



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 11-07161

Appearances

For Government: Jeff Nagel, Department Counsel
For Applicant: Alan K. Hahn, Attorney At Law

January 27, 2014

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing dated November 22, 2006 and October 11, 2011. (Government Exhibits 1 and 2.) On May 22, 2013, and August 15, 2013, the Defense of Defense (DoD) issued a Statement of Reasons (SOR)¹ 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) effective within the Department of Defense after September 1, 2006.

The Applicant responded to the SOR on July 2, 2013, and September 11, 2013, and he requested a hearing before a DOHA Administrative Judge. This case was

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On August 13, 2013, Department Counsel amended the allegations under Guideline H of the SOR by striking subparagraph 1(b), revising subparagraph 1(a), adding a new subparagraph 1(b), and adding two additional subparagraphs, 1(c) and 1(d). Department Counsel also added new allegations under paragraph 2, Guideline E (Personal Conduct).

assigned to the undersigned on November 14, 2013. A notice of hearing was issued November 20, 2013, and the hearing was scheduled for December 11, 2013. At the hearing the Government presented seven exhibits, referred to as Government Exhibits 1 through 7. The Applicant presented seven exhibits, referred to as Applicant's Exhibits A through G. He also testified on his own behalf. The official transcript (Tr.) was received on December 19, 2013. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

FINDINGS OF FACT

The Applicant is 37 years old and married with two children. He has a Bachelor's Degree in Art with an emphasis on photography. He is employed by a defense contractor as a Photographer. He is attempting to retain his 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 each of the allegations set forth under this guideline. (See Applicant's Answer to the SOR.) Applicant started using marijuana in high school in 1994, at the age of 18, a couple of times. While in college his use of marijuana became more regular, about two times a month over a six year period. After college, from 2000 to 2003, he reduced his marijuana use to about six times a year. From 2003 to 2008, he reduced his use of marijuana even further to one to two times a year. He usually used marijuana when he was at a social events, like camping trips. Most of the time marijuana was given to him for his use, but on occasions he contributed small amounts of money into a pool with others to purchase it. He estimates that he purchased marijuana on at least five occasions from 1996 through 2003. On one occasion in 1994 the Applicant sold marijuana his brother had given him to a friend of a friend.

In January 2006 Applicant began working for his current employer. At that time he underwent a drug test. He initially started his employment in a part-time call-in status, but by the end of 2006 it grew into a full time position. It was at that time that his employer requested that he apply for a security clearance. Applicant stated that he initially admitted using marijuana on his security clearance application, and his security clearance was granted in August 2007. (Tr. p. 61 and Applicant's Answer to SOR.) Following this, he continued to use marijuana on occasions. He estimates that from high school to 2008 which is the last time he used marijuana, he has used marijuana about 156 times in total. (Tr. P. 99.) Applicant testified that he understands that the use of marijuana is illegal but he did not think it was a "big deal" to violate the law. He also knew that it was against company policy to use marijuana, but he stated that he did not know that continuing to use marijuana would disqualify him from obtaining a security clearance. He also thought that the company policy was only enforced at work and did not extend to his personal time outside of the work place. Applicant admits that he

received some on-line security briefings from his company, but that he did not read it, review it or take the time to understand it. (Tr. p. 109-110.)

Applicant testified that he did not understand that using marijuana would adversely affect his security clearance until about January 2009 when he applied for Special Program Access with another agency and was told that he had to be clean from marijuana for a year and that he had to self-report. (Tr. p. 63)

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges that the 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.

The Applicant denied each of the allegations set forth under this guideline. (See Applicant's Answer to the SOR.) Applicant completed a security clearance application dated November 22, 2006. (Government Exhibit 1.) Question 24(a) of the application asked the Applicant if since the age of 16 or in the last 7 years, has he illegally used any controlled substance? The Applicant responded "Yes," and disclosed marijuana use approximately five times from May 2001 to 2005. The Government contends that he failed to list the full extent of his marijuana use that occurred from May 2001 to the present. Applicant denies that the omission was deliberate. Applicant should have indicated that he continued to use marijuana up to the present, which at that time was 2006. Accordingly, this allegation is found against the Applicant.

Question 24(b) of the same application asked the Applicant if he has ever illegally used a controlled substance . . . while in possession of a security clearance? The Applicant responded "No." Applicant explained that he answered, "No", because he applied for a security clearance in November 2006 and was not granted a clearance until August 2007. At the time he filled out the form, he had not been granted a clearance yet. (Tr. p. 73.) Based upon this analysis, this allegation is found for the Applicant.

