



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ADP Case No. 19-01479
)
)
Applicant for Public Trust Position)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

02/26/2020

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant refuted the trustworthiness concerns under Guideline E, personal conduct, and mitigated the Guideline H, drug involvement and substance misuse trustworthiness concerns. Eligibility for access to sensitive information is granted.

Statement of the Case

On July 19, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reason (SOR) to Applicant detailing trustworthiness concerns under Guideline H, drug involvement and substance misuse and Guideline E, personal conduct. The action was taken under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR on October 24, 2019, and elected to have her case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's file of relevant material (FORM), and Applicant received it on December 18, 2019. The Government's evidence is identified as Items 1 through 4. Applicant was

afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. She did not provide a response, submit documents, or object to any of the Government's evidence. Items 1 through 4 are admitted into evidence. The case was assigned to me on February 14, 2020.

Findings of Fact

Applicant admitted the SOR allegations in ¶¶ 1.a and 1.b. She denied the SOR allegation in ¶ 2.a. Applicant's admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact.

Applicant is 49 years old. She married in 1993. She has four children, ages 30, 27, 24, and 20. She has been employed since March 2014. Before then she was unemployed for three months. (Item 3)

Applicant completed a questionnaire for national security positions (SF 86) in December 2017. Section 23 asked whether in the last seven years Applicant illegally used any drugs or controlled substances. She responded, "No." (Item 3)

In December 2018, Applicant was interviewed by a government investigator. She told the investigator that personal recreational use of marijuana is legal where she resides, and she did not feel her use was illegal. She has not used any other illegal drugs. (Item 4)

Applicant was interviewed a second time by a government investigator in March 2019. During this interview, she stated that from March 2005 to September 2005, she smoked marijuana one to two times a month with a friend, who supplied the drug. She has not had contact with this friend for many years. Applicant told the investigator that she had not used marijuana from September 2005 to January 2014. She did not use drugs during this period because the job she held had random drug testing. When she became unemployed in January 2014, she used marijuana once or twice with her hairdresser. She then disclosed she used marijuana in an edible form in August 2018 and again in December 2018. She purchased the edible marijuana in a location where it is not illegal under the laws of that jurisdiction. (Item 4)

Applicant was asked during her March 2019 interview why she did not disclose her past drug use on her SF 86. She told the investigator that she did not believe she had to report her 2005 use. She also said she thought her more recent marijuana use was legal, and she did not believe she was required to disclose it. She was then informed by the investigator that marijuana use is illegal under Federal law. Applicant indicated to the investigator that she did not know that when she completed her SF 86. Her 2018 marijuana uses were after she completed the SF 86. (Item 4)

Applicant told the investigator that she did not use marijuana while employed where drug testing was conducted because she did not want any problems or violations associated with its use. She used it to relax and for stress. She stated she no longer

uses marijuana. She has found other outlets for stress relief. She does not intend to use marijuana in the future. She no longer associates with those in her past that she used marijuana with. She has never had a positive drug screening from her past employments. (Item 4)

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are to be used in determining an applicant's eligibility for a position of trust.

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(a), 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 national security eligibility will be resolved in favor of the national security."

Directive ¶ E3.1.14, states that the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states that 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.

Analysis

Guideline E, Personal Conduct

AG ¶ 15 expresses the trustworthiness concern for 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 trustworthiness concern and may be disqualifying. I find the following 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 completed her SF 86 for a public trust position in December 2017. She was only required to report drug use in the last seven years. Her 2005 use was not required to be disclosed. I found Applicant's statements credible that she did not believe her more recent uses were illegal. Her 2018 marijuana use occurred after she completed her SF 86 and therefore could not be reported on the SF 86. Applicant was unaware that marijuana use is illegal under federal law and did not become aware of it until she was advised by the government investigator. There is insufficient evidence to conclude Applicant deliberately failed to disclose her past drug use. I find that she has refuted the personal conduct allegation.

Guideline H: Drug Involvement and Substance Misuse

The security concern relating to the guideline for drug involvement and substance misuse is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 25 provides conditions that could raise security concerns. The following are potentially applicable:

(a) any substance misuse.

Applicant used marijuana in 2005, 2014, and in August and December 2018. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 26 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) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions to overcome the problem, and has established a pattern of abstinence, including, but not limited to: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were being used; and (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant's marijuana use was sporadic. Her 2014 use coincided with her unemployment and was infrequent. She abstained from marijuana use when she was employed and subject to random drug testing. Her more recent marijuana uses were in August 2018 and December 2018, subsequent to the completion of her SF 86. As noted above, Applicant was unaware that marijuana use is a violation of federal law until she was told by a government investigator during her December 2018 background interview. Her more recent uses took place in a jurisdiction where recreational use is legal. She stated she does not intend to use marijuana in the future. She has found other outlets to reduce her stress. I believe now that she is aware of the legal ramifications under federal law, that future use is unlikely to recur. There is sufficient evidence that the above mitigating conditions 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(d):

(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 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 met her burden of persuasion. There is sufficient evidence to overcome the trustworthiness concerns raised under Guideline E, personal conduct. Applicant has mitigated the trustworthiness concerns under Guideline H, drug involvement and substance misuse.

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-1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances, it is clearly consistent with the national interest to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

Carol G. Ricciardello
Administrative Judge