

KEYWORD: Personal Conduct

DIGEST: Applicant is a 43-year-old employee of a defense contractor who failed to give accurate information on his 1999 application for a security clearance (SF 86) relating to criminal record and use of marijuana. He omitted the information deliberately in an effort to secure a position with an employer doing classified work in U.S. embassies. He obtained the position and has held it for the past five years. Clearance is denied.

CASENO: 02-11272.h1

DATE: 07/21/2004

DATE: July 21, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11272

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Douglas A. Winegardner

SYNOPSIS

Applicant is a 43-year-old employee of a defense contractor who failed to give accurate information on his 1999 application for a security clearance (SF 86) relating to criminal record and use of marijuana. He omitted the information deliberately in an effort to secure a position with an employer doing classified work in U.S. embassies. He obtained the position and has held it for the past five years. Clearance is denied.

STATEMENT OF CASE

On September 9, 2003, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, 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 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. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On October 20, 2003, Applicant, in a statement by counsel, responded to the allegations set forth in the SOR, and requested a hearing. The matter was assigned to me on December 22, 2003. After several delays because of the Applicant's overseas work, a notice of hearing was issued on May 7, 2004 and a hearing was held on May 18, 2004. The Government introduced four exhibits and the Applicant introduced eight. All exhibits were admitted into evidence. The Applicant and one other person testified. The transcript was received on June 2, 2004.

FINDINGS OF FACT

Applicant is a 43-year-old employee of a defense contractor who admitted five of the allegations in the SOR, denied seven, and disagreed with the conclusions reached regarding personal conduct for failing to give accurate information on his application for a security clearance (SF 86) dated June 1999. After a complete review of the evidence in the record and upon due consideration of the record, the following additional findings of fact are made:

Applicant was arrested in 1995 for possession of marijuana, fined \$535.00, and placed on one year probation. In 1998 he was arrested for driving under the influence and sentenced to six months suspended and fined \$50.00. Neither arrest was listed in answer to Question 20 relating to a police record for alcohol and drug offenses on his SF 86.

Applicant was an occasional sporadic user of marijuana from 1992 until 1997. During that period he purchased approximately \$100.00 worth of marijuana. During a six month period ending in April 1998, Applicant smoked one to three marijuana cigarettes every weekend. When completing his SF 86 on June 14, 1999, Applicant answered "No" to Question 27 regarding the use of illegal drugs during the past seven years even though he used marijuana as late as April 1998. During some of the period of marijuana use Applicant held a security clearance but answered "No" to Question 28 relating to illegal use of drugs while holding a security clearance. He also answered "No" to Question 29 relating to purchase of drugs during the past seven years despite having purchased marijuana during the above referenced period. Applicant also falsified material facts in a signed sworn statement executed on December 20, 2000, stating that he had not used any illegal drug within the last seven years.

Applicant holds a sensitive position that requires nearly constant foreign travel installing security systems at U.S. embassies that are considered vulnerable to threat. He is highly regarded by his employers and by U.S. embassy staffs. He has never had security violation problems and is acutely aware of security requirements and demands. He is dedicated to his work and loves his job.

Applicant is twice divorced and now lives with his fiancée of four years. He provides physical and monetary support for her and her two children. She is highly supportive of his work and occasionally travels with him overseas despite illness and a recent leg amputation.

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.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (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; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the 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. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "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, ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b)

CONCLUSIONS

Applicant's failure to report certain of the offenses is alleged under Guideline E in that it indicates questionable judgment, unreliability, and unwillingness to comply with rules and regulations and could indicate that the person may not properly safeguard classified information (E2.A5.1.1.). Specifically, the deliberate omission, concealment, or falsification of relevant and material facts from a personnel security application could raise a security concern and be disqualifying. (E2.A5.1.2.2.)

Applicant believed that his two arrests for alcohol and drug offenses in 1996 and 1998 had been expunged and thus did not need to be reported on his SF 86. Even if they had been expunged they were not convictions under the Federal Controlled Substance Act, which is the only reporting exception for expungement.

Applicant acknowledged that he failed to report the drug usage on the SF 86 because he knew it would adversely affect his ability to get the job he was seeking. As a result of his failure to report he was hired and has now been in the employ of the company for almost five years holding a security clearance the entire time. Significantly, the only issue in this

matter is the failure to report past criminal activities on his SF 86. The underlying drug and alcohol-related offenses and activities are not at issue and probably would not have been because of the age of the offenses. Three of the allegations in the SOR were deemed mitigated at the hearing by counsel for the government for lack of evidence.

Applicant has not had any criminal record or drug use since 1998 and his work record has been exemplary. Nonetheless, the deliberate falsification of information that could have prevented the granting of a clearance cannot be mitigated since no mitigating factors can be met. While the conduct is not recent, there was no voluntary effort to report it after filing the false information on the SF 86. (E2.A5.1.3.2.)

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information.

The "whole person" concept recognizes that we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Applicant has shown by his testimony and appearance at the hearing as well as his supporting statements from supervisors and colleagues, that he has changed his conduct in the last six years and is a responsible, reliable, trustworthy, and credible person.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude that although the Applicant has changed his habits and conduct, it is not sufficient to mitigate the allegations in the SOR particularly in view of the deliberate omissions and the stated reason for doing so that it was to obtain employment with a company doing classified work.

FORMAL FINDINGS

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline E AGAINST APPLICANT

Subparagraph 1.a.i.: Against Applicant

Subparagraph 1.a.ii.: Against Applicant

Subparagraph 1.b.i.: For Applicant

Subparagraph 1.b.ii.: Against Applicant

Subparagraph 1.b.iii.: Against Applicant

Subparagraph 1.b.iv.: For applicant

Subparagraph 1.c.i.: Against Applicant

Subparagraph 1.d.i.: For Applicant

Subparagraph 1e.: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or renew a security clearance for Applicant. Clearance is denied.

Charles D. Ablard

Administrative Judge