



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



In the matter of:)
)
) ISCR Case No. 10-00335
)
)
Applicant for Security Clearance)

Appearances

For Government: Marc Laverdiere, Esquire, Department Counsel
For Applicant: *Pro se*

January 31, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s lengthy history of polysubstance abuse, without evidence of treatment and a favorable prognosis, when considered in light of her inconsistent statements, creates doubts about her rehabilitation and whether she has made permanent behavioral changes. Not enough time has passed for Applicant to establish her reliability, judgment, and her ability and willingness to comply with laws and regulations. Clearance denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 23, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a

preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

On June 29, 2010, DOHA issued Applicant a Statement of Reasons (SOR), which specified the basis for its decision - security concerns addressed in the Directive under Guideline H (Drug Involvement) of the adjudicative guidelines (AG).²

On August 26, 2010, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. The case was assigned to me on September 20, 2010, to determine whether a clearance should be granted or denied. DOHA issued a notice of hearing on October 4, 2010. The hearing was convened as scheduled on October 25, 2010. The Government offered exhibits (GE) 1 through 3, which were admitted without objection. Applicant testified and submitted exhibit (AE) 1. Post-hearing, she submitted Exhibit (AE) 2. Both exhibits were admitted without objection. DOHA received the transcript of the hearing (Tr.) on November 11, 2010.

Findings of Fact

Applicant admitted the factual allegations under SOR ¶¶ 1.b, 1.d, and 1.e. She denied SOR ¶¶ 1.a and 1.c. She denied SOR ¶ 1.a because she had a 2006 prescription for that drug, and because she stopped using it in September 2009. (AE 2) At her hearing, she admitted her illegal use of the drug alleged in SOR ¶ 1.c, but stated she stopped using it in September 2009. Her admissions are incorporated as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 24-year-old accountant. This is her first time applying for a security clearance. She has worked for a government contractor since September 2009, and requires a security clearance to continue her job. She completed her bachelor's degree in accounting and information systems in May 2009. Applicant is single and has no children.

In her 2009 SCA, Applicant disclosed that during the last seven years she had illegally consumed and possessed several controlled substances. She consumed marijuana frequently with her brother's friends from September 2000 until November 2001. From 2001 until 2004, she used marijuana with less frequency, and from 2004 until August 2008, she consumed marijuana approximately once every year. Initially, she claimed she last used marijuana during a vacation trip to Jamaica. (Tr. 40) Later during her testimony, she stated that she last consumed marijuana while in state A, and

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

² Adjudication of this case is controlled by the AGs, implemented by the DOD on September 1, 2006.

then changed her testimony to indicate she last used marijuana in a different state. (Tr. 61)

Applicant testified she stopped using marijuana because of health reasons and because it was not worth losing her self-respect and the respect of her family and friends. She explained that the last time she used marijuana she had the worst experience of her life. Her heart started racing and she believed she would have to go to a hospital.

Applicant consumed cocaine from October 2005 until January 2006 (during her first year of college). She consumed cocaine mostly with her best friend in college. She estimated she used cocaine once a week, but she really could not remember how many times she used it. (Tr. 42) She also purchased cocaine once. (Tr. 43) Initially, she testified she used cocaine because she was going through a difficult period in her life. (Tr. 42) She later testified she used it because she was curious and decided to experiment with it. Applicant stated she really did not like cocaine because of the way it made her feel, the people that were associated with it, and how they acted. Also, during her senior year, she took a college course about drugs that opened her eyes to the dangers of illegal drugs. She claimed she felt extremely embarrassed about her use of cocaine and stopped using it.

SOR ¶ 1.a alleges Applicant used the drug Phentermine, without a prescription, from August 2006 until November 2009. Applicant denied the allegation because both she and her mother had prescriptions for the drug, and she only used the drug from 2006 until September 2009. Her mother used it for weight loss purposes. Applicant claimed she had digestive problems that were alleviated with the drug. She presented documentary evidence showing that, during 2006, she had a prescription for the drug. (AE 2) She presented no evidence showing she had a prescription for the drug from 2007 until September 2009. Notwithstanding, I find for Applicant on this allegation.

