



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-07461
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Department Counsel
For Applicant: Thomas A. Kruza III, Attorney At Law

June 8, 2009

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted her Electronic Questionnaires for Investigations Processing (e-QIP) on February 7, 2008. On October 30, 2008, 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 December 16, 2008, and requested a hearing before an Administrative Judge. The case was assigned to the undersigned Administrative Judge on March 3, 2009. A notice of hearing was issued on March 11, 2009, scheduling the hearing for April 2, 2009. The Government offered two exhibits, referred to as Government Exhibits 1 and 2, which were received without objection. Applicant offered twenty-nine exhibits, referred to Applicant's Exhibits A through CC. She also testified on her own behalf. The transcript of the hearing (Tr.) was received on April 16, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

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. 40). 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.

FINDINGS OF FACT

The Applicant is 34 years old and engaged to be married. She is employed by a defense contractor as a Program Manager, and is applying for a security clearance in connection with her employment.

Paragraph 1 (Guideline H - Drug Involvement). The Government alleges that the Applicant is ineligible for clearance because she 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 her reliability, trustworthiness and ability to protect classified information.

The Applicant obtained her Bachelors Degree in December 1997, and her Masters Degree in Mechanical Engineering in May 2000. While in graduate school, she used marijuana about ten times, between 1998 to 1999. She also used LSD on two occasions between August 1999 and October 1999, and used cocaine on two occasions between October 1998 and November 1998. She used these illegal drugs at outdoor festivals, concerts, camping trips and in Europe. She has worked in a DoD related program as either an apprentice, or on a part or full time basis, since high school. She obtained a DoD security clearance in 1998.

In 2003, while traveling in Amsterdam with her fiance, she used marijuana three times. She also used it on one occasion in 2006, while attending a gathering with graduate student friends.

She began working for her current employer in September 2005. Although the Applicant realized that the use of illegal drugs was prohibited by law and was against DoD policy, she used illegal drugs anyway. She testified that her illegal drug use was a stupid mistake that will never be repeated. She now fully understands her responsibilities while holding a security clearance, and how serious it is to the DoD. She has not used any illegal drug for the past three years, since her last marijuana use in 2006, and she has no intention of ever using any illegal drug in the future. (Tr. pp. 59, 66-67, 70 -71, 74 -75).

Since her last use of marijuana in 2006, the Applicant has redirected her life. She no longer associates with any of her friends from graduate school or anyone else who uses illegal drugs. She realizes that her earlier drug use was stupid and that it has

no place in her life. She also realizes the enormous responsibilities that come with holding a security clearance. She understands that illegal drug use is not only against the law but against defense industry policy. She states that she will never use any illegal drug in the future and is confident that she will not. She has signed a statement of intent on March 19, 2009, indicating that if she is ever to use any illegal drug in the future, her security clearance will be immediately revoked. (Applicant's Exhibit A and Tr. pp. 65-66).

The Applicant now lives with her fiancé, who does not use illegal drugs, other than a one time marijuana use in Amsterdam. They are planning to get married this spring. They have purchased a house together and they plan to have children after they are married. When she is not working, as a stress release the Applicant enjoys exercising and playing with her pets.

Letters of recommendation from Applicant's supervisor, professional colleagues and friends indicate that they have never observed the Applicant using any illegal drugs or exhibiting the effects of illegal drug use. In fact most of them never heard about or even pondered the possibility of the Applicant or her fiancé ever using illegal drugs until they were informed of her hearing before DOHA. (Applicant's Exhibits G through P).

Performance evaluations of the Applicant for 2007 and 2009 reflect excellent ratings, her work quality is outstanding, her communication skills are effective, and her work is flawless. (See Applicant's Exhibits B and C). Applicant received a promotion dated December 31, 2008. (Applicant's Exhibit D). Applicant has received several awards in recognition of her excellence in service. (Applicant's Exhibit T).

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) a demonstrated intent not to abuse any drugs in the future, such as:
 - 26. (b).(1) disassociation from drug-using associates and contacts;
 - 26. (b).(3) an appropriate period of abstinence;
 - 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.

Conditions that could mitigate security concerns:

17(d). The individual has acknowledged the behavior and obtained counseling to change the behavior or taken positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthiness, unreliability or other inappropriate behavior, and such behavior is unlikely to recur;

17. (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation or duress.

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, extent, 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 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
- 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 her 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 H and E of the SOR. I have considered all of the evidence presented in this case, including the letters of recommendation, the favorable performance evaluations and recent promotion and the other accomplishments of the Applicant. The Applicant used illegal drugs including marijuana, LSD and cocaine for the most part in graduate school. This was a stupid and childish thing to do. Since 2006, she has not used any illegal drugs and has no intentions of ever using any illegal drug again. She is ashamed and remorseful for her misconduct in the past. She has matured since graduate school, and no longer associates with illegal drug users. She has signed a statement of intent indicating that she will not use illegal drugs in the future and if she does, her security clearance will be immediately revoked. This further demonstrates her commitment to a drug free lifestyle.

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 Conditions *26.(b) a demonstrated intent not to abuse any drugs in the future, such as: 26.(b).(1) disassociation from drug-using associates and contacts; 26.(b).(3) an appropriate period of abstinence, and 26(b)(4) a signed statement of intent with automatic revocation of clearance for any violation* applies. Accordingly, I find for 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. However, Mitigating Conditions, *17(d). the individual has acknowledged the behavior and obtained counseling to change the behavior or taken positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthiness, unreliability or other inappropriate behavior, and such behavior is unlikely to recur and 17. (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation or duress* also apply. Consequently, 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. The Applicant is 34 years old, highly educated, intelligent, successful and a well respected employee of the defense industry

who has held a security clearance for over ten years. She has stopped using illegal drugs, recently been promoted on the job, is getting married and starting a family soon. Under the particular facts of this case, the totality of the conduct set forth above, when viewed under all of the guidelines as a whole, support a whole person assessment of good judgement, trustworthiness, reliability, 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 she is trustworthy, and that she meets the eligibility requirements for access to classified information at this time. Accordingly, I find for the Applicant under Guidelines H (Drug Involvement) and E (Personal Conduct).

On balance, it is concluded that the Applicant has overcome the Government's case opposing her 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 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: 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.

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 clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson
Administrative Judge