

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant falsified a January 2002 security clearance questionnaire (SF 86) by deliberately omitting his 1997 arrest for driving under the influence of a controlled substance and his use of marijuana. During a subject interview with a Defense Security Service (DSS) agent in July 2002, Applicant deliberately falsified facts and circumstances of his 1997 arrest and of his use of marijuana. He has failed to mitigate the resulting security concerns under Guideline E (personal conduct) and Guideline J (criminal conduct). Clearance is denied.

CASENO: 02-27686.h1

DATE: 05/06/2005

DATE: May 6, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27686

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant falsified a January 2002 security clearance questionnaire (SF 86) by deliberately omitting his 1997 arrest for driving under the influence of a controlled substance and his use of marijuana. During a subject interview with a Defense Security Service (DSS) agent in July 2002, Applicant deliberately falsified facts and circumstances of his 1997 arrest and of his use of marijuana. He has failed to mitigate the resulting security concerns under Guideline E (personal conduct) and Guideline J (criminal conduct). Clearance is denied.

STATEMENT OF THE CASE

Having reviewed the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to give Applicant a security clearance. On November 14, 2003, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline E (personal conduct) and Guideline J (criminal conduct). Applicant timely answered the SOR (Answer), admitted all of the allegations, and requested a hearing.

The case was assigned to me on August 5, 2004, and I convened a hearing December 13, 2004.⁽²⁾ The parties appeared as scheduled and the government presented five exhibits (GE 1 through 5), which were admitted without objection. Applicant testified in his own behalf. DOHA received the transcript (Tr) on December 21, 2004.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is 27 years old and is a seagoing employee of a civilian shipping company which supports military sealift and logistics missions. When he hired on with that company in January 2002, he submitted an SF 86 to obtain a security clearance required to perform his duties.

Applicant began smoking marijuana in high school. His last known use of marijuana was on October 9, 1997, when Applicant smoked marijuana with some friends. Later that day, he was pulled over by police who had observed Applicant driving erratically. The police officer noted Applicant's red eyes and slurred speech and administered a field sobriety test, which Applicant failed. He also administered a breathalyser test, which Applicant passed because he had not consumed alcohol. During the field tests, Applicant told police he had smoked marijuana earlier that day. Applicant was taken to a police station where he submitted to a urinalysis test. He tested positive for marijuana and was charged with driving under the influence of a controlled substance (DUI). After several court dates and continuances, Applicant pled guilty to reckless driving in August 2000.

In his SF 86, Applicant provided detailed information about a number of different facets of his personal background; however, in response to question 24, which asked if he had ever been charged with a drug- or alcohol-related crime, Applicant deliberately omitted his 1997 DUI arrest. In response to question 27, regarding illegal drug involvement over the preceding seven years, Applicant denied any illegal drug use.

On July 16, 2002, Applicant was interviewed by a DSS agent about various aspects of his background, including prior arrests, illegal drug use, and omissions from his SF 86. Applicant deliberately falsified the circumstances of his DUI arrest, insisting that he had not smoked marijuana that day. Instead, he claimed the presence of marijuana in his blood stream was the result of second-hand smoke and that he had never used illegal drugs before. Applicant knew during the interview that all of these representations were false.

POLICIES

The Directive sets forth adjudicative guidelines⁽³⁾ to be considered in evaluating an Applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant.

However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, specifically, that Applicant deliberately omitted relevant and material information from his SF 86 and perpetuated those falsifications in a subject interview with DSS, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (personal conduct) and Guideline J (criminal conduct).

BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽⁴⁾ for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽⁵⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁽⁶⁾

CONCLUSIONS

Under Guideline E, a security concern arises where it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information.⁽⁷⁾ Here, the government questions Applicant's trustworthiness because it appears he has deliberately omitted from his SF 86 a drug-related arrest (SOR 1.a) and the fact he used marijuana during the preceding seven years. (SOR 1.b) The government also alleges Applicant deliberately made false statements during a DSS interview and in a signed, sworn statement attendant to that interview. (SOR 1.c)

Through Applicant's Answer, his testimony at hearing, and five documentary exhibits, the government has established a *prima facie* case for disqualification under Guideline E. The established facts support application of disqualifying condition (DC) 2⁽⁸⁾ and DC 3.⁽⁹⁾ At hearing, Applicant again admitted to deliberately falsifying his SF 86 and his statements to DSS; however, he did not present sufficient evidence to support any of the Guideline E mitigating conditions. Accordingly, I conclude the SOR allegations under Guideline E against the Applicant.

The security concern under Guideline J is that someone who willingly disregards the law may also disregard rules and procedures intended to safeguard classified information. Applicant's deliberate falsification of his SF 86 and his statements to DSS constitute violations of 18 U.S.C. §1001. Because the government has established Applicant intended to deceive or mislead the government, it has also established a *prima facie* case for disqualification for criminal conduct. Guideline J DC 1-(10) and DC 2-(11) apply here. By contrast, none of the listed mitigating conditions apply. Again, Applicant has not presented information sufficient to support application of any of the listed mitigating conditions. The conduct was recent in that it is part of the current investigation and adjudication of Applicant's request for clearance; each falsification was a separate criminal act, so his criminal conduct cannot be deemed isolated; and Applicant did not engage in the conduct in question unwillingly or under duress. Lastly, Applicant's apologies for lying about his past do not suffice to show clear evidence of rehabilitation. On balance, I conclude Guideline J against the Applicant.

I have carefully weighed all of the available evidence, and I have applied the appropriate disqualifying and mitigating conditions. Further, I have tried to make a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. This record raises reasonable and persistent doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Absent substantial information to mitigate these doubts, which Applicant failed to provide, I cannot conclude he has overcome the government's case.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Paragraph 2, Guideline J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 2.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 or continue a security clearance for the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Applicant was unavailable for an earlier hearing because he was out of the country until early December.
3. Directive, Enclosure 2.
4. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
5. *See Egan*, 484 U.S. at 528, 531.
6. *See Egan*; Directive E2.2.2.
7. Directive, E2.A5.1.1.
8. Directive, E2.A5.1.2.2. 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;
9. Directive, E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination;
10. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
11. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.