



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-10137
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Department Counsel
For Applicant: *Pro Se*

September 22, 2008

Decision

LOKEY-ANDERSON, Darlene, Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) dated August 14, 2006. On March 11, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant acknowledged receipt of the SOR on March 20, 2008. He answered the SOR in writing on April 3, 2008, and requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on May 15, 2008. A notice of hearing was issued on June 16, 2008, and the matter was scheduled for hearing on July 1, 2008. The Government presented seven exhibits, referred to as Government Exhibits 1 through 7, which were received without objection. The Applicant presented two exhibits, referred to as Applicant's Exhibits A and B, which were received without objection. The Applicant also testified on his own behalf. DOHA received the transcript

of the hearing (Tr.) on July 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 33 years old, single, and has an Associate Degree in Electronics Engineering. He is employed by a defense contractor as a Air Traffic Control Communications Engineer, and is applying for a security clearance in connection with his employment.

Paragraph 1 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The Applicant was arrested, charged and convicted on nine separate occasions for various criminal violations, beginning in 1992, and continuing until at least 2003.

The Applicant was arrested in November 1992, and charged with (1) Burglary. The Applicant and several other kids were breaking into cars. He was found guilty of Receiving Known Stolen Property and was sentenced to serve time in Juvenile Hall. The Applicant was a sixteen year old minor at the time of the offense. (See Government Exhibit 2).

The Applicant was arrested in March 1994, and charged with (1) Under the Influence of a Controlled Substance, and (2) Felony Drunk Driving. He was found guilty of Count (2) was sentenced to serve two days in jail, and was placed on 36 months probation. The Applicant had been using marijuana at the time of the offense. He was eighteen years of age at the time. (See Government Exhibit 2).

The Applicant was arrested in March 1998, and charged with (1) Driving Under the Influence, and (2) Driving Under the Influence with BAC .08% or More. The Applicant was driving home after having consumed alcohol at a party when he was pulled over by the police. Pursuant to a plea bargain, he pled guilty to a lesser included offense of Reckless Driving and Counts (1) and (2) were dismissed. He was sentenced to seven days in jail, fined \$100.00, and was placed on 36 months of probation. (See Government Exhibit 5).

In April 1998, the Applicant was arrested and charged with (1) Use/Under the Influence of a Controlled Substance, and (2) Possession of a Controlled Substance. The Applicant was a passenger in a car and had been using methamphetamine at the time of the offense. He pled nolo contendere to Count (2) and was sentenced to 30 days in jail, fined \$110.00, and was placed on 36 months of probation. (See Government Exhibit 2).

In May 1998, the Applicant was arrested and charged with (1) Driving Under the Influence; (2) Driving While License Suspended for Driving Under the Influence, and (3) Possession Open Container While Driving. He pled nolo contendere to Counts (1) and (2), and Count (3) was dismissed. He was sentenced to 30 days in jail, fined \$1,224.00, ordered to attend State approved Alcohol Program for Multiple Offenders, his driver's

license was restricted for 18 months, and he was placed in probation for 36 months. (See Government Exhibit 5).

In October 1998, the Applicant was arrested for (1) Unauthorized Entry, and (2) Disorderly Conduct of a Person Under the Influence of Alcohol or Drugs. The police found the Applicant out in the road in front of someone yard. The Applicant explained that he was drinking at a bar and he believes that someone slipped something into his drink because when he woke up he was in a Sheriff's car. (Tr. p. 31). He pled guilty to both counts and was sentenced to one day in jail, fined \$110.00, ordered to complete a weekly Alcohol Program for one year, and was placed on 26 months probation.

In March 2001, the Applicant was arrested and charged with (1) Inflict Corporal Injury on Spouse/Cohabitant. He pled nolo contendere to a misdemeanor charge, was sentenced to 20 days in jail, fined \$110.00, ordered to complete 52-week Anger Management Program, and was placed on 36 months probation. (See Government Exhibits 2, 3 and 5).

In August 2002, he was arrested and charged with (1) Disorderly Conduct, and (2) Under the Influence of a Controlled Substance (Methamphetamine). He was found guilty and sentenced to serve 30 days in jail on the weekends. The Applicant contends that he was not under the influence of any illegal drug at the time of the offense and had stopped using methamphetamine in 1998. (See Government Exhibit 2 and Applicant's Post-Hearing Exhibit).

