



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



In the matter of: )  
 )  
----- ) ISCR Case No. 08-05909  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Melvin A. Howry, Department Counsel  
For Applicant: Alan V. Edmunds, Attorney At Law

March 31, 2010

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**Decision**

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LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Questionnaire for Sensitive Positions (SF-86) on October 7, 2007. (Government Exhibit 1). On March 30, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J, E and H 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 April 30, 2009, and he requested a hearing before a DOHA Administrative Judge. This case was originally assigned to another Administrative Judge on October 2, 2009. The matter was transferred to the undersigned on October 19, 2009. That same day, a notice of hearing was issued scheduling the hearing for November 10, 2009. At the hearing the Government presented four exhibits, referred to Government Exhibits 1 to 4. The Applicant called three witnesses and presented seventeen exhibits, referred to as Applicant's Exhibits A

through Q. He also testified on his own behalf. The official transcript (Tr.) was received on November 19, 2009. 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 49 years old and unmarried. He is employed by a defense contractor as an Engineering Manager, 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.

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

The Applicant denied each of the allegations set forth under these guidelines. He has held a security clearance since 1982/83, and has never had a security violation. (Tr. p. 74).

The Applicant explained that in 2002, he was going through a horrible divorce and child custody battle. During the process, his ex-wife engaged in many unscrupulous tactics in an effort to malign his character and place him in a false light before the court. She wanted custody of the children and the child support that went with it. Among many false allegations, she accused him of being a drug addict. The results of the tribulations eventually brought about the divorce, and he was granted full custody of their two children.

In October 2002, the Applicant was arrested for (1) Driving Under the Influence of a Controlled Substance and (2) Domestic Violence, Non-Criminal. (Applicant's Exhibit A). The charges were dismissed. Applicant explained that he and his wife had been arguing about who their children should live with. The Applicant did come home after work, but was waiting until his wife left for work to do so. He noticed a friend of his wife following him. When he came home, his wife had taken their two children to a friend's house. She then called 911 reporting that the Applicant had pulled the telephones out of the wall and was threatening her with a gun. Applicant was upstairs getting ready for bed when the telephone rang and the sheriff's department ordered him to come out with his hands up and guns were pointed at him. Applicant was then taken into custody and arrested. Applicant was given a drug test, it was determined that he was not under the influence, and the charges were dismissed. (Tr. p. 64-65).

Three months later, in January 2003, the Applicant was arrested for violation of a Protective Order for an incident that occurred in December 2002. Applicant testified that in December 2002, while at his son's basketball game, his wife came in and sat behind him. She then followed him to his car and called 911, reporting that he had violated the ongoing Protective Order requiring that he remain at least 100 yards away from her.

The Applicant discovered that his car had been keyed and he suspected that his wife had done it. A month later, he was arrested. The matter was subsequently dismissed.

In June 2007, the Applicant was arrested for Possession of Marijuana. He explained that his brother had called him from a bar to come pick him. Applicant went into the bar and had a few beers. He then drove his brother home. On his way home, he pulled over to use his cell phone and did not realize that he had pulled over at the aqueduct entrance. At that point, he noticed something floating around in his car that had fallen to the floor. He picked it up and realized that it was marijuana. He then tucked the bag in his pocket, with the intent of returning it to his brother. A sheriff quickly pulled up shining his light on the car and saw another bag of marijuana in the seat. Applicant was then arrested. Applicant stated that none of the marijuana was not his and he did not know it had been stashed in his car. Applicant later learned that the marijuana was his brothers. Applicant hired an attorney to represent him in hopes of getting the case dismissed. For a first offender, he was required to attend 24 Narcotics Anonymous meetings and the charge was dismissed. Applicant has satisfied the courts requirement. (Applicant's Exhibit E). In hopes of getting the charge dismissed, the Applicant did not immediately report the incident to his Facility Security Officer. Approximately a month after the incident, the Applicant reported the arrest to his Facility Security Officer.

Applicant's brother testified that on the evening in question in June 2007, he had been consuming alcohol at a bar. While at the bar, he purchased marijuana from a friend. He called his brother, the Applicant, to come pick him up to give him a ride home. Once in the Applicant's car, he stashed the marijuana down the side of the seat. He did not tell the Applicant about it, and inadvertently left it in the Applicant's vehicle. Applicant's brother further testified that the Applicant, to his knowledge, has never used marijuana. (Tr. pp. 42-45)

Applicant presented a written statement of intent under penalty of perjury stating that he has no intentions to ever use illegal drugs of any sort, and if he does his security clearance will be subject to immediate revocation. (Applicant's Exhibit Q).

