



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-07759
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Department Counsel
For Applicant: Judith A. Litzenberger, Attorney At Law

November 24, 2009

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing, (e-QIP) on October 28, 2007. (Government Exhibit 1). On or about March 18, 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 April 9, 2009, and requested a hearing before an Administrative Judge. The case was assigned to the undersigned Administrative Judge on June 3, 2009. A notice of hearing was issued that same day, scheduling the hearing for June 25, 2009. The Government offered five exhibits, referred to as Government Exhibits 1 and 5, which were received without objection. Applicant offered four exhibits, referred to as Applicant's Exhibits A through D and testified on his own behalf. The record remained open until close of business on July 9, 2009, to

allow the Applicant to submit additional documentation. Applicant submitted five additional exhibits referred to as Applicant's Post-Hearing Exhibits E through I. The transcript of the hearing (Tr.) was received on July 6, 2009. 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 43 years old and has a Bachelor of Science Degree in Electrical Engineering. He is employed by a defense contractor as an Electrical Engineer, 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.

The Applicant admitted, in part, and denied in part, with explanations, the allegations set forth in the SOR under this guideline.

The Applicant has been employed in the defense industry since 1986. He has worked for the same defense contractor from 1986 until October 2007, and has held a security clearance for the past twenty-three years. He started with his current employer in October 2007. Although he was aware of the illegality of marijuana; and that his company policy and DoD prohibited its use, he used marijuana during various periods in 1986, from 1990 to 1994 and again in 2005, on an occasional basis. (Government Exhibit 3).

Applicant explained that he started using marijuana back in high school and continued experimenting with it in college. In 1986, while working part-time in the defense industry, he used marijuana on a quarterly basis. (Tr. p. 53). He used it to help him relax. He used marijuana from 1986 to 1994, on a periodic basis. (Tr. p. 55). He did not use marijuana at all between 1994, and September 2005. (Tr. p. 54). In 2005, he used marijuana about three or four times, with friends, to deal with stress from his marriage, and this was out of character for him. Since 2005, he has not used any marijuana.

Applicant asserted that in 2001, when he completed a previous security clearance application, he revealed his marijuana use and his 1994 arrest for possession of marijuana and being drunk in public to his security manager. He testified that he was told that it would not be a issue, since everyone did a little bit in college. (Tr. pp. 56-57). A copy of the Applicant's 2001 security clearance application confirms that the Applicant disclosed his marijuana use from 1990 to 1994. On this security clearance application, and also in his 2005 application, he provided information in the remarks section to clarify his answers regarding his difficulties in entering data on the computer in response to the question regarding his use of illegal drugs. (Applicant's Post-Hearing Exhibit G).

Paragraph 2 (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 admitted with explanations the allegations set forth in the SOR under this guideline.

The Applicant completed an Electronic Questionnaire for Investigations Processing dated October 28, 2007. Question 24(a) of the application asked him if since the age of 16 or in the last 7 years, whichever is shorter, had he illegally used any controlled substance, for example, marijuana, cocaine etc. The Applicant responded, "NO". (See Government Exhibit 1). This was a false answer. The Applicant failed to reveal that he had used marijuana at all and namely, as recently as November 2005.

Question 24(b) of the same application, asked the Applicant if he ever illegally used any controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly or immediately affecting public safety. The Applicant responded, "NO". (See Government Exhibit 1). This was a false answer. The Applicant failed to reveal that he had used marijuana in 1986, 1990 to 1994 and again in 2005, while holding a Department of Defense security clearance.

Question 21 of the same application, asked the Applicant if in the last 7 years he had consulted a mental health professional (psychiatrist, psychologist, counselor, etc.) or had he consulted with another health care provider about a mental health related condition. The Applicant responded, "NO". (See Government Exhibit 1). This was a false answer. The Applicant failed to reveal that in October 2005, he sought out mental health treatment with his physician. During that visit, his physician diagnosed him with bi-polar disorder and prescribed medication known as "Zyprexa" and referred him to a psychiatrist for further treatment. (Government Exhibits 2 and 5). Technically, the Applicant consulted his personal physician and not a mental health professional, however, the diagnosis and prescribed medication was for a mental condition. With this noted confusion, however, this allegation is found for the Applicant.

The Government amended the SOR at the hearing to include an additional allegation. Allegation 2(c) was added under Guideline E: the allegation read, "The Applicant falsified material facts on his questionnaire dated October 28, 2007, in response to question 23(d) wherein he deliberately failed to disclose his arrest of 1994 for possession of marijuana and being drunk in public." Question 23(d), of the same application, asked the Applicant if he has ever been charged with or convicted or any offenses related to drugs or alcohol. The Applicant responded, "Yes", and listed his arrest for DUI in January 1989. (See Government Exhibit 1). The Applicant failed to disclose his more recent arrest in 1994, for Possession of Marijuana and being drunk in public. He stated that the computer system would not allow him to do so, or maybe he simply forgot. (Tr. p. 73).

