

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant gave false information on his security clearance application, answering "No" to two questions: whether he had used drugs during the past seven years, and whether he had used drugs while holding a security clearance. He admitted deliberately answering the questions falsely, fearing that his application for a security clearance would be denied if he disclosed his prior drug use. Clearance is denied.

CASENO: 02-26281.h1

DATE: 08/26/2004

DATE: August 26, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-26281

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant gave false information on his security clearance application, answering "No" to two questions: whether he had used drugs during the past seven years, and whether he had used drugs while holding a security clearance. He admitted deliberately answering the questions falsely, fearing that his application for a security clearance would be denied if he disclosed his prior drug use. Clearance is denied.

STATEMENT OF THE CASE

On February 17, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).

The SOR alleges security concerns under Guidelines E (Personal Conduct) and J (Criminal Conduct) of the Directive. Under Guideline E, the SOR alleges that on or about March 15, 2002, Applicant falsified material facts on his security clearance application by answering "No" to two questions: whether he had used drugs since the age of 16 or in the last seven years, whichever is shorter (para. 1.a); asking whether he had ever illegally used a controlled substance while possessing a security clearance. (para. 1.b). The SOR also alleges that on October 26, 1999, Applicant was discharged from the United States Navy with a general discharge, under honorable conditions, as a result of a urinalysis screening that tested positive for cocaine use (para. 1.c). Under Guideline J, the SOR alleges that Applicant's false responses to the two questions on his security clearance application constituted felonies under 18 U.S.C. § 1001. (Government Exhibit 1)

Applicant answered the SOR on February 29, 2004. He admitted all the allegations and explained that he answered falsely to protect himself and his job, presuming that his security clearance would be revoked if he answered truthfully. He submitted a copy of his most recent performance review "as a testament to [his] personal character and professional growth" since becoming an employee of a defense contractor. He elected to have his case decided on the written record in lieu of a hearing. (Government Exhibit 3)

Department Counsel submitted the Government's written case on June 21, 2004. A complete copy of the file of relevant material (FORM) was mailed to Applicant on June 22, 2004, and he was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant did not respond. The case was assigned to me on August 10, 2004.

FINDINGS OF FACT

Applicant's admissions of the facts alleged in the SOR are incorporated into my findings of fact. I also make the following findings:

Applicant is a 29-year-old engineering supervisor for a defense contractor. He has worked for his current employer since November 15, 1999. (Government Exhibit 3, p. 1; Government Exhibit 4, pp. 1-2)

Applicant was granted a security clearance in December 1991, and he retained it during his service in the United States Navy. (Government Exhibit 4, p. 8)

Applicant used cocaine on one occasion at a private party in August 1999. He was discharged from the United States Navy on October 26, 1999, after his use of cocaine was detected by urinalysis testing. (Government Exhibit 4, p. 4; Government Exhibit 6, p. 2)

In a performance review for the period from January 1 through December 31, 2003, Applicant's current employer rated him "Superior" (the second highest rating) in quality of work, job knowledge, communications, organization skills, and management skills). He was rated "Outstanding" (the highest rating) in dependability. (Enclosure to Government Exhibit 3)

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 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." Exec. Or. 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.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to

grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Under Guideline E (Personal Conduct), "Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, [or] dishonesty . . . could indicate that the person may not properly safeguard classified information." Directive ¶ E2.A5.1.1. A "deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire" can raise a security concern and may be a disqualifying condition (DC 2). Directive ¶ E2.A5.1.2.2. Under DC 2 there must be "a showing that the applicant acted with intent to mislead or deceive the government by not disclosing the information." ISCR Case No. 00-0302, 2001 DOHA LEXIS 337 at *5 (App. Bd. Apr. 23, 2001).

Applicant admits that he should have answered Questions 27 and 28 in the affirmative, and that he deliberately concealed his drug use in an effort to protect his security clearance and his job. Based on Applicant's admissions, DC 2 is established.

In falsification cases, a mitigating condition (MC 2) may apply if "[t]he falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily." Directive ¶ E2A5.1.3.2. MC 2 applies when the falsification is old and the Applicant voluntarily provides correct information after a considerable passage of time. ISCR Case No. 99-0557 at 4 (App. Bd. Jul. 10, 2000). In this case the falsification was not old, and Applicant did not disclose his drug use until confronted with it by an investigator three months later. I conclude that MC 2 does not apply.

A mitigating condition (MC 3) may also apply if "[t]he individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts." Directive ¶ E2.A5.1.3.3) In this case, Applicant made no effort to correct the falsification until he was questioned by an investigator three months later. C 3 does not apply.

Under Guideline J, "[a] history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. Under DC 2, a single serious crime or multiple lesser offenses can raise a security concern and be disqualifying. Directive ¶ E2.A10.1.2.2. It is a felony, punishable by a fine or imprisonment for not more than 5 years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the executive branch of the Government of the United States. 18 U.S.C. § 1001.

Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. Applicant's deliberately false answers to Questions 27 and 28 on his security clearance application apparently were given at the same time and place and thus constitute a single serious crime. I conclude that DC 2 is established.

MC 2 applies when the crime was "an isolated incident." Directive ¶ E2.A10.1.3.2. While Applicant's false answers on his security clearance application may be his only crime involving falsification, his falsification was not an isolated incident of criminal conduct when considered in the context of his drug use. He attempted to conceal his prior use of cocaine by falsifying his security clearance application. Under these circumstances, I conclude that MC 2 is not established.

MC 6 applies when "[t]here is clear evidence of successful rehabilitation." Applicant has the burden of producing such evidence. Directive ¶ E3.1.15. Applicant's performance review for the year ending on December 31, 2003 reflects maturity and acceptance of responsibility. As such, it is some evidence of rehabilitation. However, the performance review covers a relatively short span of time. Furthermore, there is no evidence in the record that Applicant has faced and overcome the temptation to falsify in other, more recent situations. "Only with the passage of time will there be a track record that shows whether a person, through actions and conduct, is willing and able to adhere to a stated intention to refrain from acting in a way that the person has acted in the past." ISCR Case No. 97-0727, 1998 DOHA LEXIS 302 at *7 (App. Bd. Aug. 3, 1998). I conclude that Applicant has fallen short of producing "clear evidence" of rehabilitation.

FORMAL FINDINGS

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

Paragraph 1, Guideline E: AGAINST APPLICANT

Subparagraphs 1.a-1.c Against Applicant

Paragraph 2, Guideline J: 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 a security clearance for Applicant. Clearance is denied.

LeRoy F. Foreman
Administrative Judge