



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



In the matter of:)	
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SSN: -----)	ISCR Case No. 07-15084
)	
Applicant for Security Clearance)	

Appearances

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

October 30, 2008

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on December 19, 2006. On July 14, 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 responded to the SOR on August 11, 2008 and requested a hearing before DOHA. This Administrative Judge was assigned the matter on August 27, 2008. A notice of hearing was issued on September 12, 2008, scheduling the hearing for October 7, 2008. The Government offered eleven exhibits, referred to as Government Exhibits 1 through 11, which were received without objection. Applicant offered five exhibits, referred to as Applicant's Exhibits A through E, and he testified on his own behalf. The record remained open until October 21, 2008, to allow the Applicant the opportunity to submit additional documentation. He submitted two Post-Hearing Exhibits, referred to as Post-Hearing Exhibits A and B. DOHA received the transcript of

the hearing (Tr.) on October 17, 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 52 years old and has a Bachelors of Science Degree in Aeronautical Engineering. He is employed by a defense contractor as an Aeronautical 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 began his current employment in January 2005. His past criminal history includes five separate arrests, charges and convictions for various criminal offenses related to the possession and/or use of illegal drugs or alcohol.

His most recent arrest occurred in January 2004, when he was charged with Being Under the Influence of a Controlled Substance. Applicant admits that at the time of his arrest, he was under the influence of methamphetamine. He pled guilty and was sentenced to probation for three years and fined.

In August 2003, he was charged with (1) Possession of a Controlled Substance, a felony, (2) Under the Influence of a Controlled Substance, and (3) Controlled Substance Paraphernalia. The Applicant had been using methamphetamine prior to his arrest. He pled nolo contendere to Count 1 and was found guilty. He was sentenced to three years probation and fined.

In October 1994, the Applicant was charged with (1) Driving While Under the Influence of Alcohol or Drugs, and (2) Driving with a BAC of over .08% and under .20% of alcohol. He was found guilty of Count 1, and was sentenced to three years probation and fined.

He was arrested in November 1985, and charged with Driving While Under the Influence of Alcohol or Drugs. He was found guilty of alcohol related recklessness and was sentenced to one year probation and fined.

He was arrested in October 1982, and charged with (1) Possession of a Controlled Substance - Cocaine, (2) Possession of a Controlled Substance - Psilocybin, and (3) Possession of a Controlled Substance - Cannabis. The Applicant explained that he was on his way to a birthday party at a bar for a friend. He had a gift of psilocybin to give to his friend as a present. He missed a turn signal and was ultimately arrested and booked by police. (Government Exhibit 4). He was placed on a diversion program.

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

The Applicant was introduced to marijuana by a high school friend. He used marijuana from 1980 until at least 1983 at times weekly. He stopped associating with his friends who used marijuana, and he quit using it. In a statement to the DoD in 1985, the Applicant stated that he had absolutely no intention of future use of marijuana or any other illegal drug. (Government Exhibit 4).

In July 2003, the Applicant's mother was diagnosed with breast cancer. He took a leave of absence from work to help her through treatment, and was subsequently laid off from work. This caused financial difficulties including a bankruptcy, and the loss of his house. His two children who had been living with him had to go live with their mother. He became depressed and started using methamphetamine to help deal with the situation. From about July 2003 to at least October 2004, he used methamphetamine one to four times weekly. He then stopped associating with this group of friends, and he quit using methamphetamine. He indicates that he has been completely sober and drug free for the past four years and he has no intentions of ever using any illegal drugs in the future.

