

KEYWORD: Drugs; Personal Conduct; Criminal Conduct

DIGEST: Applicant, a 58-year-old man, is seeking to retain a security clearance for his employment as a software engineer with a defense contractor. Although his last drug involvement (marijuana use) was in May 2001, he is unable to mitigate his more than 30-year history of illegal drug involvement. In addition, Applicant is unsuitable for a security clearance because the record evidence shows he misrepresented his history of illegal drug involvement in completing security-clearance applications and in official interviews during background investigations. Clearance is denied.

CASENO: 03-21320.h1

DATE: 01/26/2006

DATE: January 26, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-21320

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Jason R. Perry, Esq., Department Counsel

James B. Norman, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 58-year-old man, is seeking to retain a security clearance for his employment as a software engineer with a defense contractor. Although his last drug involvement (marijuana use) was in May 2001, he is unable to mitigate his more than 30-year history of illegal drug involvement. In addition, Applicant is unsuitable for a security clearance because the record evidence shows he misrepresented his history of illegal drug involvement in completing security-clearance applications and in official interviews during background investigations. Clearance is denied.

STATEMENT OF THE CASE

On December 20, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline H for drug involvement, Guideline E for personal conduct (falsification), and Guideline J for criminal conduct. Applicant replied to the SOR on January 19, 2005. His answers were mixed admitting in part and denying in part the SOR allegations, and he requested a hearing.

Department Counsel indicated he was ready to proceed on June 1, 2005, and the case was assigned to me on June 13, 2005. Thereafter, a notice of hearing was issued scheduling the hearing for August 5, 2005. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript August 17, 2005.

FINDINGS OF FACT

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

Applicant is a 58-year-old married man employed as a software engineer for a defense contractor. He is seeking to retain a security clearance.

Applicant has a long-standing history of illegal drug use, which included marijuana, heroin, speed, cocaine, and hashish. His drug of choice was marijuana. Applicant first became involved with illegal drug use in 1968 or 1969. His last involvement with illegal drugs was in May 2001 when he used marijuana. Exhibit 6 is Applicant's sworn statement wherein he detailed his history of illegal drug involvement. With two minor clarifications, Applicant admitted during his hearing testimony that Exhibit 6 is a true and accurate description of his illegal drug history (Transcript at 69 - 72). Accordingly, Exhibit 6 is incorporated herein by reference. Of note in Exhibit 6, Applicant admitted to using illegal drugs while holding a security clearance while in the Army, and while employed by defense contractors during 1994 - 1996. Applicant decided to stop using illegal drugs in May 2001 because he was afraid it would jeopardize his marriage, his job, and his holding of a security clearance.

Applicant also addressed the false statements about his illegal drug history in Exhibit 6. In relevant part, Applicant admitted intentionally falsifying his answers about illegal drug use and involvement (purchase and sale) when he completed security-clearance applications in May 2000 (Exhibit 2), April 2001, and January 2002 (Exhibit 3), as well as his sworn statement in February 2002 (Exhibit 5). He stated he was untruthful because he felt ashamed and he was concerned his illegal drug history could keep him from obtaining a security clearance.

Not addressed in Exhibit 6 was a January 1992 security-clearance application (Exhibit 1). In response to Question 20a, Applicant answered "no" thereby denying ever trying or using or possessing various illegal drugs, including marijuana. In response to Question 20b, Applicant answered "no" thereby denying ever being involved in the purchase or sale of various illegal drugs, including marijuana. Applicant's answers to both questions were false.

Applicant also made false statements about his illegal drug history in interviews conducted during official background investigations. In September 1994, he falsely denied ever using any kind of illegal drug. In June 2000, he deliberately omitted using any kind of illegal drug despite his long-standing use of marijuana. And in June 2001, he deliberately omitted using illegal drug despite his long-standing use of marijuana.

Applicant presented favorable character evidence as reflected in Exhibits A, B, and C. Exhibit A is a letter from Applicant's pastor who has known Applicant for the past 12 years. Applicant has been very active in his church, and the pastor believes Applicant is a trustworthy and honest person. Exhibit B is a letter from a former supervisor who

describes Applicant as an exemplary employee who he would gladly hire again. Exhibit C is a letter from Applicant's current supervisor who has known Applicant for about five years. The supervisor believes Applicant is a serious and dependable employee who has handled classified information in the past without incident. The supervisor rates Applicant as a highly valued employee of the company.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on 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.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.⁽²⁾ Instead, it is determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

BURDEN OF PROOF

The only 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.⁽³⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁶⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ Once the government

meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽⁹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Addressing the drug involvement under Guideline H, a security concern may exist based on improper or illegal involvement with drugs. Improper or illegal involvement with drugs is relevant to an applicant's security worthiness for various reasons, including that drug abuse indicates unwillingness or inability to abide by the law. If a person is willing to violate the law by using illegal drugs, it follows that person may be willing to ignore or violate the rules and regulations concerning the proper safeguarding and handling of classified information.

