



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



In the matter of:)	
)	
-----)	ISCR Case No. 06-25447
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: James Duffy, Department Counsel
For Applicant: *Pro Se*

January 24, 2008

Decision

LOKEY-ANDERSON, Darlene, Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), dated January 31, 2005 and resigned on August 29, 2005. On August 15, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA 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 the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR in writing on September 21, 2007, in which he 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 the Applicant on October 25, 2007. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the

FORM on September 3, 2007, and he submitted a reply that was undated, but received by DOHA on December 3, 2007.

The case was assigned to the undersigned for resolution on December 13, 2007.

FINDINGS OF FACT

The Applicant is 41 years old and married. He is employed by a defense contractor as a Field Engineering Technician, 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 to illegal drug use involving multiple types of illegal drugs, beginning in 1984 and continuing until July 1997. (See Government Exhibit 7).

The Applicant began using marijuana in 1984. He smoked marijuana twice weekly from 1984 until July 1997. He never purchased it because it was always given to him. He smoked hashish on one occasion in 1990. He used acid (LSD) in 1989, and a few times through 1990. (See Government Exhibit 7). In his response to the FORM received by the Defense Office of Hearings and Appeals on December 3, 2007, the Applicant contradicts his earlier statement in Government Exhibit 7, and states that he did not smoke marijuana twice a week from 1984 through July 1997. (See Applicant's Reply to FORM).

The Applicant also used cocaine. He first used cocaine in 1993. He snorted in quarterly from 1993 through 1994. He paid between \$80.00 to \$100.00 per gram for the cocaine. Besides marijuana, hashish, acid (LSD) and cocaine, the Applicant has not used any other illegal drug and has no future intentions of ever using any illegal drug. He has never been arrested or counseled due to his illegal drug use. (See Government Exhibit 7).

From March 1985 through August 1988, and from December 1993 through November 1997, the Applicant possessed a security clearance while using illegal drugs. (See Government Exhibits 13 and 14).

Paragraph 2 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The Applicant was arrested on the charge of misdemeanor Assault and Battery in June 1996, and not Felony Domestic Assault as alleged in the SOR. (See Government Exhibit 15).

A year later, in June 1997, the Applicant was arrested for Driving Under the Influence of Alcohol with a Blood Alcohol Content Above .08% in June 1997. He and a

friend spent the day in Tijuana, Mexico where they shopped and drank margaritas and shots of tequila. The Applicant believes he had four or five drinks over several hours. He returned to California, and made an illegal u-turn and was stopped by police. He was given the breathalyser and registered .08. He pled guilty to Driving Under the Influence and the charge of Alcohol with a Blood Alcohol Content Above .08% was dismissed. He was sentenced to summary probation for three years, fined \$1,500.00, required to complete a First Conviction Program and his license was suspended for 90 days. He has satisfied all of the sentencing requirements imposed by the court and he has not been arrested since then.

The Applicant's deliberate falsifications in his security clearance application, three sworn statements to the Defense Security Service and on his answers to interrogatories, discussed below, are violations of Title 18 of the United States Code, Section 1001, a felony.

Paragraph 3 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

The Applicant completed a National Agency Questionnaire dated September 21, 1992. Question 20(a) of the application asked the Applicant if he has ever tried or used or possessed any narcotic (to include heroin or cocaine), depressant (to include quaaludes), stimulant, Hallucinogen (to include LSD or PCP), or Cannabis (to include Marijuana or Hashish), or any other mind-altering substances (to include glue or paint), even one time or on an experimental basis, except as prescribed by a licensed physician? The Applicant answered, "YES" and listed that he smoked marijuana occasional/recreational use, and that his last use of marijuana was in February 1992. He failed to list his use of marijuana, hashish, acid (LSD) and cocaine as set forth under Guideline H above. (See Government Exhibit 11).

In a signed, sworn statement dated November 1993, before a Special Agent of the Defense Security Service, the Applicant stated that he used marijuana about three times per year from 1985 to February 1989. He failed to list that he had used marijuana approximately twice weekly from 1984 to at least July 1997. (See Government Exhibit 10).

In a signed, sworn statement dated June 10, 1997, before a Special Agent of the Defense Security Service, the Applicant denied using marijuana since 1992 and denied ever using any other illegal drug. He failed to list his use of marijuana beyond 1992 and that he had also used hashish, acid (LSD) and cocaine as set forth under Guideline H above. (See Government Exhibit 9).

In a signed, sworn statement dated September 2, 1997, before a Special Agent of the Defense Security Service, the Applicant denied using marijuana prior to 1989 and he stated that his last use of marijuana was in 1992. He also denied ever using any other illegal drug. He failed to list his use of marijuana beyond 1992 and that he had

also used hashish, acid (LSD) and cocaine as set forth under Guideline H above. (See Government Exhibit 8).

