



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-04238
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

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

July 28, 2010

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) dated March 30, 2009. (Government Exhibit 1.) On January 25, 2010, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant answered the SOR in writing on February 6, 2010, and requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on March 11, 2010. A notice of hearing was issued on March 30, 2010, and the matter was scheduled for hearing on May 18, 2010. The Government presented five exhibits, referred to as Government Exhibits 1 through 5, which were received without

objection. The Applicant called one witness and presented six exhibits, referred to as Applicant's Exhibits A through F, which were received without objection. The Applicant testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on May 26, 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 31 years old, and has a high school diploma and some college. He is employed by a defense contractor as an Information Technology Specialist, and is applying for a security clearance in connection with his employment.

Paragraph 1 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The Applicant admitted each of the allegations set forth under this guideline. He began working for his current employer in August 2008. He enlisted in the United States Marine Corps in January 1998. He separated from the military in December 2002. During his military career he worked in a classified area and held a security clearance. (Tr. p. 35.) He admits that he was aware of DoD policy and the law that prohibited illegal drug use. He explained that in February 2002, while at a party, he was drinking heavily when marijuana was offered to him, and he used it. At the time of the incident, he was off base, but stationed at a military base. He subsequently tested positive for THC on a urinalyses test administered by the military. As a result, he received non-judicial punishment, loss of rank, 45 days restriction, and 45 days extra duty. (Tr. p. 46-47.)

The Applicant admits to using marijuana about three times after joining the Marine Corps and while holding a security clearance. He states that between 1996 and 2000, he used marijuana a total of about ten times. (Tr. p. 38.)

In April 2002, while in the military, the Applicant received a summary court martial for violating restriction. The Applicant testified that while he was on restriction for his marijuana use, he was not allowed to leave the barracks, except to go to work, eat or worship, and was required to check in at the Battalion office located two miles away on a daily basis. He also lost his driving privileges on base. At one point, he broke the restriction. Instead of walking to the Battalion office that was two miles away, he chose to drive and violate his restriction. He was caught speeding on base and was pulled over by military police. The Applicant plead guilty, and received a loss of rank, 30 days in the brig and loss of pay.

After serving his time in the brig, the Applicant used marijuana a couple more times, returned to work, and found out that his separation proceedings had already started. (Tr. p. 59.) He waived the Administrative Separation Board, and received an Other than Honorable Discharge from the United States Marine Corps. (Tr. p. 49, and

Government Exhibit 5.) The Applicant admits recklessness at the time and that he cannot justify his actions in using marijuana while serving in the Marine Corps. He deeply regrets his conduct due to the shame it has brought him.

In July 2007, the Applicant was arrested for Battery/Domestic Violence. The Applicant testified that his girlfriend with whom he had developed a seven-year relationship, and who was living with him, had developed a heavy drinking habit. She was also diagnosed as bi polar and clinically depressed. On the day in question, the Applicant had been consuming alcohol at a baseball game and received hateful text messages from his girlfriend. (Tr. p. 72.) When he got home, his girlfriend was mad, yelling and throwing things at him. At one point, she grabbed a knife. The Applicant snapped and began choking her until she was losing consciousness. (Tr. pp. 75 -76.) When she gained her consciousness, she ran out of the house screaming, "You're going to kill me". (Tr. p. 77.)

A subsequent investigation of the matter occurred and the Applicant learned that he was going to be arrested. He turned himself in to the authorities. He plead No Contest, was found guilty and was sentenced to 10 days jail, which was changed to work release, 52 weeks anger management, fined and sentenced to three years probation. (Tr. p. 80 - 81.) Applicant currently remains on probation for this offense. In January 2010, Applicant's probation was downgraded from formal probation to Conditional Revocable Release. (Applicant's Exhibit F.) Probation will be completed in December 2010.

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 unwillingness 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.

In an interrogatory sent to the Applicant by DOHA dated October 2, 2009, he listed his last use of marijuana in April 2001. (Government Exhibit 3.) He failed to disclose his more recent use of marijuana that occurred in 2002, two or three times while awaiting his military separation. The Applicant stated that he did not intend to deceive the government concerning his last use of marijuana, he simply made a mistake on the dates. (Tr. p. 90.) He meant to put down that his last use of marijuana occurred in 2002. (See Applicant's Answer to SOR.)

