



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



In the matter of:)
)
 -----) ISCR Case No. 14-05328
)
 Applicant for Security Clearance)

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Applicant: *Pro se*

01/12/2016

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges and the record establishes: (1) she provided false information about her history of marijuana use on her August 31, 2013 Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86) (Government Exhibit (GE) 1); and (2) she used marijuana four times from approximately April 2004 to July 2008. Her marijuana use is not recent and ceased before she received a security clearance. Drug involvement security concerns are mitigated; however, personal conduct security concerns are not mitigated. Access to classified information is denied.

History of the Case

On November 13, 2009, and August 31, 2013, Applicant completed and signed two SF 86s. (GE 1; GE 2) On March 28, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF could not make the affirmative finding under the Directive that it is clearly consistent with the national interest to grant

or continue a security clearance for her, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. (Hearing Exhibit (HE) 3) Specifically, the SOR set forth security concerns arising under AGs E (personal conduct) and H (drug involvement).

On April 9, 2015, Applicant responded to the SOR, and she requested a hearing. On September 28, 2015, Department Counsel was ready to proceed. On October 7, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for November 9, 2015. (HE 1) The hearing was held as scheduled. During the hearing, Department Counsel offered four exhibits, which were admitted into evidence without objection. (Transcript (Tr.) 14; GE 1-4) Applicant did not offer any documents into evidence. (Tr. 10) On November 23, 2015, I received a transcript of the hearing.

Findings of Fact¹

In Applicant's SOR response, she denied all of the SOR allegations, and she also provided some admissions as well as extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 29-year-old operations specialist, who is seeking a security clearance to enhance her employment with a defense contractor. (Tr. 5) In 2004, she graduated from high school, and in 2008, she received a bachelor's degree. (Tr. 5-6) She majored in psychology and minored in criminal justice. (Tr. 6) In 2015, she was awarded a master's degree in homeland security management. She requires three additional courses to complete her master's degree in business administration. (Tr. 35)

In 2006, Applicant joined a military service, and she is currently a petty officer first class (E-6). (Tr. 6) Her military specialty is operations specialist. (Tr. 7) She was accepted into officer's candidate school beginning in January 2016. (Tr. 6, 23) She has never been married. (GE 1)

Personal Conduct and Drug Involvement

Applicant's history of marijuana use is documented in her February 9, 2010 enlistment documentation (DD Form 1966/3) and in her November 13, 2009 SF 86. (GE 2; GE 4) Applicant denied any marijuana use in her August 31, 2013 SF 86, April 4, 2014 Office of Personnel Management (OPM) personal subject interview (PSI), SOR response, and at her hearing. (Tr. 16-36; GE 1; GE 3; SOR response)

In her DD Form 1966/3 Applicant disclosed in response to question 26 that she had some involvement with illegal drugs. In Section VI, Remarks, she explained that she "[e]xperimented with marijuana 4 times between 2004-2008. Last time was July 2008." (GE 4) The DD Form 1966/3 includes the following certification statement:

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

I certify that the information given by me in this document is true, complete, and correct to the best of my knowledge and belief. I understand that I am being accepted for enlistment based on the information provided by me in this document; that if any of the information is knowingly false or incorrect, I could be tried in a civilian or military court and could receive a less than honorable discharge which could affect my future employment opportunities. (GE 4)

In Section 23, Illegal Use of Drugs or Drug Activity, of Applicant's November 13, 2009 SF 86, she was asked whether in the last seven years she used marijuana. (Tr. 16-19; GE 2) Applicant answered, "Yes," and explained:

Dates of use/activity

From (Month/Year): **04/2004 (Estimated)**

To (Month/Year): **07/2008 (Estimated)**

Type of controlled substance(s) **Marijuana**

Explain (nature of use/activity, frequency of activity and number of times used)

Experimental, very infrequent use, 4 times used in 4 years (GE 2; emphasis in original)

In Section 23, Illegal Use of Drugs or Drug Activity, of Applicant's August 31, 2013 SF 86, she was asked whether in the last seven years she used marijuana. (GE 1) Applicant answered, "No." (Tr. 29; GE 1)

On April 4, 2014, an OPM investigator confronted Applicant with her prior admissions of marijuana use on her enlistment documentation and on her November 13, 2009 SF 86.² Applicant told the OPM investigator that she had no idea how the information about her marijuana use came to be on her enlistment documentation and on her November 13, 2009 SF 86. She said she had never used marijuana. She denied that she was ever in the presence of illegal drug use, and she did not associate with anyone that used illegal drugs. There is no mention of her recruiter in her OPM PSI.

