



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-06373

Appearances

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

January 28, 2016

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing dated April 15, 2014. (Government Exhibit 1.) On January 26, 2015, the Defense of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and 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 responded to the SOR on May 5, 2015, and he requested a hearing before a Defense Office of Hearings and Appeals Administrative Judge. This case was assigned to this Administrative Judge on August 26, 2015. A notice of hearing was issued on August 26, 2015, scheduling the hearing for September 21, 2015. At the hearing the Government presented two exhibits, referred to as Government Exhibits 1 and 2. The Applicant presented no exhibits, however, he testified on his own behalf. The record remained open until close of business on September 30, 2015, to allow the Applicant to submit additional supporting documentation. He submitted one Post-

hearing Exhibit, which was admitted without objection as Applicant's Post-Hearing Exhibit A. The official transcript (Tr.) was received on September 29, 2015. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

MOTION TO AMEND SOR AT HEARING

Department Counsel made a motion to amend the SOR by adding two allegations under Guideline E, referring to Section 22 and Section 23 of the Applicant's Electronic Questionnaire for Investigations Processing dated April 15, 2014. The Government asserts that the Applicant intentionally failed to list his drug involvement and criminal arrest in response to questions on his security clearance questionnaire of 2014. (Tr. pp. 28-29.) Applicant had no objection to the requested amendment and said amendment was made. (Tr. p. 45.) Paragraph 3, Guideline E was added to the SOR setting forth the following two allegations:

Question 22 of the questionnaire dated April 15, 2014, asked the Applicant, "if in the past seven years have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against him? In the past seven years have you been arrested by any police officer, sheriff, marshall or any other type of law enforcement official? In the past seven years have you been charged, convicted, or sentenced to a crime in any court? And finally, he was asked if he has ever been charged with an offense involving alcohol or drugs?" Applicant intentionally failed to disclose his 2008 arrest and charge with Driving Under the Influence of a Controlled Substance, and Possessing a Controlled Substance (narcotic).

Question 23 of the same questionnaire asked the Applicant "if in the last seven years have you illegally used any drugs or controlled substances, and in the last seven years had you ever been involved with a drug or controlled substance while in possession of a security clearance?" Applicant intentionally failed to disclose his 2008 arrest and charge with Driving Under the Influence of a Controlled Substance, and Possessing a Controlled Substance (narcotic).

FINDINGS OF FACT

The Applicant is 36 years old and is married with three children. He has a high school diploma. He is employed by a defense contractor as an Electrician and a security clearance is necessary in connection with his employment.

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

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

Applicant admitted each of the allegations set forth under this guideline. (See Applicant's Answer to the SOR.) Applicant began working for his current employer in March 2008, and he enjoys his job. Prior to that he worked for another defense contractor. He stated that he has held a security clearance for almost 15 years. (Tr. p. 19.) He has been married since 2001, and has three children.

In August 2008, at the age of 31, Applicant was arrested and charged with one count of Driving Under the Influence of a Controlled Substance, and with one count of Possessing a Controlled Substance (narcotic). (Government Exhibit 2.) He testified that his grandparents, who had essentially raised him, had recently passed away. He was depressed. He was walking down the street to his parked car while smoking a cigarette and drinking a beer when a neighbor offered him some cocaine. Applicant went to his car and after looking up how to use it, snorted it up his nose. Applicant was observed by the gang patrol that was monitoring his neighborhood, and was taken into custody. He was placed in detox for four hours and then released with a court date. At court, Applicant pled guilty and was sentenced to the MAC program for three years with a deferred judgment. The program required him to attend Narcotic Anonymous meetings, undergo bi-weekly urinalysis, and learn about the dangers of illegal drugs. Applicant believes the program helped him because he has not used any illegal drugs since the arrest and he has intentions to ever use them again.

