



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



In the matter of:)	
)	
)	ISCR Case No. 11-14158
)	
Applicant for Security Clearance)	

Appearances

For Government: Gina L. Marine, Esq., Department Counsel
For Applicant: *Pro se*

11/12/2013

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, drug involvement. The Government failed to establish deliberate falsification under Guideline E, personal conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On March 20, 2013, 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 (EO) 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) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on April 8, 2013, and requested a hearing. The case was assigned to me on August 14, 2013. The Defense Office of Hearings and

Appeals (DOHA) issued a notice of hearing on August 21, 2013, and the hearing was convened as scheduled on September 11, 2013. The Government offered exhibits (GE) 1 through 4, which were admitted into evidence without objection. The Government's exhibit index was marked as hearing exhibit (HE) I. Applicant testified and offered exhibits (AE) A through C, which were admitted into evidence without objection. The record was kept open for Applicant to submit additional evidence. She submitted AE D in a timely fashion and it was admitted without objection. DOHA received the hearing transcript (Tr.) on September 25, 2013. From October 1, 2013, to October 10, 2013, I was a furloughed federal employee and was prohibited from working on any cases during that time period.

Findings of Fact

In Applicant's answer, she admitted all the allegations in the SOR, except for SOR ¶ 2.a. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 35 years old. She is divorced and has one daughter, age 13, who lives with her. Since December 2001, she has worked for a defense contractor as a mission supervisor. She has a high school diploma and has taken some college courses. She served on active duty in the Air Force for four years, achieved the rank of senior airman (E-4), and was honorably discharged in January 2001.¹

Applicant's conduct raised in the SOR includes: (1) using marijuana about 30 times from about January 2004 to June 2010; using marijuana on at least one occasion in August 1995; using marijuana after being granted a security clearance (See SOR ¶¶ 1.a – 1.c); and (2) deliberately providing false information when asked on her security clearance application (SCA), dated July 2011, if she ever used a controlled substance while holding a security clearance (See SOR ¶ 2.a).

In her 1999 SCA, Applicant admitted using marijuana on one occasion before she joined the Air Force in 1995. She did not further elaborate on this use. She was initially granted a security clearance in approximately September 2000 and has held a clearance since then. In July 2011, as part of her security clearance periodic review, she completed another SCA. When asked in Section 23a if she had illegally used any controlled substances within the last seven years, she answered "yes" and further listed her period of use between January 2004 and June 2010. She quantified and described her use as approximately 30 times for recreational use. The next question (Section 23b) asked if she ever illegally used any controlled substance while holding a security clearance to which she answered "no."²

¹ Tr. 5, 24, 31-32; GE 1.

² GE 1, 2.

In August 2011, Applicant was interviewed by an investigator concerning her security clearance. She elaborated on her admitted use of marijuana between 2004 and 2010 by stating that she used marijuana with old friends that stopped by her house or at music concerts that she attended. The method of use was by smoking “joints.” She knew it was illegal at the time and was aware that she held a security clearance, but she does not know why she smoked it on those occasions. She stopped smoking marijuana in 2010 because she ended a relationship and also wanted to change her lifestyle. She also told the investigator that she mistakenly answered “no” to the SCA question about marijuana use while holding a security clearance. She misread the question.³

During her hearing testimony, Applicant was consistent concerning the details of her previous uses and her mistake in answering “no” to the SCA question about any marijuana use while holding a security clearance. She researched the possibility of providing hair and/or urine for drug testing and indicated she was willing to do so. However, her current employer has no drug testing policy or program and could not administer it. She knew using marijuana was illegal under both federal and state law at the time she was using it. She also knew she could not use marijuana while holding a security clearance.⁴

Applicant offered three character letters attesting to her trustworthiness, honesty, professionalism, and integrity. One letter’s author wrote that he was unaware that she had ever broken any laws, apparently unaware of her past illegal marijuana use. She also presented a written statement of intent not to use any illegal drugs in the future.⁵

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.

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.

³ GE 3.

⁴ Tr. 25-26, 38, 43.

⁵ AE C-D.

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, and 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 that an applicant may deliberately or inadvertently fail to 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 drug involvement security concern:

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.

I have considered all of the evidence in this case and the disqualifying conditions under drug involvement AG ¶ 25 and found the following relevant:

- (a) any drug abuse; and

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

One time in 1995 and on about 30 occasions from 2004 to 2010, Appellant illegally used marijuana. Her uses from 2004 to 2010 occurred while she was holding a security clearance. I find that both the above disqualifying conditions apply.

I have considered all of the evidence in this case and the mitigating conditions under drug involvement AG ¶ 26 and found the following relevant:

(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.

Although Applicant's 1995 use of marijuana was remote and infrequent, her uses from 2004 to 2010 were more frequent. Her period of abstinence is insufficient to demonstrate her intent not to use marijuana in the future. Even though three years have passed since her last marijuana use in 2010, her use while holding a security clearance and knowing her actions were illegal are cause for significant concern about her judgment. She did not establish that recurrence is unlikely. While she apparently has abstained from marijuana use for several years and provided a statement about her intent not to use it in the future, her past actions, particularly her conscious decision to use marijuana while holding a security clearance, cast doubt on her current reliability, trustworthiness, and good judgment. It is too soon to tell whether her use will recur. Although she claims she no longer uses drugs and supplied her written statement of future intent, given her history of use while holding a security clearance, this is not enough to show a demonstrated intent not to use drugs in the future. AG ¶¶ 26(a) and 26(b) partially apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying condition is potentially applicable:

(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.

Applicant answered “no” on her 2011 SCA when asked whether she used any illegal drugs while holding a security clearance. Her explanation is that she misread the question and did not intend to intentionally supply false information. This explanation has merit considering that she provided specific details about the timeframe and number of marijuana uses in response to the preceding question. These answers were truthful and the dates included the period that she held a security clearance. It would make no sense for her to then intentionally falsify the next question when she already provided the answer through her detailed response to the previous question. I found her testimony credible on this point. She did not deliberately falsify her 2011 SCA when she answered “no” about using marijuana while holding a security clearance. AG ¶ 16(a) does not apply. Having reached this result, it is not necessary to discuss the potential application of the mitigating conditions under this guideline.

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 the applicant’s conduct and all the 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 surrounding this case. I considered Applicant’s character letters and her prior honorable military service. However, I also considered that she used marijuana on multiple occasions while holding a security clearance over a seven-year period. Additionally, she was over 30 years old and at the time of her last use a mother raising a small child. Despite the presence of some mitigation, Applicant failed to provide sufficient evidence to fully mitigate the security concerns.

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement. I also find that she did not deliberately provide false information on her SCA.

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

Robert E. Coacher
Administrative Judge