

DATE: September 25, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-05108

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Shane L. Farrow, Esq.

SYNOPSIS

In January 2001, Applicant intentionally furnished false information on his security form when he answered "no" to question 24 requiring information about charges or convictions of offenses related to alcohol or drugs. The fact that (1) the charging document was legally defective because of a missing prosecutor's signature, and (2) Applicant was charged under a quasi-criminal municipal ordinance does not negate the security significance of the underlying possession charge. Because the falsification occurred less than three years ago, and due to the absence of substantiated character evidence to support Applicant's observations about himself, Applicant has not met his ultimate burden of persuasion under the personal conduct guideline. Clearance is denied.

STATEMENT OF CASE

On December 13, 2002, 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, amended April 4, 1999, issued a Statement of Reasons (SOR) to 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 Applicant, and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked. Applicant's undated Answer to the SOR was received in a timely fashion. Applicant elected to have his case decided on a written record. The Government provided a copy of the File of Relevant Material (FORM) on March 25, 2003. Applicant received the FORM on April 28, 2003. He filed his response on May 24, 2003, within the 30 day period allowed for receipt of a response. The case was received by the me for decision on June 5, 2003.

RULINGS ON PROCEDURE

In his response to the File of Relevant Material (FORM), Applicant asserted that although he was arrested for the possession of marijuana, under state law, Applicant was not formally charged because the charging papers did not carry the prosecutor's signature as required by law. The absence of the prosecutor's signature on the charging document does

not negate the security significance of the possession offense.

Applicant's second contention is that under state law, proceedings in connection with municipal ordinance violations are quasi-criminal, not criminal in nature. Hence, Applicant was never charged with a crime. Again, the claim that municipal ordinance violation does not constitute a crime does not eliminate the fact Applicant was admittedly in possession of an amount of marijuana in October 1994.

Applicant's third claim accuses the Government of stepping outside the SOR with a new allegation that Applicant should have disclosed his arrest in response to question 26 of the security form, which required him to list any arrests, charges, or convictions of any offenses in the last seven years, which were not listed in questions 21 through 25. The claim is misplaced as the Government is not lodging a new allegation but rather challenging the credibility of Applicant's assertion that he was not charged with a crime in October 1994. Apparently, the basis for Applicant's claim is a hearsay conversation Applicant had with counsel where Applicant stated he thought his arrest occurred more than seven years before he signed the security form.⁽¹⁾ Even if the statement of uncertainty as to when the offense occurred is offered for substantive purposes, the statement is seriously discredited by the lack of evidence in Appellant's sworn statement (Item 5) indicating or suggesting he was confused about the date of the possession offense.

Applicant's fourth claim seeks to attack the probative weight to be assigned the sworn statement he made to the investigator on November 8, 2001 (Item 5) because: (1) Applicant did not write the statement; (2) the investigator misquoted Applicant; and, (3) the investigator exerted pressure on Applicant to sign the statement or have his clearance and job terminated. After examining the sworn statement, I see initials written in various locations of the statement that tell me, based on experience in similar cases, Applicant had an opportunity to read the statement before affixing his signature. In addition, Applicant applied his initials to the typed in sentence (at the end of the statement) above his signature indicating he initialed all pages and corrections and acknowledged the statement was true as written. Next, Applicant's signature appears on the signature line, followed by the date of November 8, 2001, and the time stated to be 9:30 AM. Finally, the record contains no evidence to support Applicant's claims of bias or misconduct by the investigator in the taking of Applicant's sworn statement. Considering the claims (again based on a hearsay exchange between Applicant and his counsel) attacking the weight to be given the sworn statement against the lack of underlying evidence to support the claims, I find the sworn statement contains the true account of Applicant's state of mind at the time he filled out the security form in January 2001.

FINDINGS OF FACT

The SOR alleges personal conduct (Guideline E). Applicant stated in his answer:

I admit to falsifying material facts on a Questionnaire for National Security Positions, Standard Form 86, executed by me on January 23, 2001, when I answered "No" to Question 24. Your Police Record - Alcohol/Drug Offenses Have you ever been charged with or convicted of any offenses) related to alcohol or drugs?" because I failed to disclose that on October 14, 1994, I was arrested and charged with Possession of Marijuana under 35 Grams in [this state]. (Answer to SOR)

He also stated in his answer that when he filled out the security form, he did not believe he had been officially charged. He claimed:

[At] the time I filled out the security questionnaire, I was under the impression that a person has not been formally charged with a crime until that person, or representative, appears before a judge and hears the charges read in open court. Since this had never occurred in this arrest and the prosecuting attorney's letter informed me that they would not be pursuing this case, I believed that I had only been arrested, and never charged for this crime. (Answer to SOR)

Moreover, Applicant noted in his answer that when the investigator came to interview Applicant in November 2001, Applicant supposedly did not believe charges had been filed or what those charges were. (Answer to SOR)

