



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [NAME REDACTED]) ISCR Case No. 10-04637
)
 Applicant for Security Clearance)

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: *Pro se*

January 11, 2012

Decision

MALONE, Matthew E., Administrative Judge:

Applicant engaged in illegal drug use from 1977 to at least March 2008. Based upon a review of the pleadings and exhibits, Applicant’s request for a security clearance is denied.

On January 22, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for her job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant interrogatories¹ to clarify or augment information in the background investigation. After reviewing the results of the background investigation and Applicant’s responses to the interrogatories, DOHA adjudicators were unable to make a preliminary

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

affirmative finding² that it is clearly consistent with the national interest to allow Applicant access to classified information. On June 22, 2011, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if established, raise security concerns addressed at Guideline H (Drug Involvement) of the adjudicative guidelines³ (AG).

On July 28, 2011, Applicant responded to the SOR through a notarized statement and requested a decision without a hearing. On August 18, 2011, Department Counsel issued a File of Relevant Material (FORM)⁴ in support of the Government's preliminary decision. Applicant received the FORM on September 9, 2011, and was given 30 days to file a response to the FORM. On October 3, 2011, Applicant responded to the FORM by submitting a three-page notarized statement. Her submission was included in the record without objection. The case was assigned to me on November 18, 2011.

Findings of Fact

Under Guideline H, the Government alleged that Applicant used marijuana from 1977 until March 2008 (SOR 1.a); that she used cocaine between 1981 and 1996 (SOR 1.b); that she used hashish and hallucinogenic mushrooms during the first half of the 1980s (SOR 1.c and SOR 1.d, respectively); and that she used amphetamines in 1981 (SOR 1.e). In response to the SOR and the FORM, Applicant admitted, with explanations, all of the SOR allegations. In addition to the facts established through her admissions, I have made the following findings of fact.

Applicant is 49 years old and works for a defense contractor in a position that requires a security clearance. She has worked for her current employer since July 2002, but did not apply for a security clearance until January 2010. In March 2008, her company assigned her to work at a U.S. Navy submarine base. (FORM Items 5 and 6)

Applicant graduated from college with a bachelor's degree in education in 1984. She and her husband have been married since January 1995. When Applicant submitted her eQIP, she disclosed that she had used marijuana a few times in the past seven years. (Item 5) When she was interviewed by a Government investigator in February 2010, she stated that her use of marijuana was infrequent and casual since the mid-1980s. She would only smoke marijuana in the form of two or three hits with a friend she visits two or three times each year. (FORM Item 6)

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

³ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006). Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

⁴ See Directive, Enclosure 3, Section E3.1.7. The FORM included six documents (Items 1 - 6) proffered in support of the Government's case.

It appears from a summary of her interview, that Applicant and the investigator only discussed Applicant's marijuana use. In response to interrogatories from DOHA adjudicators, Applicant disclosed all of the illegal drug use alleged in the SOR. She also disclosed that around the time she was in college, she contributed money toward the purchase of small amounts of marijuana and cocaine that she used with others. (FORM Item 6; Answer to SOR; Response to FORM)

In 1996, Applicant stopped all drug use except for occasional use of marijuana. Applicant has not used marijuana since March 2008, when she started working at the aforementioned submarine base. She characterized her marijuana use as social, along the same lines as having a drink at a party. Over the past 15 years or so, she has only used with a lifelong friend when she visits him. Where he lives, marijuana use is not illegal. Applicant still associates with that friend. However, she stated that when she visits two or three times a year, he knows that she no longer uses marijuana and she will leave if people around her are using illegal drugs. (Id.)

