



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ADP Case: 10-05029
)
)
Applicant for Public Trust Position)

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

February 16, 2011

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the record evidence as a whole, eligibility for access to ADP I/II/III sensitive information is denied.

On August 8, 2009, Applicant signed a Public Trust Position Application (SF 85P). On October 15, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). 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 Adjudicative Guidelines effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on or about November 1, 2010, and requested a hearing before an administrative judge. On December 22, 2010, DOHA

issued a Notice of Hearing setting the case for January 13, 2011.¹ The case was heard as scheduled. Department Counsel offered Government Exhibits (GE) 1 and 2 into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) I, II and III into evidence without objection. DOHA received the hearing transcript (Tr.) on January 24, 2011.

Findings of Fact

In her Answer to the SOR, Applicant admitted the allegations contained in SOR ¶¶ 1.a, 1.b, and 2.b, and denied the allegation contained in ¶ 2.a. Those admissions are incorporated in the following findings.

Applicant is 34 years old and married. She and her husband have three children, ages 11, 7, and 5. After becoming a licensed registered nurse in July 1998, she worked for a nursing home for four months. In October 1998, she started a position at a hospital in the medical/surgical department. In November 2006, she was terminated from that position after the hospital discovered medication charting errors for controlled substances between November 1 and November 6, 2006.² Applicant asserted that she was unable to complete the charting because of the hospital's busy schedule that week. (AE I-B.) There is no evidence that she tested positive for marijuana or other controlled substances subsequent to the incident. After losing her position, Applicant moved to another city in January 2007 and began working at an outpatient clinic. At this time, she and her husband were separated.

On November 8, 2007, the state Nursing Board (Board) entered an order reprimanding and limiting her nursing license for misconduct and unprofessional behavior. The Board required her to complete three hours of continuing education in medication administration and documentation, and three hours in time management for health care providers. The Board required her to pay the \$1,250 cost of investigating the matter, and ordered her to undergo a substance abuse evaluation. She complied with all terms of the order, including the evaluation which found that she did not have a substance abuse problem. (AE I.)

On May 12, 2009, Applicant tested positive for marijuana, in violation of her employer's policy. She was terminated from her job on May 19, 2009. Applicant acknowledged using marijuana with family members the weekend before being tested for illegal controlled substances. (Tr. 39.) She admitted that she had also used it over a weekend in April 2009 while visiting the same family members. (Tr. 38.)

¹This case was formally assigned to me on January 11, 2011, after the Notice of Hearing issued.

²Applicant denied the allegation contained in SOR ¶ 2.a because she negotiated a voluntary resignation from her position, rather than being fired. (Tr. 40.) However, a letter from her employer references its decision to terminate her employment, and makes no mention of a voluntarily resignation. (AE I-A.)

On July 22, 2010, the Board entered a second disciplinary order based on her misconduct and unprofessional behavior. It again reprimanded her and limited her nursing license until July 10, 2011. She completed another alcohol and drug abuse assessment, which found no evidence of a substance abuse problem. (Tr. 27.) According to the order, she is subject to random drug screenings and is prohibited from practicing in any other state. She was fined \$150. (AE II-A.)

In August 2009, Applicant began a position as a Quality Assurance Specialist with a federal contractor that processes medical claims for military personnel. Applicant's supervisor submitted a letter in support of Applicant. (AE III-C.) Her performance evaluations for 2009 and 2010 rated her as "Meets Expectations" in some categories and "Exceeds Expectations" in other categories. (AE III-D, III-E.)

Applicant began using marijuana at the age of 21. She has used it two to three times a year from January 1999 to May 12, 2009, while she and her husband were visiting family members in another city. (Tr. 25, 35, 38.) She testified that she never purchased it and did not use it during her three pregnancies. She has not used any other illegal drug. (Tr. 42.) Her relatives are aware of this situation and no longer use marijuana while she is present. (Tr. 29.) Her husband no longer uses marijuana because he realized the seriousness of this situation. (Tr. 28.)

Applicant expressed credible remorse over her misconduct and poor judgment. (Tr. 45.) She has undergone three random drug screenings: one when she started her new job in 2007, one in May 2009, and one after she started her current position in 2009. Only the May 2009 screening was positive. (Tr. 32.) She has not participated in a drug rehabilitation program because she never received a recommendation to do so. (GE 2.) She recognized that her decision to continue using marijuana after her nursing license was restricted in 2007 demonstrated a lack of good judgment. (Tr. 43.) She does not intend to use marijuana again. She has learned an important lesson and is cognizant of the adverse effect it has had on her nursing career. (Tr. 30.)

