



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



In the matter of:)	
)	
)	ISCR Case No. 11-11740
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

12/04/2013

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on February 1, 2011. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) on April 22, 2013, detailing security concerns under Guideline H, drug involvement, and Guideline E, personal conduct. The action was taken 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 For Determining Eligibility for Access to Classified Information* (AG), implemented on September 1, 2006.

Applicant received the SOR on May 8, 2013, and she answered it on May 21, 2013. Applicant requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on July 19, 2013. DOHA assigned the case to another administrative judge on July 25, 2013. For workload considerations, DOHA reassigned the case to me on August 6, 2013. DOHA issued a Notice of Hearing on September 16, 2013 for a hearing scheduled on October 8, 2013. Due to the Federal Government shutdown, DOHA cancelled the hearing. DOHA issued a second Notice of Hearing on October 30, 2013, and I convened the hearing as scheduled on November 19, 2013. The Government offered exhibits (GE) marked as GE 1 through GE 4, which were received and admitted into evidence without objection. Applicant testified. She submitted exhibits (AE) marked as AE A through AE C, which were received and admitted into evidence without objection. I held the record open until November 26, 2013, for Applicant to submit additional matters. Applicant timely submitted AE D - AE H, which were received and admitted without objection. The record closed on November 27, 2013, and DOHA received the hearing transcript (Tr.) on November 27, 2013.

Findings of Fact

In her Answer to the SOR, Applicant admitted all the factual allegations in the SOR. Her admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 37 years old, works as a electrical test engineer for a DOD contractor. She began working for her employer in January 2000, and she began her current position in February 2008. Her last three performance evaluations reflect that she performs at or above the successful level in various aspects of her job. Her supervisor describes her as a highly competent lead engineer and attests to her trustworthiness and honesty in the job.¹

Applicant graduated from college in 2000 with a bachelor's degree in mathematics, and in December 2004 with a masters degree in business administration. She is single. Her hobbies include kick ball, golf, snow boarding, and sky diving.²

Applicant often traveled out-of-state to participate in sky diving events. During some of these trips between 2005 and 2009, Applicant attended parties thrown by other sky diving participates at the end of a sky diving event, usually at an individual's home. People brought various drugs to the parties. Applicant often refused to use the drugs, but on several occasions in response to peer pressure, she decided to experiment with drugs. Over four years, she smoked a marijuana joint once, she ingested hallucinogenic mushrooms twice, and she snorted cocaine on four occasions. Her first use occurred in 2005, her second use occurred one to two years later, and her last use a year later in

¹GE 1; AE D - AE F; AE H: Tr. 17, 19.

²GE 1; GE 4; Tr. 17-18, 24-25.

2009. She did not purchase these drugs nor did she manufacture or sell these drugs. Applicant held a security clearance at the times she used illegal drugs.³

Applicant has not been tested for drugs at work.⁴ She submitted to a drug test at her own expense on September 23, 2013. The test results are negative. She met with a licensed psychologist on September 30, 2013. The psychologist conducted a thorough investigative interview, a mental status exam, and an addiction severity index life assessment. The psychologist found Applicant forthcoming, nonevasive in her answers, and willing to give detailed answers to questions. Applicant's cognition and responses were consistent with a person free from mind-and mood-altering chemicals. The addiction severity index results showed no substance dependence or abuse. Finally, the psychologist noted that Applicant submitted hair follicles for drug testing. Hair follicle drug tests can detect the presence of substances in the body up to 120 days. The psychologist concluded that Applicant did not have a drug problem and that she should be granted her security clearance. The psychologist did not recommend drug treatment or counseling. Applicant does not believe that she is addicted to drugs or in need of counseling.⁵

Applicant submitted a notarized statement of intent not to use illegal drugs in the future or to associate with anyone who uses drugs. She agreed to the automatic revocation of her security clearance if she used illegal drugs. She does not associate with drug users, and she has not been sky diving for two years.⁶

Applicant completed and signed a Standard Form 86 (SF-86) on August 11, 2009. She denied any prior drug use in her answers to questions a and b in Section 23, which asks an applicant about prior drug use in the last seven years. When she met with an investigator for the Government in 2009 or 2010, she did not disclose her drug use from 2005 to 2009.⁷

During a pre-polygraph interview in late 2010 or early 2011, Applicant revealed her drug use to the polygraph examiner without being confronted about her drug use. Her revelation resulted in the loss of a high-level clearance and a new DOD investigation. When Applicant completed her e-QIP on February 1, 2011, she detailed her drug use from 2005 until 2009. She also acknowledged that her security clearance

³GE 1 - GE 3; Tr. 188-20, 41, 43, 45.