In his response to Interrogatories dated April 4, 2007, sent to the Applicant by the Department of Defense, the Applicant indicated in the Section entitled "Drug Use: that he used marijuana four times in January and February 1992 and ten times in July 1994 through September 1996. He failed to list his use of marijuana beyond 1996 and that he had also used hashish, acid (LSD) and cocaine as set forth under Guideline H above. (See Government Exhibit 6).

The Applicant completed a Questionnaire for National Security Positions dated January 31, 2005 and resigned on August 29, 2005. Question 21 of the application asked the Applicant if he has ever been charged with or convicted of any felony offenses. The Applicant answered, 'NO'. His response is truthful and accurate. He was not charged with Felony Domestic Assault, as alleged by the Government in the SOR. (See Government Exhibit 15).

Based upon the evidence presented, I find that the Applicant deliberately falsified his National Agency Questionnaire dated September 21, 1992, his sworn statements to the Defense Security Service dated November 9, 1993, his sworn statement dated June 10, 1997, his sworn statement dated September 2, 1997, and his answers to his interrogatories dated April 4, 2007.

A letter of recommendation submitted by the Senior Principle Field Engineer Technician, who is a coworker and directly responsible for assigning the Applicant his duties, and who has known the Applicant for more than ten years, indicates that the Applicant is responsible and trustworthy and is a valuable asset to the company. (See Applicant's Response to the FORM).

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;

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

Condition 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 judgment.

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;

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

Condition 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.

Conditions 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 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature 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 voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- 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 predicted 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, criminal conduct 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), criminal conduct (Guideline J) and dishonesty (Guideline E). 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 J and E of the SOR.

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 22(g) any illegal drug use after being granted a security clearance* apply. However, 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 judgment* also applies. Applicant's last use of any illegal drug, be it marijuana, hashish, acid (LSD) or cocaine last occurred in 1997, over ten years ago. His last use of illegal drugs occurred so far in the distant past and there is no evidence in the record to indicate otherwise. I do not find his past use of illegal drugs to be recent or of security significance. Accordingly, I find for the Applicant under Guideline H, Drug Involvement.

Under Guideline J, Criminal Conduct, disqualifying conditions, *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* apply. Although the Applicant's arrests and charges by law enforcement last occurred in 1996 and 1997, over ten years ago, he has recently lied a number of times

about the nature and extent of his illegal drug involvement on various Government documents, specifically by falsifying material facts in a National Agency Questionnaire, three sworn statements, and in his response to interrogatories during the course of his background investigation. By doing so, he committed violations of Title 18, United States Code, Section 1001.

Applicant's conduct under Guideline E, Personal Conduct is very troubling. He has not been honest with the Government in answering questions about his illegal drug involvement. He deliberately tried to conceal the truth about his illegal drug use. Even in his response to the FORM, he indicates that his previous statement, referring to Government Exhibit 7, concerning his drug use was not true. So much inconsistency confirms to the Government that the Applicant's credibility is a security concern. There is no reasonable excuse as to why he did not tell the truth about his drug involvement, other than the fact that he wanted to minimize it. It is obvious that he intentionally concealed this information from the Government, hoping to minimize the seriousness of the matter. Consequently, his dishonesty with the Government concerning this matter is unacceptable.

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. Under Criminal Conduct, disqualifying conditions *30(a) a single serious crime or multiple offenses* and *30(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted* apply. The Government relies heavily upon the integrity and honesty of clearance holders. It is a negative factor for security clearance purposes when an Applicant has deliberately provided false information about material aspects of his personal background. None of the mitigating factors set forth in the Directive under Guidelines E or J apply.

I have also considered the "whole person concept" in evaluating the Applicant's eligibility for access to classified information. 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 questionable judgement, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard classified information.

This Applicant has not demonstrated that he is trustworthy, and does not meet the eligibility requirements for access to classified information. Accordingly, I find against the Applicant under Guidelines J (Criminal Conduct) and 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 the Applicant as to the factual and conclusionary allegations expressed in Paragraph 4 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: For the Applicant.

Subpara. 1.a.: For the Applicant.

Subpara. 1.b.: For the Applicant.

Subpara. 1.c.: For the Applicant.

Subpara. 1.d.: For the Applicant.

Subpara. 1.e.: For the Applicant.

Subpara. 1.f.: For the Applicant.

Paragraph 2: Against the Applicant.

Subpara. 2.a.: For the Applicant.

Subpara. 2.b.: For the Applicant.

Subpara. 2.c.: Against the Applicant.

Paragraph 3: Against the Applicant.

Subpara. 3.a.: Against the Applicant.

Subpara. 3.b.: Against the Applicant.

Subpara. 3.c.: Against the Applicant.

Subpara. 3.d.: Against the Applicant.

Subpara. 3.e.: Against the Applicant.

Subpara. 3.f.: For 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