A letter from the Applicant's previous girlfriend indicates that she considers him to be a hard worker, who is reliable and dependable. She believes he has benefitted from anger management classes and has learned from his past mistakes. (Applicant's Exhibit A.)

A letter from the Applicant's current supervisor states among other favorable comments that, "During the time I have known [the Applicant] he has demonstrated a

solid work ethic, to be of good moral character and concerned for ensuring the customer is supported in a timely and effective manner. He has demonstrated a professional work ethic and is critical in supporting our customers.” (Applicant’s Exhibit B.)

Letters of recommendation from other individuals who know, work, or have worked with the Applicant, and some who currently hold security clearances, are highly favorable and consider the Applicant worthy of a security clearance. (Applicant’s Exhibits C, D, and E .)

Applicant’s military record reflects that he received Proficiency and Conduct marks that were above average, a Sea Service Deployment Ribbon and a Certificate of Commendation. (Tr. pp. 62, 63 and 67.) He believes that he has learned from his past mistakes. He has completed his 52 weeks of domestic violence counseling and has been released from formal probation to summary probation. He believes that he is now in a much more stable relationship with a woman and his life has settled down. He is living with a new girlfriend, who is much more like himself, and they have a three month old son. He has a great sense of duty to take care of his son to the best of his ability and to set an example for him to follow. (Applicant’s Answer to SOR.)

The Applicant’s current girlfriend testified that she and the Applicant reside together. She believes the Applicant is a good father to their son. She has never witnessed any misconduct on the part of the Applicant, specifically him using illegal drugs or becoming violent. (Tr. pp. 95-96.)

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 J (Criminal Conduct)

30. *The Concern.* Criminal activity creates a 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 offenses;

31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and

31.(d) individual is currently on parole or probation.

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.(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

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 pertinent 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.”

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 criminal conduct 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 engaged in criminal conduct (Guideline J), and dishonesty and poor judgment (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 J and E of the SOR.

Under Guideline J, Criminal Conduct, Disqualifying Conditions, *31.(a) a single serious crime or multiple offenses, 31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted, and 31.(d) individual is currently on parole or probation* apply. None of the mitigation conditions are applicable. The Applicant's criminal conduct and questionable judgment viewed in total, demonstrates a pattern of misconduct that has continued over an extended period and last occurred as recently as 2007, when he choked his then girlfriend to the state of losing consciousness. This conduct casts serious doubt on the Applicant's character. Additionally, the Applicant remains on probation for the offense until December of this year.

Applicant's conduct under Guideline E, Personal Conduct, Disqualifying Condition *16.(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information* applies. None of the mitigation conditions are applicable.

Although I do not find that the Applicant was intentionally deceitful to the Government in response to his interrogatories concerning his last use of marijuana, I find his other misconduct and questionable judgment despicable. The offenses committed by the Applicant over the years are not minor. His misconduct in the military that ultimately warranted an Other than Honorable Discharge from the Marine Corps, and his act of violence against his girlfriend is completely unacceptable. The Government relies heavily upon the integrity and honesty of clearance holders. It is a negative factor for security clearance purposes if an Applicant engages in a pattern of misconduct that demonstrates serious unreliability, such as is true with this Applicant.

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 questionable judgement, untrustworthiness, unreliability, lack of candor, an unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard classified information.

Given his criminal history, and questionable judgment, the most recent which occurred just three years ago, in 2007, the Applicant clearly does not meet the qualifications of an individual that can be trusted with the national secrets. Assuming that he now realizes that his immature ways, and his criminal behavior, can no longer continue, more time is needed to demonstrate that he can be trusted and to ensure the Government that he will not revert to his old ways. He remains on probation for his most recent criminal offense until December 2010. At this time, the Applicant has not demonstrated that he is sufficiently trustworthy to meet the eligibility requirements to access classified information. Accordingly, I find against the Applicant under Guidelines J (Criminal Conduct) and 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.

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