The Applicant was last arrested in August 2003, and charged with (1) Inflict Corporal Injury on Spouse/Cohabitant, a felony, and (2) Battery on Spouse/Cohabitant. He pled guilty Count (2) and was sentenced to 60 days in jail, fined \$150.00, ordered to complete 52-week Domestic Violence Battery's Program and he was placed on 36 months of probation. The Applicant explained that he was trying to leave the house and his girlfriend tried to prevent him from doing so, when an altercation ensued. (See Government Exhibits 3 and 5).

The Applicant testified that since 2003, he has matured. He has rehabilitated himself by going to church and Alcoholic Anonymous meetings. He no longer associates with anyone who uses illegal drugs. His life has greatly improved, and he now has a good woman and happy children. He is content with his life now that he no longer uses illegal drugs.

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

The Applicant completed a Electronic Questionnaire for Investigations Processing dated August 14, 2006. Question 24(a) of the same questionnaire asked the Applicant if since the age of 16 or in the last 7 years, whichever is shorter, he illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc), amphetamines, depressants barbiturates, methaqualone, tranquilizers, etc), hallucinogens, (LSD, PCP, etc.), or prescription drugs?". The Applicant answered, "No". (See Government Exhibit 1). This

was a false answer. He failed to disclose his drug use in 2002 related to his charge in August 2002, (set forth in 1(h) of the SOR), and his illegal use of drugs in marijuana in August 2004, during a camping trip with a friend. The Applicant stated that he meant to answer the question, "YES". He gave no excuse as to why he did not reveal this information in response to the question. (See Applicant's response to the SOR).

Based upon the evidence presented, I find that the Applicant deliberately falsified his Electronic Questionnaire for Investigations Processing dated August 14, 2006. The Applicant's deliberate falsification in his security clearance application, is a violation of Title 18 of the United States Code, Section 1001, a felony.

Letters of recommendation from the Applicant's manager and a coworker attest to the fact that the Applicant is responsible, trustworthy, hardworking, diligent and mature. (See Applicant's Exhibit A).

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 J (Criminal Conduct)

30. *The Concern.* Criminal activity creates a doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Conditions that could raise a security concern:

31.(a) a single serious crime or multiple offenses;

31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

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.

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.

Conditions 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 criminal conduct and personal conduct 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 criminal conduct (Guideline J), 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 not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guidelines J and E of the SOR.

Under Guideline J, Criminal Conduct, disqualifying conditions, *31.(a) a single serious crime or multiple offenses* and *31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted* apply. None of the mitigating conditions apply. The Applicant has an eleven year history of criminal conduct that includes nine arrests. Although his most recent arrest occurred in 2003, over five years ago, he lied about his drug involvement on his Security Clearance Application as recently as 2006. By doing so, he committed violations of Title 18, United States Code, Section 1001. This will be discussed further under Guideline E, below.

Applicant's conduct under Guideline E, Personal Conduct is very troubling. He was not honest with the Government in answering questions about his drug history and did not disclose his most recent drug use in 2004. There is no reasonable excuse as to why he did not tell the truth about his drug history. It is obvious that he intentionally concealed this information from the Government, hoping to minimize the seriousness of

the matter. Consequently, his dishonesty with the Government concerning this matter is unacceptable.

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. The Government relies heavily upon the integrity and honesty of clearance holders. It is a negative factor for security clearance purposes when an Applicant has deliberately provided false information about material aspects of his personal background. None of the mitigating factors set forth in the Directive under Guidelines E or J apply.

I have also considered the “whole person concept” in evaluating the Applicant’s eligibility for access to classified information. 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 questionable judgement, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard classified information.

The Applicant is now on the right path. He is living on the straight and narrow and abiding by the laws. However, given his extensive past criminal history, more time is needed in rehabilitation to ensure the Government that he will not revert to his old criminal ways. Furthermore, the Applicant has not demonstrated that he is trustworthy, and does not meet the eligibility requirements for access to classified information. Accordingly, I find against the Applicant under Guidelines J (Criminal Conduct) and E (Personal Conduct).

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 Paragraphs 1 and 2 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.: Against the Applicant.
- Subpara. 1.b.: Against the Applicant.
- Subpara. 1.c.: Against the Applicant.
- Subpara. 1.d.: Against the Applicant.
- Subpara. 1.e.: Against the Applicant.
- Subpara. 1.f.: Against the Applicant.
- Subpara. 1.g.: Against the Applicant.

Subpara. 1.h.: Against the Applicant.
Subpara. 1.i.: Against the Applicant.
Subpara. 1.j.: Against the Applicant.

Paragraph 2: For the Applicant.

Subpara. 2.a.: For 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