

KEYWORD: Criminal Conduct; Drugs; Personal Conduct

DIGEST: Applicant, a 32-year-old laborer on construction projects, mitigated security concerns of criminal activity (three arrests and one conviction) over six-year period ending in 2000, and drug involvement during same period, by sufficient elapsed time, changed conduct during past five years, steady employment, and recommendations of employers. Also, he mitigated concerns over failure to report the arrest that resulted in conviction by reporting fully the other arrests, omission of favorable disposition of one arrest, and lack of sophistication in use of government forms. Clearance is granted.

CASENO: 03-22007.h1

DATE: 11/23/2005

DATE: November 23, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22007

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq. , Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 32-year-old laborer on construction projects, mitigated security concerns of criminal activity (three arrests and one conviction) over six-year period ending in 2000, and drug involvement during same period, by sufficient elapsed time, changed conduct during past five years, steady employment, and recommendations of employers. Also, he mitigated concerns over failure to report the arrest that resulted in conviction by reporting fully the other arrests, omission of favorable disposition of one arrest, and lack of sophistication in use of government forms. Clearance is granted.

STATEMENT OF CASE

On May 7, 2004, 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) 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. 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 June 23, 2004, 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. Department Counsel submitted the Government's written case on May 31, 2005. A complete copy of the file of relevant material (FORM) was provided to the Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant submitted additional information on July 25, 2005, and the case was assigned to me on August 1, 2005.

FINDINGS OF FACT

Applicant is a 32-year-old employee of a defense contractor who works as an apprentice laborer. He admitted all of the allegations concerning criminal conduct and drug involvement but denied the allegation relating to personal conduct in falsifying information on his security clearance application (SF 86). He offered explanatory information about the allegations. 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 has a history of arrests and drug use in the 1990's ending in 2000. He was charged in 1992 with manufacture of marijuana and in 1998 with domestic assault and battery involving his former wife. Both charges were nolle prossed. The first involved marijuana seeds found by the police in his car resulting in the manufacturing charge; the second concerned a domestic dispute with his former wife who dropped the complaint. He admitted both on his SF 86 at Questions 24 and 26 but had the wrong year with a question mark and failed to state the favorable disposition of the first arrest. ⁽¹⁾ He also detailed the circumstances of both arrests in his investigative interview in September 2003. ⁽²⁾

Applicant was also arrested in 2000 and charged with fleeing in a vehicle and failure to obey a traffic control device both of which were nolle prossed. In addition, as a result of the same incident, he was charged and convicted of reckless driving without headlights or seatbelts with a fine of \$625.00 and court costs. However, he did not include the most recent arrest and conviction at Question 26 on his application for security clearance (SF 86) filed in 2003. His excuse for not reporting the arrest and conviction was that he did not remember the incident but had no intent to conceal it since he reported the other two.

Applicant used and purchased marijuana and cocaine with varying frequency between 1994 and 2000. He also used LSD on at least one occasion in 1995. After his arrest and conviction in 2000, he decided that the use of drugs was leading him in a path that would eventually destroy him and his marriage. He ceased drinking and using drugs at that time and has not used them since.

Applicant has been employed as a semi-skilled laborer in a variety of jobs since 1995. He was first a painter, then a pipe layer, and is now in an apprenticeship program training to be an electrician. His employer vouches for him and believes he will receive his journeyman's license in 2006. Since 2002 he has been working on the Pentagon renovation project. He is recommended both by his present and former supervisor, and his inspector. He has been reliable, steady, honest, and evidences a high work ethic. He has had no difficulty in his relations with colleagues or supervisors (Exhs. B-E).

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:

Applicant's arrests and conviction for criminal conduct raises concerns 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. Conditions that could raise a security concern and may be disqualifying include allegations or admissions of criminal conduct whether the person was formally charged (E2.A10.1.2.1.), or a single serious crime or multiple lesser offenses (E2.A10.1.2.2.). The allegations concerning incidents occurring in 1992, 1998, and 2000 are mitigated by the fact that all occurred over five years ago (E2.A10.1.3.1.), and there is clear evidence of successful rehabilitation (E2.A10.1.3.6.). The first two of the charges were not prosecuted at all and parts of the third and latest were not. The conviction was for two relatively minor offenses for which he paid a fine.

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.)

Applicant used drugs from 1994 until 2000, three years before the filing of his SF 86 and five years before this decision. Since 2002 he has been a stable employee of a company whose leadership speaks favorably for him. He has not had further legal difficulties and has changed his habits as to alcohol and drugs. His former employer from 1995-2001 also speaks favorably in his statement about his ability, conduct, and trustworthiness. He has demonstrated his intent not to use drugs (E2. A8.1.2.3.).

Also alleged under Guideline E is Applicant's failure to acknowledge the 2000 arrest and conviction 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.). His conduct falls under E2.A5.1.2.2 regarding the deliberate omission of relevant and material facts from any personnel security questionnaire. His only excuse for the omission was that he forgot about the incident. The Government contends that such seems unlikely since he remembered and reported the earlier two incidents, but he also did not note on the SF 86 the favorable disposition of the drug charge in 1992 at Question 24. Applicant admitted the drug use and all other aspects of the government's case in both his answer and to the investigator. He also admitted drinking to excess during the relevant period which was not alleged in the SOR.

Applicant is a laborer who has held a steady job for the past ten years, but he is not a sophisticated person who might be totally thorough with government forms. While it is expected that any applicant be thorough, I cannot ignore the facts surrounding the particular applicant under the whole person rule, and the likelihood that an honest mistake may have occurred that we might not be willing to tolerate in a highly educated and sophisticated applicant.

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.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude that it is clearly consistent with the national interest to grant clearance to Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2.Guideline H: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For Applicant

Subparagraph 2.e.: For Applicant

Subparagraph 2.f.: For Applicant

Paragraph 3.Guideline E: FOR APPLICANT

Subparagraph 3.a.: For Applicant

DECISION

After full consideration of all the facts and documents presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Charles D. Ablard

Administrative Judge

1. The SOR alleges that only the second was disclosed on the SF 86 but, in fact, both were (Exh. 4. Questions 24 and 26).
2. The FORM at p. 5 erroneously states that the second arrest was not reported to the investigator in the security interview but, in fact, it was as noted in second paragraph of p. 2 of Exh. 5.