

DATE: March 3, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-06917

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Mitchell J. Yelsky, Esq.

SYNOPSIS

Applicant under reported drug information from question 27 of his August 2001 security clearance application (SCA). However, the omission resulted from his good-faith belief he had used drugs from November 1993 to April 1994, rather than November 1994 to April 1995. Lacking the requisite intent to falsify, Applicant's conduct falls outside the scope of the second disqualifying condition (DC) of the personal conduct guideline and also 18 USC 1001. (2.a.) Applicant's falsification of his cocaine and amphetamine use on January 3, 2002 (2.b., 2.c.) was intentional though, and falls within DC 3 of the personal conduct guideline and 18 USC 1001 of criminal conduct. Considering Applicant's full disclosure of his drug history on January 24, 2002, the passage of more than seven years with only one instance of criminal behavior, coupled with the positive changes Applicant has made in his lifestyle, I am confident Applicant's intentional falsification in January 2002 will not be repeated in the future. Clearance is granted.

STATEMENT OF THE CASE

Pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as modified by Change 4, April 20, 1999, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR), dated June 13, 2002, to Applicant. The SOR detailed the 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 Applicant access to classified information, and recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted continued, denied or revoked. Applicant answered the SOR on July 9, 2002 and requested a hearing.

A notice of hearing was furnished to Applicant on October 22, 2002, and the hearing was held on November 22, 2002. The Government submitted seven exhibits (GE). Applicant furnished no exhibits (AE). Testimony was taken from Applicant and one witness. The transcript was received December 4, 2002.

RULINGS ON PROCEDURE

Prior to opening statements, the Government moved to amend the SOR by replacing certain language from subparagraph 2.a. (Tr. 10-11) The clause in bold print currently reads "**Your Use of Illegal Drugs and Drug Activity-Use in Sensitive Positions**" The Government moved to replace "**Use in Sensitive Positions**", with "**Illegal Use of Drugs**," to make the allegation conform with the government's evidence. The motion was granted.

FINDINGS OF FACT

The SOR alleges criminal conduct and personal conduct. Applicant admitted the criminal conduct allegations except for 1.e, denying he falsified any document with the requisite criminal intent. He denied 2.a. but admitted 2.b. Applicant's answer to 2.c. includes a denial and a failure to recollect whether the crystal methamphetamine use was discussed during the January 3, 2002 interview. The following factual findings are based on the record including Applicant's demeanor and conduct at the hearing.

Applicant is 28 years old and has been employed as a truck driver for a freight company since May 2000. Most of the company's business comes from hauling classified material for the Department of Defense. Applicant seeks a secret level clearance.

On February 21, 1990, at the age of 14, Applicant was convicted of aggravated burglary. He and a friend stole shotguns and rifles from the house of a mutual friend's father. (GE 2) Part of his sentence included restitution for the shotguns and rifles stolen. Also, he was placed on probation from three to five years.

On February 26, 1990, Applicant was charged with receiving stolen property. The charge was dropped.

On March 4, 1994, Applicant (age 20) was lured by two friends to break into two trucks in his neighborhood and steal speakers and other items. Applicant acted as a lookout while the other two individuals broke into the trucks and took the items. All were apprehended a short time later in Applicant's home. Applicant was charged with two counts of felony theft and two counts of misdemeanor criminal damage. Applicant entered a plea on the third count of criminal damage; he was sentenced to 90 days in jail, one year probation and ordered to pay one-third of the restitution.

In July 1994, Applicant was fined for underage drinking. He had been drinking with a friend (driver) who was stopped by the police for speeding. The arresting officer noticed Applicant with a beer in his hand, and charged Applicant with underage drinking.

On April 27, 2001, ⁽¹⁾ Applicant signed the certification section of a Security Clearance Application (SCA), Standard Form 86. In his response to question 27 (drug use since the age of 16 or in the last 7 years, whichever is shorter), Applicant answered "yes," indicating he had used cocaine and marijuana on one occasion in April 1994. As he answered question 27 of the SCA, he was thinking he had used cocaine between November 1993 and April 1994 because, "...everything that went haywire in my life happened then [1994]." (Tr. 77) In providing the drug information, Applicant used the 7 year window believing that most of his cocaine and marijuana use was outside the seven year period or before April 27, 1994. ⁽²⁾ Clearly, Applicant should have disclosed his cocaine and amphetamine use from November 1994 and April 1995, but thought April 1994, instead of April 1995, was the date he stopped using drugs.

