



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



In the matter of:)
)
) ISCR Case No. 08-07532
)
)
Applicant for Security Clearance)

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro Se*

November 17, 2009

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated Drug Involvement and Personal Conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On May 29, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H and E, Drug Involvement and Personal Conduct. 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense (DoD) for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on June 2, 2009, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted

the government's written case on July 31, 2009. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on August 7, 2009. As of October 8, 2009, she had not responded. The case was assigned to me on October 9, 2009.

Findings of Fact

Applicant is a 29-year-old employee of a defense contractor. She has worked for her current employer since May 2008. She is seeking a security clearance for the first time. She has a bachelor's degree, which was awarded in May 2008. She is single with no children.¹

Applicant smoked marijuana about 100 times between 2001 and January 2008. She used cocaine on two occasions between 2004 and 2006. She was arrested in 2005, and charged with driving under the influence (DUI) of alcohol/drugs, possession of marijuana, possession of drug paraphernalia, and failure to provide proof of insurance. The police found marijuana and a pipe in her glove box after she was stopped for swerving. She pled guilty to DUI and possession of marijuana, and the other charges were dismissed. She was sentenced to 30 days in jail with credit for time served, fined \$600, and ordered to attend an alcohol/substance abuse education treatment program. The program consisted of ten alcohol classes over the course of two months. She completed the program in July 2005.²

Applicant submitted a Questionnaire for National Security Positions (SF 86) and certified that her answers were true on May 13, 2008. Section 24b asked:

Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.) amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.) hallucinogenics (LSD, PCP, etc.), or prescription drugs?

Applicant answered "Yes," and stated that between "08/2001 (Estimated)" and "06/2006 (Estimated)" she used marijuana 50 times. She also listed that she used cocaine on two occasions between May 2004 and January 2006. She listed her 2005 arrest for DUI and possession of marijuana and drug paraphernalia under other questions. Applicant admitted that she intentionally provided false information by minimizing the amount of times she used marijuana and by stating her last illegal drug use was in June 2006. She was concerned about the impact that revealing her complete drug use would have on her new job.³ She stated in her response to the SOR:

¹ Item 5.

² Items 4-7.

³ Items 4-6.

I made some bad decisions when I was younger, but I decided to straighten up and go back to school to receive a degree and get a “real” job. [Employer] is what I found and I would hate for my poor decision making to ruin this job for me. There’s no excuse for me lying about the dates and number of times I used marijuana.

Applicant revealed her full drug use when she was interviewed for her background investigation in June 2008. She has not used illegal drugs since January 2008. She stated that she has learned from her mistakes and has “no intention of using drugs again because they are illegal and harmful to her body.”⁴

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 to be used 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, administrative judges apply the guidelines 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 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.” The applicant 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

⁴ Items 4, 6.

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 EO 10865 provides that adverse 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

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. Two are potentially applicable in this case:

- (a) any drug abuse;⁵ and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant’s cocaine and marijuana possession and use are sufficient to raise AG ¶¶ 25(a) and 25(c) as disqualifying conditions.

Two Drug Involvement 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

⁵ Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

(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 used cocaine on two occasions between 2004 and 2006. She used marijuana about 100 times between 2001 and January 2008. She has not used any illegal drugs since January 2008. She graduated from college in May 2008, and obtained a “real” job that same month with her current employer. She has stated a firm intent not to abuse any drugs in the future. There is no bright-line rule as to whether conduct is recent. Applicant has not used illegal drugs in about 22 months. However, her drug use was extensive, occurred over the course of several years, and she was untruthful on her SF 86 about how many times she used marijuana and when she stopped using marijuana. Her drug use continues to cast doubt on her reliability, trustworthiness, and good judgment. AG ¶ 26(a) is not applicable. Applicant has stated that she does not intend to abuse drugs in the future. She does not receive full mitigation under AG ¶ 26(b) for the same rationale discussed above.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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 security concern and may be disqualifying. The following disqualifying condition is 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 intentionally falsified her SF 86 in May 2008, when she minimized the amount of times she used marijuana and stated that she did not use illegal drugs after June 2006. AG ¶ 16(a) is applicable as a disqualifying condition.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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 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 discussed her full drug use when she was interviewed for her background investigation in June 2008. That does not constitute a prompt, good-faith effort to correct the falsification before being confronted with the facts. While she receives credit for discussing the information with the investigator, it is insufficient to establish a mitigating condition. I find that no mitigating conditions are applicable.

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 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 is 29 years old. She lied about her drug use on her SF 86. She deserves some credit for being truthful about her drug use in her background interview in June 2008, and for abstaining from drug use after January 2008. She appears to be remorseful, but at this time, concerns remain about her truthfulness, judgment, reliability, and trustworthiness.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated Drug Involvement and Personal Conduct security 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 E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

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

Edward W. Loughran
Administrative Judge