

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant is 35 years old and has worked for a federal contractor doing sheet-metal repairs since 1999. Applicant was arrested in 1999, for possession of marijuana. Applicant failed to divulge his arrest on his security clearance application, despite being on notice that it was an issue. He failed to mitigate security concerns under Guideline E, personal conduct, and Guideline J, criminal conduct. Clearance is denied.

CASENO: 03-24159.h1

DATE: 01/17/2006

DATE: January 17, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-24159

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Jr., Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant is 35 years old and has worked for a federal contractor doing sheet-metal repairs since 1999. Applicant was arrested in 1999, for possession of marijuana. Applicant failed to divulge his arrest on his security clearance application, despite being on notice that it was an issue. He failed to mitigate security concerns under Guideline E, personal conduct, and Guideline J, criminal conduct. Clearance is denied.

STATEMENT OF CASE

On December 22, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. [\(U\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline E, personal conduct, and Guideline J, criminal conduct.

In a sworn statement dated January 4, 2005, Applicant responded to the SOR allegations. In his statement Applicant elected to have his case decided on the written record. Department Counsel submitted the government's file of relevant material (FORM) on May 20, 2005. The FORM was mailed to Applicant on September 27, 2005, and received on October 13, 2005. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not provide any additional material. The case was assigned to me on November 30, 2005.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR, are incorporated herein, In addition, after a through and careful

review of the pleadings and exhibits, I make the following findings of fact:

Applicant is 35 years old and has been a fabrication sheet metal worker for a federal contractor since 1999. Applicant is married and has two children. Applicant served in the Navy from 1989 to 1992 and was honorably discharged.

Applicant was arrested on April 24, 1999, and charged with possession of marijuana. Applicant was stopped by a police officer for having a broken headlight on his car. His wife was in the car at the time. The police officer saw a marijuana cigarette in the car's ashtray. Applicant was a friend of the police officer's and was told he would have to go to court and pay a fine. Applicant believed the police officer was going to list his arrest under a false name so the arrest would not show up on Applicant's record.⁽²⁾ He went to court, pled guilty and was ordered to pay fines and court costs totaling approximately \$315.00.

On May 22, 2003, Applicant provided information on a electronic security clearance application (SCA) that was then submitted on May 23, 2003.⁽³⁾ On that application Applicant answered "No" to Question 24 (*Your Police Record-Alcohol/Drug Offenses-Have you ever been charged or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 .U.S.C. 3607.*)⁽⁴⁾ Applicant's answer was false in that he had been charged and convicted of drug possession in 1999.

In a sworn statement to an investigator from the Defense Security Service (DSS) on October 2, 2003, Applicant admitted he intentionally did not provide the requested information. Applicant's explanation was that he thought his police officer friend had concealed his name when he was given a ticket for possession of marijuana, and that it would therefor not be on his record.⁽⁵⁾ Applicant also claimed the marijuana did not belong to him, but was his wife's.⁽⁶⁾ He admitted that he did not provide information about his arrest on his SCA, and it was only after the investigator read him the police report regarding the marijuana possession charge did he admit the incident occurred.⁽⁷⁾ Applicant stated "It was my understanding that this arrest was not supposed to show up on my record. The police officer, my friend, who charged me with this offense insured me that it would appear under the name of "[Blank Doe]" rather than my name. That is the reason I did not list this drug related offense on my security questionnaire."⁽⁸⁾

On May 12, 2004 Applicant submitted another SCA. Before signing it he swore under oath that the information was true, complete and correct to the best of his knowledge and belief and was made it good faith. He attested that he understood that a knowing and willful false statement on the form could be punished by fine or imprisonment or both under 18 U.S.C. § 1001. ⁽⁹⁾ Applicant again answered "No" to Question 24 (*Your Police Record-Alcohol/Drug Offenses-Have you ever been charged or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 .U.S.C. 3607.*) Applicant's

answer was false in that he had been charged and convicted of drug possession in 1999. His false answer constitutes a felony violation under 18 U.S.C. § 1001.

In Applicant's answer to the SOR he contradicts his previous sworn statement to the DSS investigator regarding his arrest stating "I was given a ticket for simple possession of marijuana. I was not arrested or detained." ⁽¹⁰⁾ He again complained that, because of the alleged promise that his police officer friend made to him, the arrest should not have been part of his record. ⁽¹¹⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline E, pertaining to personal conduct, and Guideline J, pertaining to criminal conduct, with their respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. ⁽¹²⁾ The government has the burden of proving controverted facts. ⁽¹³⁾ The burden of proof is something less than a preponderance of evidence. ⁽¹⁴⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him. ⁽¹⁵⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. ⁽¹⁶⁾

No one has a right to a security clearance ⁽¹⁷⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." ⁽¹⁸⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. ⁽¹⁹⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. ⁽²⁰⁾ 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.

