



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



In the matter of:)
)
-----) ISCR Case No. 15-05800
)
Applicant for Security Clearance)

Appearances

For Government:
Andrew Henderson, Esquire, Department Counsel

For Applicant:
Leon J. Schachter, Esquire
Bigley Ranish LLP

December 22, 2016

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted her most recent Electronic Questionnaire for Investigation Processing (e-QIP) on February 25, 2015. (Government Exhibit 1.) On June 16, 2016, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H (Drug Involvement) concerning Applicant. The action was taken 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on July 15, 2016 (Answer), and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on August 22, 2016. This case was originally assigned to a different administrative judge on August 24, 2016. This case was reassigned to me on September 14, 2016.

The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on September 14, 2016. I convened the hearing as scheduled on November 7, 2016. The Government offered Government Exhibits 1 through 3, which were admitted without objection. Applicant submitted Applicant Exhibits A through R, which were admitted without objection, called one additional witness, and testified on her own behalf. Applicant asked that the record remain open until November 28, 2016, for the receipt of additional documents. Applicant's Exhibit S was received in a timely manner and admitted into the record without objection. DOHA received the transcript of the hearing (Tr.) on December 9, 2016. The record closed on November 28, 2016. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

Applicant is 27, and single. She has a bachelor's degree in aeronautical engineering. She is employed by a defense contractor and seeks to retain a security clearance in connection with her employment. Applicant admitted both allegations in the SOR, with explanations. Applicant's admissions are incorporated into the following findings of fact.

Paragraph 1 (Guideline H, Drug Involvement)

The Government alleges in this paragraph that Applicant is ineligible for clearance because she used illegal drugs, specifically marijuana no more than seven times, from 2006 through 2014. She also used marijuana one time in 2014 after obtaining a security clearance in 2009. (Tr. 23-29.)

Applicant began using marijuana on an experimental basis in high school and then in early days of college. She admitted this use on her first e-QIP, which she filled out in 2009. (Tr. 31-34; Government Exhibit 3 at Section 23.)

Applicant began working full time with her employer in 2011, after she graduated from college. She used marijuana one additional time after starting work. This was in September 2014 when she used marijuana with two elderly relatives at an annual family reunion. They were sharing a marijuana cigarette and Applicant inhaled from it one time when they offered it to her. She knew that drug use was incompatible with holding a security clearance. Accordingly, concerning her decision to use marijuana on that occasion she stated, "I think that I was an immense idiot." (Tr. 40.)¹

Applicant told the Government about her September 2014 use of marijuana when she filled out a second e-QIP in February 2015. (Tr. 34-35; Government Exhibit 1 at Section 23.)

¹See Applicant Exhibit H.

Applicant submitted a signed statement of intent not to abuse drugs in the future, stating that she agreed to random drug testing and to the “immediate and unqualified revocation of my security clearance in the event of any future positive drug test.” (Applicant Exhibit R.)

Mitigation

Applicant received her degree from a prestigious university. Two people who knew Applicant there submitted statements on her behalf. One of them is a department chair and associate professor, the other an advisor to a specific engineering contest team. Applicant was a member of that team for four years. The writers state that Applicant received the first-year engineering student award at her school. She is described as someone whose “dedication, passion, hard-work, and integrity [were] quite [evident] and well beyond that of her peers.” Both writers highly recommend her for a position of trust. (Applicant Exhibits B and F.)²

Applicant also submitted letters of recommendation from co-workers, as well as other people who work in the defense industry. She is described as “visionary,” a person of “integrity,” and a “straight arrow.” Applicant also called a friend as a witness. She works in the defense industry, but not in Applicant’s company. All these people hold security clearances, understand the nature of their responsibilities, and recommend Applicant for a position of trust. (Tr. 42-48; Applicant Exhibits C, D, E, and G.)

Applicant has worked full time for her current employer since 2011. The four annual reports that she has received show her to be a successful and valued employee. Her overall rating each year is “Significantly Exceeded Commitments.” (Applicant Exhibits L, M, N, and O.)³

Finally, Applicant is a licensed private pilot, and fully understands that drug use is incompatible with holding a pilot’s license. She has also been deeply involved over the past few years in the annual convention of an internationally known aviation organization. (Tr. 19-23; Applicant Exhibits P and Q.)

Policies

Security clearance decisions are not made in a vacuum. 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 as appropriate in evaluating an applicant’s eligibility for access to classified information.

²Applicant submitted seven letters of recommendation. (Applicant Exhibits B through H.) All the writers stated that they had reviewed the SOR and were aware of the Government’s specific security concerns.

³See Applicant Exhibits I, J, and K.

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 AG ¶ 2(a) describing 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, "Any 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination 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

Paragraph 1 (Guideline H - Drug Involvement)

The security concern relating to the guideline for Drug Involvement is set out in 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. 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; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under AG ¶ 25 and especially considered the following:

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

Applicant admitted the use of marijuana four times when in high school from approximately 2005 through 2007, and one time in 2014. She held a security clearance at the time of the last use, which occurred with relatives at an annual event held by her extended family.

I have studied all of the mitigating conditions under AG ¶ 26 and especially considered the following:

- (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 last used marijuana about two years before the record closed. This use was after not using it for about seven years. Applicant freely admitted at the hearing that

her conduct in 2014 was foolish, and she looks back on it with regret. She is a talented young woman with a fine career ahead of her. The reality of this proceeding has had a profound impact on her, as demonstrated at the hearing through her testimony and demeanor. This one-time incident was an aberration, and I am convinced not something that will be repeated in the future.⁴

In addition to two years of continued abstinence, Applicant submitted a signed statement of intent. She clearly understands the negative impact that any further drug use would have on her future.

Applicant offered sufficient evidence that would support mitigation under AG ¶¶ 26(a), and (b). Paragraph 1 is found for Applicant.

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 applicant's conduct and all the circumstances. 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 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, including her age under AG ¶

⁴Department Counsel expressed concern that Applicant did not self-report her conduct in 2014 to her Facility Security Officer (FSO) immediately, but left it until she filled out an e-QIP (Government Exhibit 1) in February 2015. (Tr. 34-38.) Applicant's counsel argued that such a requirement did not exist and submitted portions of Applicant's employer's "Company Security Manual" in support. (Applicant Exhibit S.) Section 1-4 of that Manual is entitled, "Reporting Requirements of Cleared and Accessed Employees." Subsection 1-400 gives examples of adverse information that must be reported, including financial problems and arrests. Drug use is not specifically mentioned. *But cf.* DoD 5200.2-R *Personnel Security Program*, Section 9.1.4, "Individual Responsibility," which states that clearance holders must promptly report to their security officers any of the types of conduct set forth in the Guidelines of the Directive, such as drug use. In deciding whether Applicant has mitigated the security significance of her drug use, I have specifically considered her failure to immediately inform her FSO, the fact that she freely admitted this drug use five months later on her e-QIP, and her earlier admissions of drug use on her 2009 e-QIP. Those disclosures, combined with evidence as to her character, work performance, recommendations from peers, and outside activities, outweigh the mistake she made by not promptly reporting the drug use to her FSO after the party.

(2)(a)(4). Under AG ¶ 2(a)(3), Applicant's conduct is not recent. Based on the state of the record, I find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)), and that there is also little to no possibility of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from her drug use.

On balance, it is concluded that Applicant has successfully overcome the Government's case opposing her request for a DoD security clearance. Accordingly, the evidence supports a finding for Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

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 and 1.b:

For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge