



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



In the matter of:

ADP Case No. 14-05080

Applicant for Public Trust Position

Appearances

For Government: Braden Murphy, Esq., Department Counsel

For Applicant: *Pro se*

06/06/2016

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant has not mitigated the drug involvement trustworthiness concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On November 30, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline H, drug involvement, and Guideline F, financial considerations. The action was taken under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

On January 23, 2016, and February 22, 2016, Applicant submitted answers to the SOR and requested a hearing before an administrative judge. The case was assigned to me on April 8, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 21, 2016, and the hearing was convened as

scheduled on May 11, 2016. Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. Applicant and one witness testified. Applicant did not submit any documentary evidence. DOHA received the hearing transcript (Tr.) on May 23, 2016.

Procedural Issues

Department Counsel moved to amend the SOR by withdrawing the Guideline F allegations. There was no objection and the motion was granted.

I amended the SOR to conform to the evidence presented at the hearing. SOR ¶ 1.a was amended by modifying the dates alleged to read as follows: "From approximately 1989 to 1994 and again from 2004 to June 2008."¹

I also amended SOR ¶ 1.b to conform to the evidence presented at the hearing, by deleting the date "06/2013" and substituting the date "July 2008," and deleting the date "12/2013" and substituting the date "April 2016."² There were no objections to the modifications.³

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b and 1.c. Her admissions were incorporated into the findings of fact. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 53 years old. She completed high school and some college, but did not earn a degree. She disclosed on her Electronic Questionnaires for Investigations Processing Questionnaire for National Security Positions (SF 86) that she married in 2001 and has been separated from her husband since 2005. At her hearing, she testified that she believes her husband filed for divorce and it was granted in 2006 or 2007, but she was uncertain.⁴ She has a 14-year-old child from the marriage. She has a 23-year-old child from a previous relationship. Both children currently live with Applicant. She has been employed with a federal contractor since January 2013.⁵

¹ Tr. 28-33, 47.

² Tr. 42-47.

³ DOD Directive 5220.6, as amended, permits an administrative judge on her own motion, to amend the SOR to conform to the evidence admitted or for other good cause. When such amendments are made, the administrative judge may grant either party's request for such additional time as the administrative judge may deem appropriate for further preparation or other good cause.

⁴ Tr. 16-20; GE 1 is an Electronic Questionnaires for Investigations Processing for National Security Positions. It is noted that this form was used in this case for a trustworthiness determination.

⁵ GE 1, 2.

Applicant testified that she has had a recurring drug-abuse problem. She stated she has been in abusive relationships, including her marriage. She has lived in domestic-violence shelters at different times.⁶

Applicant began using marijuana after she graduated from high school in 1982 and continued using it until 1989. She began using crack cocaine several times a week in 1989. Applicant participated in a drug treatment program for pregnant women who were addicted to drugs in 1992. She confirmed that she was using crack cocaine while she was pregnant with her first child. She apparently stopped while in this program and her son was born in June 1992. She then resumed using crack cocaine until 1994.⁷

Applicant stated that she stopped using crack cocaine in 1994 and attended Narcotics Anonymous until 2004. She stated she did not use any illegal drugs during this ten-year period. She resumed using crack cocaine in 2004 and would use it about three to four times a week until May 2006, when Applicant stated that she went to a church-based rehabilitation program until June 2007. She was required to go to meetings at the church and her home church paid for the program. The program did not have professional drug counselors, but was based on going to church and “the Word of God.”⁸ The program required attendees to go to stores, set up a table and a donation box, and then solicit donations to help others stay off drugs. She completed this program in June 2007 and received a certificate of completion.⁹

After completing the church program, she moved with her second son to a transitional housing unit for women.¹⁰ In July 2007, approximately a month after moving to transitional housing, Applicant resumed using crack cocaine daily. She testified that she knew where to purchase the crack cocaine. She then moved residences so she could take care of her mother. She testified that she stopped using crack cocaine in about May 2008. She stated she stopped using it on her own without the help of any programs.¹¹

Beginning in July 2008, Applicant began to occasionally smoke marijuana. She estimated she used marijuana about once every six months. Her last use was about a month before her hearing when she used it with some of her friends. Sometimes her friends supply the marijuana and sometimes she purchases it. She last purchased marijuana in 2016. She continues to meet with these friends about once or twice a

⁶ Tr. 20-21.

⁷ Tr. 28-30, 51-53.

⁸ Tr. 22.

⁹ Tr. 22-27, 30-33, 55.

¹⁰ Tr. 33. It is unknown where her first child was residing at this time.

