



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 08-01889

Appearances

For Government: Jeff Nagel, Department Counsel
For Applicant: Joseph Testan, Attorney At Law

February 7, 2011

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on April 11, 2006. (Government Exhibit 1.) On June 30, 2009, the Defense Office of Hearings and Appeals (DOHA) 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) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

The Applicant responded to the SOR on August 29, 2010, and he requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on October 14, 2010. A notice of hearing was issued on October 19, 2010, and the hearing was scheduled for November 19, 2010. At the hearing the Government presented four exhibits, referred to as Government Exhibits 1 through 4. The Applicant called six witness and presented four exhibits at the hearing, referred to as Applicant's Exhibits A through D. He also testified on his own behalf. The official transcript (Tr.)

was received on November 30, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

FINDINGS OF FACT

The Applicant is 51 years old and single. He has a Bachelor of Science Degree in Geophysics and Math, is employed by a defense contractor as a Software Engineer, and 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 clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

The Applicant denied each of the allegations set forth in the SOR under this guideline, except 1(e). (See Applicant's Answer to the SOR.)

From 1994 through 1995, the Applicant took care of his mother who was suffering from liver cancer. This difficult experience caused emotional turmoil for the Applicant and his family. At this time, his mother-in-law was suffering from pancreatic cancer. His mother passed away in December 1994, and a couple of days later his mother-in-law died. Applicant's emotional state was adversely effected by his mother's illness and death. (Tr. p. 102.)

In 2004, the Applicant applied for a security clearance. By an adjudicative agency decision dated April 30, 2004, the Applicant's SCI access was revoked, due to his illegal drug use and his failure to report his foreign national contacts. The basis of the revocation was that the Applicant used marijuana at least fifty times, and that he used cocaine at least fifty times between 1985 and 1986. (Government Exhibit 2.)

The Applicant stated that at no time during the prior investigation did he tell the agent or investigator that he used marijuana fifty times or that he used cocaine fifty times. (See Applicant's Answer to SOR and Government 2.) In fact, he states that he reported that he tried marijuana on two occasions in December 1999 or 2000, for a total of five puffs. (Tr. pp. 130-131.) He also reported that he used cocaine in the mid 80's, no more than five times. (Tr. pp. 133-135.) Applicant states that he answered all questions fully, candidly and honestly. (Tr. p. 139 and Applicant's Answer to SOR.) He admits that he used marijuana after having been granted a security clearance in August 2000. (Tr. p. 131.) At the time, he was hanging around friends who were partiers. (Tr. p. 131.) Since 2000, he has redirected his life, no longer associates with drug users and has not used any illegal drugs. Applicant submitted the results of a urine analysis dated August 10, 2009, that is negative for cocaine, methamphetamine, THC, opiates and Benzodiazepines. (Applicant's Exhibit B.) He admits that he exercised poor judgment when he experimented with drugs. He regrets his mistakes of the past and states that he has no intentions of ever using any illegal drug again. (Tr. p. 139.)

The Applicant testified that he did not appeal the decision by the other agency that was based upon false information because he did not read the decision well, he was stressed out, felt alone, and he did not need the SCI access at the time. (Tr. p. 137.) He did not look back on the process until 2006, when he was re-investigated for his Top Secret security clearance. In October 2006, a memorandum from the Defense Security Service indicated that his security clearance suspension was warranted. (Government Exhibit 4.) In retrospect, he realizes that he should have appealed the decision regardless of the amount of pain he would have to endure. (Tr. p. 138.)

Allegation 1(f) In his response to an interrogatory issued by the Department of Defense (DoD) dated February 5, 2009, the Government alleged that the Applicant falsified material facts in that he stated that he used marijuana either in 1999 or 2000 and that he had not tried marijuana since that time, when in fact he used marijuana to at least September 2003. (Government Exhibit 3.) No evidence was presented to me containing any supporting documentation from the interviews where the Applicant was alleged to have made these statements. Factual conclusions of third parties about what the Applicant allegedly told them, without supporting documentation, is insufficient to prove that the information is accurate or correct. As an independent trier of fact, I am not bound by their findings, which I have no way of knowing are correct. Based upon the evidence presented, this allegation is found for the Applicant.

Allegation 1(g) In his response to an interrogatory issued by the Department of Defense (DoD) dated July 10, 2008, the Government alleged that the Applicant falsified material facts in that he stated that he last tried marijuana around 2000, when in fact he used marijuana to at least September 2003. (Government Exhibit 2.) No evidence was presented to me containing any supporting documentation from the interviews where the Applicant was alleged to have made these statements. Again, factual conclusions of third parties about what the Applicant allegedly told them, without supporting documentation, is insufficient to prove that the information is accurate or correct. As an independent trier of fact, I am not bound by their findings, which I have no way of knowing are correct. Based upon the evidence presented, this allegation is found for the Applicant.