At her hearing, Applicant said that she filled out her November 13, 2009 SF 86 and her February 9, 2010 DD Form 1966/3 at her military recruiter's office with the help of her recruiter. (Tr. 18-19, 26-28; GE 2; GE 4) She claimed that she told her recruiter that she did not use illegal drugs; however, others used drugs in her vicinity. (Tr. 19-22, 31) He said it would be best to disclose the drug use; he checked yes; and he filled out her SF 86 for her. (Tr. 20, 24, 30-31) She conceded that it did not make sense for her recruiter to tell her to falsely admit to marijuana use when she did not use marijuana. (Tr. 24) She thought the comment about "experimenting" with marijuana resulted from a miscommunication with her recruiter. (Tr. 24) She denied that she reviewed the comment about experimental marijuana use before signing her SF 86 and before

²The source for the information in this paragraph is Applicant's April 4, 2014 Office of Personnel Management (OPM) personal subject interview (PSI). (GE 3)

signing her DD Form 1966/3. (Tr. 25, 28-29) Applicant denied that she used marijuana, and she denied that she intentionally provided false information about her marijuana use on her November 13, 2009 SF 86. (Tr. 31-32, 35-36; SOR response)

I accept Applicant's statements that she does not associate with drug-using associates and contacts, and she does not go to environments where drugs are used. (GE 3) However, she did not provide a signed statement of intent with automatic revocation of clearance for any violation.

Character Evidence

Applicant started a sorority at her college. (Tr. 33) She spent thousands of hours volunteering for numerous charitable organizations. (Tr. 34-35) From 2005 until 2014, she worked in retail and in a military service, where she was subject to random urinalysis testing to detect illegal drug use. (Tr. 34) There is no evidence of positive urinalysis test results indicating illegal drug use.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "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 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. This decision is not based, in whole or in part, on any express or implied determination

about applicant's allegiance, loyalty, or patriotism. Thus, any decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Drug Involvement

AG ¶ 24 articulates the security concern concerning drug involvement:

[u]se 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.

AG ¶ 25 describes two drug-involvement disqualifying conditions that could raise a security concern and may be disqualifying in this particular case: "(a) any drug abuse;"³ and "(c) illegal drug possession." AG ¶¶ 25(a) and 25(c) apply because Applicant used marijuana four times from April 2004 to July 2008.⁴ She possessed

³AG ¶ 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."

⁴AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

(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.

marijuana before she used it. Consideration of mitigating conditions is required. The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶ 26 provides for potentially applicable drug involvement mitigating conditions:

(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;

(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.

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substance. See Sch. I(c)(9). See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no “bright line” rules for determining when such conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant’s most recent marijuana use occurring approximately 17 months before the hearing was not recent. If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant recognized the adverse impact that drug use will have on her career. She is on active duty in the military, and is seeking employment by a DOD contractor. Illegal drug use is incompatible with her attendance at officer’s candidate school. There is no evidence of marijuana use after July 2008. She intends to continue to abstain from drug possession and use. AG ¶ 26(a) applies to her illegal-drug-related conduct because it is not recent. Her marijuana use “happened under such circumstances that it is unlikely to recur.” Her marijuana use ended in July 2008 and “does not cast doubt on [her] current reliability, trustworthiness, or good judgment.”⁵

AG ¶ 26(b) applies. Applicant has disassociated from her drug-using associates and contacts, and she does not go to environments where drugs are used. However, she did not provide “a signed statement of intent with automatic revocation of clearance for any violation.”