Applicant attributed the cessation of her drug use to a variety of factors. As to the mushrooms, hashish, and amphetamines, those drugs were used while she was in college or for a short period after she graduated. Her use of cocaine began in college, stopped in 1990, then resumed in 1994, when she first met her husband and his circle of friends, who used cocaine and other drugs. Applicant's husband has had to overcome a substance abuse problem, but Applicant avers he has been clean and sober since about 2003. (Response to FORM)

Applicant also attributed the end of her marijuana use to the fact that, beginning in the 1990s, she was often subjected to workplace drug tests. She stopped using marijuana for long periods whenever she knew she might have to submit to such testing as a condition of her employment. She claims to have tested negative for drugs in 1992, 1997, 2002, and 2007. However, she also resumed using marijuana in the absence of workplace drug testing. Applicant stopped using marijuana when she was assigned to work at a submarine base because, although her company did not have a drug testing policy, she knew the Navy prohibits drug use and that she might be subject to drug testing at her work site. In her response to interrogatories, and in her notarized responses to both the SOR and FORM, Applicant stated that she does not intend to use illegal drugs in the future. Her response to the FORM made clear her understanding that any future drug use would result in automatic revocation of her clearance. (FORM Item 6; Answer to SOR; Response to FORM)

Procedural Issue

In a single sentence near the end of the FORM, Department Counsel stated that the Bond Amendment disqualifies Applicant from holding a security clearance. (FORM at 6) This was not alleged in the SOR and no specific cite to the applicable parts of that statute or other supporting explanation was provided. In relevant part, the Bond

Amendment⁵ precludes granting or continuing a security clearance to anyone who is addicted to drugs or is using illegal drugs. A plain reading of its language requires a finding that the individual is presently using or involved with illegal drugs. Despite concerns about Applicant's use of marijuana, there is no indication that she is now using any substance, controlled or otherwise, in an illegal manner, or that she is addicted to any illegal substance. Accordingly, the Bond Amendment does not apply here.

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁶ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole-person" concept, those factors are:

- (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 presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁷ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of

⁵ See 10 U.S.C. § 986(c) (*PERSONS DISQUALIFIED FROM BEING GRANTED SECURITY CLEARANCES - A person is described in this section if any of the following applies to that person...*(2) *The person is an unlawful user of, or is addicted to, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)).*

⁶ Directive. 6.3.

⁷ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

persuasion.⁸ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access to classified information in favor of the Government.⁹

Analysis

Drug Involvement

The Government presented sufficient information to show that Applicant used marijuana from about 1977 until March 2008. The Government’s information also established that Applicant used cocaine between 1981 and 1996, and hashish, hallucinogenic mushrooms, and amphetamines between 1980 and about 1984. These facts raise a security concern addressed in AG ¶ 24 as follows:

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.

More specifically, available information requires application of the disqualifying conditions listed at AG ¶ 25(a) (*any drug abuse*) and AG ¶ 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*). By contrast, the mitigating conditions at AG ¶ 26(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 AG ¶ 26(b) (*a demonstrated intent not to abuse any drugs in the future, such as: (1) dissociation 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;*) must be considered here.

Applicant has not used illegal drugs since March 2008. However, she has used illegal drugs for more than 30 years, stopping only when faced with the prospect of workplace drug testing. Her current abstinence since 2008 is the result of her assignment to a military facility where she may, again, be subject to drug tests. Therefore, AG ¶ 26(a) does not apply because her drug use must be considered recent and likely to recur.

⁸ See *Egan*, 484 U.S. at 528, 531.

⁹ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

As to AG ¶ 26(b), Applicant submitted a notarized statement of intent not to use drugs in the future. However, she still associates with the same person with whom she last smoked marijuana, and who still smokes marijuana himself. Combined with the stated concerns, above, about the relative recency of her drug use and the likelihood of recurrence of her drug use, I conclude that available information does not support application of AG ¶ 26(b). On balance, Applicant has failed to mitigate the security concerns about her involvement with illegal drugs.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guideline H. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 49 years old and presumed to be a mature, responsible adult. She is well educated and has been steadily employed for most of the past 25 years. There is no other information about her personal or professional life that would support any of the whole-person factors at AG ¶ 2(a). Further, most of the available information in this case supports a likelihood of recurrence of the conduct that has raised doubts about Applicant's suitability for access to classified information. A fair and commonsense assessment of all available information bearing on Applicant's past and current circumstances shows that doubts remain about her ability to protect the Government's interests as her own. Because protection of the national interest is paramount in these determinations, such doubts must be resolved for the Government.

Formal Findings

Formal findings 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 foregoing, it is not clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is denied.

MATTHEW E. MALONE
Administrative Judge