Allegation 1(h) In his response to an interrogatory issued by the Department of Defense (DoD) dated July 10, 2008, the Government alleges that the Applicant falsified material facts in that he stated that he experimented with cocaine on a couple of occasion around 1985, when in fact he used cocaine at least fifty times from 1985 to 1986. (Government Exhibit 2.) No evidence was presented to me containing any supporting documentation from the interviews where the Applicant was alleged to have made these statements. Factual conclusions of third parties about what the Applicant allegedly told them, without supporting documentation, is insufficient to prove that the information is accurate or correct. As an independent trier of fact, I am not bound by their findings, which I have no way of knowing are correct. Based upon the evidence presented, this allegation is found for the Applicant.

Allegation 1(i) In his response to an interrogatory issued by the Department of Defense (DoD) dated July 10, 2008, the Government alleged that the Applicant falsified

material facts in that he stated that he did not contribute money to the purchase of illegal drugs, when in fact he did contribute money to the purchase of illegal drugs. (Government Exhibit 2.) No evidence was presented to me containing any supporting documentation from the interviews where the Applicant was alleged to have made these statements. Factual conclusions of third parties about what the Applicant allegedly told them, without supporting documentation, is insufficient to prove that the information is accurate or correct. As an independent trier of fact, I am not bound by their findings, which I have no way of knowing are correct. Based upon the evidence presented, this allegation is found for the Applicant.

Allegation 1(j) During an interview with a DoD investigator on April 5, 2007, the Government alleges that the Applicant falsified material facts in that he stated that he smoked marijuana in cigarette form two times in December 1999, and that he had not smoked marijuana from December 1999 to the present, when in fact he had used marijuana to at least September 2003. (Government Exhibit 3.) No evidence was presented to me containing any supporting documentation from the interviews where the Applicant was alleged to have made these statements. Factual conclusions of third parties about what the Applicant allegedly told them, without supporting documentation, is insufficient to prove that the information is accurate or correct. As an independent trier of fact, I am not bound by their findings, which I have no way of knowing are correct. Based upon the evidence presented, this allegation is found for the Applicant.

Allegation 1(k) The Applicant completed a security clearance application dated April 11, 2006. Question 24(a) asked him if since the age of sixteen or in the last seven years, whichever is shorter, has he illegally used any controlled substance. The Applicant responded, "YES", and listed that he used marijuana twice in December 1999. (Government Exhibit 1.) The Government alleges that he failed to list his use of marijuana to at least September 2003. No evidence was presented to me containing any supporting documentation from the interviews where the Applicant was alleged to have made these statements. Factual conclusions of third parties about what the Applicant allegedly told them, without supporting documentation, is insufficient to prove that the information is accurate or correct. As an independent trier of fact, I am not bound by their findings, which I have no way of knowing are correct. Based upon the evidence presented, this allegation is found for the Applicant.

Allegation 1(l) Question 24(b) of the same application asked him if he ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official, while possession a security clearance; or while in a position directly and immediately affecting the public safety. The Applicant responded, "NO." (Government Exhibit 1.) This was a false response. The Applicant failed to disclose that he had used marijuana while holding a DoD Top Secret clearance.

Allegation 1(m) Question 26(b) of the same application asked the Applicant if, to his knowledge, has he ever had a clearance or access authorization denied, suspended, or revoked, or has he been debarred from government employment. The Applicant responded, "YES", and stated that he truthfully supplied information about his twice usage of marijuana upon which they revoked his security clearance. (Government

Exhibit 1.) The Government alleges that he failed to fully disclose his use of marijuana and the basis for the security clearance revocation. No evidence was presented to me containing any supporting documentation from the interviews where the Applicant was alleged to have made these statements. Factual conclusions of third parties about what the Applicant allegedly told them, without supporting documentation, is insufficient to prove that the information is accurate or correct. As an independent trier of fact, I am not bound by their findings, which I have no way of knowing are correct. Based upon the evidence presented, this allegation is found for the Applicant.

Six witnesses, including his supervisor, coworkers, and long time friends and associates of the Applicant, testified on his behalf. They know him to be extremely honest, trustworthy, loyal, dependable, and a person of high integrity. They have never known him to lie or be untruthful and recommend him for a position of trust. (Tr. pp. 41-110.)

The Applicant's brother, a judge, and adjunct professor of law who considers himself close to the Applicant, testified that the Applicant contacted him months after the adjudication process, and informed him of the allegations that were the basis of his security clearance revocation. His brother testified that the Applicant did not tell him that he has ever used marijuana or cocaine, and if he were to learn that he did, he would be in disbelief. (Tr. p. 100.)

