



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



In the matter of:)
)
-----) ISCR Case No. 10-05390
)
)
Applicant for Security Clearance)

Appearances

For Government: Candace Garcia, Department Counsel
For Applicant: A. Bates Butler III, Attorney At Law

April 5, 2013

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing dated August 27, 2009. (Government Exhibit 7.) On a date uncertain, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J, H, and E for Applicant. Applicant signed the receipt for the SOR on April 30, 2012. 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.

Applicant responded to the SOR in writing on June 1, 2012, and requested a hearing before an administrative judge. On August 16, 2012, through counsel, Applicant submitted an Amended Answer to the SOR and 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 Applicant on November 26, 2012. Applicant received the FORM on December 7, 2012. Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant

submitted a response to the FORM on January 28, 2013. This case was assigned to the undersigned on February 8, 2013. Based upon a review of the case file, pleadings, and exhibits, (no hearing) eligibility for access to classified information is denied.

FINDINGS OF FACT

Applicant is 36 years old and has a Masters in Business Degree. He is employed by a defense contractor as an Information Technology Security Specialist and is applying for a security clearance in connection with his employment.

Applicant admitted allegations 1(a), 1(b), 1(e), 1(f), 2(a), 2(b), 3(a), 3(b), 3(c) and 3(f) of the SOR. He admits in part and denied in part allegations 1(c), 1(d), and 3(d) set forth in the SOR, and provided a clarification to his answers to 3(e) and 3(h). (See Applicant's Answer and Amended Answer to the SOR.) He has been employed with the same defense contractor for almost twelve years.

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

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

Applicant admitted that from 1994 to 2009 he illegally used marijuana. (Applicant's Exhibit 7.) From 2000 to 2009, Applicant was the leader of a band that traveled frequently throughout the United States. Marijuana was readily available in this environment and Applicant used it on a regular basis. Since 2001, Applicant has been arrested on six separate occasions and charged with Unlawful Possession of Drug Paraphernalia, Driving Under the Influence and Unlawful Possession of Marijuana.

In July 2001, he was arrested and charged with Possession of Marijuana and Possession of Drug Paraphernalia. The charges were dismissed.

Two years later, in December 2003, he was arrested and charged with Unlawful Possession, Sale or Transfer of Marijuana. A police report of the incident indicates that a search of Applicant's vehicle revealed a multicolored glass pipe containing suspected marijuana residue and the remains of a burnt marijuana cigarette. The charges were dismissed. (Government Exhibit 14.)

Three years later, he was arrested in May 2006, and charged with (1) Driving While Under the Influence, Drugs, Vapor-Releasing Substances, or any Combination, (2) Driving with an Illegal Drug or its Metabolite, (3) Possession of an Open Container of Spirituous Liquor While in a Motor Vehicle on a Roadway, (4) Possession of Marijuana, (5) Possession or Use of Drug Paraphernalia, and (6) Reckless Driving. He pled guilty to Reckless Driving, was fined and ordered to attend alcohol counseling. (Government Exhibits 8, 9 and 13).

Two months later, he was arrested in July 2006, and charged with (1) Driving Under the Influence and (2) Possession of Drug Paraphernalia. Count 1 was not filed by the prosecutor and Count 2 was dismissed. (Government Exhibits 8 and 12.)

The following year in August 2007, he was arrested for (1) Driving with Suspended License/Revoked, (2) Fail to Produce Evidence of Financial Responsibility and (3) Violation of Promise to Appear. The charges were dismissed. (Government Exhibits 8, 11, and 13.)

Two years later, in June 2009, Applicant was charged with (1) Driving Under the Influence, Drugs, Vapor-Releasing Substances, or any Combination and (2) Driving with an illegal Drug or its Metabolite. The charges were dismissed without prejudice. (Government Exhibits 8 and 10.)

Following his last arrest in 2009, he stated that he realized that he could no longer lead a life of risky behavior. He stopped performing in his band and began to focus solely on trying to get his life in order. He has been focusing on his family, and coaching his son's soccer and flag football teams and working with him in wrestling. He states that he has not used marijuana since 2009. He indicates that he has made some significant lifestyle changes since 2009 demonstrating his intent not to abuse drugs in the future. He avoids social situations in the presence of illegal activity. He states that he no longer has a desire to use drugs and now understands its risk to his employment and its legal ramifications. (See Applicant's Response to the FORM.)

