

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant provided several versions of past drug use during the security clearance application process raising personal and criminal conduct concerns. Applicant's explanation that he submitted a false statement in his own handwriting at the direction of a Defense Security Service Special Agent expanding the scope of his past drug involvement is not credible. Applicant failed to mitigate both concerns. Clearance is denied.

CASENO: 06-20152.h1

DATE: 08/09/2007

DATE: August 9, 2007

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 ISCR Case No. 06-20152
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 Applicant for Security Clearance
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**DECISION OF ADMINISTRATIVE JUDGE
ROBERT J. TUIDER**

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

William F. Savarino, Esq.

SYNOPSIS

Applicant provided several versions of past drug use during the security clearance application process raising personal and criminal conduct concerns.

Applicant's explanation that he submitted a false statement in his own handwriting at the direction of a Defense Security Service Special Agent expanding the scope of his past drug involvement is not credible. Applicant failed to mitigate both concerns. Clearance is denied.

STATEMENT OF THE CASE

On October 10, 2001, and September 4, 2003, Applicant submitted two separate security clearance applications (SF 86).¹ On August 29, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified.²

The SOR alleges security concerns under Guidelines E (Personal Conduct) and J (Criminal Conduct). The SOR 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 him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an answer notarized on October 18, 2006, Applicant responded to the SOR allegations, and elected to have his case decided at a hearing. On March 28, 2007, the case was assigned to an administrative judge. On April 4, 2007, the case was transferred to me. On May 2, 2007, DOHA issued a notice of hearing scheduling the case to be heard on May 22, 2007. The hearing was held as scheduled. On May 31, 2007, DOHA received the transcript.

FINDINGS OF FACT

In his response to the SOR, Applicant denied the allegations in SOR ¶¶ 1 and 2 with explanations.

Applicant is 34 years old.³ Since March 2006, he has been employed by a defense contractor working on enterprise class systems. Tr. 90. Additionally, in

¹GE 2 and GE 1, respectively. For convenience, the security clearance application(s) in this decision will be called SF 86. There is a separate allegation of falsification stemming from each SF 86.

²On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are not applicable to Applicant's case.

³GE 1 and 2, *supra* n. 1.

August 2006, Applicant along with two other colleagues began their own business providing high assurance products to clients in a classified environment. Tr. 118. His title in this company is chief technology officer. His employment requires a security clearance. Tr. 16-18, 22.

Applicant was awarded a bachelor of science degree in May 1997, majoring in communications. Upon completion of his undergraduate studies, he attended graduate school majoring in speech communications and completed all required course work, but did not complete his thesis. Tr. 15-16.

He has no military service. He married his wife in October 1997, and they have one child, a seven-year-old son.

In May 1995 at age 22, Applicant was convicted of criminal possession of a weapon in the third degree. In April 1995, he purchased a stolen weapon for the purpose of committing suicide. His attempted suicide was thwarted after his ex-girlfriend intervened and contacted the authorities. Although his suicide attempt was unsuccessful, his possession of a stolen weapon resulted in his being arrested, confined for two months, and convicted of a felony. He was sentenced to time served and five years probation. Tr. 23-25, GE 6. He was released from probation for good behavior in April 1997 after serving 18 months. Among the terms of his probation was abstinence from alcohol and illegal drugs, which he testified he complied with. Tr. 29-35, GE 6.

Applicant has a history of drug abuse, which formed the basis of the Personal Conduct SOR allegations discussed below.

Personal Conduct

Question 27 of Applicant's October 27, 2001, SF 86 asks, "**27. Your Use of Illegal Drugs and Drug Activity – Illegal Use of Drugs** Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?" Applicant answered, "Yes" and listed marijuana use from August 1992 to May 1995 once a week.

The SOR alleged in ¶ 1.a. "whereas in truth, you deliberately failed to disclose your additional marijuana use as set forth below: (1) You used marijuana, with varying frequency, from about May 1995 to at least 2001." Applicant testified on cross-examination the range of dates involving his drug abuse from August 1993 to May 1995 are the correct dates. Tr. 79.

Question 27 of Applicant's September 4, 2003, SF 86 asked the same question, *supra*. Applicant answered, "No."

The SOR alleged in ¶ 1.b. “whereas in truth, you deliberately failed to disclose your use of marijuana within the past seven years as set forth below: (1) You used marijuana, with varying frequency, from about September 1996 to at least 2001.”