Based upon consideration of all the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline E-Personal Conduct is a security concern when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

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. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. 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.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a prima facie case for disqualification under Guideline E and Guideline J.

Based on all the evidence, Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2 (*The deliberate omission, concealment, or 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*), applies in this case.

Despite being on notice that his previous falsification about his drug arrest had raised a security concern, Applicant deliberately falsified his SCA on May 12, 2004. PC DC E2.A5.1.2.2 applies. There is a consistent pattern to Applicant's responses regarding his drug charge and it is that he did not believe the charge was part of his record because he thought a police officer friend was going to falsify a police report for him. He does not deny the charge, or that he pled guilty, and paid a fine, but rather his concern is that the charge should have been concealed for him as an act of friendship by a police officer. The plain language of the question put Applicant on notice that even if the record had been expunged or in his case concealed in an illegal manner, he still was required to divulge the drug charge. Applicant's actions were deliberate and meant to mislead. Applicant's willingness to hide his past and his lack of truthfulness demonstrate questionable judgment and dishonesty that makes him vulnerable as a security risk.

I have considered all the mitigating conditions and especially considered Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.2 (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*), PC MC E2.A5.1.3.3 (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*), and PC MC E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). I conclude none of the mitigating conditions apply. Applicant deliberately concealed his drug charge because he thought it would not show up on his record where the government could find out about it. He failed to divulge the charge to the DSS investigator until confronted with the police report. Applicant continues to believe that because he thought his police officer friend was going to conceal the charge he did not have to report it on his SCA, and in his latest statement he argues that he was not really arrested. Applicant's falsifications are not isolated, but rather show a continuing pattern of deception. He did not volunteer the required information until confronted with it. Applicant failed to show any positive steps towards reducing his vulnerability, but rather continues to contradict himself regarding his transgressions. Applicant failed to mitigate the security concerns regarding his personal conduct.

Based on all the evidence Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser charges*) apply. Applicant was arrested and charged with possession of marijuana in 1999. He pled guilty to the offense. Applicant falsified his SCA by deliberately denying he had been charged or convicted of any offense related to drugs. Applicant's falsification was made under oath and is a violation of 18 U.S. C. § 1001, a felony.

I have considered all the mitigating conditions and especially considered Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.2.1 (*The conduct was not recent*), CC MC E2.A10.1.2.2 (*The crime was an isolated incident*), CC MC E2.A10.1.2.4 (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*). I conclude Applicant's offense of deliberately providing false information is criminal and recent. The combination of his drug and falsification offenses negate that his crimes were isolated. CC MC E2.A10.1.2.1 and CC MC E2.A10. 1.2.2 do not apply. Applicant's deliberate omissions were voluntary, he still believes he was somehow justified in concealing the sought after information. Therefore, I find both CC MC E2.A10.1.2.4 and CC MC E2.A10.1.2.6 do not apply. I find Applicant failed to mitigate the security concerns regarding his criminal conduct.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination

that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I considered all the evidence provided and also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I find Applicant has failed to mitigate the security concerns raised by his personal conduct and criminal conduct. Therefore, I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guideline E and Guideline J are decided against Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1 Personal Conduct (Guideline E) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Paragraph 2 Criminal Conduct (Guideline J) AGAINST THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 2.a. Against the 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.

Carol. G. Ricciardello

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. Item 5 at 2.
3. Item 6.
4. This falsification is not part of the SOR allegations. I have considered it only in the context that Applicant had been on notice as to type of questions he was required to answer before filling out his later SCA. I have also considered it in the context of Applicant's October 2, 2003 admissions regarding his arrest.
5. Item 5 at 2.
6. *Id.*
7. *Id.* at 3.
8. *Id.*
9. Item 4.
10. Item 2.
11. *Id.*
12. ISCR Case No. 96-0277 at 2 (App. Bd. Jul. 11, 1997).
13. ISCR Case No. 97-0016 at 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
14. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
15. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
16. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15
17. *Egan*, 484 U.S. at 531.

18. *Id.*

19. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

20. Executive Order 10865 § 7.