Following his most recent arrest in January 2004, the Applicant indicates that he has completed a state funded program for drug abusers known as "Prop. 36". He described the program as a "one to two year drug treatment program that consisted of classes and meetings, and upon completion, the pending felony was reduced to a misdemeanor". (Tr. p. 35). The record was left open after the hearing to give the Applicant the opportunity to submit documentation concerning this recovery program. He submitted a copy of the court docket that includes his progress reports from the Proposition 36 program. (Applicant's Post-Hearing Exhibit B). The Applicant also submitted a signed and notarized affidavit or Statement of Intent that indicates that he will not use any methamphetamine or any other controlled substance in the future and that he understands and agrees that if he does, it will result in the automatic revocation of his security clearance. (Applicant's Post-Hearing Exhibit A).

Paragraph 3 (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 an Electronic Questionnaire for Investigations Processing (e-QIP) dated December 19, 2006. (Government Exhibit 9). Question 23 (d) of the application asked the Applicant, have you ever been charged with or convicted of any offenses related to alcohol or drugs. The Applicant answered, "YES" and listed his felony arrest for August 20, 2003. He failed to list his charges and convictions in 1994 for driving while under the influence of alcohol or drugs, and in 2004 for being under the influence of a controlled substance. (See Government Exhibit 9). The Applicant explained that he thought the question was asking him to disclose only arrests that may have occurred within the last seven years and that he obviously misread the question. (Tr. pp. 50-51). Under the circumstances, I do not find that this excuse has any merit. The Applicant should have disclosed his complete criminal history.

Letters of recommendation from the Applicant's direct manager, coworkers and professional colleagues indicate that the Applicant has gone through some hard times in the past but that he has persevered through dedication and hard work and has successfully completed all of the sentencing requirements imposed by the court. The Applicant is considered to be a dedicated employee who is timely, reliable and trustworthy. He is also said to be a responsible family man who lives a well balanced life. (Applicant's Exhibits B, C and D).

Applicant has received four cash awards from his employer for outstanding performance on the job on January 22, 2007. (Applicant's Exhibit A and Tr. p. 56).

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;

Conditions that could mitigate security concerns:

None.

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.

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, drug involvement 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 her 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), drug involvement (Guideline H), and personal conduct (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, H and E of the SOR.

The evidence shows that over the past twenty-two years, the Applicant has been arrested and convicted on five separate occasions for drug or alcohol related offenses, the most recent of these arrests occurred just four years ago. On that occasion, the Applicant was arrested for Being Under the Influence of Methamphetamine. 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 are applicable. Accordingly, Guideline J is found against the Applicant.

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. Applicant told the Government in 1985 that he had no intentions of further illegal drug use, but he returned to using drugs, in 2004, this time, methamphetamine. Applicant's states that his last use of any illegal drug was in 2004, and that he has no intentions of ever using any illegal drug again. He has completed the Proposition 36 program, and is making progress in his rehabilitation. However, given the extensive nature of his drug use and the fact that he returned to using illegal drugs when he told the Government in the past that he would not use them, raises questions as to whether he can remain drug free. The Applicant is on the correct path, however, more time in rehabilitation is needed to demonstrate to the Government that he will not return to using illegal drugs. Given the circumstances of this case, I find his past use of illegal drugs to be recent and of security significance. Accordingly, I find against the Applicant under Guideline H, Drug Involvement.

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's excuse for not listing his entire criminal history on his security clearance application is not reasonable and therefore has no merit. Based upon the evidence presented, I find that the Applicant deliberately concealed this information from the Government on his security clearance application. Consequently, Guideline E is found against the Applicant.

I have also considered the "whole person concept" in evaluating the Applicant's eligibility for access to classified information. It is noted that he is respected and admired by his manager and colleagues. However, 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, and a lack of candor, an unwillingness to comply with rules and regulations, and other characteristics indicating that the person may not properly safeguard classified information.

This 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), H (Drug Involvement), 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, 2 and 3 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.

Paragraph 2: Against the Applicant.

- Subpara. 2.a.: Against the Applicant.
- Subpara. 2.b.: Against the Applicant.
- Subpara. 2.c.: Against the Applicant.

Paragraph 3: Against the Applicant.

- Subpara. 3.a.: 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