On July 16, 2004, Applicant was interviewed by a Defense Security Service (DSS) Special Agent and provided a signed, sworn statement. Of note, Applicant submitted this entire statement in *his own handwriting*. Salient portions of that statement include:

I used marijuana approximately 25 times between 1991 and 2001. The overwhelming majority of this use was from about 1991 to 1995. I did use marijuana a few times between 1996 and 2001. . . . I have absolutely no intent on using any illegal drugs in the future. I have not made any purposeful attempt to obtain marijuana or any other illegal drug since 2001. . . . The only family member I know for sure that used illegal drugs was my father in law (. . .) and my brother in law (. . .). To the best of my knowledge they only used marijuana. . . . I no longer associate with anyone outside of my father in law who uses illegal drugs. . . . My wife has never used marijuana in my presence. My wife currently does not use marijuana or any other illegal drugs. My wife never plans on using marijuana or any other illegal drug in the future. Based upon information my wife gave me, she did use marijuana a few times in the past, but I never saw it. . . . I answered illegal drug questions on my SF-86 dated 4 September 2003 incorrectly. This was a regretful oversight. At the time of filling out my security forms I was nervous and anxious about my clearance and career.⁴

Applicant testified the DSS Special Agent who interviewed him advised him that he had two statements from two separate individuals suggesting greater marijuana usage than Applicant claimed in his SF 86s. The net result of this interview culminated in Applicant preparing a sworn statement, which he wrote in his own handwriting quoted verbatim *supra*. Applicant testified the Special Agent “basically told me what to write.” Applicant further testified the Special Agent “verbally read off what I should write in the statement.” Applicant testified that that the words, “I did use marijuana a few times between 1996 and 2001” were the Special Agent’s words and not true. After preparing the statement in his own handwriting, Applicant initialed each paragraph before swearing its contents were correct and true as written adding the DSS Special Agent assisted him in preparation of this statement. Tr. 44-58. On cross-examination, Applicant stated he thought during the interview, he had to write down what the Special Agent dictated even if not true and to sign adopting the agent’s statement as his own. Tr. 76.

Applicant discussed this statement with his wife when he got home and testified he “felt sick to my stomach.” Tr. 58. In their discussions about this statement, Applicant recalled that his wife had no recollection of her drug use. Tr.

⁴ GE 4.

59. Applicant did not contact his Facility Security Officer or attempt to contact DSS to correct his statement. When asked why he did not do either, he responded “I didn’t know.” Tr. 59. Applicant stated that he did not know providing a statement was voluntary. Tr. 71-72.

On June 12, 2003, Applicant submitted an earlier signed, sworn statement to a DSS Special Agent.⁵ Verbatim portions of that statement are:

During 1988, at age 15, I experimented with marijuana on one occasion. From Aug 91 to May 95, while a college student, I used marijuana on a once weekly basis at parties and get-togethers while in the company of college friends. . . . I stopped using marijuana in May 95 because I wanted to change my life.

Applicant provided derogatory/unfavorable information about himself in both SF 86s in Questions 19 (Medical Record), 22 (Employment Record), 21 (Police Record – Felony Offenses, 22 (Police Record – Firearms/Explosives Offenses, and 38 (Financial Delinquencies).⁶

Criminal Conduct

SOR ¶ 2.a alleges that information set forth under paragraph 1., above constitutes a violation of Federal law, Title, 18, United States Code, Section 1001, a felony.

A former supervisor, colleague, and retired naval officer testified on Applicant’s behalf and referred to him as “one of the best engineers I’ve worked with.” He added he was reliable and trustworthy. Tr. 95. Applicant’s wife testified by telephone and stated she had never seen or suspected that her husband was involved in any drug use since she has known him. Tr. 110. She denied any past drug use. Tr. 110-111. She confirmed Applicant’s version of how his interview was conducted in July 2004 by the DSS Special Agent, that being Applicant “was led to say and write things that were not necessarily true, kind of coaxing him into saying things that weren’t his own thoughts.” Tr. 112. Applicant’s business partner testified on his behalf and stated that he never had any suspicion that Applicant was involved in drug use since he knew him and that he was aware of his past drug use, but was not sure of the dates involved. Tr. 122-123.

POLICIES

In an evaluation of an applicant’s security or trustworthiness suitability, an administrative judge must consider the “Adjudicative Guidelines for Determining Eligibility For Access to Classified Information” (Guideline[s]), which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions

⁵ GE 5.

⁶ GE 1, and GE 2.

(DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified or sensitive information.

These Guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Guideline ¶ 2(a): "(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence."

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that "[a]ny doubt concerning personnel being considered for access to classified [or sensitive] information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts by "substantial evidence,"⁷ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating

⁷ "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).⁸

A person seeking access to classified or sensitive information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to such information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified or sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of such information.