In his sworn statement dated November 8, 2001 (Item 5), Applicant provides a similar account of his arrest and receiving a letter from the district attorney stating the charges were dropped. However, Applicant did not provide any information about his beliefs on the validity of the charge. He stated, "[I] did not list this incident on my forms because I did not

think much of it, I didn't think it was relevant and I did not want my employer to find out." (Item 5)

Having weighed the sworn statement (Item 5) against the answer to the SOR (Item 3), and the response to the FORM, the sworn statement makes no mention of the rather expansive opinion Applicant expressed in his answer to the SOR that he was not charged with a crime. Second, if Applicant was misquoted or pressured into signing the statement, it seems reasonable that at least some of his displeasure with the sworn statement would have been noted in his answer to the SOR. Considering the entire record, I find Applicant sought to intentionally conceal the possession charge from the security form because: (1) he did not think much of it; (2) he did not think it was relevant; and, (3) he did not want his employer to know about the offense notwithstanding his disclosures of his felony conviction in 1990 (question 21) and his financial delinquencies (question 38) on the same form.

Appellant claims he never used drugs and his arrest was the result of associating with the wrong people. Applicant has been married for five years and has a young child. Applicant believes that over the past two years he has made major contributions to national defense capabilities as a computer programmer.

POLICIES

Enclosure 2, page 16 of the Directive, sets forth disqualifying and mitigating conditions that must be given binding consideration in making security clearance determinations. These conditions must be considered in every case according to the pertinent guideline; however, the conditions are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the conditions exhaust the entire realm of human experience or that the conditions apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Conditions most pertinent to evaluation of the facts in this case are:

Personal Conduct (Guideline E)

Disqualifying Conditions (DC):

1. The 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.

Mitigating Conditions (MC):

1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;
2. The falsification was an isolated incident, was not recent, and individual has subsequently provided the correct information voluntarily;
3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under nine additional policy factors that make up the whole person concept. Those factors (found at pages 16 and 17 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (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 behavioral changes; (7) the motivation for the conduct; and, (8) The potential for pressure, coercion, exploitation, or duress; (9) and, the likelihood of continuation or recurrence.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge can only draw those inferences or conclusions that have a 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.

The Government must establish a *prima facie* case against Applicant under personal conduct (Guideline E) that establishes doubt about Applicant's judgment, reliability, and trustworthiness. Then, the Applicant has the ultimate burden of demonstrating with evidence in refutation, explanation, mitigation, or extenuation that it is clearly consistent with the national interest to grant or continue his security clearance.

CONCLUSIONS

Behavior involving questionable judgment or dishonesty falls within the scope of the personal conduct guideline of the Directive. On January 23, 2001, Applicant intentionally falsified his security form when he answered "no" to question 24 of the form requiring information about charges or convictions for offenses related to alcohol or drugs. He did not think the information was important and/or relevant, nor did he want his employer to know about the offense. His choice to conceal information from the Government comes within DC 2 of the personal conduct guideline as Applicant sought to conceal relevant and material facts from his security form. The fact that he was charged under a defective charging paper does not eliminate the underlying significance of his conduct. His claim he did not want his employer to know about the possession charge does not justify providing false information during the course of a security investigation.

There are three mitigating conditions that are potentially applicable to the circumstances of this case. MC 1 applies when the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness or reliability. Independent records and Applicant's admission confirm Applicant's charge with possession of marijuana in October 1994. In addition to the information being substantiated is the fact that drug involvement is always is relevant to a determination of judgment and trustworthiness.

MC 2 of the personal conduct guideline should be considered where the falsification was an isolated event and the information was provided voluntarily. Applicant's thin evidence in mitigation falls short of MC 2 as Applicant had to be confronted with the information before he came forward with a full disclosure. MC 3 is clearly not pertinent to these facts either as there is no evidence to show an effort by Applicant to correct the falsification before being confronted with the facts.

Even though Applicant has failed to overcome the disqualifying conditions under personal conduct, his conduct must still be evaluated under the nine general factors of the whole person concept. Intentionally providing false information during the course of a security investigation is a serious offense because it brings the individual's credibility in question. Though the falsification occurred only once, the date of the falsification was less than three years ago. Applicant was 29 years old, well beyond the age of majority, when he provided false information on his security form in January 2001. While Applicant has presented positive character evidence about himself and what he believes he has accomplished for the national defense, there is no corroborating evidence from coworkers, friends, and family to support Applicant's character evidence. Having considered the personal conduct evidence in the context of the whole person, I also find against Applicant.

FORMAL FINDINGS

Formal Findings required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are:

Paragraph 1 (personal conduct): AGAINST THE APPLICANT.

a. 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 Applicant a security clearance.

Paul J. Mason

Administrative Judge

1. This information does not appear in Applicant's answer, his security form, or his sworn statement.