

DATE: July 12, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-22861

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant deliberately omitted from a November 2001 security clearance application (SF 86) his past use of marijuana. He was also issued a citation for possessing alcohol as a minor and was fired twice from two jobs by the same municipal employer by age 18. While his employment problems and alcohol-related arrest may be excused out of youthful inexperience, Applicant provided nothing to refute, mitigate, or extenuate the security significance under Guideline E (personal conduct) of his falsification. Clearance is denied.

STATEMENT OF THE CASE

On September 29, 2003, per DoD Directive 5220.6, as amended (Directive), the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns about his personal conduct. The SOR further informed him that, based on information available to the government, DOHA adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant's security clearance. [\(1\)](#)

On November 6, 2003, Applicant responded to the SOR (Answer) and admitted to all of the allegations therein. He also requested a determination without a hearing. On March 30, 2004, DOHA Department Counsel submitted a file of relevant material with nine exhibits (Items 1 - 9) attached (FORM) in support of the government's preliminary decision, a copy of which was sent to Applicant on the next day. Applicant received the FORM on April 8, 2004 and was afforded 30 days to submit additional information in his own behalf. However, he did not respond to the FORM and the case was assigned to me on May 20, 2004.

FINDINGS OF FACT

Applicant's admissions are incorporated herein as facts. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact:

Applicant is 23 years old and employed by a defense contractor. He seeks a security clearance as part of his job description. He graduated from high school in ay 2000, but has held a variety of jobs since 1997, including his own small business from April 2001 to at least November 2001. He was twice employed by a county parks agency in the county where he lived. His first job lasted from July 1997 until June 1999, when he was terminated for repeated tardiness. His second parks job lasted from September 1999 until January 2001, when he was terminated because he stopped showing up. Applicant attributes his loss of both jobs in part to immaturity. (2)

Applicant used marijuana five times while he was in high school. He never bought it himself, or engaged in any other drug transactions or trafficking for profit, but used it at parties when it was offered to him. He also began social drinking around age 17 at family gatherings but never to excess. (3)

In June 2000, just after he graduated from high school, Applicant was issued a citation by the police for illegal possession of alcohol by a minor after he and some friends were caught drinking beer in the woods. Applicant appeared in court and elected the option of performing 50 hours community service in lieu of paying a fine. He completed the service hours in December 2000 and the charges were dismissed. (4)

Applicant completed, signed, and submitted a security clearance application (SF 86) on November 7, 2001. An electronic version of this form (EPSQ) containing the same information was transmitted on November 14, 2001. In response to questions about illegal drug use in the preceding seven years, Applicant indicated he had never used or had otherwise been involved with illegal drugs. He did not disclose his past drug use because he was afraid his parents would find out and because he thought he might be subject to criminal prosecution for his drug use. (5) When he was interviewed by a DSS agent in April 2002, he disclosed his drug use when asked.

PROCEDURAL ISSUE

SOR subparagraph 1.a alleges Applicant falsified his answer to question 29 on his November 7, 2001 SF 86 by answering "no." That question asks, in relevant part, if, in the preceding seven years Applicant had engaged in the buying, selling or other trafficking of illegal drugs for his or another's profit. The SOR alleges this is a deliberate falsification because Applicant used marijuana five times between 1997 and 1999. Applicant has admitted this allegation, however, there is no evidence to support an allegation he ever engaged in the conduct addressed in question 29. Included in the FORM is a motion by Department Counsel to amend SOR subparagraph 1.a to read as follows:

"a. You falsified material facts on a Security Clearance Application, Standard Form 86, executed by you under date November 14, 2001, in response to 'Question 27. Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs. Since the age of 16 or in the past 7 years, whichever is shorter, have you illegally used an (sic) controlled substance, for example marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?' You deliberately failed to disclose that from approximately 1997 to 1999 you used marijuana approximately 5 times."

Department Counsel urges the following in support of his motion:

1. Directive, enclosure 3, paragraphs 10 and 17 authorize the Administrative Judge to amend an SOR to conform to the evidence;
2. Applicant has admitted he deliberately falsified his response to SF 86 questions about his drug use;
3. Through the original allegation in SOR 1.a and his interview with DSS, Applicant has been on notice about the government's concern regarding omission of relevant information from his SF 86;
4. Applicant "essentially interpreted" the original SOR 1.a to refer to drug use as opposed to drug trafficking;
5. Reference in SOR 1.a to question 29 instead of question 27 is "merely a typographical error," and
6. The evidence conforms to the amended allegation.

As for the last two supporting arguments, SOR 1.a is hardly a typographical error. Such an error would appear as a misspelled word or wrong date on a form.⁽⁶⁾ Also, the reasoning behind Department Counsel's assertion that the evidence conforms to the amended allegation is somewhat circular given that amendments are made to conform to the evidence. Nonetheless, Applicant told DSS he deliberately omitted his drug use from the SF 86, and there is no indication at all that Applicant ever bought drugs for his own use much less trafficked in drugs for profit. Further, his admission to SOR 1.a does not make sense on its face if, as he stated in interview with DSS, he never bought drugs. Thus, it appears he was admitting to an allegation he omitted information about his drug *use* from the SF 86.