The scope of an administrative judge's decision is limited. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. Executive Order 10865, § 7.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Guideline E (Personal Conduct)

Under Guideline ¶ E2.A5.1.1., “[c]onduct involving . . . lack of candor [or] dishonesty . . . could indicate that the person may not properly safeguard classified information.” Of particular concern is any failure to provide truthful and candid answers during the clearance process. One personal conduct disqualifying conditions is particularly relevant this case. Guideline ¶ E2.A5.1.2.2. provides, “[t]he deliberate omission, concealment, or falsification of relevant and material 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.”

Applicant places the trier of fact in the unenviable position of trying to determine which version of his past drug use is true and accurate. The security clearance application process requires the full, frank and consistent disclosure of past conduct – favorable and unfavorable. Applicant offers the explanation that the true and accurate version past drug use is the more favorable one he provided in his October 2001 SF 86.

⁸“The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

He would also have one believe that as a college-educated individual, who completed all of his graduate work for this master's degree, at age 31, would reiterate in his own handwriting a very unfavorable and untruthful version of past drug use dictated to him by DSS Special Agent. Not only would he have one believe the DSS Special Agent managed to coax or coerce him to provide unfavorable past drug use about himself, but also about his father-in-law and brother-in-law and a rather qualified history of drug use involving his current wife. In short, I do not find his explanation credible and conclude his intent was to conceal the information about the extent of his past drug use.⁹ I accept his handwritten statement to the DSS Special Agent on July 16, 2004, as the most credible description of his drug use.

Guideline ¶ E2.A5.1.2. provides for seven Guideline E mitigating conditions. None of them are applicable in this case.

Guideline J (Criminal Conduct)

Guideline ¶ E2.A10.1.1. articulates the Government's concern concerning criminal conduct stating, "[a] history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness." One personal conduct disqualifying conditions is particularly relevant this case. Guideline ¶ E2.A10.1.2.1. provides, "[a]llegations or admissions of criminal conduct, regardless of whether the person was formally charged."

For a violation of 18 U.S.C. § 1001 to occur, the falsification must be material. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995): as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." *See also United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004).

I conclude Applicant provided false information during the security clearance application process. His false statements about his drug use are material and violate 18 U.S.C. § 1001. The discussion under Personal Conduct, *supra*, applies.

Guideline ¶ E2.A10.1.3.1. provides for six Guideline J mitigating conditions. None of them are applicable in this case.

"Whole Person" Analysis

In addition to the facts discussed in the enumerated disqualifying and mitigating conditions, I have considered the general adjudicative Guideline related to the whole person. As noted above, Applicant's failure to provide truthful, accurate and consistent information as it pertained to his past drug use is sufficiently serious to

⁹ In ISCR Case No. 04-08934 at 2 (App. Bd. Aug. 17, 2006) the Board stated an applicant's statements about his or her intent and state of mind when an SF 86 or SF 85P was executed were relevant but not binding information. Moreover, an applicant's statements are considered in light of the record evidence of a whole. *Id.* "The security concerns raised by an applicant's falsification are not necessarily overcome by applicant's subsequent disclosures to the government." *See ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 2004).*" *Id.*

raise a security concern. His actions with respect to personal and criminal conduct were knowledgeable and voluntary. At the time he provided false information, he was sufficiently mature to be fully responsible for his conduct.

The motivation for Applicant's falsification is apparently to provide a more favorable version of his past drug abuse and to obtain a security clearance. Such failure to be forthright and honest raises concerns about his integrity and as such is incompatible with access to classified information. It casts doubt on his reliability and trustworthiness.

Applicant presented some extenuating and mitigating evidence. He has overcome substantial personal adversity following an unsuccessful suicide attempt and felony conviction. He was released from his probation for good behavior, although this accomplishment is undermined by his apparent failure to comply with the terms of his probation to remain drug free. He went on to complete his education, got married, and is a conscientious spouse and parent. He is accomplished in his profession and had the mettle to start his own business.

After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude Applicant has not mitigated the security concerns pertaining to personal and criminal conduct. The evidence leaves me with doubts as to his security eligibility and suitability.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"¹⁰ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to a security clearance.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline e: AGAINST APPLICANT

 Subparagraph 1.a: Against Applicant

 Subparagraph 1.b: Against Applicant

 Subparagraph 1.c: Against Applicant

Paragraph 2, Guideline J: AGAINST APPLICANT

 Subparagraph 2.a: Against Applicant

¹⁰See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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 Applicant. Clearance is denied.

Robert J. Tuidor
Administrative Judge