⁴Her employer rarely conducts random drug tests. Tr. 32

⁵AE A; AE B; Tr. 20-21, 43, 45-46.

⁶AE C; Tr. 24, 38-39.

⁷GE 1; GE 4.

had been revoked in January 2011. She stated that she was unsure of the reasons because she had not received a letter of explanation.⁸

The SOR alleges that Applicant intentionally falsified her answers about her drug use on her August 11, 2009 SF-86 and during her 2009 or 2010 personal subject interview. (¶¶ 2.a, 2.b, 2.c) In her March 2011 affidavit, during her personal subject interview in 2011, in her response to the SOR, and at the hearing, Applicant admitted that she intentionally falsified her 2009 SF-86 and that she intentionally falsified facts about her past drug use during her 2009 or 2010 personal subject interview.⁹

In addition to the above falsification allegations, the SOR also alleges that Applicant intentionally denied the reasons for the revocation of her security clearance when she completed her e-QIP on February 1, 2011. While she admitted this allegation in her response to the SOR, she never acknowledged falsifying this information in her March 2011 affidavit or in her 2011 personal subject interview. At the hearing, she denied knowledge as to the specific reason for the revocation because she had not received the letter of revocation, although she admitted that she was “fairly certain” as to why her clearance had been revoked. Her facility security officer (FSO) told her and her supervisor about the revocation in a January 2011 meeting, but did not give her a reason for the revocation. Her FSO prepared a letter of revocation dated January 25, 2011, which states that Applicant’s security clearance was being revoked because of her illegal drug use while holding a security clearance and her deliberate falsification of these facts during her 2010 security processing. This letter is post marked January 31, 2011, and it was mailed to her home address by restricted delivery with a return receipt requested. The exact date of delivery of this letter is unknown as the return receipt was not part of the record.¹⁰

Applicant regrets her behavior. She states that she would never do anything to compromise national security. If someone approached her to provide classified information, she would refuse and report the incident to her FSO.¹¹

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 used in evaluating an applicant’s eligibility for access to classified information.

⁸GE 1; Tr. 21, 26, 35-37, 38-40.

⁹GE 1 - GE 4; Tr. 21.

¹⁰GE 2; GE 3; AE G; Tr. 37-38.

¹¹Tr. 26, 41-42, 44.

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 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, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for 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 an 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

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.

(a) Drugs are defined as mood and behavior altering substances, and include:

(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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

(a) any drug abuse (see above definition);

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

(g) any illegal drug use after being granted a security clearance.

Applicant experimented with marijuana, hallucinogenic mushrooms, and cocaine approximately seven times over a four-year period of time. During this time, she held a security clearance. To use these drugs, she possessed them. The psychological report indicates that she is not a drug abuser or drug dependent. A security concern is raised under AG ¶¶ 25(a), 25(c), and 25(g).

The Drug Involvement guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 26(a) through ¶ 26(d), and the following are potentially applicable:

(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; and,

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

Applicant last used drugs four years ago. She has changed her friends and no longer associates with individuals who use drugs. She has not been sky diving in two years and has no immediate plans to resume this activity. She has agreed to the revocation of her security clearance should she use illegal drugs in the future. She has mitigated the security concerns raised in SOR ¶¶ 1.a, 1.b, and 1.c.

