

DATE: October 17, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-30295

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Jr., Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 34-year-old man employed as an outside machinist for a defense contractor doing business at a naval shipyard. He is unable to successfully mitigate the security concerns of personal conduct and criminal conduct based on his deliberate falsification of a sworn statement made during his background investigation. Clearance is denied.

STATEMENT OF THE CASE

On November 19, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline E for personal conduct (falsification) and Guideline J for criminal conduct (violation of 18 U.S.C. § 1001, making a false statement within the jurisdiction of a federal agency). Applicant replied to the SOR and his one-page answer was received by DOHA on December 16, 2004. He admitted to subparagraphs 1.a, 1.b, and 1.c, he denied subparagraphs 1.d and 1.e, and he neither admitted nor denied subparagraph 2.a. Also, he indicated he did not desire a hearing.

On April 6, 2005, Department Counsel submitted his written case consisting of all relevant and material information that could be adduced at a hearing. This so-called File of Relevant Material (FORM) was mailed to Applicant and it was received by him on April 13, 2005. Applicant did not submit any information within the 30-day period after receiving the FORM. The case was assigned to me on May 31, 2005. Issuing a decision in this case was delayed due to a heavy caseload.

FINDINGS OF FACT

Applicant's admissions, as described below, to the SOR allegations are incorporated herein. In addition, after a thorough review of the record, I make the following findings of fact:

Applicant is a 34-year-old man who is a native-born U.S. citizen. He is employed as an outside machinist for a defense

contractor doing business at a naval shipyard. It appears Applicant is seeking to obtain a security clearance for the first time.

On or about March 7, 2002, Applicant completed and signed a security-clearance application. In doing so, he was required to certify that his statements on the form were true, complete, and correct to the best of his knowledge and belief and made in good faith. Applicant has a history of criminal conduct and answered certain questions on his security-clearance application as follows:

1. In response to Question 21, (b)(2) Applicant answered yes and disclosed an assault charge from May 1993 that was dismissed.
2. In response to Question 22, (b)(3) Applicant answered yes and disclosed a possession of a firearm offense from May 1993 that was dismissed.
3. In response to Question 24, (b)(4) Applicant answered yes and disclosed a possession of a controlled substance (cocaine) offense from April 1992.
4. In response to Question 26, (b)(5) Applicant answered no.

Applicant was arrested in 1984 and charged with possession of PCP. The matter was disposed of in juvenile court, and he was found guilty and sentenced to one year in custody. He did not disclose this matter in response to Question 24. In his answer, Applicant admits not disclosing the matter, but states that he does not remember the incident.

He was arrested in September 1991 and charged with possession of stolen property, and he was subsequently convicted of disorderly conduct. In December 1992, he was sentenced to a one year conditional discharge and ordered to pay a \$45 surcharge. He did not disclose this matter in response to Question 21. In his answer, Applicant admits not disclosing the matter, but states he does not remember the incident. The FORM contains no information showing the possession offense was a felony, and it is reasonable to presume disorderly conduct is not a felony. Likewise, other than the bare allegation in the SOR, the FORM contains no information showing Applicant was charged with the felony offense of grand larceny.

He was arrested for failure to appear (FTA) and possession of cocaine with intent to distribute in April 1992. The FTA was dismissed. In July 1992, per a plea agreement, he pleaded guilty to possession of cocaine, a lesser felony. The state court sentenced Applicant to imprisonment for two years, with two years suspended, and with five years to be served on probation, the first year supervised. He disclosed this matter, in general terms, in response to Question 24.

In May 1993, two months before his one-year supervised probation ended, he was arrested and charged with attempted murder, assault, and criminal possession of a weapon. He was indicted on the charges and held in pretrial confinement from May 1993 until at least February 28, 1994. He disclosed the assault charge in response to Question 21 and the weapons charge in response to Question 22, but he did not disclose the attempted murder charged in his security-clearance application. In his answer, Applicant indicates all the charges stemmed from one incident and he denies any intent to falsify or hide the matter. To the best of Applicant's knowledge, he believes the charges were dismissed. The FORM contains no information showing the disposition of the charges.

The SOR alleges that in September 1996 and January 1999, Applicant was arrested for unlisted offenses, the records were sealed, and no further information was available. These unlisted offenses were not disclosed in response to Question 26. In his answer, Applicant indicates he does not remember any of these charges. Other than the bare allegations, the FORM contains no information showing Applicant was charged with these offenses.

In July 2002, Applicant was interviewed during the course of a background investigation. The interview produced a sworn statement wherein he addressed various matters, including the cocaine case, the attempted murder case, and his involvement with and use of illegal drugs. Concerning the attempted murder case, Applicant explained he was uncertain why his security-clearance application did not reflect the attempted murder charge other than he was not sure he understood he was charged with it. He denied any intent to falsify or conceal the matter on his security-clearance application.

Concerning illegal drugs, Applicant stated that he had never used nor been involved in any way with marijuana, cocaine, or any illegal drugs. He stated he was not using cocaine or marijuana when he was arrested for the cocaine offense, nor was he selling or trafficking any illegal drugs when he was arrested for the cocaine offense.

The FORM contains no information supporting the allegation in subparagraph 1.e. It alleges Applicant provided false and misleading information during an August 2002 interview. In his answer, Applicant denies this allegation.