Applicant stated that he now realizes how stupid and childish it was of him to use cocaine. (Tr. p. 25.) He admits that he made a mistake that will not occur again. He does not want to lose his children, and has never wanted to hurt them or embarrass them. When he was released from jail the Monday following the arrest, he ran about nine blocks, put on his work clothes, and went straight to work. He did not report the incident to his company security officer. He claims that he told one person at work, but the individual has since passed away. (Tr. p. 26.) He now understands that he must immediately report any criminal conduct of any sort to his company security officer.

Paragraph 3 (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.

Applicant completed an Electronic Questionnaire for Investigations Processing on April 15, 2014. (Government Exhibit 1.) Question 22 of the questionnaire asked the Applicant if in the past seven years has he been issued a summons, citation, or ticket to appear in court in a criminal proceeding against him? In the past seven years has he been arrested by any police officer, sheriff, marshall or any other type of law enforcement official? In the past seven years has he been charged, convicted, or sentenced to a crime in any court? And finally, he was asked if he has ever been charged with an offense involving alcohol or drugs? The Applicant responded, "NO," to each question. (Government Exhibit 1.) These were false answers. Applicant failed to disclose that he was arrested in August 2008 and charged with Driving Under the Influence of a Controlled Substance, and with one count of Possessing a Controlled Substance (narcotic).

Question 23 of the same questionnaire asked the Applicant if in the last seven years had he illegally used any drugs or controlled substances, and in the last seven years had he ever been involved with a drug or controlled substance while in possession of a security clearance? The Applicant responded, "NO," to both questions. (Government Exhibit 1.) These were false answers. Applicant failed to disclose the arrest and charge listed above.

Applicant testified that he failed to disclose his drug-related arrest to on his security clearance application dated April 15, 2014, because he was embarrassed. He stated that it is something he really tries to forget about. He states that he does not want to remember that part of his life. He thinks too highly of himself and his family and he knows that his grandparents would be disappointed in him if they knew about his misconduct. (Tr. P. 27-28.)

A letter from the Applicant's project manager dated September 25, 2015, indicates that he has known Applicant since March 17, 2008, when the Applicant started his employment with the company. He has moved from a starting position as a Mechanical Assembler III to an Engineer Technician III. He is in good standing on the job. (Applicant's Post-Hearing Exhibit A.)

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 J (Criminal Conduct)

The Concern. Criminal activity creates 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 lesser offenses; and

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:

32.(a) so much 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.

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.

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 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, 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 criminal conduct (Guideline J), drug involvement (Guideline H) and falsification (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 Guideline E.

The evidence shows that the Applicant was arrested and charged with Driving Under the Influence of a Controlled Substance, and Possession of a Controlled Substance (narcotic) in 2008. At the time of the arrest, Applicant held a DoD security clearance. He did not report the incident to his company security officer. Applicant knew that the use of cocaine was against the law. Applicant states that he had never used any illegal drug before 2008 and that he has not used any illegal drug since 2008. There is no evidence in the record to prove otherwise. Although there is no excuse for Applicant's use of cocaine in 2008, the fact that it occurred over six years ago and has not recurred is to his benefit. With the passage of time, without recurrence, I am inspired with the confidence that he has stopped all illegal drug use.

Under Guideline J, Disqualifying Conditions 31.(a) *a single 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. However, Mitigating Condition 32.(a) *so much 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* is also applicable.

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. 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. Under the

facts of this case, mitigation is controlling. Accordingly, I find for the Applicant under Guideline J and Guideline H.

Under Guideline E, the circumstances are much different. Applicant completed his security questionnaire in 2014. At that time, he failed to disclose his 2008 arrest and charge involving illegal drugs. Applicant was not candid or forthright in his responses to questions on his security clearance application concerning his illegal drug involvement. He states that he was too embarrassed to disclose it. 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 letter 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 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. 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 Paragraph 3 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.

Paragraph 2: For the Applicant.

Subpara. 2.a.: For the Applicant.

Paragraph 3: Against the Applicant.

Subpara. 3.a.: Against the Applicant.

Subpara. 3.b.: 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