Letters of recommendation from numerous professional and business associates, including directors, managers, engineers, military officers, and friends, as well as his brother, his father, and his landlord, describe the Applicant as an outstanding performer with excellent leadership, communication, interpersonal relationship, analytical, and mathematical skills. He is said to be dedicated to his work, honest, reliable, trustworthy, and a highly valued asset to the organization. He has their highest recommendation for a position of trust. (Applicant's Exhibits A and C.)

The Applicant has received a number of awards and recognitions, including out-of-cycle merit raises and other bonus. In 1998, he received the Meritorious Unit Citation for superior performance from May 1995 through June 1998. In 1998, he received one of the highest awards of the company, the Presidential Achievement Award, for outstanding job performance and technical excellence. He has made many significant contributions to the company and is considered a true asset to the organization. (Applicant's Exhibit D.)

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.

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:

17. (f) the information was unsubstantiated or from a source of questionable reliability.

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 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 not met its initial burden of proving that the Applicant falsified his security clearance application, (Guideline E.) The totality of this evidence indicates good judgment, reliability and trustworthiness on the part of the Applicant. 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 E of the SOR.

The problem in this case is that the documents supporting the factual allegations are third hand statements. These documents were prepared by unknown third parties, which are presumed to be based on alleged statements of the Applicant. These

documents were not presented to me. In fact, no evidence was presented to me containing any supporting documentation from the interviews where the Applicant was alleged to have made these statements. Any fair evaluation of the evidence must take into account the Applicant's absolute denials, as opposed to the dearth of supporting documentation.

There is no independent evidence in the record to support the fact that the Applicant used marijuana fifty times, that he used cocaine fifty times, or that he contributed money to the purchase of marijuana. He stated emphatically to the contrary. Accordingly, I cannot find that he intentionally failed to disclose this information to the Government during this investigation.

The Applicant did not deliberately falsify his security clearance application, responses to interrogatories, nor did he provide false information to an investigator during his background investigation concerning his past illegal drug use. First, the information is not substantiated. Secondly, although the Applicant used marijuana in 2000, after having been granted a security clearance, there is no evidence in the record that he intended to falsify his questionnaire. Furthermore, this occurred over ten years ago and he has no intentions of ever using any illegal drug again. 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 to the allegations. Under the particular facts of this case, Mitigating Condition 17.(f) *the information was unsubstantiated or from a source of questionable reliability* also applies. Consequently, I find for the Applicant under Guideline E, Personal Conduct.

The Applicant's credibility is critical in this case. His testimony was credible and consistent with his written statements that include the information he provided in response to interrogatories, in his security clearance application, and during his interview with the investigator. Whether the Applicant's mother's long illness and eventual death caused him to be indifferent to the decision to revoke his security clearance, or whether he was simply overwhelmed and felt defeated by the gross inaccuracies in the decision, is unclear. In hindsight, however, the Applicant realizes that he should have appealed the decision of the agency that based its decision on false, incorrect or inaccurate information. Although there is a presumption that the information relied upon by the other agency was correct, it is not substantiated, nor does the fact that he did not appeal the decision prove that the information was accurate.

There are many blind assertions here. The only sound evidence presented is the fact that the Applicant used marijuana after having been granted a security clearance in 2000, however, this occurred over ten years ago. Since then, the Applicant has not used any illegal drug, and has no intentions of ever using any drugs in the future.

I have also considered the “whole-person concept” in evaluating the Applicant’s eligibility for access to classified information, including the favorable testimony from people who know him well, and the numerous letters or recommendation submitted on his behalf. 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 good judgment, trustworthiness, reliability, candor, a willingness to comply with rules and regulations, and/or other characteristics indicating that the person may properly safeguard classified information.

This Applicant has demonstrated that he is trustworthy, and does meet the eligibility requirements for access to classified information. Accordingly, I find for the Applicant under Guideline E (Personal Conduct.)

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 Paragraphs 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: For the Applicant.
- Subpara. 1.a.: For the Applicant.
- Subpara. 1.b.: For the Applicant.
- Subpara. 1.c.: For the Applicant.
- Subpara. 1.d.: For the Applicant.
- Subpara. 1.e.: For the Applicant.
- Subpara. 1.f.: For the Applicant.
- Subpara. 1.g.: For the Applicant.
- Subpara. 1.h.: For the Applicant.
- Subpara. 1.i.: For the Applicant.
- Subpara. 1.j.: For the Applicant.
- Subpara. 1.k.: For the Applicant.
- Subpara. 1.l.: For the Applicant.
- Subpara. 1.m.: 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