she had abstained from drug use for an appropriate period, had disassociated from those with whom she had used drugs in the past, and had changed her conduct to avoid environments where drugs are used. She did not provide a signed statement of her intent not to abuse drugs in the future, with automatic revocation of her security clearance for any violation.

Applicant’s illegal drug use occurred periodically over a period of 13 years, suggesting a lifestyle choice that went beyond curiosity and experimentation. From 2002 until 2007, she used illegal drugs while holding multiple security clearances, thereby consciously jeopardizing her ability to protect classified information and deceiving military and civilian colleagues who relied upon her to perform her duties responsibly and with good judgment.

Because she seeks to avoid any future drug use, Applicant has enrolled in weekly counseling in order to understand her past drug use and the circumstances that caused it. She is serious about her duties as a parent, and she testified credibly that she has the incentive and will to avoid illegal drug use in the future. I conclude that AG ¶¶ 26(a) and 26(b) apply in mitigation to the facts of Applicant's case.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

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 personal conduct raises security concerns under AG ¶¶ 16(a), 16(b), and 16 (e)(1). AG ¶ 16(a) reads: "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." AG ¶ 16(b) reads: "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative." AG ¶ 16(e)(1) reads: "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing. . . ."

Applicant used illegal drugs while holding multiple security clearances over a period of five years. She admitted deliberately falsifying her answers to Sections 24a and 24b on three separate security clearance applications that she executed in 2002, 2004, and 2007. Moreover, she provided false and misleading information in multiple interviews with investigators from another federal government agency in 2010. Applicant's deceptions continued for over eight years, and had she not been questioned so many times by skilled interrogators, she might never have revealed her deliberate falsifications.

Applicant stated that she falsified her security clearance applications because she feared she would lose her job if she told the truth about her drug involvement and her drug use while holding security clearances. However, her deceptions caused the Government to trust her with important classified information that would not have been permitted had her ongoing drug use been known. Her multiple deceptions and her failure to disclose her drug use while holding security clearances made her vulnerable

to exploitation, manipulation, and duress. Her conduct reflects a pattern of questionable judgment, untrustworthiness, and unwillingness to abide by rules and regulations.

Applicant showed remorse for her personal conduct. However, the serious nature of her protracted deceptive conduct leads me to conclude that insufficient time has elapsed to demonstrate that she now is a trustworthy and reliable person whose judgment can be trusted to carry out the responsibilities attendant to holding a security clearance. I conclude that none of the Guideline E mitigating conditions applies 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 the facts and circumstances in this case. When Applicant suffered a miscarriage in 2007, she realized that drug use was not compatible with parenthood. Because she wanted to become a mother and raise healthy children, she stopped using illegal drugs, and she testified credibly that she has not used them since 2007. She now has two healthy children.

When she executed three separate security clearances during her military service and as a government contractor, Applicant was a mature adult. On each of those applications, Applicant was not candid about her illegal drug use. Additionally, she used illegal drugs while entrusted with security clearances. Moreover, she was not candid about her drug involvement while holding security clearances when she was interviewed by investigators at another federal government agency.

Applicant's protracted and long-standing lack of candor raises serious concerns about her current security worthiness. While Applicant demonstrated that she no longer

used illegal drugs, she failed to meet her burden of persuasion in mitigating the Government's allegations under the personal conduct adjudicative guideline. Overall, the evidence in this case leaves me with questions and doubts at this time about Applicant's judgment, eligibility, and suitability for a security clearance.

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:	FOR APPLICANT
Subparagraphs 1.a. - 1.b.:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a. - 2.g.:	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