



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



In the matter of:

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) ISCR Case No. 15-07444
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Applicant for Security Clearance

Appearances

For Government: Jeff A. Nagel, Department Counsel
For Applicant: Ronald P. Ackerman, Attorney At Law

November 29, 2016

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing dated November 11, 2013. (Government Exhibit 1.) On May 18, 2016, the Department of Defense (DoD) 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) effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing on June 8, 2016, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals. On August 8, 2016, the case was assigned to the undersigned Administrative Judge for processing. A notice of hearing was issued on August 31, 2016, scheduling the hearing for October 19, 2016. The Government offered four exhibits, referred to as Government Exhibits 1 through 4, which were received without objection. Applicant presented three exhibits, referred to as Applicant's Exhibits A through C, which were also admitted without objection. Applicant testified on his own behalf. The transcript of the hearing

(Tr.) was received on October 27, 2016. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

FINDINGS OF FACT

Applicant is 53 years old and married with two adult children. He has a Master's degree in Business Administration. He is employed by a defense contractor as a Mission Assurance Engineer. He 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.

Applicant denied allegations 1.a., and 1.b., set forth under this guideline. He admitted allegation 1.c. (See Applicant's Answer to the SOR.) Applicant has worked for the defense industry for the past 31 years. He began working for his current employer in 2001. He has held a security clearance since 1997, and has never incurred a security violation.

Applicant has a history of marijuana use from June 2009 to the present. He began using marijuana a few nights a week that increased over time to three or four nights a week, and then daily. Applicant used marijuana over the years to help him with his chronic depression and anxiety. He testified that he self-medicated himself with his wife's marijuana. His wife was given a medical marijuana card for her migraine headaches and menopause problems, which expired on April 14, 2013. (Applicant's Exhibit A.) Applicant states that he has never used marijuana at work, and does not believe that his marijuana use has had any impact on his work performance or his ability to properly safeguard classified information.

In January 2008, Applicant was granted a DoD security clearance. He continued using marijuana after having been granted the clearance. He knew at the time he was using marijuana that it was against his company's rules and regulations, against DoD national security policy, and against Federal law.

Applicant completed a security clearance application dated November 11, 2013, where in he admitted that he not only used marijuana, but also that he intended to continue using marijuana in the future. Despite his counsel's argument that he made a mistake on the application when he answered the question, Applicant was candid and truthful at the hearing, and stated that he did not make a mistake, and in fact intended to continue using marijuana at that time. He actually used marijuana until February or March 2014. He has not used marijuana since then.

Applicant explained that since 1995, he has sought out treatment for his depression and anxiety. In 2009, when nothing else seemed to work, he began using marijuana. In 2012, he became so depressed that he voluntarily checked himself into a hospital. There he received Electro-Convulsive Therapy for his depression, which he

found to be very helpful. He started eating better and exercising and by 2014, he felt that he did not have to use marijuana anymore. He is currently not on any prescription medication. He states that he now feels better than he ever has in years. (Tr.p. 26.) He states that he has no intentions of using marijuana in the future. He further states that if he has any future problems, he will pursue treatment through medical doctors and psychiatrists, ECT treatments and the like.

Applicant acknowledges his errors in judgment by using marijuana. A letter from his supervisor indicates that he knows that Applicant used marijuana for a period while employed with the company. He still believes the Applicant to be honest, hardworking, trustworthy and conscientious. A letter from the Applicant's wife confirms that Applicant used her medical marijuana for his depression, and last used it in 2014. She also believes he is honest, trustworthy and reliable. Both of them recommend that Applicant be granted a security clearance. (Applicant's Exhibits B and C.)

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;

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

25.(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

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 illegal 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 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 Guideline H of the SOR.

Applicant's use of marijuana started in 2009, while holding a DoD security clearance, for the purposes of treating his chronic depression and anxiety. He continued to use it, and over time he increased its use to almost daily. Applicant knew that it was against his company's rules and regulations, against DoD national security policy, and against Federal law to use marijuana. Why he did not initially seek out professional medical help is most troubling. Applicant is not a young man. He is an experience employee in the defense industry, highly educated, and clearly understands the responsibilities associated with possessing a security clearance.

Applicant contends that he has now sought out professional medical treatment, and no longer needs to use marijuana to treat his condition. He claims that he has not used marijuana since April 2014, and has no intentions of any future use. At this point, he has only been drug free for about 32 months. His extensive six year history of marijuana use, from 2009 to 2014, has not yet mitigated. This past conduct clearly demonstrates a lapse in sound judgment and raises serious questions about his judgment, 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*; 25.(g) *any illegal drug use after being granted a security clearance*; and 25.(h) *expressed intent to*

continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use apply. None of the mitigating conditions are applicable.

I have also considered the “whole-person concept” in evaluating the Applicant’s eligibility for access to classified information. Applicant has only been drug free for the past 32 months or so. The decision to stop using marijuana is recent. At this time, he has not earned the privilege of holding a security clearance. Considering the extensive nature of his daily marijuana use, more time without drug use is required in order to demonstrate the level of maturity, character, judgment and responsibility expected of an employee who works for the defense industry and has access to classified information. Applicant’s past illegal conduct is still too extensive, too serious, too recent, and a clear indicator of poor judgment and unreliability that preclude him from security clearance eligibility at this time.

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 qualifications 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. 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 Paragraph 1 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.

Subpara. 1.c.: 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