Here, based on the record evidence, the government established its case under Guideline H. A security concern is raised by Applicant's long-standing history of illegal drug involvement, which included the use of marijuana, heroin, speed, cocaine, and hashish. His drug of choice was marijuana, which he used from about 1969 to May 2001. His illegal drug involvement also includes the purchase and sale of marijuana, although there is no evidence Applicant was a drug dealer. Given these circumstances, both DC 1⁽¹²⁾ and DC 2⁽¹³⁾ apply against Applicant. Aggravating the situation under the whole-person concept, Applicant's drug abuse took place at times while he held a security clearance. The remaining DC do not apply based on the facts and circumstances here. The concern here is Applicant's illegal drug involvement is indicative of irresponsible behavior and poor judgment, and it calls into question his willingness or ability to follow the law.

Turning to the mitigating conditions under the guideline, MC 1⁽¹⁴⁾ applies in Applicant's favor. His last involvement with illegal drugs was when he last used marijuana in May 2001, which is more than four years. Accordingly, his illegal drug involvement may be considered not recent. Applicant also receives some credit under MC 3⁽¹⁵⁾ based on his abstaining from using marijuana and any other illegal drug.

To sum up, I considered both the favorable and unfavorable evidence of Applicant's illegal drug involvement. After weighing the record evidence as a whole, I conclude the unfavorable evidence outweighs the favorable evidence, and

Applicant has failed to successfully mitigate the security concern. In reaching this conclusion, I gave particular consideration to the nature, extent, and seriousness of Applicant's illegal drug history, his knowledgeable participation in drug abuse while holding a security clearance, the frequency of his drug abuse during a 30-plus-year period, and his age and maturity at the time. Accordingly, Guideline H is decided against Applicant.

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. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully.

An omission of relevant and material information, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or thought the arrest had been expunged from the record and did not need to be reported.

Here, based on the record evidence as a whole, the government established its case under Guideline E. I conclude Applicant deliberately provided false and misleading information about his history of illegal drug involvement when he completed security-clearance applications and during official interviews. The record evidence as a whole shows Applicant was a "fairly secretive" drug user (Transcript at 67) and he attempted to keep his drug involvement from the government. Accordingly, both DC 2-(16) and DC 3-(17) apply against Applicant. His misrepresentations and false statements create doubt about his judgment, reliability, and trustworthiness.

I reviewed the mitigating conditions under Guideline E and conclude none apply. Falsification is a serious matter, not easily mitigated or extenuated. Accordingly, 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. 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.

Here, based on the record evidence as a whole, the government established its case under Guideline J. Applicant engaged in criminal conduct by providing false and misleading information about his illegal drug history in violation of 18 U.S.C. § 1001, which is a felony offense. Given these circumstances, both DC 1-(18) and DC 2-(19) apply against Applicant. His criminal conduct creates doubt about his judgment, reliability, and trustworthiness. No mitigating conditions apply. Accordingly, Guideline J is decided against Applicant.

In reaching my decision, I considered the evidence as a whole, both favorable and unfavorable, the whole-person

concept, the clearly-consistent standard, and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline H: Against Applicant

Subparagraphs a - n: Against Applicant

SOR ¶ 2-Guideline E: Against Applicant

Subparagraphs a - h: Against Applicant

SOR ¶ 3-Guideline J: Against Applicant

Subparagraph a: 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 or continue a security clearance for Applicant. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Executive Order 10865, § 7.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
11. *Egan*, 484 U.S. at 528, 531.
12. E2.A8.1.2.1 Any drug abuse.
13. E2.A8.1.2.2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.
14. E2.A8.1.3.1. The drug involvement was not recent.
15. E2.A8.1.3.3. A demonstrated intent not to abuse any drugs in the future.
16. E2.A5.1.2.2. The deliberate omission, concealment, of 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.
17. E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.
18. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
19. E2.A10.1.2.2. A single serious crime or multiple lesser offenses.