



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



In the matter of:)
)
) ISCR Case No. 08-05925
)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro Se*

March 23, 2009

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, Drug Involvement. Applicant’s eligibility for a security clearance is denied.

On November 7, 2008, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement. The action was taken under Executive Order 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on November 25, 2008, and elected to have her case decided on the written record. Department Counsel submitted the Government’s file of relevant material (FORM) on January 8, 2009. The FORM was mailed to Applicant and it was received on January 27, 2009. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.

Applicant did not object to the FORM and did not submit additional material. The case was assigned to me on March 12, 2009.

Findings of Fact

Applicant admitted all of the allegations in the SOR. After a thorough and careful review of the pleadings, exhibits, and statements submitted, I make the following findings of fact.

Applicant is a 46-year-old employee for a defense contractor. She admitted using and purchasing marijuana with varying frequency from about November 2006 until November 2007. While employed by a defense contractor and holding a security clearance, Applicant was ordered by her employer to take a drug urinalysis in November 2007 that tested positive.

Applicant purchased marijuana about six times from a casual acquaintance she had known for more than 20 years. Her purchases were for her personal use. She paid about \$40 each time she purchased marijuana. She smoked the marijuana with a pipe she obtained from the acquaintance. She used it alone and at her home.¹

Approximately a week or two after the positive drug test and admitting to her supervisor her marijuana use, Applicant injured her shoulder and was placed on medical leave.² Applicant had surgery for her injury in January 2008.

Applicant was interviewed by an investigator from the Office of Personnel Management on February 20, 2008, and explained she used marijuana because she was under a great deal of stress due to being placed in a supervisory position. The use of marijuana made her relax and relieved the stress.³ In her answer to the SOR, she explained she used marijuana because she was “under a great deal of stress and pain.”⁴ Applicant was aware of her employer’s drug policy.

Applicant had anticipated attending a substance abuse program after her interview, but it was delayed until her doctor released her from medical leave. Applicant returned to work on May 19, 2008. She began a drug treatment program in July 2008 and completed it in October 2008. She indicated that she was required to take random urinalyses and attend narcotics anonymous meetings twice a week and attend classes three times a week.⁵ She provided a certificate of completion for “Phase I Intensive

¹ GE 6.

² *Id.*

³ *Id.*

⁴ GE 3.

⁵ GE 6.

Outpatient Program Chemical Dependency Treatment” dated October 14, 2008.⁶ No other information was provided about this program. No information was provided as to whether there was a diagnosis or a prognosis regarding Applicant’s drug use. Applicant indicated in her answer that she is enrolled in the Employee Assistance Program (EAP) through her company and she is in compliance with the requirements. No independent information was provided from the EAP as to what the requirements were and her compliance record. She indicated that from October 24, 2008 to the present she was in Phase II of an aftercare treatment program. No information was provided as to what this involves or the credentials of the program or its counselors. She indicated she will continue to take random drug tests and will comply with all treatment necessary.⁷ In answers to interrogatories dated September 15, 2008, Applicant indicated her last use of illegal drugs was on November 26, 2007. She also indicated she did not intend to use illegal drugs in the future. She also indicated she had learned her lesson and would like to put this embarrassment behind her.⁸

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense 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 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

⁶ GE 3.

⁷ *Id.*

⁸ GE 6.

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 as to obtaining 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 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.

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 security concern pertaining to 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 all of the evidence in this case and the disqualifying conditions under Drug Involvement AG ¶ 25 and especially considered the following:

- (a) any drug abuse;
- (b) testing positive for illegal drug use;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia, and
- (g) any illegal drug use after being granted a security clearance.

Applicant used illegal drugs while holding a security clearance from approximately November 2006 to November 2007. She purchased marijuana for her personal use approximately six times. She tested positive for marijuana use while employed by a defense contractor. I find all of 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 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;
- (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;
- (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.

Applicant's illegal drug use from November 2006 to November 2007 was frequent. She admitted to using marijuana because she felt stress from her job. She has not provided any convincing evidence that these conditions are unlikely to recur. It has been approximately a year and a half since her last drug use. I do not have any evidence other than Applicant's written response to confirm her abstinence. In addition, considering Applicant repeated use of illegal drugs while holding a security clearance, I find that her actions cast doubt on her current reliability, trustworthiness and good judgment. Therefore, I find (a) does not apply.

The burden shifted to Applicant to mitigate the security concerns raised by her illegal drug use. She did not provide sufficient evidence to substantiate a demonstrated intent not to use drugs in the future. There were no records from her drug treatment program or EAP to substantiate any of her written assertions. Although Applicant provided a certificate of completion for Phase I of a drug treatment program, there was minimal information provided as to what Phase I included, what was the extent of the treatment she actually received, whether her drugs test were all negative, whether she was diagnosed as drug dependent or otherwise, or if there was a prognosis for her by a duly qualified medical professional or a recommendation for further treatment. No information was provided as to the accreditation of the program she attended and what, if any, the credentials were for counselors she may have seen. No information was provided as to whether Applicant still has an association with the person who supplied her marijuana or if she has learned an alternative way to deal with her stress. She did not provide a signed statement of intent not to use illegal drugs with automatic revocation of clearance if she violated it. Applicant provided a certificate of completion

of some type of drug treatment program; however, without additional independent information to verify that she is drug free, the certificate is insufficient to mitigate the security concerns regarding her drug involvement. I find none of the above mitigating conditions apply.

Whole Person” Analysis

Under the whole person concept, the administrative judge must evaluate an applicant’s security eligibility by considering the totality of the applicant’s conduct and all the circumstances. An 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 a security clearance must be an overall common sense 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. Applicant began using marijuana to relieve stress from her job. She continued to use it for approximately a year and while holding a secret security clearance. She attended a drug treatment program and completed Phase I of it, but no specific information was provided about this program or a prognosis by a duly qualified medical professional. Applicant has the burden of persuasion and failed to provide convincing mitigation. For all these reasons, I conclude Appellant failed to mitigate the security concerns arising from her drug involvement.

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.e:

Against 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 Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge