



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-00524
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Julie R. Mendez, Department Counsel
For Applicant: *Pro se*

April 23, 2010

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on March 29, 2007. (Government 4.) On August 10, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H, G 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 for SORs issued after September 1, 2006.

The Applicant responded to the SOR in writing on September 8, 2009, in which he elected to have the case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) to the Applicant on October 14, 2009. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM on October 22, 2009, and he submitted no reply. The case was assigned to the

undersigned for resolution on January 11, 2010. Based upon a review of the case file, pleadings and exhibits, eligibility for access to classified information is denied.

FINDINGS OF FACT

The Applicant is 29 years old. He is employed by a defense contractor as a Graphics Specialist, and is applying for a security clearance in connection with his employment.

Department Counsel, pursuant to Paragraph E.3.1.13. of DoD Directive 5220.6, moved to amend the Statement of Reasons by striking portions of the original SOR. Specifically, to strike subparagraph 2.d in its entirety, and in subparagraph 3a, to strike the language "and 2d". Applicant made no objection. Said amendments were so ordered.

Paragraph 1 (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 each of the allegations set forth in the SOR under this guideline. The Applicant completed an Electronic Questionnaire for National Security Positions (e-QIP) on March 29, 2007. Question 24(a), asked him if since the age of sixteen or in the last seven years which is shorter, had he used any illegal substance? The Applicant answered, "NO." (Government Exhibit 4.) This was a false answer. The Applicant failed to list that he used marijuana from about 1999 to about 2006. (Government Exhibits 3 and 5.)

Question 24(c), asked him if in the last seven years, had he been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic depressant, stimulant, hallucinogen, or cannabis for his own intended profit or that of another? The Applicant answered, "NO." (Government Exhibit 4.) This was a false answer. The Applicant failed to list that he had purchased and sold marijuana from about 2001 through about 2006, as set forth below. (Government Exhibits 3 and 5.)

The Applicant completed the security clearance application in March 2007, less than a year since his last admitted drug use. He told the government investigator that he failed to disclose his drug sales history because he was never charged or arrested. (Government Exhibit 5.) The question does not ask about arrests or convictions, merely if an Applicant has been involved in the illegal purchase or sale. (Government Exhibit 4.)

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

The Applicant admitted each of the allegations set forth in the SOR under this guideline. The Applicant used marijuana twice in high school in 1999. His marijuana

use increased in college to about two to three times per month. He states that he limited his marijuana use to the weekends, and continued using it until at least April 2006, after leaving college. During this period, the Applicant purchased the marijuana for his own use, or obtained it from his roommate. He states that he used marijuana out of boredom and it was just something to do before going out and partying with friends. (Government Exhibit 5.)

From 2001 to 2006, the Applicant became involved in the sale and distribution of marijuana. In 2001, while attending college, he met an individual (A) who sold him 5 pound increments of marijuana. Applicant would in turn break it up into smaller amounts, usually 1/4 ounce to sell at the university and in the surrounding areas. Applicant estimates that he sold marijuana to three to five persons per weekend from his apartment. Applicant used the proceeds of his drug sales for general entertainment activities and to buy marijuana for his own use. (Government Exhibit 5.)

In April 2006, Applicant's friend (A), was arrested and charged with Conspiracy to Distribute and Possess With Intent to Distribute Cocaine and Possession with Intent to Distribute Cocaine resulting in significant prison time and forfeiture of significant assets. (Government Exhibit 6.) As a result of (A)'s arrest, the Applicant was admittedly brought in for questioning by the FBI in late 2006, and questioned regarding his involvement in the buying and selling of drugs. Applicant has not admitted any cocaine drug sales and states that he did not know the details of A's drug operation. Applicant states that his last contact with A was in April 2006 and has had no further contact with him since then.

Paragraph 3 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he has engaged in criminal activities.

The Applicant admitted each of the allegations set forth in the SOR under this guideline. The Applicant deliberately sought to conceal his marijuana use from 1999 to 2006, and his purchase and sale of marijuana from 2001 to 2006. By intentionally concealing this information from the Government on his security clearance application of March 2007, he violated federal law, Title 18, United States Code, Section 1001, a felony.

The Applicant admits that he has made a series of poor decisions in the past. He regrets his actions and is now trying to move forward with his life in a positive direction. He is going back to school, and redirecting his life and has no desire to ever engage in the criminal activities of the past. He states that he is trying to reconcile his former transgressions. (Government Exhibit 3.)

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 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.

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;

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

Conditions that could mitigate security concerns:

None.

Guideline J (Criminal Conduct)

30. *The Concern.* Criminal activity creates 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.

Condition 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, alcohol abuse and poor 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 falsified his security clearance application, (Guideline E), has a history of drug involvement (Guideline H), and criminal conduct (Guideline J). 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 E, H and J of the SOR.

The Applicant intentionally failed to disclose his marijuana use, and his purchase and sale, in response to questions 24.(a) and 24.(d) of his security clearance application of March 2007. 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. Consequently, I find against the Applicant under Guideline E, Personal Conduct.

The evidence also shows that the Applicant used, purchased and sold marijuana for profit as recently as 2006, and was questioned by the FBI regarding this illegal conduct. 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. Accordingly, I find against the Applicant under Guideline H, Drug Involvement.

The Applicant's use, purchase and sale of marijuana is criminal and dangerous. By falsifying his security clearance application, the Applicant violated federal law, Title 18, United States Code, Section 1001, a felony. 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. None of the mitigating conditions are applicable. Accordingly, I find against the Applicant under Guideline J, Criminal 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 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 E (Personal Conduct), Guideline H (Drug Involvement), and Guideline J (Criminal 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, 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: Against the Applicant.
- Subpara. 1.a.: Against the Applicant.
- Subpara. 1.b.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subpara. 2.a.: Against the Applicant.

Subpara. 2.b.: Against the Applicant.

Subpara. 2.c.: Against the Applicant.

Paragraph 3: Against the Applicant.

Subpara. 3.a.: Against the Applicant.

Subpara. 3.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