



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 11-09051
)
Applicant for Security Clearance)

Appearances

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

June 27, 2013

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (E-QIP) on April 26, 2011. (Government Exhibit 1.) On December 17, 2012, the Department of Defense (DoD) pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, (as amended), issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and E for Applicant. The SOR set forth the reasons why DoD adjudicators 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 Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR on January 23, 2013, and he requested an administrative hearing before an Administrative Judge. This case was assigned to the undersigned on May 13, 2013. A notice of hearing was issued on May 15, 2013, and the hearing was scheduled for June 4, 2013, by video-teleconference. At the hearing the Government presented three exhibits, referred to as Government Exhibits 1 through 3, which were admitted without objection. Applicant presented no exhibits, however, he testified on his own behalf. The record remained open until close of business on June 12, 2013, to allow Applicant to submit additional documentation. He submitted seven

Post-Hearing Exhibits, referred to as Applicant's Post-Hearing Exhibits 1 through 7, which were admitted without objection. The official transcript (Tr.) was received on June 14, 2013. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

FINDINGS OF FACT

Applicant is 49 years old and married with one child. He has a high school diploma, a few years of junior college, and Air Force training. He is employed with a defense contractor as a Software Engineer and is seeking to retain a security clearance in connection with this employment.

The Government opposes Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline H - Drug Involvement). The Government alleges that Applicant is ineligible for clearance because he abuses illegal drugs.

Applicant admitted each of the allegations set forth in the SOR under this guideline. He served in the United States Air Force from 1983 to 1987 until he was honorably discharged. During his military career, he held a security clearance and never had a security violation. Applicant then went on to work for a defense contractor and held a security clearance for twelve years. In total, he has held a security clearance for the past twenty-five years without incident.

Applicant began working for his current employer in 2002. He was granted a Secret level security clearance in June 2004, and an interim Top Secret security clearance in April 2011. In April 2011 the Applicant used marijuana while at a dinner party at a friend's house. He explained that after a nice dinner, one of the couples at the party had some marijuana and suggested that they try it. They brought out a pipe, loaded up a single bowl, and passed it around the table. (Tr. p. 28.) Applicant indicated that he ingested only a minute amount. He admits that he held a security clearance at the time. He does not understand why he used it. He knew it was against the law to use marijuana or any illegal drug for that matter. Although he was also violating security clearance rules and regulations, he stated it did not enter his mind at the time. (Tr. p. 29.) Up until this incident, he did not think that marijuana use was that serious to the DoD. He now understands that it is. During his interview with an investigator, he was asked if he used any illegal drug within the last seven years. Applicant stated that although it was a minute amount, he could not lie, and so he stated that he had used marijuana. He then informed his Security Manager and his Supervisor that he had used marijuana.

Applicant indicates that he will never used marijuana or any illegal drug again. He realizes that he lost sight of his own personal integrity and responsibilities to uphold

the security policies and regulations associated with holding a security clearance. He is embarrassed by this immature conduct. He states that he will never violate the trust of the United States ever again. He indicates that he is loyal to the people of this great nation, and will uphold his security clearance responsibilities in the future. (Applicant's Answer to SOR).

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.

As discussed above, Applicant used marijuana while holding a DoD security clearance calls into question his maturity, his character, his judgment and his ability to follow rules and regulations associated with having a security clearance.

Seven letters of recommendation from individuals who have known the Applicant for many years, including his Security Manager, three past supervisors, who are now executive managers, and a coworker, attest to the Applicant's hard working nature, professionalism, integrity, commitment to excellence and deep commitment to the United States and its ideals. They are aware of his one time error in judgment by using marijuana. They still consider him to be honest, dependable, trustworthy, conscientious, organized, efficient, extremely competent, and always striving to perform to the highest standards. He is said to be asset to the organization, and is highly recommended for a security clearance. (Applicant's Post-Hearing Exhibits 1 through 7.)

POLICIES

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

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:

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 and surrounding circumstances;
- 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 instances of drug involvement and personal conduct, which 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 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 been involved in illegal drugs (Guideline H). This evidence indicates possible 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.

The evidence shows that Applicant used marijuana at a dinner party on one occasion in April 2011. This illegal conduct is unexcusable. However, this one time error in judgment has not occurred before or after this incident, and he convincingly asserts that he has no intentions of ever using marijuana in the future. This has obviously been a tough learning experience for the Applicant that he does not ever want to revisit. For the past two years he has been completely drug free and has demonstrated that he can be trustworthy. Under Guideline H, Drug Involvement, Disqualifying Conditions 25.(a) *any drug abuse*; and 25.(g) *any illegal drug use after being granted a security clearance* apply. Mitigating Conditions 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.

There is sufficient evidence of drug rehabilitation. Considering all of the evidence, Applicant has introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case. Accordingly, I find for Applicant under Guideline H, Drug Involvement.

There is also evidence that Applicant's use of marijuana while holding a security clearance shows a defect in character and poor judgment. He credibly testified that he will not engaged in illegal drug use ever again, and that his misconduct is now a thing of the past. He has nothing to gain and everything to lose if he continues this misconduct. I do not believe he is so ignorant as to continue this behavior. Accordingly, Guideline E (Personal Conduct) is found for the Applicant.

I have also considered the "whole-person concept" in evaluating Applicant's eligibility for access to classified information. 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, candor, and a willingness to comply with rules and regulations, and/or other characteristics indicating that the person may properly safeguard classified information.

I have considered all of the evidence presented, including Applicant's favorable letters of recommendations and his favorable work history. They mitigate the negative effects his drug involvement and personal conduct can have on his ability to safeguard classified information. On balance, it is concluded that Applicant has overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding for Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the SOR.

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.

Paragraph 2: For Applicant.
Subpara. 2.a.: For 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 Applicant. Eligibility for access to classified information is granted.

Darlene Lokey Anderson
Administrative Judge