¹¹ Tr. 21, 34-41, 55; GE 2 is the summary of an unsworn statement taken by a Government investigator on April 16, 2014. In the summary, Applicant indicated that after she completed the church-based rehabilitation program, she did not use crack cocaine again. This is inconsistent with the testimony she provided.

month. She does not know if her friends use other types of illegal drugs. She admitted she continued to use illegal drugs after completing her SF 86. Her intention going forward is to not use illegal drugs. She has never been arrested for her drug activity. Applicant testified that the people she associates with should not have a bearing on her trustworthiness.¹²

Applicant completed a SF 86 in March 2014. In response to question 23, which inquired about her past illegal drug use and activity, she disclosed that she used crack cocaine from May 2006 to June 2008. Part of question 23 stated: "Do you intend to use this drug or controlled substance in the future?" Applicant stated: "I no longer want to use crack cocaine because it is very expensive and I don't want it to affect my job or how I care for my kids."¹³ She also disclosed other drug use as: "THC (such as marijuana, weed, pot, hashish, etc.)" She disclosed that her first marijuana use was June 2013 and her most recent use was December 2013. She described her use as: "nature of use was recreational[,] I would use[] a couple of times a week." She disclosed her intent to not use it in the future was because "I do not want it to affect how I do my job."¹⁴ During her background interview with a government investigator in April 2014, Applicant disclosed she used marijuana about twice a week from June 2013 until December 2013. She used it by herself. She purchased it through a telephone contact and paid about \$20 for six blunts. She used it at her residence. She indicated that she stopped using marijuana because she did not want it to affect her job and she had no intention of using it in the future.¹⁵ When asked why she continued to use marijuana after completing her SF 86, she stated: "I can't really answer that, Judge. The only thing that I could tell you at this time is that, you know, I do my job and I do it well. And anything outside of my job, I felt, was my own personal recreation."¹⁶ Applicant acknowledged that she was aware that the use of marijuana is illegal.¹⁷

Applicant testified that her employer has never tested her for drug use, but she is subjected to random drug testing. She is aware that her employer has a drug-use policy that mandates no illegal drugs are permitted on the premises and use of illegal drugs is prohibited.¹⁸

Applicant's mother testified on her behalf. She believes Applicant has not used illegal drugs since she moved back to where she is currently residing. Applicant has

¹² Tr. 42-47, 56-57, 60-62.

¹³ GE 1 at pages 29-30. I have not considered Applicant's failure to report her earlier marijuana use for disqualifying purposes, but will consider it in analyzing mitigation, credibility, and the whole person.

¹⁴ GE 1.

¹⁵ Tr. 50-51, 58-59; GE 2.

¹⁶ Tr. 50.

¹⁷ Tr. 50.

¹⁸ Tr. 59-60.

helped care for her mother while her mother was recovering from surgery. She believes Applicant's attitude has changed and her character is good.¹⁹

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) "The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. 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 [sensitive] information will be resolved in favor of national security."

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 to obtain a favorable trustworthiness decision.

A person who seeks access to sensitive 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

¹⁹ Tr. 63-68.

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the trustworthiness concern for 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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

- (a) any drug abuse;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinued drug use.

Applicant has a history of illegal drug use and possession beginning in 1982 and continuing up until April 2016, a month before her hearing. She used crack cocaine extensively in the past and continues to use marijuana. She has not participated in a bona fide drug rehabilitation program since 1992, and her most recent marijuana use was after completing her SCA. She told a government investigator in April 2014 that she did not intend to use illegal drugs in the future. Her last purchase of marijuana was in 2016, and she continues to associate with friends who use marijuana. I did not find Applicant's testimony credible that she does not intend to use illegal drugs in the future. There is significant evidence to conclude that she has not clearly and convincingly committed to discontinue her use of illegal drugs. The above disqualifying conditions apply.

I have considered the mitigating conditions under AG ¶ 26. 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;
- (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; and

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

Applicant has a long history of using illegal drugs from 1982 to April 2016. Based on her testimony, she has refrained from using crack cocaine since June 2008, but she continued to use marijuana, even after completing her SCA. Applicant's drug use is recent and did not happen under circumstances that are unlikely to recur. She purchased marijuana as recently as 2016 and continues to associate with friends who use illegal drugs. Her behavior casts doubt on her current reliability, trustworthiness, and good judgment. AG ¶ 26 (a) does not apply.

There is insufficient evidence to conclude Applicant has demonstrated an intention to not abuse any drugs in the future. Based on Applicant's recent purchase and use of marijuana; her continued association with friends who use illegal drugs; her past promises that she does not intend to use illegal drugs in the future; and an insignificant period of abstaining from illegal drug use, I find AG ¶ 26(b) does not apply.

Applicant testified that she completed a church-based rehabilitation program, but there were no certified professional counselors associated with it. She also participated in a drug-rehabilitation program for addicted pregnant women, but she continued to use crack cocaine after her child was born. She used crack cocaine while in a transitional housing program. Applicant continued to use marijuana up to April 2016. AG ¶ 26(d) does not apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of the 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 public trust position 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 have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant has a long history of drug addiction and abuse. Based on her testimony she stopped using crack cocaine in June 2008, but continued to use marijuana up until a month before her hearing. She purchased marijuana in 2016 and continues to associate with friends who are drug users. Applicant does not have a credible track record to conclude she will not use illegal drugs in the future. Overall, the record evidence leaves me with serious questions and doubts about Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has not mitigated the drug involvement trustworthiness concerns.

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:	Against Applicant
Paragraph 2, Guideline F:	WITHDRAWN
Subparagraphs 2.a-2.g:	Withdrawn

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Carol G. Ricciardello
Administrative Judge