

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant provided false answers on his SF 86 concerning his employment record and illegal drug usage. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from the falsifications. Clearance is denied.

CASENO: 02-24941.h1

DATE: 09/02/2004

DATE: September 2, 2004

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-24941

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Edward w. Loughran, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant provided false answers on his SF 86 concerning his employment record and illegal drug usage. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from the falsifications. Clearance is denied.

STATEMENT OF THE CASE

On February 3, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding ⁽¹⁾ it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On February 23, 2004, the Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing.

On May 17, 2004, the Applicant received a complete copy of the file of relevant material (FORM) dated April 29, 2004, and was given the opportunity to file objections and submit material in extenuation, mitigation, or refutation. The Applicant's response to the FORM was due on June 18, 2004. No response has been received. In the FORM, DC presented 8 exhibits (Items). The Applicant submitted no exhibits. I was assigned the case on July 7, 2004.

FINDINGS OF FACT

The SOR alleges Personal Conduct and Criminal Conduct. The Applicant admits to the following: he was fired from a job for repeated tardiness; he was booked and released in February 1999 for fraudulent use of a license plate; he used crystal methamphetamine in March/April 1997; and used marijuana between 1994 to May 1997. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact.

Applicant is 37 years old, has worked for a defense contractor since April 2001, and is seeking to obtain a security clearance.

In February 1999, Applicant was involved in a motor vehicle accident. His license plates had expired on his car and he had taken a current decal from an abandoned vehicle to make it appear his license plates were valid. He was cited for fraudulent use of a license plate. In January 2000, the Attorney General's Office chose not to prosecute the case. (Gov Ex 6)

Applicant first began smoking marijuana at age 15--1982--and continued until May 1997. His usage varied, from daily use in high school to three times a year from 1992 to 1997. He last used marijuana in May 1997 and does not intend to use marijuana or any other illegal drug again.

From June 1992 through May 1997, Applicant was employed at a job, which he listed on his SF 86. In March/April 1997, he injured his back and went on workman's compensation. While on leave, he tried crystal methamphetamine. When he returned to work, he was order to undergo a urinalysis. After taking the test, he told his employer he was going to quit and gave two weeks notice. Just prior to the end of the notice period, his employer told him he was fired because the urinalysis was positive for methamphetamine.

From May 1997 through July 1997, Applicant was employed at a job, which he listed on his SF 86. He was not happy about working conditions at the job and complained frequently. His unhappiness with the job resulted in him being late for work on numerous occasions. He was terminated for his tardiness.

In April 2001, Applicant completed a Questionnaire for National Security Positions, Standard Form (SF 86). He answered "no" to question 22, which asked if during the prior seven years, he had been fired from a job, quit a job after

being told he would be fired, left a job by mutual agreement following allegations of misconduct or unsatisfactory performance. Applicant's excuse for not list his firing for the positive urinalysis was because he believed he had quit before he was fired. His excuse for not list his termination for tardiness because his employment was because the job was of such a short duration he did not think it was pertinent enough to list on his SF 86.

Applicant answered "no" to question 23 f, which asked him if during the prior seven years he had been arrested for, charged with, or convicted of any offense not listed in response to questions above. The form instructed him that he could leave out traffic fines of less than \$150. He did not list his fraudulent use of a license plate because he was not arrested.

Applicant answered "no" to question 24, which asked him if he had used any controlled substance since the age of 16 or in the last seven years, whichever is shorter. He did not list his illegal drug usage on his SF 86 because he was not using any illegal drugs at the time he completed the form. (Gov Ex 5)

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

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. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Personal Conduct, Guideline E, 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.

Conditions that could raise a security concern and may be disqualifying include:

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. (E2.A5.1.2.2.)

Conditions that could mitigate security concerns include:

None Apply.

Criminal Conduct, Guideline J, the Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

- a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.

- b. A single serious crime or multiple lesser offenses;

Conditions that could mitigate security concerns include:

None Apply.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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 judgment, 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." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Personal Conduct. Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. When Applicant completed his SF 86 he deliberately omitted information about his illegal drug use and employment record. Disqualifying Condition 2 ⁽²⁾ applies.

In February 1999, he was cited for fraudulent use of a license plate, which was not prosecuted. The record fails to show he was arrested for this traffic related offense. He did not list it in response to SF 86 question 23f. Since he was not arrested and could leave out traffic fines of less than \$150, he was not required to list this incident in response to the question. I find for him as to SOR subparagraph 1.b.

In July 1997, Applicant was terminated for tardiness at work. He had worked at the company two months before being terminated. He did not list this termination because he the duration of employment was so short as not to be pertinent. The question is asked to address the reasons for termination and is not a question about how long an applicant was employed. He failed to list his termination from a job he had for approximately five years because he had already notified his employer he was quitting when he was terminated for a positive urinalysis. The question is worded to solicit a response about the reasons for termination, i.e., was it due to misconduct or unsatisfactory performance. His excuses for failing to list his terminations is unpersuasive. His failure to list his terminations were a willful falsification.

Applicant started using marijuana in 1982 at age 15 and used it until May 1997. While in high school he used it daily. He completed his SF 86 just two years after his last use. He failed to list his illegal drug use because he was not using at the time he completed the form. Question 24 does not ask Applicant if he is "currently" using illegal drugs, but asks about his illegal drug use since the age of 16 or in the last seven years. The question clearly asked him about his past illegal drug use, which he failed to disclose. His failure to list his illegal drug usage was a willful falsification.

None of the mitigating conditions (MC) apply. MC 1⁽³⁾ does not apply because illegal drug usage and being terminated from employment are certainly information pertinent to a determination of judgment, trustworthiness, or reliability. MC 2⁽⁴⁾ does not apply because the questionnaire was completed in April 2001, which is recent. MC 3 does not apply because there is no showing Applicant made a prompt, good faith effort to correct the falsification before being confronted with the facts. MC 4⁽⁵⁾ and 6⁽⁶⁾ do not apply because the falsification was not caused by improper advice or based on advice from legal counsel.

The Government has satisfied its initial burden of proof under Criminal Conduct. Under Guideline J, the security eligibility of an applicant is placed into question when a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. The Applicant gave false answers on his SF 86. By certifying falsely that his responses were true, complete and correct to the best of his knowledge and belief, and made in good faith, the Applicant violated Title 18, Section 1001⁽⁷⁾ of the United States Code. His false answers are felonious conduct under the laws of the United States. Candor is important, and the Applicant was unable or unwilling to be candid about his background. Because of this serious misconduct, there should be compelling reasons before a clearance is granted or continued. Applicant has failed to provide any compelling reasons. Accordingly, subparagraph 2.b. is resolved against the Applicant.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or

absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Personal Conduct.: AGAINST FOR THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: Against the Applicant

Paragraph 2 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.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.
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. (E2.A5.1.2.2.)
3. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability. (E2.A5.1.3.1.)
4. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. (E2.A5.1.3.2.)
5. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided. (E2.A5.1.3.4.)
6. A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information. (E2.A5.1.3.6.)
7. Title 18, Section 1001 of the United States Code provides: (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--
 - (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
 - (2) makes any materially false, fictitious, or fraudulent statement or representation; or
 - (3) makes or uses any false writing or document knowing the same to contain any materially false; fictitious or fraudulent statement or entry; shall be fined under this title or imprisoned or both.