

KEYWORD: Personal Conduct; Alcohol; Drugs

DIGEST: Applicant failed to mitigate allegations of personal conduct raised by his failure to report criminal and drug use and arrests on three questions on his security clearance application and the underlying criminal and drug offenses. Clearance is denied.

CASENO: 03-19040.h1

DATE: 07/28/2005

DATE: July 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-19040

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant failed to mitigate allegations of personal conduct raised by his failure to report criminal and drug use and arrests on three questions on his security clearance application and the underlying criminal and drug offenses. Clearance is denied.

STATEMENT OF CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, 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) dated January 3, 2005, to Applicant which detailed reasons 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. It was received by Applicant on January 5, 2005. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement dated February 19, 2005, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record in lieu of a hearing. Because of the incompleteness of the response, a second response was requested and received but undated. Department Counsel submitted the Government's written case on April 19, 2005. A complete copy of the file of relevant material (FORM) was provided to Applicant, and

he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not do so and the case was assigned to me on June 15, 2005.

FINDINGS OF FACT

Applicant admitted some of the allegations in the SOR but offered extenuating and mitigating circumstances. He denied others. After a complete and thorough review of the information in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 34-year-old employee of a defense contractor. He has been involved in various activities involving use of alcohol and drugs between 1995 and 2000 that resulted in several arrests and prosecutions although some charges were dismissed and expunged.

Applicant falsified information on his security clearance application (SF 86) dated July 12, 2001, by failing to fully disclose information required on three questions relating to the above conduct. The first omission was on Question 24 relating to his police record for alcohol and drug offenses. He did admit a 1998 misdemeanor possession offense but failed to report three others in 1995 (possession of open container of alcohol), 1999 (possession of and possession with intent to sell marijuana), and 2000 (possession of marijuana). The second omission was on Question 27 relating to use of illegal drugs where he failed to fully report, later admitted to an investigator, his use between 1994 and 2000. The third omission was for Question 29 regarding illegal drug activity during the past seven years involving, purchase, trafficking, and sale whereas he was arrested on those charges in March, 1999, just a little over two years before the submission of his SF 86 where he answered the question in the negative.

While charges were dropped for the 1995 and 2000 arrests, Applicant has admitted the underlying conduct and he was convicted for the 1998 and 1999 offenses.

Applicant has not been in any legal difficulties since 2000 and there is no evidence to establish that he is likely to do so in the future.

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.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (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 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. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the 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. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b)

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 all allegations set forth in the SOR:

Under Guideline E, Applicant's failure to report his arrests for the various charges over a six- year period on his SF 86 indicates questionable judgment, unreliability, and unwillingness to comply with rules and regulations and could indicate that the person may not properly safeguard classified information. (E2.A5.1.1.) Specifically, the deliberate omission, concealment, or falsification of relevant and material facts from a personnel security application could raise a security concern and may be disqualifying. (E2.A5.1.2.2.); and a pattern of dishonesty or rule violations. (E2.A5.1.2.5.)

He knew the information would be regarded as adverse and he had no sound reason to believe such information was not relevant to his holding a security clearance since it was requested on the form. Even though three of the arrests and prosecutions were later expunged or dismissed, the questions on the SF 86 called for information about arrests which clearly had been made for all the offenses. The information was not provided as required.

Applicant's arrest for criminal conduct raises issues under Guideline J (E2.A10.1.1) involving a history or pattern of criminal activity creating doubt about a person's judgment, reliability and trustworthiness, and an admission of criminal conduct (E2.A10.1.2.1.), and a single serious crime or multiple lesser offenses (E2.A10.1.2.2.). The allegations alleged to have occurred in 1995 and 1998 are mitigated by the fact that all occurred over seven years ago and are relatively minor in nature. (E2.A10.1.3.1.) However, the seriousness of the 1999 and 2000 charges involving a large quantity of marijuana in 1999 with an alleged intent to sell, and the recency of the 2000 charges, prompts my conclusion that they should not be mitigated for passage of time (E2.A10.1.3.1) or that they were isolated instances (E2.A10.1.3.2.). The government also alleges that the failure to answer the questions on the SF 86 under Guideline E constitutes a crime under 18 U.S.C. 1001. Absent a clear showing of intent, I conclude that this allegation has not been proven.

The government has cited Disqualifying Condition (DC) 1 under Guideline H concerning drug involvement as relevant to the proposed denial of a security clearance for the Applicant. Drug involvement is always a security concern because it raises questions about a person's willingness or ability to protect classified information. Any drug abuse is a condition that may be disqualifying. The following definition is provided: "Drug abuse is the illegal use of a drug" (E2.A8.1.1.3) A mitigating condition might be applicable since the drug involvement was not recent. (E2.A8.1.3.1.)

However, Applicant used drugs from 1992 until 2000 just one year before the filing of his SF 86. While there are some inconsistencies in his statements as to the period of his use, the SOR allegation that he used drugs since 1982 seems unrealistic since he would have been only eleven years old at that time. Therefore, I amend the SOR to reflect a date of 1992 which appears from his answers to have been the date he intended to admit. I find that the allegation should not be mitigated by passage of time (E2.A8.1.3.1.) since the use was over such a long period of time thus requiring an greater period of time to justify application of the mitigating condition. No other mitigating conditions are applicable.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information.

The "whole person" concept recognizes that we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound

judgment, mature thinking, and careful analysis. After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude that the Applicant's actions and conduct precludes a finding that it is clearly consistent with the national interest to grant a security clearance to him.

FORMAL FINDINGS

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline E : AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: For Applicant

Paragraph 3 Guideline H AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

DECISION

After full consideration of all the facts and documents 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.

Charles D. Ablard

Administrative Judge