



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-07126
SSN: -----)
)
Applicant for Security Clearance)

Appearances

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

October 13, 2010

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on May 26, 2009. (Government Exhibit 1). On April 28, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H 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 May 21, 2010, and he requested a hearing before a DOHA Administrative Judge. This case was assigned to another Administrative Judge on June 30, 2010. The matter was transferred to the undersigned Administrative Judge on July 12, 2010. A notice of hearing was issued on July 13, 2010, and the hearing was scheduled for August 26, 2010. At that hearing the

Government presented two exhibits referred to as Government Exhibits 1 and 2, which were admitted into evidence without objection. The Applicant presented five exhibits, referred to as Applicant's Exhibits A through E, which were admitted without objection. The Applicant also testified on his own behalf. The official transcript (Tr.) was received on September 9, 2010. 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 34 years old and has a Master's Degree in Mechanical Engineering. He is employed by a defense contractor as a Test 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.

The Applicant admitted that he used marijuana, at varying frequencies, namely about once or twice a month from about May 2002 to at least July 2009. He states that he used it a total of fifty times. (Tr. p. 47.) He denies that he may use it in the future. (See Applicant's Answer to SOR.) He also testified that he used marijuana earlier than 2002, during his undergraduate education from 1994 to 1998, but not on a regular basis. He never used it alone, but was in social settings with roommates or friends. During the periods he used it, he knew it was against the law.

The Applicant began working for his current employer in November 2006. Shortly after starting his employment there, (by late 2006, early 2007), it became clear to him that as a Test Engineer he would begin the process of applying for a security clearance. (Tr. pp. 38-39.) Even so, he continued to use marijuana.

In May 2009, he completed a security clearance application and admitted his marijuana use. (Government Exhibit 1.) He subsequently underwent an interview by a DoD investigator in July 2009, wherein he stated that he may use marijuana in the future because at that time, he could not say for certain that he would not. (Government Exhibit 2 and Tr. p. 65.) The Applicant testified that since then, he has come to realize how important it is not to use marijuana while holding a security clearance. (Tr. p. 66.) He now states that he has no intent of using it in the future. (Tr. p. 51.) He understands that to use marijuana is against DoD policy and his company policy. Although he continues to maintain contact with friends who use marijuana, and attends social events once a month where marijuana may be used by others, he does not use it. As the Applicant explained, he lives near the beach where marijuana is hard to avoid. At times he can smell it on the streets. (Tr. p. 73.) For the past year, he has lived with his girlfriend who does not use marijuana. (Tr. p. 44.)

The Applicant prepared and submitted a letter of intent dated August 26, 2010, that indicates that he does not intend to use marijuana in the future. He understands

that any further use of marijuana will be grounds for his security clearance to be immediately and permanently revoked. (Applicant's Exhibit A.)

An e-mailed note of appreciation dated March 3, 2010, remarks that Applicant was involved in a difficult task that was well done. A letter dated March 24, 2010, reflects that the Applicant's work product significantly contributed to the successful outcome of the project. He is said to be technically sound with a willingness to get the job done under tight deadlines. He is considered a valuable asset to the organization. (Applicant's Exhibit B.)

Applicant's Client Satisfaction Survey indicates nearly perfect ratings and very favorable comments from the customer. The Applicant was complimented by his superiors for his outstanding job performance on a challenging and demanding job assignment for a critically important customer. (Applicant's Exhibit C.)

Applicant testified that his performance appraisal ratings have been outstanding so far. (Tr. p. 42.) The United States Patent and Trademark Office data base reflects four patents registered in the Applicant's name. (Applicant's Exhibit E.)

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. (b) a demonstrated intent not to abuse any drugs in the future, such as:

(3) an appropriate period of abstinence;

4) a signed statement of intent with automatic revocation of clearance for any violation.

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 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 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). 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 Guideline H of the SOR. I have considered all of the evidence presented in this case, including the e-mail notes of commendation, the client satisfaction survey, the patents, and the letter of intent signed by the Applicant. The Applicant has not used marijuana or any illegal drug since July 2009, a one year period, and he has no intentions of ever using any illegal drug again. He now has a better understanding of the seriousness of the matter. He realizes that he used bad judgment during the period he used marijuana and is now committed to a drug-free lifestyle. He has significantly matured over the past year. Applicant has signed a statement of intent indicating that he will not use illegal drugs in the future, and if he does, his security clearance will be immediately revoked. This further demonstrates his commitment to a drug-free lifestyle.

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. Mitigating Conditions 26.(b) a demonstrated intent not to abuse any drugs in the future, such as: 26.(b).(3) an appropriate period of abstinence, and 26.(b).(4) a signed statement of intent with automatic revocation of clearance for any violation* applies. Accordingly, I find for the Applicant under Guideline H, Drug Involvement.

I have also considered the "whole-person concept" in evaluating the Applicant's eligibility for access to classified information. The Applicant is 34 years old, educated,

intelligent and successful. He understands the responsibilities of an individual who has the privilege of holding a security clearance. He realizes the seriousness of illegal drug use and how negatively it can effect his professional career. He no longer uses illegal drugs, and is looking forward to a successful career and a good life. Under the particular facts of this case, the totality of the conduct set forth above, when viewed under all of the guidelines as a whole, support a whole-person assessment of good judgement, trustworthiness, reliability, 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 that he meets the eligibility requirements for access to classified information at this time. Accordingly, I find for the Applicant under Guideline H (Drug Involvement).

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 Paragraph 1.

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.

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