



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-11596
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Department Counsel
For Applicant: Stephanie N. Mendez, Attorney At Law

June 21, 2010

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on June 12, 2007. (Government Exhibit 1.) On June 19, 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 adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense (DoD) for SORs issued after September 1, 2006.

The Applicant responded to the SOR and it was notarized on August 21, 2009, wherein he requested a hearing before a DOHA Administrative Judge. This case was assigned to the Administrative Judge on November 12, 2009. A notice of hearing was originally issued on December 14, 2009, scheduling the hearing for February 3, 2020. The matter was rescheduled and an amended notice of hearing was issued on January 8, 2010, scheduling the hearing for March 10, 2010. At the hearing the Government presented five exhibits, referred to as Government Exhibits 1 to 5, which were admitted

without objection. The Applicant presented twenty-seven exhibits, referred to as Applicant's Exhibits A through Z and AA. He called four witnesses and testified on his own behalf. The official transcript (Tr.) was received on March 22, 2010. 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 33 years old and has a Master of Science in Mechanical Engineering. He is employed by a defense contractor as a Systems 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.

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he has engaged in conduct involving questionable judgment, lack of candor, dishonesty, or an unwillingness to comply with rules and regulations.

The Applicant admitted each of the allegations set forth under these guidelines. (Applicant's Answer to SOR.) He has worked for his current employer since February 2003. He used marijuana about ten times between July 2001 to at least May 2003. (Tr. p. 89.) He began using marijuana in college, continued to use it while living in Europe during an internship, and last used it on Memorial day in May 2003. On that day, he was at a party with friends and smoked it in a turkish pipe. He has also purchased marijuana with friends for his own use.

The Applicant also used psilocybin mushrooms on four separate occasions, twice in February 2002, and twice in December 2006. In 2002, he used psilocybin during an internship in Germany. In 2004, the Applicant applied for a security clearance that was granted sometime in 2005, with the understanding that he was no longer using illegal drugs. He knew the use of illegal drugs was against the law and prohibited by his company. On New Years Eve, 2006, while holding a DoD security clearance, the Applicant used psilocybin mushrooms again, on two occasions. He also purchased psilocybin mushrooms with friends for his own use.

In May 2004, the Applicant provided a statement to the Department of Defense indicating that he had no intent of ever using illegal drugs in the future. (Government Exhibit 4.) The Applicant explained that at the time he made the statement, he had no intent to use illegal drugs in the future. At the hearing, he testified that he has no plan to use any illegal drug in the future. (Tr. pp. 91). He states that it has not been easy for him but he has made a lifestyle change and a deliberate attempt to reduce the frequency of contact with his friends that use illegal drugs. (Tr. pp. 115 -116).

The Applicant submitted a notarized letter of Intent wherein he states that he will not repeat his past illegal drug use and understands that if he does, his security clearance would be subject to automatic revocation. (Applicant's Exhibits K and AA.)

The Applicant explained that after having used marijuana and psilocybin mushrooms, he was asked by his company to apply for a job that would require SCI access. Instead of telling the truth about his use of illegal drugs, he submitted a falsified security clearance application in June or July 2006, and intentionally omitted his most recent use of psilocybin mushrooms. Prior to going into the polygraph exam, the Applicant confessed to the examiner that he had not been truthful on the application. In June 2007, the Applicant was denied program access through another Government agency due in part to his illegal drug use set forth above. Since then, the Applicant has admitted his illegal drug use. (Government Exhibit 1.)

Four witnesses testified on behalf of the Applicant. A System Director, two Department Directors and a Senior Project Leader from the Applicant's company testified that they consider the Applicant to be a hard worker, efficient, trustworthy and responsible. He is also known to be conscientious and loyal. They are aware of his mistakes and have forgiven him. (Tr. pp. 27-78.)

Numerous letters of recommendation from his supervisor, professional colleagues and friends of the Applicant attest to his hard working nature, superior performance, high technical abilities, excellent leadership skills, good judgment, reliability and trustworthiness. He is well respected by everyone and highly recommended for a position of trust. (Applicant's Exhibits A through I.)

The Applicant has undergone drug tests that have all come back with negative results. (Applicant's Exhibit J.)

The Applicant submitted the results of a psychological examination he underwent on January 22, 2010, by a licensed Clinical Psychologist of his choice. The results of the examination indicates that the Applicant tests with a low probability of substance abuse and substance dependence. There is no indication, on interview or test data, that he would present a security risk. (Applicant's Exhibits L and M.)

Applicant's performance appraisals for the periods from February 24, 2003 through November 12, 2009, all reflect "satisfactory" ratings. (Applicant's Exhibits N through 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)

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:

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.

Conditions 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 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 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 a history of illegal drug use (Guideline H), and dishonesty (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 Applicant has used marijuana and psilocybin mushrooms while working for his current employer, a defense contractor, and while holding a security clearance. He knew at the time that it was illegal and against company policy. Although his most recent use of any controlled substance occurred in 2006, over four years ago, he told the Government in 2004, that he had no intent to use illegal drugs in the future, and then broke his word. Given his past history, there is no guarantee that he will remain drug free in the future or that his word can be relied upon. Although the probability is low that he will return to drug use, the possibility exists, and poses a security risk that cannot be ignored. Under Guideline H, Drug Involvement, Disqualifying Conditions 25.(a) *any drug abuse*, and 25.(c) *illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia* apply. None of the mitigating conditions are applicable. Accordingly, I find against the Applicant under Guideline H, Drug Involvement.

Furthermore, the Applicant deliberately provided false information to the Government in 2006, concerning his illegal drug use in the past. He only confessed his drug use when faced with a polygraph. This conduct displays dishonesty and an unwillingness to comply with rules and regulations and shows a pattern of unreliability and untrustworthiness. Under the particular facts of this case, his poor personal conduct is considered a significant security risk, which prohibits a favorable determination in this case. Under Guideline E, Personal Conduct, Disqualifying Conditions, 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. Consequently, I find against 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 a 33 year old project engineer who has had a productive career, as evidenced by his witnesses, his favorable letters of recommendation and his performance appraisal. However, he has also disregarded the law, company policy and DoD regulation, revealing a defect in judgment

that cannot be ignored. 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 he clearly does not meet the eligibility requirements for access to classified information. Accordingly, I find against the Applicant under Guideline H (Drug Involvement), and 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.
 - Subpara. 1.e.: Against the Applicant.

- Paragraph 2: Against the Applicant.
 - Subpara. 2.a.: Against the Applicant.
 - Subpara. 2.b.: 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