Applicant has known of the government's concerns in this area since his subject interview in April 2002 and he has had ample notice and opportunity to respond to this motion since receiving the FORM on April 8, 2004, yet he has not responded or otherwise contested it. In view of all the foregoing, I hereby amend the SOR to conform with the record evidence as provided for in Directive, Enclosure 3, paragraph 17. SOR subparagraph 1.a is stricken and the following language inserted in its place:

"a. You falsified material facts on a Security Clearance Application, Standard Form 86, executed by you under date November 7, 2001, when you answered 'Question 27. Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs. Since the age of 16 or in the past 7 years, whichever is shorter, have you illegally used any controlled substance, for example marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?' By answering "no" to this question, you deliberately failed to disclose the information set forth in subparagraph 1.b, below."

POLICIES

The Directive sets forth adjudicative guidelines⁽⁷⁾ to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account 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 SOR allegations and having reviewed the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are those conditions listed under Guideline E (personal conduct).

BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽⁸⁾ 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.⁽⁹⁾

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.⁽¹⁰⁾

CONCLUSIONS

Personal conduct may be a security concern if it is shown an applicant's behavior involves questionable judgment,

untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct could indicate the person may not properly safeguard classified information.⁽¹¹⁾ Of note in this case is the government's concerns about Applicant's honesty. The government has established a *prima facie* case for disqualification under Guideline E based on Applicant's deliberate omission of relevant information about his drug use from his most recent SF-86. He intended to mislead the government in this regard because of his concern he could face criminal charges for his drug use, and his concern some of his listed references might tell Applicant's parents of his drug use. Applicant now knows both concerns were misplaced and somewhat childish; however, Guideline E disqualifying condition (DC) 2⁽¹²⁾ applies to the allegations in SOR 1.a (as amended). By contrast, there are no applicable mitigating conditions available to Applicant with respect to SOR 1.a (as amended).

As for his terminations from employment and his citation for underage drinking, these events took place when he was in high school or soon after graduation. Such conduct falls within aforementioned general security concern under Guideline E. While none of the Guideline E mitigating conditions applies to these facts, several of the "whole person" factors listed in Section E2.2 of the Directive weigh in Applicant's favor.⁽¹³⁾ Teenagers do not always make good decisions about work commitments and they sometimes succumb to peer pressure to experiment with drugs and alcohol. Here, the Applicant did not show up for work on time during his first stint with the park authority and it eventually cost him his job. When the same employer took him back, several months after Applicant graduated from high school, he still could not manage to place his job at or near the top of his list of things to do each day and eventually stopped showing up. All of this is not ideal conduct, but it does not become serious unless and until it becomes a pattern into adulthood. This is not the case here. Applicant has one old, minor criminal charge in his background. He experimented with drugs while in high school, but there is no indication of use in the past five years. He is now 23 years old and has been employed continuously and without incident since January 2001. There is, likewise, no indication of an on-going drug involvement, alcohol abuse, or criminal conduct concern. Therefore, I conclude SOR 1.b, 1.c, and 1.d for Applicant.

On balance, however, Applicant's deliberate falsification of his SF 86 cannot be attributed to youth or immaturity. It was a bad decision taken to protect his own interests at the possible expense of the government's ability to adequately assess his suitability for clearance. I resolve Guideline E against the Applicant.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guideline. These facts raise reasonable 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 resolve those doubts, which Applicant failed to provide, I cannot conclude it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

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

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: For the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d: For 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. Items 4, 5 and 6.
3. Item 6.
4. Items 6 - 9.
5. Items 4 - 6.
6. It appears this SOR is the result of poor quality control in the drafting process. A proper legal review of this SOR should have focused on the fact there was absolutely no support for the allegation that Applicant was ever involved in drug transactions for personal use, much less trafficking in illegal drugs for profit. Thus, his answer to SF 86 question 29 was correct and should not have been alleged as a falsification.
7. Directive, Enclosure 2.
8. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
9. *See Egan*, 484 U.S. at 528, 531.
10. *See Egan*; Directive E2.2.2.
11. Directive, E2.A5.1.1.
12. 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;
13. Directive E2.2.1.1. The nature, extent, and seriousness of the conduct; E2.2.1.2. The circumstances surrounding the conduct, to include knowledgeable participation; E2.2.1.3. The frequency and recency of the conduct; E2.2.1.4. The individual's age and maturity at the time of the conduct; E2.2.1.5. The voluntariness of participation; E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes; E2.2.1.7. The motivation for the conduct; E2.2.1.8. The potential for pressure, coercion, exploitation, or duress; and E2.2.1.9. The likelihood of continuation or recurrence;