



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



In the matter of:)
)
) ISCR Case No. 07-05939
)
)
Applicant for Security Clearance)

Appearances

For Government: D. Michael Lyles, Esq., Department Counsel
For Applicant: *Pro Se*

September 5, 2008

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the Drug Involvement security concerns but failed to mitigate the Personal Conduct concerns raised by her false answers in a Questionnaire for National Security Positions in 2006, and in her response to interrogatories in 2007. Eligibility for access to classified information is denied.

On May 23, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on June 12, 2008, 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 11, 2008. 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 19, 2008. She responded with an undated letter and two attached performance appraisals. Department Counsel did not object to her response. I have marked Applicant's response as Exhibits (Ex.) A through C, and they are admitted. I received the case assignment on September 3, 2008.

Findings of Fact

Applicant is a 34-year-old employee of a defense contractor. She has worked for the same company since 2006. She attended community college. She served in the U.S. military from 1995 to 1997, and was honorably discharged. Applicant is divorced and has a five-year-old child.¹

Applicant was arrested on April 24, 2004, and charged with operating while intoxicated (OWI). She pled guilty on May 18, 2004, to operating while impaired by liquor. She was sentenced to one day in jail, with credit for one day of time served, ordered to pay fines and costs of \$1,035, and to attend outpatient treatment.²

Applicant attended treatment. Her discharge summary dated August 5, 2004, stated:

Progress/Lack of Progress Client reports great progress. She is no longer using alcohol or marijuana. She reports feeling better physically and emotionally. Client attended 8 sessions of outpatient therapy. She appears highly motivated to staying free of drugs and alcohol.³

Applicant was recommended to continue to attend weekly Alcoholics Anonymous (AA) meetings. The final diagnosis included alcohol abuse and marijuana abuse. The discharge summary included a "Clinician's Signature" by an "MSW," which normally refers to a master's degree in social work.⁴ I find that Applicant used marijuana an indeterminate number of times prior to August 2004.

SOR ¶ 1.a alleges "[i]n a report of medical history dated December 17, 1994 [Applicant] admitted to being a marijuana user." Applicant admitted the allegation but qualified her admission by stating "I do not recall the incident in Paragraph 1.a, but I do believe you have documentation to support it so, I do not deny it." The government did not provide independent evidence of this allegation in the FORM. She reiterated in her response to the FORM that she did not recall using drugs in 1994.

¹ Item 4.

² Items 4, 5, 7.

³ Item 6.

⁴ *Id.*

Applicant submitted a Questionnaire for National Security Positions (SF 86), certified as true on May 15, 2006. She denied using any illegal controlled substance, including marijuana, during the previous seven years.⁵ This was an intentionally false answer.

Applicant responded to interrogatories on June 12, 2007. She answered “no” to the question that asked if she had “used any narcotic, depressant, stimulant, hallucinogen (to include LSD or PCP) and/ or any Cannabis (to include marijuana and hashish), except prescribed by a licensed physician?” This was an intentionally false answer. Applicant stated that she provided the false information because “I very desperately want the job I currently have and this is why I omitted any drug use.”⁶

Applicant’s job from 2004 through 2006 required random drug testing, which she passed. She moved to a different state in 2006. She stated that she will never use marijuana again and she would readily submit to any random drug testing. She further stated “I admit and deeply regret the mistakes I have made and I will gladly accept any consequences that come with it.” Her performance appraisals reflect excellent job performance during the last two years.⁷

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 over-arching adjudicative goal is a fair, impartial and common sense 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

⁵ Item 4.

⁶ Items 3, 7.

⁷ AE A-C.

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 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 Executive Order 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.

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

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

- (a) any drug abuse;

- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence; and

(e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program.

Applicant's drug possession⁸ and use are sufficient to raise AG ¶¶ 25(a) and (c) as disqualifying conditions. The final diagnosis upon her discharge from treatment included marijuana abuse. The clinician was an MSW, but it is unclear who made the actual diagnosis. The evidence is insufficient to completely qualify as a disqualifying condition under either AG ¶ 25(d) or (e).

Three 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;

(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; 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.

Applicant used marijuana prior to August 2004. How much and how often is unclear because she falsified her response to interrogatories. There is no evidence that she has used illegal drugs in the last four years. She receives some credit under AG ¶ 26(a). She moved to a different state in 2006. She signed a statement of intent that she will not use illegal drugs in the future. AG ¶ 26(b) is applicable. She completed a court-ordered treatment program. Her clinician wrote that "[s]he appears highly motivated to staying free of drugs and alcohol." That is commendatory but is insufficient to qualify as

⁸ Drugs must be possessed in order to be used.

a favorable prognosis by a duly qualified medical professional. AG ¶ 26(d) is partially applicable.

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 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; and
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant intentionally falsified her SF 86 in 2006. She lied in her response to interrogatories in June 2007. Both of the above disqualifying conditions have been established.

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;

(f) the information was unsubstantiated or from a source of questionable reliability; 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, judgment, or willingness to comply with rules and the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

I have considered all the potential mitigating conditions. Applicant submitted her SF 86 in May 2006. She deliberately failed to disclose her past drug use. She again provided false information in 2007. Applicant has not submitted sufficient credible information to establish any of the mitigating conditions.

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 common sense 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. Applicant used marijuana prior to

2004. There is no evidence that she has used illegal drugs since then. She intentionally falsified her SF 86 in 2006, when she failed to list her drug use. She compounded her wrongdoing by again providing false information in her June 2007 response to interrogatories. I considered Applicant's military service and her excellent job performance. However, her repeated dishonesty calls in question her 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 the 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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant

Conclusion

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

Edward W. Loughran
Administrative Judge