

DATE: March 5, 2004

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 03-02344

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 35-year-old mechanical engineer who has been employed by a government contractor since October 2001. He deliberately failed to disclose his use of marijuana in a Security Clearance Application he submitted in December 2001, fearing he would not receive a security clearance if he was truthful. Applicant has failed to mitigate the security concern that arises from his personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On September 12, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline E, involving personal conduct. Applicant submitted an answer to the SOR dated October 16, 2003, requested a hearing, and admitted the sole SOR allegation.

The case was assigned to me on November 27, 2003. A notice of hearing was issued on January 14, 2004, scheduling the hearing for January 29, 2004. The hearing was conducted as scheduled. The government submitted two documentary exhibits that were marked as Government Exhibits (GE) 1 & 2, and admitted into the record without an objection. The Applicant testified, and offered one documentary exhibit that was marked as Applicant Exhibit (AE) 1, and admitted into the record without an objection. The transcript was received on February 4, 2004.

FINDINGS OF FACT

Applicant's admission to the SOR allegation is incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 35 years old, single, and has been employed as a project engineer by a defense contractor since October

2001. He received an associate degree in math science in May 1990, and a bachelor degree in mechanical engineering in December 1992. He was previously employed as an engineer in the private sector from April 1993 to August 2001. He left that job following allegations of unsatisfactory performance. He submitted a performance appraisal from his present employer that indicates he is a motivated, resourceful and valued employee.

Applicant used marijuana while in high school approximately once a month. From 1987 to 1991, he used marijuana about once every two months, but stopped using it when he accepted employment to avoid problems with drug testing. However, he used marijuana again in late 1997 or early 1998 at the apartment of a woman he was dating, and in October 1998, while visiting a foreign country where the use of marijuana was legal.

Applicant submitted a Security Clearance Application, (SF 86) on December 3, 2001. He answered "No" in response to question 27: *Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs - Since the age of 16 or in the past 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?* Based upon his use of marijuana in 1997 and/or 1998 this answer was false.

Applicant was interviewed by a special agent of the Defense Security Service (DSS) in February 2002, and denied using marijuana after 1991. He was re-interviewed on February 28, 2002, and at that time provided a written statement (GE 2) in which he admitted the 1997/98 use of marijuana and falsification of the SF 86. He provided the following explanation for the falsification: "I did not list my two uses of marijuana in the last seven years on the security clearance questionnaire, as I was afraid it might effect [sic] my ability to get a security clearance. I recognize I intentionally falsified information regarding that question." He testified at the hearing that he willingly falsified the answer, explaining he didn't think one false answer would be sufficient cause to deny him a security clearance.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon 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. Considering the evidence as a whole, Guideline E, pertaining to personal conduct, with its DC and MC, is most relevant in this case.

BURDEN OF PROOF

The sole 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.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁴⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁵⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁶⁾ 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.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹¹⁾

CONCLUSIONS

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. Applicant's intentional falsification in failing to disclose his use of marijuana when he submitted the SF 86 severely undermines the ability to place such trust and confidence in him at the present time. His false answer and the reasons he has given for providing that answer raise significant security concerns.

DC 2: *The deliberate omission, concealment, or falsification of relevant and material fact 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. I have considered all Mitigating Conditions under Guideline E and find none apply. Guideline E is decided against Applicant.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find that Applicant has failed to overcome the case against him and satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

SOR ¶ 1-Guideline E: Against the Applicant

Subparagraph 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.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.