In approximately August 2002 (Tr. 79), Applicant reviewed his medical records. They indicated he was evaluated at the hospital in April 1995 instead of April 1994. As he reviewed these records, Applicant recalled his cocaine use occurred between approximately November 1994 and April 1995, rather than November 1993 and April 1994, as he originally believed. Since Applicant was mistaken about when he used drugs, I find he lacked the requisite intent required by DC 2 of the personal conduct guideline, which is necessary to establish an intentional falsification of his SCA on April 27, 2001.

In a signed sworn statement dated January 3, 2002 (2.b.), Applicant stated he used cocaine on one occasion at a bar on the night before Easter in April 1994, and after experiencing fright associated with a rapidly beating heart, went to the hospital for an evaluation. ⁽³⁾ While Applicant conceded he lied about the frequency of cocaine use (Tr. 85), he presented several additional reasons for apparently supplying false information to the Agent on January 3, 2002. Applicant did not tell the Agent the truth about the frequency of his cocaine use (2.b.), "[B]ecause the way I understood

the question, it was seven years, so I physically didn't think I had to write that down." The aforementioned response suggests Applicant was somehow guided by the questions of SCA he submitted in August 2001, when he responded to the Agent's questions on January 3, 2002. There was nothing in the Agent's testimony that gave Applicant the impression his answers during the interview with her were still connected to the drug question in the SCA.

Applicant also was nervous during the interview/sworn statement because the Agent's sister-in-law was his doctor. (Tr. 82) Applicant was also embarrassed about his past drug use (Tr. 84), and scared he would not get his security clearance if he revealed the frequency of his cocaine use. (Tr. 86)

In the January 3, 2002 sworn statement, Applicant also indicated he might have taken valium once or twice during high school. However, he did not disclose use of any other drug, specifically that he had also used crystal methamphetamines (2.c.) between November 1994 and April 1995. Even though Applicant was motivated by other reasons, he still intentionally falsified the information he provided to the Agent concerning the frequency of his cocaine use and the use and frequency of methamphetamine use from November 1994 to April 1995. (2.c.)

On January 24, 2002, Applicant provided a sworn statement in which he supplied the full scope of his drug use, including cocaine and methamphetamines. In explaining why he did not disclose the frequency of his cocaine and methamphetamine use, Applicant stated, "I did not previously disclose the additional cocaine use, or my crystal methamphetamine use during my prior DSS interview because I was nervous about discussing drug use; and I was concerned about the possible impact that such disclosure would have on getting my security clearance." The frequency of his cocaine use was twice a week from November 1994 to April 1995. (Tr. 95-105) While not specifically questioned on how his methamphetamine use would be changed, GE 3 refers to the same beginning and ending dates for methamphetamine use. In addition, when discussing the frequency of his methamphetamine use, he indicated on two or three occasions. Therefore, I find he used methamphetamines on two or three occasions between November 1994 and April 1995.

Applicant's job performance is outstanding. (Tr. 64; 111) He never has had a late delivery or a security violation since he began with his current employer in ay 2000. Every two years, Applicant receives training on how to transport Department of Defense equipment. (Tr. 62) Applicant is truly remorseful for lying during the security clearance investigation. (Tr. 76) Applicant testified credibly he has learned to respect other people's property and to work for what you receive in life. (Tr. 74)

His driving partner has known Applicant for five years and has seen no indication of drug use by Applicant. His partner has found Applicant to be an excellent driver who is trustworthy. (Tr. 110-112)

POLICIES

Enclosure 2 of the Directive sets forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors 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 factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

Criminal Conduct

Disqualifying Conditions:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Mitigating Conditions:

1. The behavior was not recent;
2. The crime was an isolated event;
6. There is clear evidence of successful rehabilitation.

Personal Conduct

Disqualifying Conditions:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, ...used to determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;
3. Deliberately providing false or misleading information concerning relevant and matters top an investigator...in connection with a personnel security or trustworthiness determination.

Mitigating Conditions:

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

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 16 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; and (9) 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 under this Directive 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 all the factual allegations under Guideline J (criminal conduct) and Guideline E (personal conduct) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to the sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

CONCLUSIONS

Personal conduct is defined as behavior that manifests poor judgment, dishonesty, as well as a lack of candor. There is no doubt Applicant omitted material information from his August 2001 SEA, when he did not disclose the full scope of

his cocaine use, and did not identify methamphetamine use and frequency between November 1994 and November 1995. The omission of material information constitutes one of the elements of the second disqualifying condition (DC) of the personal conduct guideline. However, a finding in Applicant's favor under 2.a. is based on Applicant's good-faith but mistaken belief he had used cocaine, marijuana, and methamphetamine between November 1993 and the night before Easter, 1994, rather than between November 1994 and the night before Easter, 1995.

