

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant is 42 years old, married, and works as an inspector for a defense contractor. Applicant failed to disclose two arrests in 1991, a job termination in 1996, and past illegal drug use on his security clearance application. He did not mitigate the personal conduct and criminal conduct security concerns. Clearance is denied.

CASENO: 03-22798.h1

DATE: 11/25/2005

DATE: November 25, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22798

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 42 years old, married, and works as an inspector for a defense contractor. Applicant failed to disclose two arrests in 1991, a job termination in 1996, and past illegal drug use on his security clearance application. He did not mitigate the personal conduct and criminal conduct security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On December 20, 2004, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on January 24, 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on April 4, 2005. On June 22, 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. DOHA received the hearing transcript (Tr.) on June 30, 2005.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 42 years old, married, with one child and one step-child. He works for a defense contractor as an inspector.

(Tr. 32, 33; Exhibit 1)

A government investigator interviewed Applicant on July 29, 2002 about his security clearance application (SCA) he signed on April 23, 2002. During that interview Applicant was asked about but did not disclose any illegal drug usage at any time in his life. In a written statement signed by Applicant on August 28, 2003, Applicant admitted using marijuana, LSD, cocaine and hash. He used marijuana until the age of 30 in 1992. The other illegal drugs were used until about 1989. He used cocaine six times, LSD once, and hash six times. Applicant did not list his past drug use because he did not want to appear to have any weaknesses. (Tr. 25, 51, 53, 59; Exhibits 2 at 3, 6 at 16 and 17)

Applicant disclosed in his SCA in answer to Question 24 (*Police Record-Alcohol/Drug Offenses . .Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?*) that he had a January 1998 arrest for driving under the influence of alcohol. Applicant deliberately did not list a July 4, 1991, driving while intoxicated and reckless operation arrest. The intoxicated driving charge was dismissed. Applicant pled guilty to reckless operation. He was fined \$600, sentenced to 30 days in jail, his driver's was license suspended for 90 days, ordered to complete an alcohol rehabilitation program, pay \$250 for that program, and put on two years probation. After the probation was completed successfully, 25 days of jail time and \$250 of the fine would be suspended. (Tr. 35-38, 55-59; Exhibits 1-4)

Applicant also deliberately failed to disclose, in response to Question 24, that on July 4, 1991, he was also charged with possession of marijuana of less than 100 grams. The charge was sworn out on July 4th, and Applicant was served with the summons while in jail on or about July 8, 1991. The marijuana was found in his car after it was impounded when he was arrested for the intoxicated driving charge. His court date was July 15, 1991. (Tr. 21-24, 38-45, 57-59; Exhibits 1, 3-5)

Applicant deliberately did not disclose on his SCA Question 20 (*Your Employment Record*) that he had been terminated from a job in December 1996 from a tool company at which he worked. He claims he was not discharged from the temporary employment services company as alleged in the SOR, but was working directly for the tool company. Applicant went out for lunch with co-workers, had three vodka and orange drinks, and did not feel fit for work. He attempted to "call off" but was unsuccessful in reaching his supervisor. The company terminated him for walking off the job after his scheduled lunch break. The workers compensation department of Applicant's state denied unemployment compensation because he quit his job without notifying his employer. The unemployment compensation denial letter states Applicant had five weeks of qualifying work with an employment agency and one week of qualifying work with the tool company. Furthermore, in his 2003 statement he admitted he working for the temporary service at the tool company. (Tr. 13, 14, 17-19, 46-51; Exhibits 1, 2, A-C)

Applicant's job performance evaluations show he is a competent employee who meets the job expectations and requirements. His evaluation ratings rank him in the middle of each category on the evaluation sheets. (Exhibit D)

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry*

§ 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

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. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

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, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying

conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. ay 2, 1996). All that is required is proof of facts and circumstances that 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. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "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* Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline E: Personal Conduct: *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.* E2.A5.1.1

Guideline J: Criminal Conduct: *The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.* E2.A10.1.1

CONCLUSIONS

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. Applicant failed to disclose when originally asked on his SCA and in the 2002 investigative interview his past illegal drug use, the 1991 intoxicated driving and reckless driving arrests, and a job termination. Applicant has a pattern of deliberately failing to disclose events in his life that the government should know to make an informed judgment before deciding to grant him a security clearance.

At the hearing Applicant attempted to explain, differentiate, and distinguish his repeated failures to disclose needed information about him, but they were distinctions without differences. Applicant even appeared to be trying to deny his signature was on the SCA. For example, Applicant claimed he reported his 1991 intoxicated driving arrest on the paper copy of the SCA he wrote at his employer's office, but it was not typed into the electronic version. When he signed that version he did not notice the arrest and reckless driving conviction was missing. Then, Applicant claims he was not

arrested for the marijuana charge because he was already in jail on the other charge, an officer did not formally arrest him outside of jail, so he says he did not list it on his SCA. Next, Applicant denied the job termination allegation because it did not allege the facts as he remembered them, even though he was terminated from employment in December 1996, plus he thinks his math was "fuzzy" so he could not count backwards from 2002 to include job terminations back to 1992. These explanations are not persuasive and are nothing more than a smoke screen by Applicant. I do not believe them.

His explanations for non-disclosure are even less persuasive when the evidence shows he made disclosures of 1998 and 2000 events when he answered Questions 24 and 20, respectively. If he knew those events, he knew the earlier events.

The personal conduct Disqualifying Conditions (DC) applicable are DC 2 (The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, or similar form used to determine security clearance eligibility or trustworthiness E2.A5.1.2.2), DC 3 (Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, or other official representative in connection with a personnel security or trustworthiness determination. E2.A5.1.2.3), DC 4 (Personal conduct or concealment or information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail. E2.A5.1.2.4),

DC 5 (A pattern of dishonesty or rule violations. E2.A5.1.2.5). Applicant deliberately failed to disclose two arrests, a job termination, and past drug use. He did not disclose these facts on his SCA, nor in the initial interview in 2002 to the government investigator. This conduct makes Applicant vulnerable to coercion, exploitation or duress because there is a pattern of conduct and of non-disclosure that someone may find useful for pressuring Applicant. Finally, Applicant has a pattern of dishonest conduct, including the repeated falsification.

After weighing the evidence, examining the Mitigating Conditions (MC) in the guideline, I conclude none apply to Applicant. Therefore, I conclude this guideline against Applicant.

Regarding the criminal conduct security concern, the DC applicable are DC 1 (Allegations or admission of criminal conduct, regardless of whether the person was formally charged. E2.A10.1.2.1), and DC 2 (A single serious crime or multiple lesser offenses. E2.A10.1.2.2). Applicant's repeated deliberate failures to disclose requested information in the security clearance process on his application are violations of 18 U.S.C. § 1001. It is a violation of that statute to knowingly and willfully make a materially false statement to any department or agency of the U.S. government. Applicant made false statements on his SCA and in 2002 to the government investigator. Such false statements concerning his criminal conduct and illegal use of drugs are material to a determination of his security worthiness.

No MC apply in this case. Applicant made no persuasive showing at the hearing that he met any of the MC set forth in the guideline. Therefore, I conclude this guideline against him.

FORMAL FINDINGS

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

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.a.1: Against Applicant

Subparagraph 1.a.2: Against Applicant

Subparagraph 1.a.3: Against Applicant

Subparagraph 1.a.4: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.b.1: Against Applicant

Subparagraph 1.b.2: Against Applicant

Subparagraph 1.c: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

DECISION

In light of all of 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.

Philip S. Howe

Administrative Judge

1. Pursuant to Exec. Or. 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).