

KEYWORD: Personal Conduct

DIGEST: Applicant deliberately lied on his security clearance application (SCA) in answer to Question 26 about an arrest in 1995. Marijuana usage was also alleged, but was beyond the seven years disclosure period required by Question 27 of the SCA, and there was no falsification present because the information was not required to be disclosed by Question 27. Applicant mitigated the personal conduct security concern regarding his marijuana usage, but did not mitigate regarding his failure to disclose his 1995 arrest. Clearance is denied.

CASENO: 02-21674.h1

DATE: 07/23/2004

DATE: July 23, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21674

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant deliberately lied on his security clearance application (SCA) in answer to Question 26 about an arrest in 1995. Marijuana usage was also alleged, but was beyond the seven years disclosure period required by Question 27 of the SCA, and there was no falsification present because the information was not required to be disclosed by Question 27. Applicant mitigated the personal conduct security concern regarding his marijuana usage, but did not mitigate regarding his failure to disclose his 1995 arrest. Clearance is denied.

STATEMENT OF THE CASE

On July 30, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, 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. The SOR detailed reasons under Guideline E (Personal Conduct) 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 conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn statement, dated September 22, 2003, Applicant responded to the SOR allegations. He requested a hearing. This case was assigned to me on January 30, 2004. A Notice of Hearing was issued on February 19, 2004 setting the hearing date for March 3, 2004. Applicant waived the lack of 15 days notice before the hearing date (Tr. 6). The Government presented four exhibits, three of which were admitted into evidence. Applicant appeared and testified, and offered three exhibits, all of which were admitted into evidence. I received the transcript (Tr.) on March 11, 2004.

FINDINGS OF FACT

Applicant admitted to the allegations in the SOR. Those admissions are incorporated herein as findings of fact. After a complete review of the evidence in that hearing record , I make additional findings of fact:

Applicant is 33 years old. He works for a defense contractor installing data and communications lines at various facilities. Applicant is engaged to be married, and owns his own home. (Tr. 44, 47; Exhibit 1 at 3, Exhibits A, B, and C)

Applicant was arrested in June 1995 for outstanding traffic offense warrants and having drug residue in a pipe in his car. Those charges were reduced to disturbing the peace and Applicant pled guilty. The traffic offenses involved in the 1995 arrest were unpaid parking tickets and having expired plates. Applicant did not disclose this arrest on his security clearance application (SCA) that he submitted in November 2001 because he thought it was expunged. He called the attorney who represented him to ask whether the record was expunged. The attorney left a message on Applicant's voice mail that the attorney could find nothing on his case, and Applicant interpreted that statement to mean the record was expunged. Applicant thought that after his two years probation, the charge would be expunged. He was never told the arrest would be expunged. Applicant answered Question 26 (Police Record-Other Offenses) negatively, and deliberately did not disclose his 1995 arrest. (Tr. 19 to 26; Exhibit 1 at 7, Exhibit 2 at 5 and 6)

Applicant admitted he smoked marijuana during his high school and college time. Those years were 1988 until April 1994. He smoked infrequently, and only about 12 times during that time period. Applicant disassociated himself from those girlfriends and other people with whom he smoked marijuana during those years. Applicant completed his SCA in November 2001, and the seven year time period required for disclosure by Question 27 (Use of Illegal Drugs) would make the start of the disclosure period November 1994. Applicant admitted he lied on the SCA because he had an experience with an Army recruiter in 1989 in which his full disclosure resulted in his not being allowed to enlist. Applicant was concerned that full disclosure on the SCA would result in a denial of his security clearance. (Tr. 27 to 51; Exhibit 2 at 5; Answer)

Applicant's employee performance evaluations from 1998, 2000, and 2001 show that his work performance is above company standards, he is very productive, and his supervisors have full confidence in him. Applicant is rated as dependable, competent, and a team player. (Exhibits A to C)

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. The president has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgement, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 pertinent 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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline E - Personal Conduct:

E2.A5.1.1. *The Concern:* Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

E2.A5.1.2. Conditions that could raise a security concern and may be disqualifying also include:

E2.A5.1.2.2. The deliberate omission, concealment, falsification or misrepresentation 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;

E2.A5.1.3. Conditions that could mitigate security concerns include:

None

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Guideline E, I conclude the Government proved its case. Applicant admitted he deliberately lied on his SCA about his 1995 arrest and his marijuana use from 1988 to 1994. Disqualifying Condition (DC) 2 applies.

Regarding Mitigating Conditions (MC), I do not apply any to this case. While Applicant did the correct thing by telling the investigative agent about his 1995 arrest and marijuana use, Applicant should have made the full disclosure required when he completed the SCA. The SCA asked for arrests in Question 26, but Applicant misunderstood what he was told in 1995 and thought the arrest was expunged, but there is no legal or documentary basis for that belief.

However, in Question 27, Applicant did not disclose his marijuana use in the past seven years. The marijuana use he disclosed to the investigator was beyond that seven year period, so he did not have to disclose it. But he admitted he lied to the investigator, and admitted the allegations of the SOR, but these admissions are improvident and misplaced. There was no falsification there because Question 27 did not require this information be disclosed.

Therefore, after considering all of the record evidence, I conclude this guideline against Applicant on the falsification of his answer to Question 26. I conclude this guideline for Applicant on Question 27.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline E: Against Applicant

Subparagraph 1.a.: Against Applicant

Subparagraph 1.a.(i): Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.b.(i): For Applicant

DECISION

In light of all the circumstances and facts 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.

Philip S. Howe
Administrative Judge