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse drugs after being issued a prescription that is lawful under federal law. She did not provide proof of satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, and a favorable prognosis by a duly qualified medical professional.

In conclusion, Applicant possessed and used marijuana four times from April 2004 to July 2008. After completing college, she joined a military service that prohibits members from using illegal drugs, and she complied with her service’s restrictions against illegal drug use. The motivations to stop using illegal drugs are evident. She understands the adverse consequences from illegal drugs.⁶ She has demonstrated a sufficient track record of no drug abuse to eliminate drug involvement as a bar to her access to classified information.

⁵In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

⁶Approval of a security clearance, potential criminal liability for possession of drugs and adverse health, employment, and personal effects resulting from drug use are among the strong motivations for remaining drug free.

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 one condition that could raise a security concern and may be disqualifying with respect to the alleged falsification of Applicant's August 31, 2013 SF 86 used to process the adjudication of her security clearance in this case:

(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.⁷

In Section 23, Illegal Use of Drugs or Drug Activity, of Applicant's August 31, 2013 SF 86, she was asked whether in the last seven years she used marijuana. Applicant answered, "No." She knew that she used marijuana about two or three times from August 2006 to July 2008. AG ¶ 16(a) is established.

AG ¶ 17 provides five conditions that could mitigate security concerns in this case:

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

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is

⁷The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant deliberately and improperly denied that she used marijuana in the previous seven years on her August 31, 2013 SF 86, when in fact she knew that she used marijuana about two or three times from August 2006 to July 2008. She maintained her denial of marijuana use in her OPM PSI, SOR response and at her hearing. I accept Applicant's history of marijuana use as documented in her February 9, 2010 DD Form 1966/3 and in her November 13, 2009 SF 86 as more credible than Applicant's OPM PSI, SOR response, and statement at her hearing. Applicant's recruiter had no known reason to fabricate the content of her February 9, 2010 DD Form 1966/3 and in her November 13, 2009 SF 86 document, and they were written closer in time or more contemporaneous to Applicant's marijuana use than Applicant's statements in her August 31, 2013 SF 86, OPM PSI, SOR response, and at her hearing.

In sum, Applicant's falsification of her August 31, 2013 security clearance application by intentionally denying any marijuana use in the previous seven years raised a security concern. She did not admit her conduct and take responsibility for her poor decision despite being given multiple opportunities to do so. Instead she attempted to blame her false statement on her recruiter. No mitigating conditions apply. Guideline E concerns are not mitigated.

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 have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant has achieved important employment goals, demonstrating some self-discipline, responsibility, and dedication; however, this evidence is insufficient to mitigate security concerns. Applicant is a 29-year-old operations specialist seeking a security clearance to enhance her employment with a defense contractor. (Tr. 5) In 2008, she received a bachelor's degree with a major in psychology and minor in criminal justice. In 2015, she was awarded a master's degree in homeland security management. She requires three additional courses to complete her master's degree in business administration. In 2006, she joined a military service; she is currently a petty officer first class; and she was accepted into officer's candidate school beginning in January 2016. Applicant started a sorority at her college. She spent thousands of hours volunteering for numerous charitable organizations. She ended her marijuana use in 2008 before being given access to classified information.

The adverse information is more significant. Applicant's falsification of her August 31, 2013 security clearance application by intentionally denying any marijuana use in the previous seven years raised a serious security concern. She did not admit her conduct and take responsibility for her poor decision to lie about her history of marijuana use on her 2013 security clearance application despite being given multiple opportunities to do so. Instead she attempted to blame her false statement on her recruiter. The protection of national security relies on applicants to self-report conduct that jeopardizes security, even when that disclosure might damage the applicant's career. Applicant cannot be trusted to disclose potentially derogatory information, and her reliability, trustworthiness and ability to protect classified information is not established.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Drug involvement security concerns are mitigated; however, personal conduct security concerns are not mitigated.

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 E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

MARK HARVEY
Administrative Judge