



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



In the matter of:)	
)	
-----)	ISCR Case No. 14-01586
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Department Counsel
For Applicant: *Pro se*

April 10, 2015

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing dated November 13, 2013. (Government Exhibit 1.) On October 6, 2014, the Defense of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E for Applicant. 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 (AG) effective within the Department of Defense after September 1, 2006.

The Applicant responded to the SOR on November 7, 2014, and he requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on January 26, 2015. A notice of hearing was issued that same day, and the hearing was scheduled for February 27, 2015. At the hearing the Government presented two exhibits, referred to as Government Exhibits 1 and 2. The Applicant presented one exhibit, referred to as Applicant's Exhibit A. He also testified on his own behalf. The official transcript (Tr.) was received on March 30, 2015. The record remained open until close of business on March 6, 2015, to allow the Applicant to

submit additional documentary evidence. Applicant submitted three Post-Hearing Exhibits, referred to as Applicant's Post-Hearing Exhibits A through C, that were admitted without objection. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

FINDINGS OF FACT

The Applicant is 23 years old and is single. He has a high school diploma and almost two years of college. He is employed by a defense contractor as a Software Developer. He is applying for a security clearance in connection with his employment.

Paragraph 1 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for a security clearance because he has engaged in conduct involving questionable judgment, lack of candor, dishonesty, or an unwillingness to comply with rules and regulations.

The Applicant admitted allegations 1.a. and 1.b. and denied allegation 1.c. set forth under this guideline. (See Applicant's Answer to the SOR.) During his senior year in high school, Applicant applied for and was commissioned into the United States Air Force Academy. He spent approximately a year at the academy before he decided it was not right for him and left. Applicant left the academy after finding out that his bad vision would disqualify him from being a pilot, and he did not get along well with his CO and several members of his squadron. In June 2009, while attending the academy it was required that he apply for a security clearance in order to participate in a computer science conference. Applicant was informed that the clearance did not come through in time to attend the conference. (Tr. p. 20.) Applicant claims that he was never informed whether or not his security clearance was ever activated. After leaving the academy Applicant worked for two other employers, non-defense related, before he was hired by his current employer in October 2011, where he was worked since then.

Applicant states that in March 2013, while attending a popular outdoor music festival, he used marijuana. He explained that he was consuming alcohol at the time and does not remember how much marijuana he used. (Tr. p. 23.) He has never used marijuana again, nor has he ever used any other illegal drug, nor a prescription drug without a proper prescription. At the time he used the marijuana he was unemployed. He believed that his security clearance had either never been activated or had lapsed due to inactivity. Applicant testified that he understands the Department of Defense zero-tolerance policy on illegal drug use and he knows that it is against the law. He states that he has no intentions of ever using any illegal drug in the future. Applicant self-reported this marijuana use on his most recent security clearance application.

Applicant began working for a previous employer, in January 2013. In April 2013, Applicant was fired from his job after it was discovered that he had hacking tools and a software application, used specifically for hacking his workstation, which was against company policy. The government also alleges that it was discovered that the

Applicant was using TOR¹ and visiting other hacking web-sites at work on his work computer.

Applicant strongly asserts that he had verbal permission from his project manager to download the programs in question. He explained that he picked up several tools that can be used in the course of unethical hacking but that are also very useful in the pursuit of network security and system and network management. He states that he used the programs for legitimate purposes in the course of completing tasks, including network inventory, diagnosis and repair of network interface cards, and network and computer security demonstrations and presentations. Many of the tools were not configured in a way to be usable in a malicious manner. Applicant states that he did not ever install TOR on his work computer for any reason. He states that he never visited other hacking websites at work on his work computer. Applicant further states that his company became aware that these tools were on his system while performing a routine network scan that picked up a Java Script Virus in the Chrome Browser. Applicant found this ironic since he used Firefox religiously at the company. They found a Java Script Virus in the Chrome Browser Cache and proceeded to conduct an investigation on his work system. Applicant states that he would not have installed this on his computer if he did not have the approval or request from his supervisor. (Tr. p. 29.) He downloaded it to perform a demonstration to the company on password security frame by hacking several simple passwords on his machine. Applicant asked for a copy of the scan that they found the programs with, but they would not provide it.

Applicant completed a security clearance application dated November 13, 2013. (Government Exhibit 1.) Section 13(c) regarding his Employment Record, asked if any of the following happened to him in the last seven years. "1 - Fired from a job, 2 - Quit a job after being told you would be fired, 3 - Have you left a job by mutual agreement following charges or allegations of misconduct, 4 - left a job by mutual agreement following notice of unsatisfactory performance, 5 - Received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of a security policy?" The Applicant responded, "No." He failed to disclose that he had been fired from his job. Applicant explained that he did not deliberately answer this question untruthfully. His response was based on his misunderstanding of his termination of his previous employment since he had been hired at will and was still on probation. He was unaware that voluntary termination of probationary employment from either party qualified under the terms set forth in the question. In hindsight, he realizes that this was stupid and naive on his part. He simply misunderstood the terms of termination with that employer. He now understands how to correctly answer the question by admitting that he has been fired by a previous employer.