Paragraph 3 (Guideline E - Personal Conduct). The Government alleges that Applicant is ineligible for a security clearance because he has engaged in conduct involving questionable judgment, lack of candor, dishonesty, or an unwillingness to comply with rules and regulations.

As part of his security background investigation, Applicant admitted to falsifying his security clearance application, two subject interviews, and his response to subject interview interrogatories. When he completed his notarized Interrogatory response dated November 18, 2010, he stated that his drug use was limited to his time in college. This was a false statement. In fact, he had used marijuana as recently as June 2009.

During an interview on January 6, 2010, with an authorized investigator for the U.S. Department of Defense, Applicant stated that he had not used marijuana or any other illegal substances since 1999. This was a false statement. In fact, he had used marijuana to at least June 2009. (Government Exhibit 8.)

During an interview on December 9, 2009, with an authorized investigator for the U.S. Department of Defense, Applicant stated that he had not used marijuana or any other illegal substances since 1999. This was a false statement. In fact, he had used marijuana to at least June 2009. (Government Exhibit 8.)

During an interview on November 10, 2009, with an authorized investigator for the U.S. Department of Defense, Applicant stated that he did not drink alcohol prior to

his July 2006 arrest and that he passed his breathalyzer and field sobriety tests. This was a false statement. In fact, he consumed alcohol prior to the arrest. He also tested positive for a marijuana metabolite in his urine, and he failed the field sobriety tests. (Government Exhibit 8.)

Applicant completed a security clearance application dated August 27, 2009. (Government Exhibit 7.) Question 22(e) asked him if he had ever been charged with any offenses related to alcohol or drugs. Applicant answered, "Yes," and listed his DUI arrests in July 2009, July 2006 and May 2006. He failed to disclose his July 2001 arrest for Possession of Marijuana and Possession of Drug Paraphernalia and his December 2003 arrest for Unlawful Possession, Sale, or Transfer of Marijuana.

Question 23(a) of the same questionnaire asked Applicant if in the last seven years has he illegally used any controlled substance. He answered, "No." (Government Exhibit 7.) This was a false statement. In fact, he had used marijuana to at least June 2009.

Question 24(b) of the same questionnaire asked Applicant if in the last seven years he had been ordered, advised, or asked to seek counseling or treatment as a result of his use of alcohol. Applicant answered "No." (Government Exhibit 7.) This was a false response. In fact, he was ordered to attend alcohol counseling in 2006 following his arrest in May 2006.

Applicant admits being dishonest and displaying a lack of candor in submitting his interrogatories, security clearance application, as well as a signed statement under oath. He explained that he was in fear of losing his job if he told the truth. He said that he stopped using marijuana after college because he was afraid of the employment consequences and the impact to his hard earned reputation as a good employee if he told the truth. He was ashamed and fearful of admitting that he had used marijuana periodically until June 2009. (Government Exhibit 3.) After talking with colleagues he felt that if he stuck to his original statements he would be better off than coming forward with the truth. In 2010, during a discussion with some military friends, he told them about his falsifications. They informed him that he should have been forthright and honest. (See Applicant's Response to the FORM.)

Applicant's performance development summaries for 2010, 2011 and 2012 reflect that his work product consistently "exceeds expectations." In one of his evaluations he was also described as having significant technical experience and skills. He has developed a solid foundation in understanding his job requirements and has provided a high level of service. (Applicant's Exhibit 2.)

Applicant is considered to be a valued employee as evidenced by various Achievement awards and a job promotion effective April 28, 2012, in recognition of his professional growth, development and contributions to the company. (Applicant's Exhibits 6, 7, and 8.)

Letters of recommendation submitted on behalf of Applicant from his employer, pastor, and various coaching associates, attest to his diligent work ethic, at work and in his community activities with youth sports and church. He is considered to be a respected man of a responsible nature and overall trustworthiness. (Applicant's Exhibit 9.)

Applicant recently completed his Masters in Business and provided a copy of his class schedule and his high grade point average of 3.86. (Applicant's Exhibit 5.)

POLICIES

Enclosure 2 and Section E.2.2. of the Directive set 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; and

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

Conditions that could mitigate security concerns:

32.(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

32.(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

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.(b) testing positive for illegal drug use; and

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 judgement; and

26.(b) a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts, (2) changing or avoiding the environment where drugs were used, and (3) an appropriate period of abstinence.

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.(a) 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; and

16.(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority or other official government representative.

