

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is a 24-year-old employee of a defense contractor. She pled guilty to attempted wrongful appropriation in 1999. While in high school and college she used marijuana for a period of five months. Applicant deliberately falsified her security application in 2002, a violation of federal criminal law. She has not mitigated the concerns under the Criminal and Personal Conduct Guidelines. Clearance is denied.

CASE NO: 03-00598.h1

DATE: 01/31/2006

DATE: January 31, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-00598

DECISION OF ADMINISTRATIVE JUDGE

NOREEN A. LYNCH

APPEARANCES

FOR GOVERNMENT

Nichole L. Noel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 24-year-old employee of a defense contractor. She pled guilty to attempted wrongful appropriation in 1999. While in high school and college she used marijuana for a period of five months. Applicant deliberately falsified her security application in 2002, a violation of federal criminal law. She has not mitigated the concerns under the Criminal and Personal Conduct Guidelines. Clearance is denied.

STATEMENT OF THE CASE

On October 20, 2003, 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 Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, (Directive), issued a Statement of Reasons (SOR) to Applicant. The SOR 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 because of security concerns arising under Guidelines J (Criminal Conduct) and E (Personal Conduct).

On November 26, 2003, Applicant submitted a notarized response to each of the factual allegations set forth in the SOR, and elected to have the case decided on the record in lieu of a hearing. Department Counsel submitted the government's written case on June 2, 2005. Department Counsel provided a complete copy of the File of Relevant Material (FORM) [\(1\)](#) to Applicant, along with notice of her opportunity to file objections and submit material to refute, extenuate, or mitigate the allegations. Applicant received the FORM on June 28, 2005. Applicant did not provide a written response to the FORM. This case was assigned to me on August 24, 2005.

FINDINGS OF FACT

Applicant denied, with explanation, the factual allegations pertaining to criminal conduct under Guideline J (subparagraphs 1.a, 1.b, and 1.c) and admitted, with explanation, the factual allegations pertaining to personal conduct under Guideline E (subparagraph 2.b and 2. d).⁽²⁾ Those admissions are incorporated here as findings of fact. She denied the remaining allegations. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 24-year-old employee for a defense contractor.⁽³⁾ She graduated from high school, attended college but did not graduate for financial reasons. After leaving college, Applicant worked in various positions. She is currently employed as a janitor for a federal contractor. She applied for a security clearance in connection with her employment in February 2002.⁽⁴⁾

In 1998, Applicant and her boyfriend, both 18 years of age, were involved in an unspecified incident in his house. She was detained by the police and questioned for non-spousal domestic battery.⁽⁵⁾ The district attorney reviewed the facts related to her detention by the police and decided not to file charges for battery or proceed with prosecution.⁽⁶⁾ There have not been any other such incidents.

On March 30, 1999, Applicant was arrested and charged with theft of auto. She pled guilty to a reduced charge of attempted wrongful appropriation. The Court ordered restitution and sentenced Applicant to 36 months probation.⁽⁷⁾ Applicant satisfied the restitution order in the amount of \$2,500.00.⁽⁸⁾

While still in college, Applicant used marijuana. She admits using the substance twice per week for five months in 1999. She also tried marijuana in high school.⁽⁹⁾

Applicant withdrew from college in January 2000 for financial reasons.⁽¹⁰⁾ In the same month the college evicted her from her dormitory room because she was not enrolled in school that semester. not for underage drinking.⁽¹¹⁾ In March 2000. Applicant was evicted from off campus apartments for underage consumption of alcohol on the premises, while underage and in violation of campus policy. She was not charged with the underage drinking.

When Applicant began working for a defense contractor, she applied for a security clearance. Applicant completed a security clearance application (SF 86) in February 20, 2002.⁽¹²⁾ The SOR alleges false answers to Questions 26 and 27. Question 26 on that form read as follows:

Your Police Record -Other Offenses [:]

In the last 7 years, have you been arrested for, charged with, or convicted of any offense (s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150.00 unless the violation was alcohol or drug related.) For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the 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 answered "No" to this question. [\(13\)](#) She did not report her arrest for the attempted wrongful appropriation or non-spousal domestic battery detention.

Question 27 on the SF 86 read as follows:

Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs [:]

Since the age of 16, or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc., hallucinogens (LSD, PCP, etc.,) or prescription drugs?

Applicant answered "No" to this question, despite the fact she used marijuana in 1997, and twice per week for a period of five months in 1999. [\(14\)](#)

In her November 26, 2003 answer to the SOR, Applicant denied her arrest for attempted wrongful appropriation under allegation 1.a, but admitted it for allegation 2.a, and stated that she included it in her security application in 2002. She also explained that she misinterpreted the question concerning the drug use. She stated that she did reveal the marijuana use to the government investigator.

POLICIES

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2, Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. In addition, each security clearance decision must be 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, 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. 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.⁽¹⁵⁾ The government has the burden of proving controverted facts.⁽¹⁶⁾ The burden of proof is something less than a preponderance of the evidence.⁽¹⁷⁾ Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against her.⁽¹⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁹⁾

No one has a right to a security clearance⁽²⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽²¹⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽²²⁾ Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant.⁽²³⁾ 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 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:

Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Personal Conduct - Guideline E: 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.

