

KEYWORD: Drugs; Personal Conduct; Criminal Conduct

DIGEST: Applicant is a 26-year-old employee of a defense contractor. He admitted smoking marijuana from 1991 to 1997, and then falsely answering questions on his security clearance application about his marijuana use. When questioned by an investigator, he continued to deny any marijuana use until confronted with his prior inconsistent statement. Serious concerns exist as to Applicant's veracity and his explanations now do not mitigate the disqualifying conditions of the applicable Guidelines. Clearance denied.

CASE NO: 01-25868.h1

DATE: 09/12/2003

DATE: September 12, 2003

In Re:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-25868

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 26-year-old employee of a defense contractor. He admitted smoking marijuana from 1991 to 1997, and then falsely answering questions on his security clearance application about his marijuana use. When questioned by an investigator, he continued to deny any marijuana use until confronted with his prior inconsistent statement. Serious concerns exist as to Applicant's veracity and his explanations now do not mitigate the disqualifying conditions of the applicable Guidelines. Clearance denied.

STATEMENT OF THE CASE

On April 21, 2003, the Defense Office of Hearings and Appeals (DOHA), under 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, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) 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 Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

Applicant submitted a signed and sworn statement, dated May 12, 2003. He admitted all the allegations contained in the SOR, and offered explanations and justifications for his prior statements and actions. Applicant requested his case be decided on the written record in lieu of a hearing.

On July 8, 2003, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) was provided to Applicant. He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. He received the FORM on July 24, 2003. Applicant did not file a response to the FORM by the August 23, 2003 due date. The case was assigned to me on September 3, 2003.

FINDINGS OF FACT

Applicant admitted all of the SOR allegations. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following additional findings of fact:

Applicant is 27 years old, married, and works for a defense contractor. Applicant has one daughter and two step-daughters. Applicant served in the U.S. Army and received an honorable discharge. (Item 5 at 1, 2, 5; Item 6; Item 7 at 1)

Applicant smoked marijuana in 1991 and 1992. While on active duty but without a security clearance Applicant smoked marijuana on December 27 and 30, 1997. Applicant was on leave at that time. (Item 4; Item 5 at 7; Item 6 at 1 and 2; Item 7 at 3; Item 10 at 2)

Applicant received an Article 15, non-judicial punishment under the Uniform Code of Military Justice, on June 15, 1998, for wrongfully possessing marijuana in his dormitory room in January, 1998. The marijuana was in an article of clothing in his locker. (Item 9)

Applicant deliberately answered Question 27 falsely on his security clearance application by denying any illegal use of drugs in the past seven years from June 3, 1999, when Applicant signed that application. In fact, Applicant had used marijuana twice in 1997. Applicant deliberately failed to disclose this marijuana use during interviews with Defense Security Service investigators in 1999 and 2002, by denying such use at least three times. Applicant later admitted such use and blamed his forgetfulness for the omission of information. Applicant feared he would not be able to get a security clearance and retain his job with he disclosed his marijuana use. (Item 5 at 7; Item 6;

Item 7 at 1 and 3)

Applicant's manager counseled Applicant for making false statements relating to his non-selection for promotion within his company. This counseling occurred on or about May 31, 2002. Applicant was also counseled by the same person for his poor attendance and tardiness on or about May 16, 2002. Applicant asserted his need to care for his wife and new baby, and the working of a second job to provide income for his family as the reasons for his tardiness and unauthorized absences. Applicant was also counseled on or about October 10, 2001 for tardiness by reporting for work at 10:40 a.m. when his work start time was 7:30 a.m. (Item 8 at all)

Applicant violated federal law by knowingly and willfully providing false information on the security clearance application and to two federal investigators. These violations were of Title 18, United States Code, §1001. These violations, if prosecuted, would constitute a felony offense under federal law. (Item 5 at 7; Item 6 at all; Item 7 at 1 and 3)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security

and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* At 527. The president has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgement, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* Section 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation;
- (3) how recent and frequent the behavior was;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the voluntariness of participation;
- (6) the presence or absence of rehabilitation and other pertinent 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 (See Directive, Section E2.2.1. of Enclosure 2).

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. See *Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment,

reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive Para E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive Para. E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See Exec . Or. 12968 Section 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline H - Drug Involvement

(A) Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information

(B) Drugs are defined as mood and behavior-altering substances and include:

(1) Drugs, materials and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens); and

(2) Inhalants and other similar substances.

(C) Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

(D) Conditions that could raise a security concern and may be disqualifying include:

(1) Any drug abuse (see above definition);

(2) Illegal drug possession, including purchase.

(E) Conditions that could mitigate security concerns include:

(1) The drug involvement was not recent;

(3) A demonstrated intent not to abuse any drugs in the future.

Guideline E - Personal Conduct:

(A) Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

Refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personal security or trustworthiness determination.

(B) Conditions that could raise a security concern and may be disqualifying also include:

(2) The deliberate omission, concealment, falsification or misrepresentation 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;

(4) Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;

(5) A pattern of dishonesty;

(C) Conditions that could mitigate security concerns include:

(2) The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;

(5) The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.

Guideline J - Criminal Conduct

(A) The Concern: A history or pattern of criminal activity creates doubt about a person's judgement, reliability and trustworthiness.

(B) Conditions that could raise a security concern and may be disqualifying include:

(1.) Allegations or admissions of criminal conduct, regardless of whether the person the person was formally charged;

(2.) A single serious crime or multiple lesser offenses.

(C) Conditions which could mitigate security concerns include:

(1.) The criminal behavior was not recent;

(6.) There is clear evidence of successful rehabilitation.

CONCLUSIONS

Upon consideration of all the facts in the record as evidence, and after application of all appropriate legal requirements, factors, and conditions cited above, I conclude the following with respect to each allegation set forth in the SOR:

Guideline H - Drug Involvement: I conclude the Government established its case by the record evidence and the admissions of the Applicant. Applicant used marijuana three times within the time period required for disclosure by the security clearance application Question 27. Disqualifying Conditions (DC) 1 and 2 apply. The Mitigating Conditions (MC) 1 and 3 apply here. The marijuana use was not recent, the last incident of smoking was in December, 1997, and the last possession accusation was in 1998. Applicant's new child, marital and family obligations, and his express statements about no future drug use, and his move from his former residence in another state and away from his former environment, all demonstrate to me that Applicant will not be a user of illicit drugs in the future. The finding is for the Applicant.

Guideline E - Personal Conduct: Applicant did not make the required and appropriate full disclosure, even when asked several times and given an opportunity to provide the information. Applicant cited his fear for his job and the need for a clearance as the reasons for his mendacity. I do not find his reasons persuasive or credible. Under this guideline, a security concern may exist if an applicant is shown to be untrustworthy, dishonest, lacking in candor, dishonest in his disclosures, and failing to comply with requirements of disclosure. Applicant had two interviews in 1999 and 2002, respectively, and did not voluntarily disclose the required information until confronted by the investigator. DC 2, 4, and 5 apply. I cannot find any Mitigating Conditions which apply here. The finding is against the Applicant.

Guideline J - Criminal Conduct: The Government established its case here. Applicant has a pattern established of criminal conduct which calls into question his judgement. DC 1 and 2 apply here. I do not apply any MC here because I can find none which are applicable. The finding is against the Applicant.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline H: For Applicant

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2 Guideline E: Against Applicant

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against Applicant

Subparagraph 2.f.: Against Applicant

Paragraph 3 Guideline J: Against Applicant

Subparagraph 3.a.: Against Applicant

DECISION

In light of all the circumstances and facts 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.

Philip S. Howe

Administrative Judge