First, Applicant's drug use occurred at least six years before he certified the SEA in April 2001. In that six year period, it is reasonable for a person to forget exactly when they started and stopped using drugs without the aid of a reference date that Applicant did recall as being the last date he used drugs. But, while Applicant remembered he stopped using drugs on the night before Easter, he was still mistaken as to the year.

Second, the Easter date Applicant identifies in his sworn statement (dated January 3, 2002) as being the last date he used drugs, is also identified as the last date he used drugs in his January 24, 2002 sworn statement.

Third, medical records (GE 7) reference April 16, 1995 as the day he was evaluated at the hospital. The symptoms Applicant described in GE 2 and GE 3 sworn statements, are also repeated in the records (GE 7).

Finally, even though Applicant believed most of his cocaine use occurred before the seven year period, he still acknowledged on the SEA he used the drug inside the seven year period, although he may have under reported the frequency by one use. Having weighed and balanced Applicant's explanations with the sworn statements and medical records, I find Applicant lacked the specific intent required both for DC 2 of the personal conduct guideline, as well as 18 U.S.C. 1001, when he omitted almost all his cocaine history from his SEA (2.a in August 2001).

On the other hand, Applicant intentionally falsified his sworn statement dated January 3, 2002 (2.b. of the SO), by concealing the frequency of his cocaine use. Applicant intentionally falsified the January 3, 2002 sworn statement by failing to disclose his amphetamine use from November 1994 to April 1995. Applicant's other reasons for intentionally falsifying the sworn statement may be classified as motives, and his motives do not justify lying during the security clearance process.

Applicant's intentional falsifications are mitigated by the second mitigating condition (MC) under the personal conduct guideline. MC 2 refers to an isolated incident, and the January 3, 2002 sworn statement, even though recent, was an isolated incident. On January 24, 2001, twenty-one days later, Applicant provided the full account of his drug use. While his complete disclosure would not qualify under MC 3 (the individual made prompt, good-faith efforts to correct the falsification, before being confronted with the facts) Applicant nonetheless provided the missing information voluntarily and within the purview of C 2. In sum, Applicant's voluntary disclosure of correct information meets Applicant's ultimate burden of persuasion under the personal conduct guideline.

Criminal conduct is any kind of criminal activity which creates doubt about a person's judgment, reliability and trustworthiness. Applicant's three convictions for felonious burglary, felonious theft, and underage drinking, fall within DC 2 of the criminal conduct guideline and cast a dark cloud over Applicant's judgment and reliability. Applicant is entitled to some mitigation because the crimes occurred when Applicant was a juvenile, and the crimes are not recent. (MC 1) While the crimes are not isolated in relationship to one another, they are isolated by the passage of more than seven years.

I find clear evidence of successful mitigation supported by Applicant's record on the job as substantiated by his co-driver of five years. Hence, 1.a., 1.b., 1.c., and 1.d., are found for Applicant.

Applicant's intentional falsification under 2.b. also constitutes felonious conduct under the 1.e. of the SO, representing a violation of 18 U.S.C. 1001. Even if the intentional falsification is not mitigated by MC 2 of the personal conduct guideline, the presence of only one criminal offense since July 1994 demonstrates to me Applicant has made the appropriate behavioral changes to warrant serious consideration under the sixth general factor of the whole person concept. Applicant's credible testimony of the importance of hard work and his good performance record as corroborated by his co-driver, show me Applicant's past drug use and dishonest conduct are unlikely to recur in the future. (Ninth factor of the whole person concept) Accordingly, I find in Applicant's favor under the personal conduct and criminal conduct guidelines.

FORMAL FINDINGS

Paragraph 1 (criminal conduct): FOR THE APPLICANT.

1.a. For the Applicant.

1.b. For the Applicant.

1.c. For the Applicant.

1.d. For the Applicant.

1.e. For the Applicant.

Paragraph 2 (personal conduct): FOR THE APPLICANT.

1.a. For the Applicant.

1.b. For the Applicant.

1.c. For the Applicant.

DECISION

In light of all the circumstances presented by the record in his case, it is clearly consistent with th national interest to grant or continue a security clearance for Applicant.

Paul J. Mason

Administrative Judge

1. Though the SOR indicates execution took place on March 13, 2001, the certification occurred closer to April 27, 2001, when Applicant signed the certification.
2. If Applicant believed he was past the seven year window, then subjectively there would be no reason for him to answer "yes" to question 27. (Tr. 79)
3. Hospital records (GE 7) confirm Applicant's symptoms plus right arm tingling.