Disqualifying and mitigating conditions, either raising security concerns or mitigating concerns, pertaining to these adjudicative guidelines, are set forth and discussed in the Conclusions section below. For clarity, I will discuss each separately.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

Criminal Conduct

The government established its case as to allegation 1.a under Guideline J. Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegation or admission of criminal conduct, regardless of whether the person was formally charged*) and E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*) apply. In 1999, Appellant pled guilty to attempted wrongful appropriation. She was sentenced to six months in jail, placed on six months probation and ordered to pay \$2,500.00 in restitution. Her conduct clearly falls under the CC DC of this guideline.

I have also considered the Criminal Conduct Mitigating Conditions (CC MC) and concluded that E2.A10.1.3.1 (*The criminal behavior was not recent*) and CC C 2 E.2.A10.1.3.2 (*The crime was an isolated incident*) apply. Applicant has not had any other convictions since the 1999 incident. This is a period of six years. She was young, in college, and admits doing some dumb things. Since then, Applicant has been employed and responsible. She completed her probation successfully and satisfied the judgment for restitution. Applicant has mitigated the government's concerns as to allegation 1.a.

The government has failed to establish its case as to allegation 1. b. Applicant denies formal charges or prosecution. In addition, there are no court documents in the file to substantiate this allegation. A memorandum, dated April 16, 1998, confirms no charges were filed in Applicant's case.

As to allegation 1.c, I conclude for the reasons discussed in the Personal Conduct section, Applicant deliberately omitted relevant information in Questions 26 and 27 on her security application. This intentional falsification constitutes a felony under the law (18 U.S.C. Section 1001). Accordingly, criminal conduct under Guideline J is concluded against Applicant.

Personal Conduct

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.

The government established its case for allegation 2.a under Guideline E. 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...*) applies. When Applicant completed her security application form in 2002, she answered "no" to Question 26 on her 2002 security clearance application and denied any arrests, charges, or convictions for the last 7 years. Applicant did not list the 1999 conviction for which she paid \$2,500.00 in restitution. Her letter of explanation, dated November 26, 2003 stated that she did provide information about the attempted wrongful appropriation charge on the SF 86. That is not true. The security application does not have any information about that incident. She then stated that she believed the 1999 incident did not need to be revealed because no charges were filed. While Applicant may have misinterpreted the question concerning the battery incident, I do not find it reasonable that she could misinterpret the Attempted Wrongful Appropriation to which she pled guilty.

When Applicant completed her security application in February 2002, she knew she had used marijuana in 1997 and 1999, even though she had not been charged or arrested for possession. When she answered "no" to Question 27 on her 2002 security clearance application and denied any drug use in the past seven years, Applicant knowingly failed to tell the truth about her past drug use in 1997 and 1999. She chose not to reveal this information in fear it would impact her security clearance application. She only revealed the drug use when questioned by the government. I am not persuaded by her statement that she never meant to falsify any information on her security clearance application. I conclude Applicant has not mitigated and overcome the government's case.

As to allegation 2.c, Department Counsel acknowledged that evidence in the record supports that Applicant was not evicted from her dormitory room for underage drinking, but rather for not being enrolled that semester. The government

admitted it has not established its case under allegation 2. c. Therefore, I find for Applicant.

Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2 (*reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*) applies in this case. Under allegation 2.d, Applicant's admission for the underage drinking supports the government's case. I find against her under Guideline E. Accordingly, for the reasons stated, I conclude it is not clearly consistent with the national interest to grant a security clearance to 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. Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: Against Applicant

Paragraph 2. Guideline E (Personal Conduct) AGAINST APPLICANT

Subparagraph 2. a: Against Applicant

Subparagraph 2. b: Against Applicant

Subparagraph 2. c: For Applicant

Subparagraph 2. d: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly not consistent with national interest to grant a security clearance for Applicant. Clearance is denied.

Noreen A. Lynch

Administrative Judge

1. The government submitted five items in support of its contentions.
2. Item 2 (Applicant's Answer to SOR, dated November 26, 2003) at 1-2.
3. Item 3 (Transmittal Letter Receipt, dated October 29, 2003) at 1.
4. Item 4 (Security Clearance Application (SF 86), dated February 20, 2002) at 1-10.
5. Memorandum, dated April 16, 1998 included in the case file.
6. *Id.*
7. Restitution Judgment, dated July 8, 1999 included in the case file.
8. *Id.* at 2.
9. Item 2, *supra* note 2, at 1.
10. *Id.*

11. Letter from Resident Life Office Manager to Applicant, dated November 3, 2003.
12. Item 4 (Security Clearance Application (SF 86), dated February 20, 2003) at 1-10.
13. Item 4, *supra* note 12 at 1.
14. Item 2, *supra* note 2 at 1.
15. ISCR Case No. 96-0277 (July 11, 1997) at 2.
16. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
17. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
18. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
19. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
20. *Egan*, 484 U.S., at 531.
21. *Id.*
22. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
23. Executive Order No. 10865 § 7.