



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



In the matter of:)
)
-----) ISCR Case No. 07-02595
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jennifer I. Goldstein, Department Counsel
For Applicant: Charles S. Tigerman, Attorney At Law

October 30, 2008

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on June 23, 2005. On July 22, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline F 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 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 August 14, 2008, and requested a hearing before an Administrative Judge. The case was assigned to the undersigned Administrative Judge on September 4, 2008. A notice of hearing was issued on September 12, 2008, scheduling the hearing for October 2, 2008. The Government offered seven exhibits referred to as, Government Exhibits 1 through 7, which were received without objection. Applicant offered no exhibits but testified on his own behalf. The transcript of the hearing (Tr.) was received on October 16, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

FINDINGS OF FACT

The Applicant is 70 years old and has a Bachelor's of Science in Mathematics and a Bachelor of Arts in Statistics. He is employed by a defense contractor as an Chief Engineer, and is applying for a security clearance in connection with his employment.

Paragraph 2 (Guideline H - Drug Involvement). The Government alleges that the Applicant is ineligible for clearance because he abuses illegal drugs.

The Applicant has been working for the Department of Defense in some capacity for almost fifty years. He began using marijuana in 1970, and continued to use it until at least 1989. He understood at the time that its use was illegal.

On October 25, 1990, the Applicant appeared before a DOHA Administrative Judge in a security clearance proceeding and discussed his marijuana use from 1970 to at least 1989. At the hearing, the Applicant was asked whether he planned to use marijuana in the future. The Applicant stated that, I do not". (Government Exhibit 6, p. 25, lines 19 through 23). He further stated that "For my use, I believe that I should not smoke at all. I believe it's in my best interest and the best interest of the Department of Defense that I do not, both because of my participation and role as a leader in my company." (Government Exhibit 6, p. 38, line 22). Despite the statement he made to the Department of Defense at the hearing, the Applicant subsequently used marijuana on two occasions during the period from January 1999 through February 2002. (Government Exhibit 3). He does not know why he use it on these occasions. (Tr. p. 55).

During the present hearing, the question was asked of the Applicant if he were retired and no longer needed a clearance, could he state that he would never use marijuana in the future. The Applicant could not say that he would never use it. (Tr. p. 58).

The Applicant further stated that his wife suffers from a back condition and was prescribed marijuana by a NASA internal medicine physician. She keeps marijuana in their home and uses it when her back is bothering her.

Paragraph 3 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he intentionally falsified material aspects of her personal background during the clearance screening process.

The Government contends that the Applicant provided false information to the Government during his security clearance hearing on October 25, 1990, when he stated he had no intentions of using marijuana again, when in fact he continued to use marijuana on at least two more occasions during the period from January 1999 through February 2002. The Applicant contends that at the time he made the statement, he had no intentions of ever using marijuana again, and that at the time he made the statement he was being truthful. (Tr. pp. 23 -26).

Applicant's argument has no merit in this case. The Government relied on the statement of the Applicant, to be true and accurate, with the impression that the Applicant would not use marijuana in the future. The Applicant broke his promise to the Government.

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 H (Drug Involvement)

24. *The Concern.* 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.

Conditions that could raise a security concern:

25.(a) any drug abuse;

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

22.(g) any illegal drug use after being granted a security clearance.

Condition that could mitigate security concerns:

None.

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.

Condition 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.

Condition that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances.
- 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 voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes.
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- 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 predicted 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 (Guideline H) and dishonesty (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 Guidelines H and E of the SOR.

The evidence shows that the Applicant used marijuana from 1970 until at least September 1989. It also shows that he represented to the Government during a hearing before DOHA in October 1990, that he did not intend to use marijuana again, leaving the government with the impression that he would never use it in the future. The Applicant did not keep his word. During the period from January 1999 to February 2002, the Applicant used marijuana on at least two occasions. Under Guideline H, Drug Involvement, Disqualifying Conditions, *25(a) any drug abuse, 25(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution or possession of drug paraphernalia, and 22(g) any illegal drug use after being granted a security clearance* apply. However, Mitigating Condition *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* also applies. Applicant's last use of marijuana occurred in 2002, over six years ago. His last use of illegal drugs occurred so far in the distant past and there is no evidence in the record to indicate otherwise. I do not find his past use of illegal drugs to be recent or of security significance. Accordingly, I find for the Applicant under Guideline H, Drug Involvement.

On the other hand, the Applicant misled the Government by stating that he would no longer use marijuana when in fact he did. Under Guideline E, Personal Conduct, disqualifying condition *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 applies. Applicant told the Administrative Judge that he had no intention of using marijuana again and then used it again. He cannot be trusted. I find that he deliberately lied to the Government during the DOHA hearing in October 1990. Consequently, I find against 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. The Applicant is 70 years old and cannot in all truthfulness say that he will not use marijuana in the future. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole person assessment of poor judgement, untrustworthiness, unreliability, a lack of candor, an unwillingness to comply with rules and regulations, and/or other characteristics indicating that the person may not properly safeguard classified information.

This Applicant has demonstrated that he is not trustworthy, and does meet the eligibility requirements for access to classified information. Accordingly, I find against the Applicant under Guideline E (Personal Conduct). Guideline H (Drug Involvement) is found for the Applicant.

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 2 of the SOR. Paragraph 1 is found for the Applicant.

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: For the Applicant.

Subpara. 1.a.: For the Applicant.

Paragraph 2: Against the Applicant.

Subpara. 2.a.: Against the Applicant.

Subpara. 2.b.: Against the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson
Administrative Judge