

DATE: April 5, 2005

In Re:

SSN:

Applicant for Security Clearance

ISCR Case No. 03-06637

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Edward H. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The absence of evidence to support the sexual assault and the lack of a criminal record results in a finding for Applicant under the criminal conduct guideline. However, Applicant's favorable evidence about his work performance since September 2002 does not satisfy his substantial burden of persuasion under the personal conduct guideline. Clearance is denied.

STATEMENT OF CASE

On April 12, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, amended April 4, 1999, 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 and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant furnished his answer to the SOR on June 23, 2004. He elected to have his case decided on a written record. The Government provided Applicant a copy of the File of Relevant Material (FORM) on August 23, 2004. Applicant received the FORM on August 31, 2004. His response to the FORM was due by October 2, 2004. No response was received. The case was assigned to me on October 12, 2004.

FINDINGS OF FACT

The SOR alleges criminal conduct and personal conduct. Applicant admitted subparagraph 1.a. that he was arrested for Sexual Assault, 2nd degree, a Felony. Applicant also admitted subparagraph 2.a., but explained he did not know that a charge should have been listed. An influencing factor in not disclosing the arrest was having no criminal record. Applicant also admitted subparagraphs 2.b. deliberately omitting his marijuana use from his SCA, and subparagraph 2.c. in not revealing his marijuana use during his interview on December 27, 2002.

Applicant is 24 years old and employed as a computer analyst II by a defense contractor. He seeks a secret clearance. He

has never had a security clearance.

Criminal Conduct. Even though Applicant admitted in his answer to the SOR being arrested for the sexual assault, Applicant indicated in his sworn statement dated December 27, 2002 that he was not arrested but summoned to the police station to provide information about the sexual conduct. He claimed the sex was consensual and not by force as the victim alleged. The reason the victim initially claimed Applicant forced her to have sex was because she was afraid of her mother, and, according to Applicant, she subsequently apologized to him. Applicant was never required to appear in court. In addition, Applicant indicated he talked with a criminal attorney who reviewed the records and told him he had not been charged. Finally, Applicant had known the alleged victim since childhood.

Personal Conduct. On October 9, 2002, Applicant signed and submitted a SCA. In response to question 26 (asking whether Applicant had been arrested for, charged with or convicted of any offense not listed in questions 21, 22, 23, 24 and 25), Applicant answered "No" even though he had been arrested on February 1, 2001 for sexual assault as set forth in subparagraph 1 a. In both his sworn statement dated December 27, 2002 and his answer to the SOR, the fact he was not convicted of a crime was the primary reason why Applicant did not disclose his arrest for Sexual Assault. However, the perplexing statement in Applicant's answer is, "I did not know that being arrested and questioned meant that I was "charged" for a crime." Question 27 requires information about **arrests** and **charges** as well as convictions. (emphasis added) See, SOR, FORM.

In response to question 27 (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, morphine codeine, heroin, etc.) amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.) hallucinogenics (LSD, PCP, etc.), or prescription drugs?), Applicant answered "No" even though he had used marijuana at least three times between April and May 2001.

In a December 27, 2002, interview with a Special Agent from the Defense Security Service (DSS), Applicant stated he did not use drugs. In his sworn statement dated January 24, 2003, during his discussion of why he did not furnish information about his drug use on the SCA and the December 27, 2002, interview, Applicant explained:

I did not list this use of marijuana on my security questionnaire because I did not recall seeing the questions pertaining to illegal drug use or even the question pertaining to the use/abuse of alcohol or alcohol related incidents. I did not try to conceal this information from anyone, nor did I falsify my security questionnaire.

In addition, I had my mother assist me in preparing the reference portion [of] my security questionnaire because I did not have information available and she may have filled out the rest of the questionnaire for me. I apparently did not review the questionnaire thoroughly when I signed it.

In addition, during my previous interview with S/A [DSS Agent], I told him that the girl who had accused me of the sexual assault was involved with illegal drugs. He then asked me if I was also involved with drugs. I told, him, no, because I thought he was referring to the harder forms of drugs and not marijuana. (Item 6.)

The quote above reveals that Applicant did not read and answer truthfully each question of the entire SCA (specifically question 27) even though he signed the SCA certifying that all the information was true and answered in good faith. Concerning Applicant's reasons for not disclosing his drug use in the December 27, 2002, interview, the "harder forms of illegal drugs" account is one explanation why Applicant did not disclose his drug use to the Agent. However, his explanation is not credible since the Special Agent's question was directed at drug use. I am unable to understand how Applicant assumed the Agent was referring to a harder form of illegal drugs, especially after Applicant had accused the complainant of using drugs. I find Applicant deliberately concealed material information about his drug use from the December 27, 2002, interview.

