



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 08-10652
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Jeff Nagel, Department Counsel  
For Applicant: Jillian L. Oportus, Esq.

July 30, 2009

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**Decision**

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LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing, (e-QIP) on May 8, 2008. On March 24, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline 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 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 16, 2009, and requested a hearing before an Administrative Judge. The case was assigned to the undersigned Administrative Judge on May 12, 2009. A notice of hearing was issued on June 2, 2009, scheduling the hearing for June 23, 2009. The Government offered three exhibits, referred to as Government Exhibits 1 through 3, which were received without objection. Applicant called one witness, and offered fourteen exhibits, referred to as Applicant's Exhibits A through N and testified on his own behalf. The transcript of the hearing (Tr.) was received on June 30, 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 46 years old and married with one child. He has a Master's Degree of Science in Information and Telecommunication Systems. He is employed by a defense contractor as a Senior Computer Consultant, 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 obtained his masters degree from a prestigious university. He has been working for his current employer since November 2006. However, since 2002, he has worked on a government contract. Applicant testified that he used marijuana with varying frequency, at least ten times a year, from 1980 through 2009. On two occasions during this period, on August 14, 1982, and in November 1984, the Applicant was arrested and charged with Possession of Marijuana. On both occasions, he was found guilty and sentenced to pay a fine and court costs. (Government Exhibit 2). He successfully completed the sentence in both cases.

At various times while using marijuana, he purchased it for his own use. He testified that he has never grown, cultivated or sold marijuana. (Tr. P. 45). He explained that he last used marijuana in February 2009 during the Super Bowl game. (Tr. pp. 46-47). Since then he has taken three separate drug tests that have all come back negative for drugs, including marijuana. (Applicant's Exhibits J, K and M). He has also signed a notarized statement of intent dated June 2, 2009, indicating that if he were to ever use any illegal drugs in the future he agrees to the immediate revocation of his security clearance. (Applicant's Exhibit L, and Tr. p. 49). The Applicant testified that he has decided to stop using marijuana because his job and security clearance are more important than an occasional buzz. (Tr. p. 49). Two years ago, he moved from a college dominated beach community where illegal drug use was common and into a family oriented community. He married a dentist who does not use illegal drugs. Applicant admits knowing that his use of marijuana was illegal, but that he was never notified by his employer that it was against company policy. (Tr. pp. 50-51). Not wanting the effects of illegal drug use to be transferred to his offspring, during a four month period, from August 2007 through January 2008, when he and his wife were trying to conceive a child, he stopped using marijuana. At some point, he also stopped for about a year or a year and a half but returned to using marijuana again. (Tr. p. 73). He does not believe that he is addicted and he has never sought out any medical attention for his drug use.

The Applicant completed a security clearance application dated May 2008 and subsequently, on October 1, 2008, underwent a personal subject interview by an investigator who inquired into his background to determine his eligibility for access to classified information. He knew at that time that the DoD was concerned about his history of illegal drug use. Despite this, he used marijuana again in February 2009.

An individual who has worked with the Applicant since 2006 testified that he interacts with the Applicant on a daily basis. In his opinion, the Applicant is extremely

conscientious, and a person of strong moral character who is hardworking, diligent, and honest and recommended for a position of trust. (Tr. pp. 28-37).

Letters of recommendation from the Applicant's manager, coworkers, brother-in-law, past school mate and professional colleagues and friends attest to his trustworthiness and reliability. He is considered intelligent, hardworking, conscientious and diligent in the performance of his job. (Applicant's Exhibits B, C, D, E and F).

Applicant's annual performance appraisals for 2007 and 2008 are favorable. (Applicant's Exhibits H and 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.

#### Condition that could mitigate security concerns:

26.(b) a demonstrated intent not to abuse 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 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 the 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 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. 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 Guideline H of the SOR.

The evidence shows that the Applicant's eighteen years history of marijuana use began in high school and continued through college and through his professional work history. On average he used it at least ten times a year from 1980 through 2008. His most recent use of marijuana occurred in February 2009, just four months before the hearing. He contends that he has now stopped using marijuana and has signed a statement of intent indicating such. However, under the particular circumstances of this case, the statement of intent does not hold much weight given his long period of use and the fact that he used it as recently as February 2009. He used marijuana knowing that it was prohibited by law. Common sense would dictate that it is also clearly prohibited by his employer and by the Department of Defense, even though he states that he has never been notified of such. The Applicant's conduct demonstrates poor judgment and untrustworthiness. He is not currently eligible for a security clearance. If he can continue to remain drug free in the future, he may be eligible for a security clearance sometime in the future, but not now.

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 22(g) any illegal drug use after being granted a security clearance* apply. Although Mitigation Condition *26(b)(4), a demonstrated intent not to abuse drugs in the future, such as, a signed statement of intent with automatic revocation of clearance for any violation* is applicable, it is not controlling in this case. I find his past use of illegal drugs to be too recent and of serious security significance. Accordingly, I find against the Applicant under Guideline H, Drug Involvement.

I have also considered the "whole person concept" in evaluating the Applicant's eligibility for access to classified information. The Applicant is 46 years old, mature, educated, intelligent, successful, well respected, and he has worked for a government contractor since at least 2002. He has made some very poor decisions by using marijuana for over the past eighteen years and has only four months of abstinence. 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 poor judgement, 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).

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 Paragraph 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: 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.

### **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