The Applicant testified that he had taken the security questionnaire home to complete on his home computer, and had about a day and a half to finish it. (Tr. p. 33). He gave a number of explanations as to why he did not disclose his recent marijuana use on his security clearance application. Since he had revealed his previous drug use on earlier security clearance applications, he thought the information was part of the record. (Tr. p. 57). He believed that he should have read the questions more carefully and apparently misinterpreted the question. (Tr. p. 34). He was embarrassed about his illegal drug use and simply did not put it on the application. (See Applicant's Answer to SOR). Since he told his security officer and his supervisor about his bi-polar medical diagnosis, he did not think to reveal his marijuana use because he believed it to be insignificant. (Tr. p. 71). He finally realized that he made a mistake and should have revealed the 2005, marijuana use on his 2007, security clearance application. (Tr. p. 70). He stated that he did not intend to omit anything on the questionnaire or deceive the Government. (Tr. p. 22).

Applicant's performance appraisals from 1986 to 1987 and 1990 to 2005 reflects that he either "meets" or "exceeds" performance requirements in every category. (Applicant's Exhibit A). Applicant's performance appraisals from 1988, 1989 and 2006 also reflect that he consistently "exceeds the responsibilities of his job and is a candidate for promotion." (Applicant's Exhibit D). Applicant has received promotions and salary increases over the twenty years that he has worked for the defense contractor. (Applicant's Exhibit B). Various awards, bonus and merit pay increases were given to the Applicant for his contributions to the defense industry. (Applicant's Exhibit C).

A letter from the Applicant's current supervisor reflects that she considers the Applicant to be stable, dependable, reliable, professional and competent. He is recommended for a position of trust. (Applicant's Exhibit I).

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.(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia;

25.(g) any illegal drug use after being granted a security clearance.

Conditions 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.

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:

None.

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 pertinent 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 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/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 drug involvement (Guideline H) and that he falsified his security clearance application (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 H and E of the SOR.

The evidence shows that the Applicant used marijuana while holding a DoD security clearance for many years during his twenty-three year history with the defense industry. He used marijuana knowing that it was prohibited by law and clearly prohibited by the Department of Defense. His most recent use of marijuana occurred three or four times in 2005. This demonstrates poor judgment and untrustworthiness. Under the particular facts of this case, his use of marijuana in 2005 is considered recent in light of the fact that he was using it while holding a security clearance, which prohibits a favorable determination in this case.

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 25(g) any illegal drug use after being granted a security clearance* apply. None of the mitigating conditions are applicable. I find his past use of marijuana to be recent and of security significance. Accordingly, I find against the Applicant under Guideline H, Drug Involvement.

With respect to the Applicant's failure to disclose his 2005 marijuana use on his 2007 security clearance application, I find that it was intentional. Considering all of the Applicant's excuses, I find only one to be credible. Clearly, as a middle aged man who is well respected in the company, he was embarrassed about his continued illegal drug use and did not want to disclose it. There is no other plausible explanation for his conduct.

I find that the Applicant intentionally sought to conceal his 1994 arrest on his security clearance application in response to question 23(d). The Applicant's excuse that the computer system would not allow him to place the entry is without merit. He clearly knew how to operate the computer program and place entries in the remarks section of the application, because he listed his 1989 arrest for DUI.

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. None of the mitigating conditions are applicable. I find that the Applicant deliberately falsified his security clearance application by concealing his marijuana use. Consequently, I find against the Applicant under Guideline E, Personal Conduct.

As previously discussed, subparagraph 2(b) of the SOR is found for the Applicant.

I have also considered the “whole person concept” in evaluating the Applicant’s eligibility for access to classified information. The Applicant is 43 years old, mature, educated, successful, well respected, and a long time employee of the defense industry, who has held a security clearance for twenty-three years. I have considered all of the evidence, including the favorable performance appraisals, as well as the awards, and letters of recommendation. The fact remains, however, that he used marijuana, during various periods of those twenty-three years while holding a security clearance, and last used it in 2005. He also did not disclose this use on his 2007 security clearance application. 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 judgment, untrustworthiness, unreliability, a lack of candor, 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. Accordingly, I find against the Applicant under Guideline H (Drug Involvement) and under Guideline 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.

Subpara. 1.d.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subpara. 2.a.: Against the Applicant.

Subpara. 2.b.: For the Applicant.

Subpara. 2.c.: 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