

KEYWORD: Personal Conduct; Criminal Conduct; Drugs

DIGEST: Applicant used marijuana from 1996 to December 2000, including after he had been granted an interim security clearance. He failed to disclose the marijuana use in a Security Clearance Application (SF 86) he signed on October 18, 2000, and thereafter provided false information in statements he made during the course of his security clearance investigation. Applicant has failed to mitigate the security concern that arises from his personal conduct in providing a false answer in the SF 86 and during his interviews. Clearance is denied.

CASENO: 02-24141.h1

DATE: 01/05/2005

DATE: January 5, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24141

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant used marijuana from 1996 to December 2000, including after he had been granted an interim security clearance. He failed to disclose the marijuana use in a Security Clearance Application (SF 86) he signed on October 18, 2000, and thereafter provided false information in statements he made during the course of his security clearance investigation. Applicant has failed to mitigate the security concern that arises from his personal conduct in providing a false answer in the SF 86 and during his interviews. Clearance is denied.

STATEMENT OF THE CASE

On January 20, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline E for personal conduct, Guideline J for criminal conduct, and Guideline H for drug involvement. Applicant submitted a sworn answer to the SOR that was received by DOHA on February 13, 2004, admitted all SOR allegations, and requested a hearing.

This case was assigned to me on September 10, 2004. A notice of hearing was issued on October 29, 2004, scheduling the hearing for November 16, 2004. The hearing was conducted as scheduled. The government submitted four documentary exhibits that were marked as Government Exhibits (GE) 1-4, and admitted into the record without objection. Applicant testified at the hearing, and called three witnesses to testify on his behalf. The transcript was received on November 24, 2004.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 29 years old, has been married since November 2000, and has a three-year-old child. Applicant graduated from high school in 1993, and attended college from August 1993 to December 1995. He held numerous jobs for relatively short periods of time between 1995 and 2000, primarily as a pizza cook or pizza delivery driver, interspersed with periods of unemployment that generally continued for several months. He enlisted in the Navy in March 1997, but was discharged after two weeks because of health problems.

Applicant was initially hired by his present defense contractor employer in late 2000, and was granted an interim security clearance on October 19, 2000. However, he was refused immediate employment after he failed a pre-employment drug test in November 2000. He was allowed to reapply six months later, and has been employed by that defense contractor since. The testimony of his character witnesses, who are his work supervisors, establishes Applicant has done extremely well in this employment and is considered to be an excellent employee.

Applicant answered "No" to question 27 in the Security Clearance Application (SF 86) he signed on October 18, 2000. That question asked: *Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs - Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example marijuana . . . ?* While answering that question in the negative, Applicant disclosed an arrest for "simple possession" and "paraphornalia" [sic] in response to question 24 which inquired about his police record dealing with alcohol/drug offenses.

Applicant was arrested on August 1, 1998, and charged with possession of marijuana and possession of drug paraphernalia. He explained the arrest occurred after a car he was riding in was stopped for a traffic offense. The police officer was granted permission to search the vehicle, and discovered about one gram of marijuana and a pipe used for smoking marijuana in Applicant's suitcase. Applicant was convicted of both offenses and fined \$750.00.

Applicant was questioned about his use of marijuana by contract investigators working on behalf of the Defense Security Service and provided sworn statements on May 31, 2002 and June 25, 2002. In the May statement he claimed he began smoking marijuana in 1996, used about a quarter pound of marijuana per month, and quit smoking marijuana shortly after being released from jail following his 1998 arrest. In the June statement he reaffirmed that he had not consumed marijuana since August 1998.

Applicant provided a sworn statement to a Special Agent of the Defense Security Service on June 30, 2003. In that statement he admitted using marijuana from 1996 until December 2000. He stated he considered himself to have been a heavy user of the drug, he had smoked on average one-half ounce of marijuana, and he spent between \$40.00 and \$50.00 per month purchasing the drug. As to the incorrect answer in the SF 86 he submitted, Applicant indicated he filled out a security clearance application in which he answered the question correctly, and provided the form to his employer's security office. He then went on to state: "I was informed by the Security Officer that it would be in my best interest to change my Yes response to drug use to a No response. I did not consent to the change but it was obviously performed."

In his answer to the SOR and during his testimony, Applicant admitted, contrary to his claim in the June 2003 statement that the answer was

changed without his permission, that he was the person who provided the false answer. However, he does maintain he made the change at the suggestion of his employer's security officer.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon 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. Considering the evidence as a whole, Guideline E, pertaining to personal conduct, Guideline J, pertaining to criminal conduct, and Guideline H, pertaining to drug involvement, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole 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.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁴⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁵⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁶⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹¹⁾

CONCLUSIONS

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-

mind, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

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.

Applicant provided a false answer to question 27 in the SF 86 he submitted, and false information to DSS investigators in statements he provided in May and June 2002. His failures to disclose his marijuana use in the SF 86, and his continued use of the drug following his August 1998 arrest, severely undermine the ability to place trust and confidence in him at the present time. The false answers and information raise significant security concerns.

Disqualifying Conditions (DC) 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*; and DC 3: *Deliberately providing false or misleading information concerning relevant and material matters to an investigator, or other official representative in connection with a personnel security or trustworthiness determination* apply in this case. I have considered all Mitigating Conditions under Guideline E and find none apply. 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. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. 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.

The SF 86 and sworn statements Applicant submitted, each of which contained deliberate falsifications, fall within the criminal prohibition against making false statements imposed by Title 18, United States Code, Section 1001. DC 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply in this case.

Considering the testimony of Applicant's character witnesses, his excellent work performance, changed family circumstances, and the sincere expression of remorse and regret he expressed at the hearing, I find Mitigating Conditions (MC) 4: *. . . the factors leading to the violation are not likely to recur* and MC 6: *There is clear evidence of successful rehabilitation* apply. Applicant has mitigated the criminal conduct security concern, and Guideline J is decided for Applicant.

Under Guideline H, illegal drug involvement raises questions about an individual's willingness or ability to protect classified information. Involvement with or use of an illegal drug indicates unwillingness or inability to abide by the law. Cleared employees must respect regulations whether they agree with them or not. If they do not respect the rules on illegal substances, they may not respect the rules designed to protect classified information.

Applicant purchased and used marijuana from 1996 until 2000, including for a short period of time after he executed an SF 86 and was granted an interim security clearance. He was also convicted of possession of marijuana and possession of paraphernalia in 1998. DC 1: *Any drug abuse*; and DC 2: *Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution* apply in this case. MC 1: *The drug involvement was not recent*; and C 3: *A demonstrated intent not to abuse drugs in the future* also apply. Applicant has mitigated the security concern caused by his use of marijuana, and Guideline H is decided for Applicant.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has failed to overcome the case against him and satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

SOR ¶ 1-Guideline E: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph a: Against the Applicant

SOR ¶ 2-Guideline J: For the Applicant

Subparagraph a: For the Applicant

SOR ¶ 3-Guideline H: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: 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 Applicant. Clearance is denied.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.