Question 24(c) of the same application asked the Applicant if in the last 7 years has he been involved in the illegal purchase. . . of any narcotic . . . or cannabis for his own intended profit or that of another? Applicant responded, "No." Applicant indicated that he did not know if there was any intended profit by anyone when he purchased the marijuana. (Tr. pp. 74-76.) Applicant failed to disclose that he had purchased marijuana from 1999 to 2003. Accordingly, this allegation is found against the Applicant.

Applicant completed another security clearance application dated October 11, 2010. Question 23(b) of the application asked the Applicant if he has ever illegally used a controlled substance while in possession a security clearance? The Applicant responded "No." Applicant failed to disclose that he had used marijuana after he had been granted a security clearance in August 2007. The Applicant was clearly dishonest when he answered this question. He should have revealed the full extent of his

marijuana use, namely that he had been using it since high school to at least 2008. Accordingly, this allegation is found against the Applicant.

Question 23(c) of the same application asked the Applicant if in the last seven years has he been involved in the illegal . . . purchase . . . of any controlled substance? " Applicant responded "No." Applicant explained that he last purchased marijuana in 2003, which was outside of the seven years requested by the question. He also stated that he only sold marijuana once in 1994 and that it was not within seven years of the application date and that is why he did not disclose it. Applicant should have disclosed his purchase of marijuana in 2003. (Tr. pp. 78-79.) Accordingly, this allegation is found against the Applicant.

From December 2008 to September 2010, during a security background investigation by another agency for Special Program Access, the Government contends that the Applicant provided false information regarding his dates of marijuana use, the dates of marijuana use while holding a security clearance, his purchase of marijuana and his sale of marijuana. The evidence in the record indicates that the Applicant was denied Special Program Access based upon his past use, sale and purchase of marijuana. (Applicant's Exhibit G, and Government Exhibit 3.) Applicant admits that he can't specifically recall all dates of use, but he does remember that his last use of marijuana was in May 2008. He denies any deliberate falsifications concerning his drug involvement. There is no evidence in the record that supports the fact that the Applicant provided false information regarding his illegal drug involvement. Accordingly, this allegation is found for the Applicant

Nine letters of recommendation were submitted on behalf of the Applicant from his Manager who hired him, a past supervisor, and coworkers who have worked closely with him on many assignments. They attest to the Applicant's good judgment, professionalism, trustworthiness and honesty. In the work place, Applicant has always demonstrated highly ethical behavior, dependability and reliability. Applicant is highly recommended for a security clearance. (Applicant's Exhibit E.)

Applicant signed a Letter of Intent dated July 2, 2013 indicating that he will not use marijuana in the future and that any future illegal drug use will result in automatic revocation of his security clearance. (Applicant's Exhibit F.)

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)

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; and

25.(g) any illegal drug use after being granted a security clearance.

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.(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;

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 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 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 not 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 has used marijuana from about 1994 to at least May 2008 at varying frequencies. He continued to use marijuana after having been granted a Secret DoD security clearance in about 2007. Applicant testified that he knew it was illegal and against DoD policy to do so, but did not think it was a big deal. The fact that the Applicant failed to follow rules and regulations demonstrates that he is not an individual whom the Government would find sufficiently trustworthy for clearance. In addition, common sense is one of the very basic character requirements that one must have to be eligible for access to classified information. In this case, Applicant fell short in this area.

Applicant claims that he was naive, does not have a military background, and did not understand the restrictions and requirements involved in holding a security clearance. I find this argument difficult to accept. Applicant is a 37 year old college-educated man with two children who has worked in the defense industry since 2006 and who by now should have a concrete understanding of the eligibility requirements for security clearance holders. Under the circumstances, I find that he intentionally disregarded the law and DoD policy. He contends that he last used marijuana in 2008. Although he has not used illegal drugs in several years, his judgement is warped to some extent and raises serious security concerns about his reliability 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*, and 25.(g) *any illegal drug use after being granted a security clearance* apply. None of the mitigating conditions are applicable. Accordingly, I find against the Applicant under Guideline H, Drug Involvement.

Furthermore, Applicant deliberately falsified his answers to questions concerning his illegal drugs involvement on two different security clearance applications in response to questions about his drug history. There is no excuse for this misconduct and poor judgment. The Government relies on the representations of its civilian employees and must be able to trust them in every instance. 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 Condition 16.(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 applies. None of the mitigating conditions are applicable. Accordingly, I find against 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. I have considered all of the evidence, including his favorable letters 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 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. According to the standards set forth in the Directive, based upon 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.

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.

Paragraph 2: Against the Applicant.
Subpara. 2.a.: Against the Applicant.
Subpara. 2.b.: For the Applicant.
Subpara. 2.c.: Against the Applicant.
Subpara. 2.d.: Against the Applicant.
Subpara. 2.e.: Against the Applicant.
Subpara. 2.f.: For the Applicant.
Subpara. 2.g.: 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