



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 07-16835  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Melvin A. Howry, Department Counsel  
For Applicant: Bruce M. Kaufman, Attorney At Law

December 8, 2008

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**Decision**

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LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Personnel Security Questionnaire, (SF-86) on August 10, 1989. On May 20, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and 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 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 July 14, 2008, and requested a hearing before an Administrative Judge. The case was assigned to another Administrative Judge on August 25, 2008. The matter was transferred to the undersigned Administrative Judge on October 20, 2008. A notice of hearing was issued on September 15, 2008, scheduling the hearing for October 27, 2008. The Government offered seven exhibits, referred to as Government Exhibits 1 through 7, which were received without objection. Applicant called seven witnesses and offered eight exhibits, referred to Applicant's Exhibits A through H. He also testified on his own behalf. The record remained open until close of business on November 3, 2008 for receipt of additional documentation. The Applicant submitted one Post-Hearing Exhibit

consisting of two enclosures. The transcript of the hearing (Tr.) was received on November 4, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Request for Administrative Notice**

Department Counsel requested that I take administrative notice of United States Code, Title 21, Sections 802 and 812 which define the Controlled Substance Act. Applicant had no objection. (Tr. p. 24). The request and the attached documents were not admitted into evidence, but were included in the record. The facts administratively noticed are set out in the Findings of Fact, below.

### **Motion to Amend SOR**

On August 22, 2008, by written motion, Department Counsel moved to amend the SOR by adding ¶ 1.c, alleging "You were arrested on November 26, 1981, in Norwalk, CA and charged with (1) Possession of a Controlled Narcotic, and (2) Possession of Concentrated Cannabis. You went to court and proceedings were suspended pending pre-trial diversion. You successfully completed the program and the case was dismissed. (Tr. pp. 5 -6.) Applicant's counsel had no objection to the motion. (Tr. p. 6). The motion to amend the SOR was granted.

### **FINDINGS OF FACT**

The Applicant is 49 years old and married. He is employed by a defense contractor as an Aircraft Electronic Technician, and is applying for a security clearance in connection with his employment.

Paragraph 1 (Guideline H - Drug Involvement). The Government alleges that the Applicant is ineligible for clearance because he abuses illegal drugs.

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because the Applicant engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that raise questions about his reliability, trustworthiness and ability to protect classified information.

The Applicant began using marijuana while he was in the United States Navy from 1976 until 1980. He did not hold a security clearance at that time. On November 26, 1981, he was arrested and charged with (1) Possession of a Controlled Substance, and (2) Possession of Concentrated Cannabis. At court, the proceedings were suspended pending pre-trial diversion. He successfully completed the diversion program and the case was dismissed.

In 1984, the Applicant began working for his current employer. Since then, he has had different job classifications, some of which required a DoD security clearance, others that have not. He has held a Top Secret security clearance, without incident for

the past ten years. He indicates that he has disclosed his 1981 drug arrest on his security clearance applications as required.

In June 2006, while holding a Top Secret DoD security clearance, the Applicant attended a wake for a friend who had passed away. Later that night, a few friends, including the Applicant, got together to smoke marijuana that the decedent had. The Applicant smoked some marijuana and then went to bed. That night, he slept in his truck, got up the next day, and drove home. By then, he no longer felt the effects of the marijuana. (Tr. p. 97). Four days later, the Applicant's employer required him to undergo a drug and alcohol screening test due to an industrial accident related to his work. The test came back positive for marijuana use. The Applicant admitted that he had smoked marijuana at his friend's wake but had not smoked it at any other time since then. He was immediately placed on leave by his company, and required to enroll in a Drug Rehabilitation Program. He attended the program everyday for three weeks. At night he attended Narcotic Anonymous meetings. He also attended counseling sessions with a psychologist, and underwent drug testing weekly. He completed the program. (Applicant's Post-Hearing Exhibit). Two months after the incident, he was permitted to return to work. Presently, the Applicant continues to participate in the drug testing program, which is random testing for drugs and alcohol. The Applicant was informed by his company that if he tests positive again, he will be facing termination. (Tr. p. 104). All of his drug tests since the incident have come back negative.

A Statement of Intent was submitted by the Applicant that indicates that he will never use any marijuana or any other illegal drug again. (Applicant's Exhibit H and Tr. P. 106).

The Applicant indicates that this has been a real lesson, a slap in the face. He is extremely remorseful for his conduct. This has been the biggest embarrassment for him. He worries about it every night. (Tr. p. 111).

Seven character witnesses testified on behalf of the Applicant, including his present manager, his past site manager, and other professional colleagues who have worked with the Applicant, some of who know him as a friend. They all attest to his reliability and trustworthiness. He is considered to be extremely ethical and an outstanding employee. (Tr. pp. 26-31, 41-46, 56-61, 65-70, 75-79, 82-86, and 91-112).

## **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. (b) testing positive for illegal drug use;
- 25. (g) any illegal drug use after being granted a security clearance.

Conditions that could mitigate security concerns:

26. (b).(4) a signed statement of intent with automatic revocation of clearance for any violation.

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. (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.

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 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 drug involvement (Guideline H). The totality of this evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant (Guideline E). 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 H and E of the SOR.

I have considered all of the evidence presented in this case, including all of the favorable witness testimony and the accomplishments of the Applicant. In spite of his letter of intent, the coincidence of him testing positive on a drug test after what he says is his only use of marijuana is highly improbable and difficult to believe. The evidence shows that the Applicant used marijuana while holding a DoD security clearance. He used marijuana knowing that it was prohibited by law and clearly prohibited by the Department of Defense. This demonstrates poor judgment, untrustworthiness and unreliability. As recently as June 2006, he tested positive for marijuana during a drug screening conducted by his company. The Applicant is not currently eligible for a security clearance. If he can remain drug free, he may be eligible for a security clearance sometime in the future, but not now. His recent use of marijuana in 2006, absolutely prohibits a favorable determination in this case.

Under Guideline H, Drug Involvement, Disqualifying Conditions, *25(a) any drug abuse, 25(b) testing positive for illegal drug use, and 22(g) any illegal drug use after being granted a security clearance* apply. Mitigating Condition *26(b)(4) a signed statement of intent with automatic revocation of clearance for any violation* applies. Despite this, 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 *Conditions, 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* applies. None of the mitigating conditions are applicable in this case. 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 49 years old, a veteran, mature, intelligent, successful, well respected, and a long time employee of the defense industry who has held a security clearance for many years. Why he used marijuana while holding a security clearance is bizarre. Why he used marijuana at all is even more of a mystery. 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, 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 not meet the eligibility requirements for access to classified information at this time. Accordingly, I find against the Applicant under Guidelines 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 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.

Paragraph 2: Against the Applicant.

Subpara. 2.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