¹ TOR is free software for enabling anonymous communication. TOR directs internet traffic through a free, worldwide, volunteer network consisting of more than six thousand relays to conceal a user's location and usage from anyone conducting network surveillance or traffic analysis. Using TOR makes it difficult for internet activity to be traced back to the user: this includes"visits to Web sites, online posts, instant messages, and other communication forms. TOR's use is intended to protect the personal privacy of users, as well as their freedom and ability to conduct confidential communication by keeping their internet activities from being monitored.

Three letters of recommendation were submitted on behalf of the Applicant. One from a Systems Administrator and two from a Lead Software Developer, who is the Applicant's direct supervisor. They collectively indicate that Applicant is a skilled developer who has kept his supervisor informed of the whole situation regarding the incident at his previous workplace. Applicant has on multiple occasions used his knowledge of computer security to help his current company provide a more secure and safe product. Applicant is said to consistently demonstrates a reasonably comprehensive knowledge of computer security techniques and theory, and accomplishes the tasks that are assigned to him. He demonstrates leadership, strong morals and judicious reasoning. He is always sociable, competent, professional and helpful. He is recommended for a security clearance. (Applicant's Exhibit A and Applicant's Post-Hearing Exhibits A and B.)

Applicant's employee evaluation for the period from November 2013 to June 30, 2014, reflects that he "consistently meets" his job requirements in every aspect that is applicable. (Applicant's Post-Hearing Exhibit C.)

POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline E (Personal Conduct)

15. *The Concern.* 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.

Conditions that could raise a security concern:

16.(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

16.(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

16.(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

16.(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.

Conditions that could mitigate security concerns:

17.(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; and

17.(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, extent, and seriousness of the conduct;
- b. The circumstances surrounding the conduct, to include knowledgeable participation;
- c. The frequency and recency of the conduct;
- d. The individual's age and maturity at the time of the conduct;
- e. The extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavioral changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and

- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct, which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is “clearly consistent with the national interest” to grant an Applicant’s request for access to classified information.

The DoD Directive states, “The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination.” The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence, which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, “Any determination under this order . . . 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.”

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in drug abuse and dishonesty that demonstrates poor judgment or unreliability.

It is the Government’s responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant’s conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government’s case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in drug involvement, and been fired from employment, and did not report it on his security clearance application (Guideline E). The totality of this evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant’s conduct, I conclude there is a nexus or connection with his security clearance eligibility. Considering all of the evidence, the Applicant has introduced persuasive evidence in rebuttal, explanation or

mitigation that is sufficient to overcome the Government's case under Guideline E of the SOR.

The evidence shows that the Applicant self-reported his one-time use of marijuana in 2013. He has not used marijuana since then. At the time he used marijuana he was unemployed. He did not realize at the time that his security clearance that was granted to him while he was a student at the United States Air Force Academy was active. Although this is no excuse, Applicant has no intentions of ever using any illegal drug again. He understands that holding a security clearance is a privilege and that he must adhere to the law and DoD policy that prohibits the use of illegal drugs if he is to hold a clearance. Applicant has not used any illegal drug in almost two years. He has demonstrated good judgment, reliability and trustworthiness.

Applicant is extremely intelligent and computer competent. He understands the finer points of information technology and information security, probably much more than his previous employer. Had he been trying to do something illegal or malicious, he could have hidden his activities from his employer. Instead, his employer was aware of his use of these programs, which was open and obvious. I believe that the Applicant had no ill intent and was, to the best of his knowledge, operating in accordance with his former employer's guidelines and regulation. On this basis, and because I find the Applicant to be most credible and convincing, this allegation is found for the Applicant.

Finally, Applicant failed to disclose that he had been fired from previous employment on his security clearance application. He erroneously convinced himself that since he was hired at will and was still on probation, as he had only worked for the company for less than three months, he did not have to say that he was fired. He now realizes how stupid he was to omit it, and will always disclose it in the future.

Under Guideline E, Personal Conduct, Disqualifying Conditions 16.(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*; 16.(c) *credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information*; 16.(d) *credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information*, and 16.(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 apply. However, Mitigating Conditions 17.(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, and 17.(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress also apply.

Given the fact that the Applicant has not used marijuana since 2013 and has no intentions of ever using it or any illegal drug again; and since he now realizes that he must admit on his security clearance application that he has been fired from his previous employment, whether or not he is or was on probation at the time of the firing. He has mitigated the security significance of his conduct. Accordingly, I find for the Applicant under Guideline E, Personal Conduct.

I have also considered the "whole-person concept" in evaluating the Applicant's eligibility for access to classified information. I have considered all of the evidence, including his favorable letters of recommendation which, under the particular circumstances of this case, I find extremely compelling and convincing.

A security clearance is a privilege, not a right. In order to meet the qualification for access to classified information, it must be determined that the Applicant is, and has been, sufficiently trustworthy on the job and in his everyday life to adequately protect the Government's national interest. According to the standards set forth in the Directive, based upon the conduct outlined here, this Applicant has demonstrated that he is trustworthy, and he does meet the eligibility requirements for access to classified information.

On balance, it is concluded that the Applicant has overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the SOR.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

- Paragraph 1: Against the Applicant.
- Subpara. 1.a.: For the Applicant.
- Subpara. 1.b.: For the Applicant.
- Subpara. 1.c.: For the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson
Administrative Judge