Character Evidence. Applicant has two children to support. He has applied himself diligently to the current project. Applicant's performance evaluations from September 2002 to June 2004 demonstrate he has received proficient to highly proficient ratings.

POLICIES

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, the guidelines and the whole person concept.

Burden of Proof

The government has the burden of proving controverted facts by substantial evidence. After the government meets its burden, an applicant has the ultimate burden of presenting evidence in refutation, extenuation, or mitigation that demonstrates it is clearly consistent with the national interest to grant or continue his security clearance. Any doubt concerning an applicant's security clearance access should be resolved in favor of national security. *Department of the Navy v. Egan*, 484 U.S. 518, at 531.

Criminal Conduct

The security concern of this guideline is a history or pattern of criminal conduct that creates doubt about a person's judgment, reliability and trustworthiness.

Personal Conduct

Dishonesty and poor judgment during but not limited to the security investigation are the focus of this guideline.

CONCLUSIONS

Criminal Conduct. Because Applicant was arrested and charged with criminal behavior, his conduct falls within the first disqualifying condition (DC) of the criminal conduct (CC) guideline. DC CC E2.A10.1.2.1. (*allegations or admission of criminal conduct, regardless of whether the person was charged*). A careful review of the available facts persuades me to conclude that no criminal behavior occurred. Though there was an arrest and charge, there was no trial or a finding of guilt for the principal offense or any lesser included offense. Applicant knew the complainant since childhood and believed the sex was entirely consensual. According to Applicant, the complainant apologized to him for fabricating the charge. Having weighed the allegation with the absence of underlying evidence, and Applicant's clean criminal record, I find for Applicant under subparagraph 1.a.

Personal Conduct. Dishonesty is the central issue of the personal conduct guideline. If an individual has demonstrated a lack of candor during the security investigation, he may not be a suitable candidate to safeguard classified information. While Applicant claims he misunderstood question 26, he uses the same words "arrest," and "charge" in his rationalizations for his "no" answer to the question. As noted in Findings of Fact, the question requires information of arrests, charges and convictions. I find Applicant's deliberate omission of material information from question 26 of the SCA comes within the purview of second disqualifying condition (DC) of the personal conduct (PC) guideline. PC DC E2.A5.1.2.2. (*the deliberate omission of material facts from any personnel security questionnaire used to determine security clearance eligibility*). Applicant's omission of his drug use from his SCA also falls within PC DC E2.A5.1.2.2. because Applicant deliberately withheld information about his drug use.

Applicant decision not to tell the truth about his drug use in the December 27, 2002 interview gives rise to PC DC E2.A5.1.2.3. (*deliberately providing false or misleading information concerning relevant and material matters to an investigator in connection with a personnel security determination*). In discussing the details of the alleged sexual assault, Applicant stated the complainant used drugs. However, when asked by the investigator, Applicant decided not to tell the truth about his own drug use.

While three mitigating conditions (MC) are potentially applicable under the PC guideline, Applicant has provided insufficient evidence under all MC to overcome his dishonest conduct. PC MC E2.A5.1.3.1. (*the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability*) is not applicable to the material information Applicant omitted from the SCA and his sworn statement because an individual's criminal record is always pertinent to judgment.

PC MC E2.A5.1.3.2. (*the falsification was an isolated incident, was not recent, and the individual has subsequent provided information voluntarily*) does not apply on these facts because the deliberate omissions occurred during two phases of the security investigation less than three years ago. PC MC E2.A5.1.3.3. (*the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*) is also unavailable for mitigation because Applicant would not have disclosed his drug use had he not been confronted with the subject. Applicant's claim he eventually disclosed his drug history during the second interview in January 2003 represents good judgment but it does not excuse his decision not to disclose this relevant information about his criminal record and/or his drug use on his SCA and in the December 27, 2002, interview.

Applicant's positive job performance since September 2002 weighs in his favor but does not mitigate his dishonest behavior demonstrated in October and December 2002. Applicant's poor judgment is aggravated not reading the entire SCA before signing the important form. In reaching my decision under the CC and PC guidelines, I have also evaluated the circumstances of this case under the whole person concept.

FORMAL FINDINGS

Paragraph 1 (criminal conduct, Guideline J): FOR THE APPLICANT.

a. For the Applicant.

Paragraph 2 (personal conduct, Guideline E): AGAINST THE APPLICANT.

a. Against the Applicant.

b. Against the Applicant.

c. 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 Applicant a security clearance.

Paul J. Mason

Administrative Judge