Applicant used the controlled substances Ambien from about January 2007 until September 2009, and Adderall from September 2007 until September 2009, without a prescription. She randomly used Adderall approximately 25 times. Her boyfriend had a prescription for Adderall and shared his prescription with her. She believed she also suffered from Attention Deficit Disorder (ADD) and took the drug to help her concentrate and study for her college and CPA exams. Although she did not have a prescription for the drug, she believed her use of Adderall was not illegal because she was using it for its intended purpose and her use was sporadic. She recently obtained a prescription for her ADD.

Applicant testified her mother had a prescription for Ambien and gave it to her when Applicant had trouble sleeping. She claimed she used the drug three times during a period of three years. Applicant testified that it was not until she completed her SCA that she realized her use of drugs without a prescription was illegal. She stopped using the drug after she completed her SCA.

At her hearing, Applicant acknowledged that when she used marijuana and cocaine she knew that using these drugs was illegal. She explained she was young and immature and made the mistake of experimenting with these drugs. She expressed embarrassment and remorse for her illegal use of the drugs. Applicant claimed she has been abstinent from illegal drugs since September 2009. She also claimed she made lifestyle changes to prevent her from using drugs in the future. She graduated from college and moved to another town. She has been working full-time for a government contractor, and she has not used drugs since she started working. She no longer associates with her drug-using friends and avoids people, situations, and places where illegal drugs are likely to be used.

Applicant has not participated in any drug rehabilitation or counseling program. She submitted a written statement indicating her intent to never use controlled substances illegally again, with the understanding that her security clearance will be automatically revoked if she becomes involved in any illegal drug-related misconduct.

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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 to reach his decision.

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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any expressed or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication that 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 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 or her] 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

Guideline H, Drug Involvement

AG ¶ 24 articulates the security 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.

Applicant's illegal use of controlled substances from 2000 until September 2009, triggers the applicability of two drug involvement disqualifying conditions: AG ¶ 25(a): "any drug abuse;"³ and AG ¶ 25(c): "illegal drug possession . . . and purchase."

³ AG ¶ 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." AG ¶ 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.

AG ¶ 26 provides four 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.

I find that none of the Guideline H mitigating conditions fully apply. Applicant's illegal use of four different controlled substances was frequent and spans a lengthy period. I also find her use of controlled substances is recent. Applicant has not participated in any drug treatment program and presented no favorable prognosis from a qualified medical professional.

Applicant provided conflicting testimony about the reasons behind her illegal use of controlled substances, i.e., she was experimenting; she was going through a difficult period in her life; and she believed her use of drugs was legal even though she did not have a prescription. Applicant also presented conflicting testimony about when and where she used marijuana the last time. Initially, she indicated it was during a vacation in Jamaica; later she stated it was while she was in one state; and then she stated it was in another state.

AG ¶ 26(b) partially applies because she submitted a signed statement of intent with automatic revocation of clearance for any abuse of controlled substances. It applies in part, but does not fully mitigate the security concerns, because, considering the

record as a whole, her drug use is recent and sufficient time has not passed for Applicant to establish her ability and willingness to stop using illegal drugs.

Because of the number of different controlled substances Applicant abused, the serious mental and health consequences associated with the use of some of the drugs, the period during which she used the drugs, and her conflicting testimony, I find that not enough time has passed for Applicant to establish her reliability, judgment, and her ability and willingness to comply with laws and regulations. Applicant's favorable evidence, at this time, is not sufficient to mitigate the Guideline H security concerns.

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 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.

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. AG ¶ 2(c). 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has worked for a government contractor since September 2009. She is a good worker and did well academically while in college and continues to further her graduate education. She disclosed her illegal use of controlled substances in her SCA. These factors show some responsibility, judgment, and mitigation.

On the other hand, the factors against granting Applicant's security clearance, as discussed under Guideline H, are more substantial. Applicant's lengthy history of polysubstance abuse, without evidence of treatment and prognosis, when considered in light of her inconsistent statements, creates doubts about her rehabilitation and whether she has made permanent behavioral changes. I find that not enough time has passed for Applicant to establish her reliability, judgment, and her ability and willingness to

comply with laws and regulations. Overall, the record evidence fails to convince me of Applicant's eligibility and suitability for a security clearance.

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
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b - 1.e:	Against Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge