



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 09-03425

Appearances

For Government: Jeff Nagel, Department Counsel
For Applicant: *Pro se*

February 23, 2011

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) dated January 27, 2009. (Government Exhibit 1). On September 23, 2010, 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 for SORs issued after September 1, 2006.

The Applicant responded to the SOR on October 13, 2010, and he requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned Administrative Judge on November 12, 2010. A notice of hearing was issued on January 3, 2011, scheduling the hearing for January 21, 2011. At the hearing the Government presented three exhibits, referred to Government Exhibits 1 to 3. The Applicant called one witness and presented three exhibits, referred to as Applicant's Exhibits A through C. He also testified on his own behalf. The official transcript (Tr.)

was received on February 3, 2011. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

FINDINGS OF FACT

The Applicant is 30 years old, married and is a high school graduate. He is employed by a defense contractor as a Pierside Service Technician, 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 admits each of the allegations set forth under this guideline. The Applicant began his employment with his current company in November 2007. At the time he was hired, he disclosed his complete drug related past to his employer and did not withhold any information from them.

The Applicant was born in the United States. His father played professional basketball in the NBA before moving to Germany to play for nine years, when the Applicant was one year old. In 1989, in the fourth grade, the Applicant returned with his family to the United States. In the United States, the Applicant felt as though he did not fit in with the other children at school. German was his first language, and he could not read English. At the age of thirteen, to gain acceptance from others, he started experimenting with illegal drugs. He used marijuana, cocaine, LSD and methamphetamine. He used marijuana on a daily basis until 2004. At the age of seventeen, he started using methamphetamine with his girlfriend and her mother who introduced him to the drug. He used methamphetamine on a daily basis until 2004. He also used cocaine two times in 1997, and LSD twice in 1995.

In 1998, the Applicant was arrested for Violation of Health & Safety Controlled Substance for Sale, Possession of Controlled Substance. The Applicant admitted that he had marijuana on his person. He was sentenced to work a furlough program for three months, and required to submit a urinalysis test. He tested positive on the urinalysis and was remanded to jail for six months. He was placed on probation for five years. (Applicant's Answer to SOR.)

In June 2000, the Applicant was arrested again. He was charged with Possession of Controlled Substances for Sale, and Possession of Controlled Substance parapherna (*sic*) [paraphernalia.] At the time of the arrest, he possessed about an ounce of marijuana and an ounce of methamphetamine. (Tr. p. 48.) He spent six months in county jail and was placed on probation for three years. (Applicant's Answer to SOR.)

In February 2002, the Applicant was arrested for "Possession of Substance Controlled and for Sale, Tranp/ETC Possession of Controlled Substance and Possession of Controlled Substance." He was sentenced to the Department of

Corrections for two years, and ordered to pay a \$200.00 fine. The Applicant explained that at the time of his arrest, he possessed half an ounce of methamphetamine. He had borrowed a neighbor's car and was on his way back home when he was pulled over. The Applicant stated that he sold drugs to his friends and to supply his habit. As a result of this conviction, the Applicant spent a year and a half in prison. While in prison, he completed a Substance Abuse Program. Upon his release, he relapsed for a weekend. His parole officer advised him to turn himself in. He did so and served 90 additional days. Following this arrest, the Applicant stopped using illegal drugs and he made many positive changes in his life. The Applicant submitted a court record showing that his convictions set forth above were set aside and the charges dismissed. (Applicant's Exhibit B.)

Since June 2004, the Applicant has been drug free. He attended Narcotics Anonymous (NA) meetings for a while, but stopped when he felt he no longer needed them. He no longer associates with people who use drugs. (Tr. p. 39.) He has no desire to ever use illegal drugs again. He is the sole provider in his family. For the past three years, the Applicant has been happily married to a woman who does not tolerate illegal drug use. (Tr. p. 39). He testified that he would never do anything to jeopardize his situation with his wife, or his job, or his parents. (Tr. p. 40.) The Applicant stated that he regrets his mistakes of the past and has learned from them. (Applicant's Answer to SOR.)

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 completed a Questionnaire for National Security Positions dated January 27, 2009. Question 23(a) asked him if he has ever been charged with or convicted of any felony offense? Question 23(b) asked if he had ever been charged with or convicted of a firearms or explosives offense? Question 23(c) asked if there are currently any charges pending against him for any criminal offenses? Question 23(d) asked if he has ever been charged with or convicted of any offenses related to alcohol or drugs? Question 23(e) asked him if in the last seven years, had he been subject to court-martial or other disciplinary proceedings under the Uniform Code of Military Justice? Question 23(f) asked him if in the last seven years, had he been arrested for, charged with, or convicted of any offenses not listed in response to a, b, c, d, or e, above. The Applicant failed to disclose his drug related arrests of February 2002, July 2000, and July 1998.

Question 24(a) of the same questionnaire asked the Applicant since the age of sixteen or in the last seven years, whichever is shorter, had he illegally used any controlled substance. Question 24(b) asked him if he ever illegally used a 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? Question 24(c) asked him if in the last seven years, has 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 failed to disclose his daily methamphetamine use until June 2004, his daily marijuana use until 2004, his arrest in February 2002 for Possession and Sale of a Controlled Substance, his arrest in July 2000 for Possession of Controlled Substance for Sale, and Possession of Controlled Substance sic Parahera [parahernalia], and his arrest of July 1998 for violation of Health and Safety Controlled Substance for Sale, and Possession of Controlled Substance.

The Applicant did not report his 2000 arrest for possession of marijuana to his security office at his place of employment.

The Applicant explained that he in no way intended to conceal, hide or deceive the Government in response to the questions on his security clearance application nor did he intend to hide anything from his facility security officer. (Tr. p. 51.) He thought that he was answering the questions truthfully. It was his understanding that his criminal matters were expunged and that he did not have to put them down on the questionnaire. (Applicant's Exhibit B and Tr. p 51.) Furthermore, he did not tell his security officer about his 2000 arrest because the matter had been expunged. (Tr. p. 54.) Knowing now that he should have revealed the information, he states that he will do so in future.

A coworker of the Applicant, who met the Applicant in 2007, and became aware of his checkered past when the Applicant told him about it, is of the opinion that the Applicant has eliminated drugs from his life forever. The Applicant is described as a quick learner, with an outstanding work ethic, and a good attitude. His honesty, integrity, trustworthiness and reliability is beyond reproach. He is trusted with all access to all secret areas and areas that are kept under lock and key, and highly recommended for a position of trust. (Tr. pp. 61-62.)

A letter of recommendation from the individual who hired the Applicant attests to his excellent work habits, dependability, dedication, reliability and intelligence. (Applicant's Exhibit C.)

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;

Conditions that could mitigate security concerns:

26.(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.

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:

None.

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;
- 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; 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."

CONCLUSION

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 abuse (Guideline H) and that he was less than candid on

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 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 abused a variety of illegal drugs including methamphetamine, marijuana, cocaine, and LSD until 2004. At one point, he was so involved in illegal drugs that he sold them to friends to supply his habit. He was arrested three times and convicted twice for possession and sale of a controlled substance, and as a result, he went to prison for a year and a half. Since then, the Applicant has transformed his life. He has completed a substance abuse program, stopped using illegal drugs and has been drug free since 2004, almost seven years. He has gotten married to a woman who does not tolerate illegal drug use, and he has no interest, desire or intent to ever return to that lifestyle. He no longer associates with drug users. The instigators of the conduct have been removed from his life, and there is no chance that he will engage in any such conduct in the future. He has provided persuasive evidence demonstrating that he has put any such misconduct behind him. He currently displays good judgment and trustworthiness.

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*, apply. However, Mitigating Conditions 26.(a) *the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment* applies. Accordingly, I find for the Applicant under Guideline H, Drug Involvement.

With respect to the Applicant's failure to disclose his arrest history on his security clearance application, I find that it was unintentional. He credibly testified that he believed that his criminal matters had been expunged and that he was not required to disclose them. This belief was reasonable under the circumstances.

As stated above, I find that the Applicant did not deliberately conceal any material information from the Government on his security clearance application, nor did he intend to conceal information from his facility security officer. The Applicant honestly believed that his criminal matters were expunged and that he was not required to reveal them. Under the particular circumstances of this case, 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, including his favorable witness testimony, and letter of recommendation. 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 good judgment, trustworthiness, reliability, candor and 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 he is trustworthy, and meets the eligibility requirements for access to classified information. 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 his 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.
- Subpara. 1.e.: For the Applicant.
- Subpara. 1.f.: For the Applicant.
- Subpara. 1.g.: For the Applicant.

Paragraph 2: For the Applicant.

- Subpara. 2.a.: For the Applicant.
- Subpara. 2.b.: For the Applicant.
- Subpara. 2.c.: 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