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.

In 1982, the Applicant completed a security clearance application, and did not disclose his infrequent use of marijuana in college from 1978 to 1981 on the application. Applicant admits that he answered the question falsely, but argues that he was young and did not understand the seriousness of falsifying the document at the time. He is now much more mature and understands the implications of his actions. He has not used marijuana or any other drug since then. He also more fully understands the responsibility of being honest and candid with the Government at all times.

Applicant's Program Manager and a past supervisor, who have both evaluated his Applicant's work performance for several years between the period from 2001

through 2007, testified that Applicant is a wonderful worker, who has always received good ratings at the "meets" or "exceeds" company standards. They consider the Applicant sufficiently trustworthy for access to classified information. (Tr. pp. 32-34). Applicant's experience, great knowledge and technical expertise, have been the reasons he was promoted from Flight Test to take the Lead position overseas. (Tr. p. 55).

Applicant's work performance evaluations for 2006 through 2008, overall reflect that he "meets" or "exceeds requirements". (Applicant's Exhibit H). Applicant has also received a number of achievement awards for his work performance. (Applicant's Exhibit I).

Four letters of recommendation from individuals who have worked with the Applicant and/or know him well, attest to his hard working nature, dedication to his job and reliability. They describe him as professional, a good team leader, with excellent technical abilities, integrity and loyalty, and a person of high ethics. (Applicant's Exhibits B, C, F and K).

## **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 lesser 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:

32.(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

32.(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job

training or higher education, good employment record, or constructive community involvement.

#### 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.

#### Conditions that could mitigate security concerns:

17.(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

#### 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;

#### Conditions that could mitigate security concerns:

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;

26.(b) a demonstrated intent not to abuse any illegal drugs in the future, such as:

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

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;
- 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 behavior 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."

## CONCLUSION

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 abuse and/or 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 criminal conduct, (Guideline J) that he falsified his security clearance application (Guideline E), and he engaged in drug abuse, (Guideline H). 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 J, E and H of the SOR.

The evidence shows that while going through a bad divorce and custody battle, he was arrested and charged with Driving Under the Influence of Alcohol, Domestic Violence, violating a Protective Order, and Possession of a Controlled Substance. All of the charges were dismissed. Two of the arrests occurred over seven years ago. The most recent occurred over three years ago. Applicant fully explained the circumstances concerning each incident and has provided persuasive evidence demonstrating that he has put any such misconduct behind him. He currently displays good judgment and trustworthiness.

Under Guideline J, Criminal Conduct, Disqualifying Conditions, 31.(a) *a single serious crime or multiple lesser offenses*, and 31.(c) *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted* apply. However, Mitigating Conditions 32.(a) *so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*, and 32.(d) *there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement* also apply. Under the particular facts of this case, the Applicant's criminal conduct is in the distant past. The

instigators of the conduct have been removed from his life, and there is no chance that he will engage in any such conduct in the future.

With respect to the Applicant's failure to disclose his use of marijuana use on his 1982 security clearance application, I find that it was intentional. At that time, he was obviously too young and immature to meet security clearance eligibility. However, given the time that has passed, twenty-six years, without reoccurrence of the drug abuse or incidents of dishonesty, I find that the falsification is no longer of security significance. Applicant now understands the significance of holding a security clearance and the responsibilities that come with it.

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. However, Mitigating Condition, 17.(c) *the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment* also applies. 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*, apply. However, Mitigating Conditions 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*, and 26.(b) *a demonstrated intent not to abuse any illegal drugs in the future, such as: (4) a signed statement of intent with automatic revocation of clearance for any violation* also apply. Accordingly, I find for the Applicant under Guidelines J, Criminal Conduct, and H, Drug Involvement.

As stated above, I find that the Applicant deliberately falsified his security clearance application by concealing his marijuana use. However, he has not used marijuana for over twenty six years and has no intentions of ever using it again. Under the particular circumstances of this case, his past conduct no longer has security significance. Accordingly, I find for 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. 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 and 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 meets the eligibility requirements for access to classified information. Accordingly, I find for the Applicant under Guidelines J (Criminal Conduct), H (Drug Involvement), and 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, 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: For the Applicant.

Subpara. 1.a.: For the Applicant.

Subpara. 1.b.: For the Applicant.

Subpara. 1.c.: For the Applicant.

Paragraph 2: For the Applicant.

Subpara. 2.a.: For the Applicant.

Subpara. 2.b.: For the Applicant.

Paragraph 3: For the Applicant.

Subpara. 3.a.: 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