



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 06-17745
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Stephanie C. Hess, Esquire, Department Counsel
For Applicant: *Pro se*

January 16, 2008

Decision

MASON, Paul J., Administrative Judge:

Applicant submitted his Security Clearance Application (SCA), on August 25, 2005. On November 27, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under the criminal conduct, drug involvement, and personal conduct guidelines. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on January 4, 2007, and requested that a decision be made on the record in lieu of a hearing. A copy of the Government's file of Relevant Material (FORM, the Government evidence in support of the allegations of the SOR) was sent to Applicant on September 12, 2007. Applicant received the FORM on October 2, 2007. Applicant's response was submitted on November 27, 2007, and

received on December 5, 2007. Department Counsel was notified on December 6, 2007 by the DOHA administrative staff that the response was received, and officially acknowledged there would be no objection to Applicant's response. The case was assigned to me for decision on December 17, 2007.

Findings of Fact

Applicant is 36 years old and has worked for his employer since 1991. He began as a production lead and was promoted in January 2005 to supply chain manager/logistics specialist. He seeks a security clearance.

Criminal Conduct. Applicant admitted both charges¹ in subparagraph 1.a. of the SOR. Plea negotiations resulted in the CCW charge being reduced to a misdemeanor while the marijuana charge was dropped. The weapon was discovered in the driver's door compartment after he was stopped for speeding on September 1, 1995. The marijuana was found during a search of the car.

Applicant had the gun in his car for protection. Four years later, he obtained a state gun license. He does not carry a gun currently because he has children. In explaining the ultimate disposition of the charges, Applicant stated, "I was told by my lawyer at the time that the marijuana charges were dropped and the felony of the weapons charge was reduced to a misdemeanor and all I had to do was mail in a fine and forfeit the gun to the state of [Y]"(Item 3). Applicant noted that he answered the felony question "NO"² on his security clearance application (SCA) because he did not know a charge is not canceled or voided with the disposition of the case.

Drug Involvement. Applicant denied he used marijuana until 2005 as alleged under subparagraph 2.a. In his responses to interrogatories (Item 5) dated September 25, 2006, he claims he made a mistake in responding to question 5 of the interrogatories by stating that his last use of marijuana was September 1, 2005. He attributes the mistake to haste and not properly checking the answers before submitting them. He meant to place the "1995" year in place of the "2005" year, because the earlier date indicates when he was charged with the two crimes alleged in subparagraph 1.a. of the SOR. Furthermore, Applicant stated he took several drug tests since 1995, and had to quit using marijuana to maintain his job. Also, Applicant requested in a cover letter (January 4, 2007) in his answer to the SOR that he had not been sent the information that supported the government's claim of his marijuana use after September 1, 1995.

Even though several of Applicant's responses in Item 5 (responses to interrogatories) appear to be entered in the appropriate spaces, then traced over a

¹ The charges were carrying a concealed weapon (CCW), a felony, and possession of marijuana , a misdemeanor.

² Presumably, Applicant is referring to his SCA (Item 4) he signed on August 25, 2005. However, the SCA reflects he answered "YES" to question 23.a. (Have you ever been charged with or convicted of any felony offense?).

second time, there is no way for me to determine why he employed this procedure with some of his responses and not others. Tracing his responses a second time could mean he was trying to emphasize the accuracy of the entry, and that September 1, 2005 was actually the last time he used marijuana. An equally credible explanation is that his first pen failed temporarily and he used a second pen to complete his interrogatory responses. Having weighed Applicant's explanations, I find that he intended to write in the date when he was originally charged with the two offenses. He negligently entered the wrong year. Accordingly, I find Applicant's last marijuana use was in 1995. Subparagraph 2.a. and 2.b. are found in Applicant's favor. Subparagraph 2.c. was admitted by Applicant, but mitigated by the passage of more than 12 years.

Personal Conduct. I find Applicant intentionally falsified his SCA on August 25, 2005 (subparagraph 2.a.) by denying he had ever been charged with an offense related to alcohol or drugs. I do not accept Applicant's first explanation that he did not know the charges stay with you whether reduced or dropped. Based on my findings under paragraph 2, subparagraph 3.b. is found in Applicant's favor. His drug use falls outside the purview of question 24 (a) of his August 25, 2005 SCA because it was not within the last seven years.

Applicant was interviewed on January 27, 2006, and contacted by telephone between January 5, 2006 and May 1, 2006 (subparagraph 3.c.) and he did not disclose the possession of marijuana charge resulting from his arrest in September 1995. He stated in explanation the reason he did not disclose the marijuana offense during the interviews was, "the possession of marijuana was dropped along with the concealed weapons charges. With them being dropped, I thought that there was never formal charges." (Item 5, response to question 3) I find he intentionally concealed the drug offense during the two interviews.

Applicant attributed the undisclosed information to haste and/or not being aware of the permanence of a criminal record.

Applicant has been employed by his employer for 16 years. His job consists of completing subassemblies for aircraft and managing personnel/suppliers in the manufacturing and maintenance process. He is currently enrolled at an online university where he recently received an associate's degree in business.

Policies

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) “[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability.” ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” See *Egan*, 481 U.S. at 531; see Directive E2.2.2.

Criminal Conduct (CC)

Criminal behavior creates doubt about a person’s judgment and willingness to comply with laws.

Drug Involvement (DI)

Use of illegal drugs invites questions about an individual’s reliability and trustworthiness.