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 adverse to an applicant 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 criminal conduct, drug abuse, and 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 or her a security clearance.

In this case the Government has met its initial burden of proving that Applicant has engaged in criminal conduct (Guideline J), drug involvement (Guideline H), and dishonesty (Guideline E). The totality of this evidence indicates poor judgment, unreliability and untrustworthiness on the part of Applicant. Because of the scope and nature of Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility. Considering all of the evidence, Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guideline E of the SOR.

The evidence shows that Applicant used marijuana from 1994 to at least 2009, and was arrested six times on related charges. He states that he has not used marijuana since 2009 and there is no evidence in the record to show otherwise. For three-and-a-half-years he had not used any illegal drug and he claims that he has no intentions of ever using illegal drugs again. Applicant is commended for his favorable lifestyle changes and is encouraged to continue with his drug free lifestyle. Under Guideline H, Drug Involvement, Disqualifying Conditions 25.(a) *any drug abuse*, 25.(b) *testing positive for illegal drug use*, 25.(c) *illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia* apply. Mitigating Condition 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 judgement*, and 26.(b) *a demonstrated intent not to abuse any drugs in the future, such as; (1) disassociation from drug-using associates and contacts, (2) changing or avoiding the environment where drugs were used, and (3) an appropriate period of abstinence* also apply. Accordingly, I find for Applicant under Guideline H, Drug Involvement.

In regard to the Applicant's history of criminal conduct, it too stopped in 2009. He has not been arrested or charged with any violation of law since then. Under Guideline J, Criminal Conduct, Disqualifying Conditions 31.(a) *a 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. Mitigating Conditions 32.(a) so much time has elapsed since his criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment, and 32.(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement also apply. Accordingly, I find for Applicant under Guideline J, Criminal Conduct.

Most troubling in this case is the fact that Applicant was untruthful concerning his history of illegal drug use on various Government documents that include his interrogatories and security clearance application. He deliberately concealed material information from the Government because he was ashamed and in fear of losing his job. There is no excuse for this misconduct. The Government relies on the representations of its defense contractors and must be able to trust them in every instance. Applicant made no prompt, good-faith effort to correct his mistakes. Applicant cannot at this time be deemed sufficiently trustworthy. In fact, he has demonstrated 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, Disqualifying Conditions 16.(a) *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, and 16.(c) deliberately providing false or misleading information conveying relevant facts to an employer, investigator, security official, competent medical authority or other official government representative apply. None of the mitigating conditions are applicable.*

I have also considered the "whole-person concept" in evaluating Applicant's eligibility for access to classified information. Applicant is an educated man who has made some very poor choices in his life. Although he has recently been working hard to turn his life around, for many years he has shown extreme immaturity and unreliability. His long history of misconduct shows indicators of poor judgment and unreliability that preclude him from security clearance eligibility at this time. There is absolutely no excuse for this illegal conduct.

Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole supports 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.

A security clearance is a privilege, not a right. In order to meet the qualification for access to classified information, it must be determined that the applicant is and has been sufficiently trustworthy on the job and in his everyday life to adequately protect the

Government's national interest. Overall, based upon the seriousness of the conduct outlined here, this applicant has demonstrated that he is not trustworthy, and he does not meet the eligibility requirements for access to classified information. Accordingly, I find for Applicant under Guideline J (Criminal Conduct) and Guideline H (Drug Involvement), but against him under Guideline 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 Applicant as to the factual and conclusory allegations expressed in Paragraph 3 of the SOR. Paragraphs 1 and 2 are found for Applicant.

FORMAL FINDINGS

Formal findings for or against Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: For Applicant.

- Subpara. 1.a.: For Applicant.
- Subpara. 1.b.: For Applicant.
- Subpara. 1.c.: For Applicant.
- Subpara. 1.d.: For Applicant.
- Subpara. 1.e.: For Applicant.
- Subpara. 1.f.: For Applicant.

Paragraph 2: For Applicant.

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

Paragraph 3: Against Applicant.

- Subpara. 3.a.: Against Applicant.
- Subpara. 3.b.: Against Applicant.
- Subpara. 3.c.: Against Applicant.
- Subpara. 3.d.: Against Applicant.
- Subpara. 3.e.: Against Applicant.
- Subpara. 3.f.: Against Applicant.
- Subpara. 3.h.: Against 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 Applicant.

Darlene Lokey Anderson
Administrative Judge