



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No. 09-07046

Appearances

For Government: Ray T. Blank, Jr., Department Counsel
For Applicant: *Pro se*

December 30, 2010

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on July 14, 2009. (Government Exhibit 4.) On July 16, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H, E and L 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 August 5, 2010, 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 September 10, 2010. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant

received the FORM on September 17, 2010, and he submitted a reply dated September 30, 2010. The case was assigned to the Administrative Judge for resolution on October 28, 2010. The Government, through Department Counsel, moved to amend the SOR under subparagraph 3(d) to reflect the following allegation: From December 2006 to at least July 16, 2010, you were employed by Kell Systems, Inc. A U.S. subsidiary for Kell Systems, Ltd., a British based company. The Government also moved to amend subparagraph 3(e) to reflect the following allegation: You own approximately \$115K in stock shares with Kell Systems, Inc., a U.S. subsidiary for Kell Systems, Ltd., a British-based company. The Applicant had notice of the proposed amendments and submitted no objection. Accordingly, the proposed amendments were allowed. 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 51 years old. He is employed by a defense contractor 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 allegations 1(a), 1(b), and 2(c), as set forth in the SOR. He denied allegations 2(a), 2(b), 3(a), 3(b), and 3(c). (Applicant's Answer to the SOR.) The Applicant used marijuana over a thirty-four year period, from about 1974 to at least September 2008. (Government Exhibit 4). He used marijuana on perhaps eight occasions while traveling overseas during ten to twelve business trips between 1991 and 2008. (Government Exhibit 2). He smoked marijuana in a foreign country on at least three of the trips between 2001 and 2008. On those three occasions, he states that he may have taken perhaps eight puffs of marijuana. The Applicant states that he is not a habitual user of marijuana, that he is not a current user, and that he has not used marijuana in the past two years. He claims that the only uses of marijuana in the past seventeen years occurred where it was not illegal. During an interview with a DoD investigator on August 25, 2009, the Applicant indicated that he may use marijuana in the future under certain circumstances, if he did not have a security clearance. (Government Exhibit 6). He now states that he has no intentions of using marijuana in the future. (Government Exhibit 2).

Paragraph 3 (Guideline L - Outside Activities). The Government alleges that the Applicant is ineligible for clearance because he has engaged in certain types of outside-employment or activities that pose a conflict with an individual's security responsibilities.

The Applicant is currently employed with a United States defense contractor. He has also worked for a company that is the American subsidiary of a British-based company from December 2006 to at least July 16, 2010. He is now a minority shareholder in the British-based company. His shares are valued at approximately \$115,000.00 with the potential to be worth about \$500,000.00 if bought out by another American company. (Government Exhibit 6). The Applicant is also the President of the United States subsidiary of this British-based company. (Government Exhibit 4). The company sells equipment to the United States Government directly or through authorized resellers of the units, which include other companies with significant Department of Defense contracts. (Government Exhibit 2). Applicant has a substantial financial stake with his company by virtue of stock ownership. The Applicant states that the company is going through the due diligence process of being acquired. The completion of the sale of the company stock is expected by November 2010. There is no evidence in the record to support this transaction.

A Canadian based company was a customer of the Applicant's company from December 2004 to April 2005. A Swiss-based company was a customer of the Applicant's company from June 2005 to May 2006. A German-based company was a client from February 2005 to July 2007.

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:

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. (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 judgement, 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;

16.(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of:

(3) a pattern of dishonesty or rules violation.

16.(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Conditions that could mitigate security concerns:

None.

Guideline L (Outside Activities)

36. The Concern. Involvement in certain types of outside employment or activities is of security concern if it poses a conflict of interest with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information.

Conditions that could raise a security concern:

- 37.(a) any employment or service, whether compensated or volunteer, with;
 - (2) any foreign national, organization, or other entity;
 - (3) a representative of any foreign interest.

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, personal conduct and outside activities 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), personal conduct (Guideline E) and outside activities (Guideline L). 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, E and L of the SOR.

The evidence shows that the Applicant used marijuana for thirty-four years, from 1974 to at least September 2008. There is also evidence that just last year, in August 2009, at forty-nine years of age, the Applicant discussed the matter with an investigator from DoD, and was unable to rule out the future use of marijuana under certain circumstances. He now states that he does not intend to use illegal drugs in the future. Given his long history of marijuana use, more time without drug use is required to demonstrate to the Government that he will not return to his old habits. 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 apply. None of the mitigating conditions are applicable. Accordingly, I find against the Applicant under Guideline H, Drug Involvement.

Applicant's repeated use of marijuana demonstrates 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, the following Disqualifying Conditions apply:

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, 16.(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of: (3) a pattern of dishonesty or rules violations, and 16.(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

None of the mitigating conditions are applicable. Consequently, I find against the Applicant under Guideline E, Personal Conduct.

In regard to his outside activities the record shows that the Applicant is a minority shareholder, owning shares valued at \$115,000.00 with the potential to be worth about \$500,000.00 if bought out by another American company. He is President of the United States subsidiary of a British-based company. This company does business with the Department of Defense. Applicant has a substantial financial stake with the company by virtue of his stock. Under Guideline L, Outside Activities, Disqualifying Conditions 37(a) *any employment or service, whether compensated or volunteer, with; (2) any foreign national, organization, or other entity; and (3) a representative of any foreign interest* apply. None of the mitigating conditions are applicable. Accordingly, I find against him under Guideline L, Outside Activities.

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's long history of marijuana use and his outside involvement with a British-based company demonstrate that he is not sufficiently trustworthy at this time, 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), Guideline E (Personal Conduct) and Guideline L (Outside Activities).

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.: For the Applicant.

Subpara. 3.b.: For the Applicant.

Subpara. 3.c.: For the Applicant.

Subpara. 3.d.: Against the Applicant.

Subpara. 3.e.: 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