Personal Conduct (PC)

Conduct involving questionable judgment, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability and trustworthiness.

Analysis

Criminal Conduct (CC)

Applicant’s conviction of the misdemeanor³ of carrying a concealed weapon offense and possession of marijuana (subparagraph 1.a.) falls within (DC) 31.a. (*a single serious crime or multiple lesser offenses*). However, the conduct is mitigated by the passage of time. Therefore, CC mitigating condition (MC) 32.a. (*so much time 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, or good judgment*) is applicable to find subparagraph 1.a. in Applicant’s favor.

³ A misdemeanor is generally defined as a minor crime less serious than a felony, and where the sentence is one year or less, a fine, or both. A felony is a serious crime for which the sentence of one year or more may be imposed.

Subparagraph 1.b. alleges Applicant violated 18 U.S.C. 1001 by intentionally falsifying questions 23(d) and 24(a)⁴ of his August 25, 2005 SCA, and by failing to disclose the marijuana charge during an interview on January 27, 2006, and during a telephone interview between January 5, 2006 and May 1, 2006. In order to establish a violation of 18 U.S.C. 1001, the falsifications must be material or capable of influencing an agency decision. Due to the passage of time, I conclude that the deliberate falsifications are no longer material. Subparagraph 1.b. is found for Applicant.

Assuming the falsifications are found to be material, then CC MC 32.a. provides substantial mitigation. CC MC 32.d. (*there is successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*) applies in part due to the positive character evidence supplied by Applicant. His academic record and good job performance weigh in his favor, even though the two items of character evidence provide little insight into his pattern of dishonesty during the security investigation. Subparagraph 1.b. is resolved in Applicant's favor.

Drug Involvement (DI)

Applicant's drug involvement fits the definition of DI DC 25.a. (*any drug use*) and 25.c. (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*). The infrequent drug use is mitigated by the passage of about 12 years and DI MC 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*). Subparagraphs 2.a., 2.b., and 2.c. are resolved in Applicant's favor.

Personal Conduct (PC)

Applicant's deliberate falsification of his SCA on August 25, 2005 falls within PC DC 16.a. (*the deliberate omission or falsification of relevant facts from any personnel security questionnaire to determine security clearance eligibility*). Applicant's deliberate omission of his marijuana charge during an interview on January 27, 2006 and an interview conducted between January 5 and May 1, 2006 invoke the application of PC DC 16.b. (*deliberately providing false or misleading information concerning relevant facts to an investigator*). The three elements of PC DC 16.a. are satisfied based on Applicant's deliberate omission of his drug charge from his SCA, an application form utilized by the government to determine security clearance eligibility. Applicant's deliberate omissions did not stop in August 2005. Between January and May 2006, Applicant continued to deny the marijuana charge. The three elements of PC DC 16.b. are satisfied based on the deliberate omission of relevant facts to an investigator.

⁴ As discussed below, my favorable finding under subparagraph 2.b. warrants a finding for Applicant under subparagraph 3.b. because he there has been no drug use since September 1995.

I have carefully weighed the mitigating conditions under the PC guideline and have concluded none apply. PC DC 17.a. (*the individual made prompt, good-faith efforts to correct the omission or falsification before being confronted with the facts*) is inapplicable because Applicant did not disclose the marijuana charge even after he knew or should have known his drug record was a security concern. Applicant did not admit to the drug charge until September 2006 when he was specifically asked why he omitted the drug information. PC MC 17.c. (*the offense was minor, or so much time has passed, or the behavior is so infrequent, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*) is not applicable due to the seriousness and recency of Applicant's falsifications. PC MC 17.d. (*the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused the untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur*) does not apply either. Applicant only acknowledged his drug charge after trying unsuccessfully several times to conceal the information, and he has not received counseling. Subparagraphs 3.a. and 3.c., and the PC guideline are found against Applicant.

Whole Person Concept (WPC)

In rendering my decision under the specific guidelines, I have considered this case under the general concepts of the whole person. When Applicant committed the criminal conduct in 1995, he may not have been aware about the nature and permanence of criminal records. Ten years later he may not have been aware of the importance of full disclosure on an SCA. However, when he was contacted by the investigator between January and May 2006, he should have realized (at age 34) that his drug record was a security concern. Rather than simply disclosing the marijuana charge however, he chose to continue concealment of the information. Due to the recency of his falsifications, insufficient time has passed to conclude he warrants access to a security clearance. Applicant has mitigated the drug involvement concerns with the passage of time. The passage of time and the lack of materiality of the underlying criminal behavior has mitigated the criminal behavior. Applicant's academic record and job performance are insufficient to overcome the pattern of falsifications under the personal conduct guideline.

Formal Findings

Paragraph 1 (Criminal Conduct, Guideline J):	FOR THE APPLICANT
Subparagraph 1.a.	For the Applicant.
Subparagraph 1.b.	For the Applicant.

Paragraph 2 (Drug Involvement, Guideline H):	FOR THE APPLICANT.
Subparagraph 2.a.	For the Applicant.
Subparagraph 2.b.	For the Applicant.
Subparagraph 2.c.	For the Applicant.
Paragraph 3 (Personal Conduct, Guideline E):	AGAINST THE APPLICANT.
Subparagraph 3.a.	Against the Applicant.
Subparagraph 3.b.	For the Applicant.
Subparagraph 3.c.	Against the Applicant.

Conclusion

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 Applicant. Clearance is denied.

Paul J. Mason
Administrative Judge