



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



In the matter of:)
)
) ISCR Case No. 11-04578
)
Applicant for Security Clearance)

Appearances

For Government: William T. O’Neil, Esq., Department Counsel
For Applicant: *Pro se*

January 11, 2012

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally possessed and used marijuana, with varying frequency, between 1981 (age 16) and October 2010 (age 45). From 1998 until October 2010, she acquired marijuana from her cohabitant, and smoked the marijuana at home. Applicant used marijuana while working for a government contractor. She lives with her marijuana provider. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on November 9, 2010. 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.

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.

On June 22, 2011, DOHA issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (Drug Involvement) of the adjudicative guidelines (AG).² Applicant answered the SOR on July 15, 2011, and she elected to have her case decided on the written record in lieu of a hearing. A copy of the file of relevant material (FORM), dated August 29, 2011, was provided to her by transmittal letter dated September 6, 2011. Applicant received the FORM on September 16, 2011. She was allowed 30 days to submit any objections to the FORM and to provide material in extenuation and mitigation. She did not respond to the FORM. The case was assigned to me on November 29, 2011.

Findings of Fact

Applicant admitted the factual allegation in the SOR. Her admission is incorporated herein as a finding of fact. After a thorough review of the evidence of record, including her SCA, her answer to the SOR, her response to a DOHA interrogatory, and her statement to a government investigator, I make the following additional findings of fact.

Applicant is a 46-year-old production associate employed by a defense contractor. She attended college from August 2007 until December 2007, but she did not receive a degree. Between June 1983 and August 1991, Applicant was married and divorced three times. She has a 16-year-old daughter. Applicant has custody of her daughter, who visits with her father during the weekends.

Applicant started working for her employer, a government contractor, in September 1999. Her November 2010 SCA is her first application for a security clearance. Applicant disclosed in her SCA that she illegally used marijuana from July 1998 until October 2010, and that during the last seven years she had financial problems. She described her use of marijuana as “occasionally on the weekend.” She stated in her SCA that she decided to stop using marijuana “simply because it is not good for her lungs.”

In December 2010, Applicant was interviewed by a government investigator about her illegal drug use and financial problems. Applicant told the investigator that she started illegally using marijuana in 1981, when she was approximately 16 years old and attending high school. She was living with her step-sister because her mother had died. Her step-sister would bring the marijuana home and they smoked it while riding around on her back patio. Applicant estimated she experimented with marijuana approximately six or seven times when she was 16 years old, and about the same number of times at age 17. After graduating from high school, Applicant moved away from her step-sister’s home and never smoked marijuana with her again. Her step-sister died of a drug overdose in September 1994.

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

Applicant also illegally used marijuana with her boyfriend (cohabitant) from 1998 until October 2010. She met her boyfriend around July 1998, and he moved in with her in August 1998. (November 2010 SCA) Applicant's boyfriend would bring her a marijuana cigarette, two or three times a month, usually during the weekends, and she smoked it on the patio behind her residence. Smoking the marijuana cigarette would give Applicant energy, and she would always accomplish her tasks around the house. Her most recent marijuana use was in October 2010.

Applicant explained to the investigator that she never used marijuana around her daughter. Applicant would use the marijuana during those weekends when her daughter visited her father. Her daughter is now spending more weekends with Applicant. Applicant stopped using marijuana because she does not want to expose her daughter to marijuana, and because she wants to stop using marijuana. Her boyfriend has agreed to never smoke marijuana in the house or around her daughter. Applicant told the investigator that she is not addicted to marijuana.

Applicant has not discussed her use of marijuana with anyone else but her boyfriend. Applicant presented no documentary evidence to show he has participated in drug counseling or rehabilitation. She presented no evidence of a recent diagnosis or prognosis concerning her use of illegal drugs.

Policies

The Secretary of Defense may 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, a clearance decision is merely an indication that the Applicant has or 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 about 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 illegally possessed and used marijuana, with varying frequency, between 1981 (age 16) and October 2010 (age 45). While in high school, she experimented with marijuana with her step-sister. From 1998 until October 2010, she acquired marijuana from her cohabitant, and smoked the marijuana at home. Applicant used marijuana while working for a government contractor.

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Three drug involvement disqualifying conditions raise a security concern and are disqualifying in this particular case:

- (a) any drug abuse,³ and
- (c) illegal drug possession.

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.

None of the Guideline H mitigating conditions apply. Applicant's illegal marijuana use, although with varying frequency, spanned a period of approximately 29 years, and her use was not infrequent. She started using drugs while she was in high school (age 16), and her use extended until October 2010 (age 45). She illegally used drugs socially, and not under extraordinary circumstances. She knew or should have known that her use of drugs was illegal and that it would adversely affect her ability to hold her job and a security clearance. She illegally used drugs for many years while working for a government contractor.

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.

Applicant claimed she last used marijuana in October 2010. She averred her intent not to use marijuana in the future because she does not want to expose her daughter to marijuana and because it is bad for her health. She did not submit a signed statement of intent not to use illegal drugs with automatic revocation of clearance for any violation. Applicant has not discussed her use of marijuana with anyone but her boyfriend. Her live-in-boyfriend has been providing marijuana to Applicant during the last 12 years.

Applicant's actions are not sufficient to mitigate drug involvement concerns. Applicant presented no documentary evidence to show she participated in any counseling or aftercare treatment program. She presented no evidence of a recent diagnosis or prognosis concerning her illegal drug use. In light of Applicant's age, experience, the prolonged period she used drugs, her cohabitation with her marijuana provider, and her recent history of illegal drug use, her promise not to use drugs without corroboration (e.g., clear evidence of lifestyle changes, statements from those who know her about her disassociation from her drug-using friends, or a competent medical diagnosis and prognosis) is not sufficient to show her use of drugs is unlikely to recur.

Considering the record evidence as a whole, I find that Applicant's past questionable behavior casts doubt on her reliability, judgment, and willingness and ability to comply with the law. She failed to mitigate the Guideline H security concerns.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). Applicant receives credit for disclosing her marijuana use in her SCA. She stopped using illegal drugs in October 2010. Apparently, she has done well working for a government contractor since 1999. She seems to be concerned about keeping her daughter away from illegal drugs, and has taken the first steps to being abstinent.

Notwithstanding, in light of Applicant's age, her 29 years of illegal marijuana use, the recency of her last drug use, and her cohabitation with her marijuana provider, her promise not to use illegal drugs in the future is not sufficient to show her questionable behavior is unlikely to recur. 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:

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 eligibility for a security clearance to Applicant. Clearance is denied.

JUAN J. RIVERA
Administrative Judge