However, Applicant has not fully mitigated the security concerns raised under this guideline because she experimented with illegal drugs while holding a security clearance. When she did this conduct, she betrayed a sacred trust given to her by United States government. She exercised poor judgment when she decided to use illegal drugs in her thirties. She did so when she knew it was against the rules at work and would impact her eligibility for a security clearance. The SOR allegation in ¶ 1.d is found against Applicant.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(a) 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; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

The Government alleges two incidents of falsification by Applicant when she completed her 2009 SF-86, one incident of falsification when she met with the security clearance investigator in 2009 or 2010, and one incident of falsification when she

completed her 2011 e-QIP. For AG ¶ 16(a) to apply, Applicant's omissions must be deliberate. The Government established that Applicant omitted material facts from her 2009 security clearance application when she answered "no" to questions about her drug use. She also omitted material facts about her drug use during her 2009 or 2010 personal subject interview, and about the reasons for the revocation of security clearance in her 2011 e-QIP. This information is material to the evaluation of Applicant's trustworthiness and honesty. Applicant admitted the falsification of her 2009 SF-86 and her failure to provide information about her drug use during her 2009 or 2010 personal subject interview. At the hearing, she denied intentionally withholding information about the reason for the revocation of her security clearance in January 2011.

When the allegation of falsification is controverted, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.¹²

Applicant readily admitted intentional falsification of her 2009 SF-86 and her intentional failure to provide information about her drug use to the security investigator during her 2009 or 2010 personal subject interview. A security concern is established under AG ¶¶ 16(a) and 16(b) as to SOR allegations 2.a, 2.b, and 2.c.

When she completed her e-QIP on February 1, 2011, Applicant acknowledged that her security clearance had been revoked, then stated that she had not received the letter explaining the reasons for the revocation. She met with her supervisor and FSO in January 2011, and they told her that her security clearance had been revoked, but did not give her further information. At the hearing, she acknowledged she was "fairly certain" as to why her clearance had been revoked, but since she did not have the reasoning, she answered "uncertain". Following the January 2011 meeting, her FSO prepared a letter explaining the reasons for the revocation of her security clearance on January 25, 2011, but did not mail it until January 31, 2011. He mailed the letter to Applicant's home address. She could not have received this letter before she completed her e-QIP, particularly since he requested a return receipt to show that she received the letter. As an engineer, Applicant is trained to be precise. Her hearing testimony about her "uncertain" answer reflects that she needed a precise explanation before she gave a conclusive reason on her e-QIP. She did not intentionally falsify her answer on her 2011 e-QIP. SOR allegation 2.d is found in favor of Applicant.

The Personal Conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 17(a) through ¶ 17(g), and the following are potentially applicable:

¹²See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant admitted her illegal drug use in her 2011 e-QIP. Without her admission, the Government would not have learned about it. Her admission came about 18 months after the completion of her 2009 SF-86 and months after her personal subject interview, which can not be considered prompt. Once she came forward about her conduct, she has been honest and forthright about what she did. She acknowledged and continues to acknowledge her lies. Her recent openness about her illegal drug use reflects positive steps taken by her to mitigate the security concerns raised by her intentional falsification of her 2009 SF-86 and her failure to be honest during her 2009 or 2010 personal subject interview. She partially mitigated the security concerns raised by her personal conduct. However, the security concerns raised by her personal conduct cannot be fully mitigated for reasons discussed under the whole-person analysis, *infra*.

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 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility

for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is well-educated and a highly productive employee. Her work performance and her supervisor's letter of recommendation reflect her employer's favorable view of her work. She generally complies with the law and the rules of the work place. During a four-year period of time, she experimented with three different illegal drugs after succumbing to peer pressure. She not only used illegal drugs, but she deliberately falsified her 2009 SF-86 answers about drug use, and she deliberately decided not to tell the security clearance investigator about her drug use during her 2009 or 2010 personal subject interview. Her decision to lie reflects on her ability to be trusted and to be honest. Her decision to use drugs while holding a security clearance reflects negatively on her judgment and reliability. When viewed as a whole, her lies to the Government and her use of illegal drugs while holding a security clearance raise questions about her trustworthiness, her exercise of good judgment in the management of classified information, and her ability to withstand pressure from outside sources.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from her drug involvement and personal conduct.

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
Subparagraphs 1.a-1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.c:	Against Applicant
Subparagraph 2.d:	For 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.

MARY E. HENRY
Administrative Judge