Policies

Positions designated as ADP I, ADP II, and ADP III are classified as "sensitive positions." (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) "The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the Adjudicative Guidelines (AG). 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(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 [sensitive] 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.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, "[t]he 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, and has the ultimate burden of persuasion as to obtaining a favorable [trustworthiness] decision."

A person who applies for access to sensitive information seeks to enter 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 protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Executive Order 10865 provides that "[a]ny determination under this order adverse to an applicant shall be a determination 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.

(a) Drugs are defined as mood and behavior altering substances, and include:

(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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes two conditions that could raise a security concern and may be disqualifying:

(a) any drug abuse (see above definition); and

(b) testing positive for illegal drug use.

Applicant admitted that she illegally used marijuana from January 1999 to May 12, 2009, when she tested positive for marijuana. The evidence is sufficient to raise both disqualifications.

AG ¶ 26 provides conditions that could mitigate security concerns raised under this guideline:

(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.

AG ¶ 26(a) does not apply because Applicant used marijuana two or three times a year for approximately ten years, up to May 2009, less than two years ago. She voluntarily chose to use it while visiting family members. Those facts cast doubt on her current judgment. AG ¶ 26(b) has some mitigating application to Applicant's illegal drug use. She does not intend to use marijuana again and no longer uses it with family members, including her husband, who has also stopped using the substance. There is no record evidence to trigger the application of AG ¶ 26(c) or AG ¶ 26(d).

Guideline E, Personal Conduct

The security concern pertaining to this guideline 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 two conditions that could raise a security concern and may be disqualifying:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group; and

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Applicant's history of illegal marijuana use creates a vulnerability to duress as it is an activity, if known in the general public, which could affect her standing both professionally and personally. Applicant acknowledged that she violated her employer's policies pertinent to illegal drug use in May 2009, and failed to comply with charting regulations pertaining to controlled substances in 2007. The evidence is sufficient to raise both disqualifying conditions as related to the allegations contained in the SOR.

AG ¶ 17 includes four conditions that could mitigate security concerns arising under this guideline:

(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

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶ 17(c) does not apply for the reasons set forth under the analysis of AG ¶ 26(a) above. Applicant has candidly acknowledged her misconduct and visibly expressed remorse. She has not obtained counseling to address the factors that contributed to her long-term use of marijuana and would lend credibility to her assertions that she does not intend to use marijuana in the future. Hence, AG ¶ 17(d) does not apply. Applicant's decision to cease using marijuana with family members is some evidence of a positive step she has taken to reduce her vulnerability to duress. However, because she did not provide any independent evidence to support her testimony, AG ¶ 17(e) and AG ¶ 17(g) have limited application.

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 applicant's

conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). They include the following:

- (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 include 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 relevant facts and circumstances surrounding this case. Applicant is a candid 34-year-old registered nurse, who has received commendable performance evaluations for the past two years from her current employer. However, she has a ten-year history of illegally using marijuana two to three times a year with her husband and other family members. In two instances, she was disciplined and her nursing license was limited for allegations related to drug abuse and unprofessional conduct. In 2007, she was reprimanded for failing to properly chart narcotics and ordered to undergo a substance abuse evaluation. Although the evaluation did not disclose a substance disorder, the disciplinary process should have alerted her to the seriousness of illegally using marijuana and the potential negative consequence it could have on her career. It did not. She continued to use marijuana for more than two years. In May 2009, she lost another position. In July 2010, the Board again restricted her nursing license for failing a drug test and ordered that disciplinary status remain in effect until July 11, 2011. While she testified that she no longer uses marijuana, she did not present any independent evidence, such as random drug screenings, participation in a substance abuse rehabilitation program, or an independent evaluation from a licensed clinical social worker or physician with credentials in the field of addictions, to corroborate her testimony and diminish the likelihood of a recurrence. At this time, the record evidence leaves sufficient doubt as to Applicant's present eligibility and suitability for a public trust position at this time.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant

Paragraph 2, Guideline E:

AGAINST APPLICANT

Subparagraphs 2.a and 2.b:

Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly not consistent with the national interest to grant Applicant eligibility for a public trust position. Eligibility for access to ADPI/II/III sensitive information is denied.

SHARI DAM
Administrative Judge