In September 2002, Applicant was interviewed again. The interview produced a sworn statement wherein he addressed marijuana use, cocaine use, other illegal drug use, and purchase and sale of illegal drugs. In his sworn statement (1) he admitted using marijuana on a periodic basis, sometimes daily, from 1983 to 1995; (2) he admitted spending at times \$50 weekly for marijuana; (3) he admitted using cocaine on a periodic basis from 1984 to 1992; (4) he admitted spending at times \$150 weekly for cocaine; (5) he admitted spending \$15,000 in total for cocaine; and (6) he admitted using PCP in 1983-1984.

The record is silent concerning the character or quality of Applicant's work performance.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.⁽⁶⁾ Instead, it is determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁷⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁸⁾ The government has the burden of proving controverted facts.⁽⁹⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽¹⁰⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽¹¹⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹²⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽¹³⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁴⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁵⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully.

An omission of relevant and material information, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or thought the arrest had been expunged from the record and did not need to be reported. Here, based on the record evidence as a whole, the government established its case under Guideline E. I conclude Applicant deliberately provided false and misleading information in his July 2002 sworn statement, as alleged in subparagraph 1.d, when he denied any use or involvement with marijuana, cocaine, or other illegal drugs. His sworn statement from September 2002--where he admits to an extensive history of illegal drug use and involvement--plainly shows he was lying in his July 2002 sworn statement. Given these circumstances, DC 2-(16) and DC 3-(17) apply against Applicant.

Concerning the other four falsification allegations, however, the government has not established its case by the substantial-evidence standard. Concerning Question 21, the record evidence is insufficient to show that Applicant was charged with the felony offense of grand larceny, and it is likewise insufficient to show that the possession of stolen property offense is a felony. Accordingly, subparagraph 1.a(1) is decided for Applicant.

Also, concerning Question 21, the record evidence is insufficient to show Applicant deliberately omitted or concealed the attempted murder charge and related charges. All the charges stemmed from the same incident. And Applicant disclosed the assault charge in response to Question 21 and he disclosed the weapons charge in response to Question 22. He claims he did not understand he was charged with attempted murder. Given all these circumstances, Applicant made a good-faith effort to disclose the overall incident on his security-clearance application. Accordingly, subparagraph 1.a(2) is decided for Applicant.

Concerning Question 24, the record evidence is insufficient to show Applicant deliberately omitted or concealed his arrest in 1984 for possession of PCP. In 1984, Applicant was 13 years old and the matter was disposed of in juvenile court. He claims he does not remember the incident, which is reasonable considering the passage of time and the other incidents of criminal conduct in Applicant's life. He disclosed the cocaine case, in general terms, in response to Question 24. If he was truly trying to hide drug-related charges or convictions, one would think he would conceal the more recent cocaine case as opposed to a juvenile matter. Accordingly, subparagraph 1.b is decided for Applicant.

Concerning Question 26, the record evidence is insufficient to show Applicant deliberately omitted or concealed arrests for unlisted offenses from September 1996 and January 1999. Applicant has no recollection of these charges, and there is simply no evidence showing that these charges were ever brought against Applicant. Accordingly, subparagraph 1.c is decided for Applicant.

Concerning the August 2002 interview, the record evidence is insufficient to prove Applicant provided false or misleading information about his illegal drug use. There is simply no evidence about this interview in the FORM. Accordingly, subparagraph 1.e is decided for Applicant.

I reviewed the mitigating conditions under Guideline E and conclude none apply. Falsification of a sworn statement during an official background investigation is a serious matter, not easily mitigated or extenuated. Accordingly, Guideline E is decided against Applicant.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Applicant's falsification of his sworn statement is in violation of 18 U.S.C. § 1001, which is a felony offense.

(18)

(19)

Given these circumstances, both DC 1 and DC 2 apply against Applicant. His criminal conduct (making a false statement within the jurisdiction of the Defense Department) creates doubt about his judgment, reliability, and trustworthiness. No mitigating conditions apply. Accordingly, Guideline J is decided against Applicant.

In reaching my decision, I have considered the evidence as a whole, both favorable and unfavorable, the whole-person concept, the clearly-consistent standard, and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline E: Against Applicant

Subparagraph a: For Applicant

Subparagraph b: For Applicant

Subparagraph c: For Applicant

Subparagraph d: Against Applicant

Subparagraph e: For Applicant

SOR ¶ 2-Guideline J: Against Applicant

Subparagraph a: Against 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 Applicant. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Question 21 states, in relevant part, "Have you ever been charged with or convicted of any felony offense?"
3. Question 22 states, in relevant part, "Have you ever been charged with or convicted of a firearms or explosives offense?"
4. Question 24 states, in relevant part, "Have you ever been charged with or convicted of any offense(s) related to drugs or alcohol?"
5. Question 26 states, in relevant part, "In the last seven years have you been arrested for, charged with, or convicted of any other offense(s) not listed" in the security-clearance application.
6. Executive Order 10865, § 7.
7. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
8. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

9. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
10. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
11. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
12. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
13. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
14. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
15. *Egan*, 484 U.S. at 528, 531.
16. 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.
17. 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.
18. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
19. E2.A10.1.2.2. A single serious crime or multiple lesser offenses.