

KEYWORD: Criminal Conduct; Drugs; Personal Conduct

DIGEST: From 1988 to 2000, Applicant was charged with five different criminal offenses, two related to the illegal possession of firearms and three to drug-related misconduct. He was convicted twice for drug-related misconduct. In 2002, Applicant submitted a SF 86 in which he deliberately failed to disclose the above information and that he sold drugs for profit. He failed to mitigate the criminal conduct, drug involvement, and personal conduct security concerns. Clearance is denied.

CASENO: 03-07008.h1

DATE: 03/31/2006

DATE: March 31, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-07008

DECISION OF ADMINISTRATIVE JUDGE

JUAN J. RIVERA

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

From 1988 to 2000, Applicant was charged with five different criminal offenses, two related to the illegal possession of firearms and three to drug-related misconduct. He was convicted twice for drug-related misconduct. In 2002, Applicant submitted a SF 86 in which he deliberately failed to disclose the above information and that he sold drugs for profit. He failed to mitigate the criminal conduct, drug involvement, and personal conduct security concerns. Clearance is denied.

STATEMENT OF THE CASE

On July 19, 2005, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns under Guideline J (Criminal Conduct), Guideline H (Drug Involvement), and Guideline E (Personal Conduct). The SOR informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information. [\(1\)](#)

On August 9, 2005, Applicant answered the SOR (Answer). He admitted the allegations in subparagraphs 1.a. through 1.f, 2.a, and 3.d. He denied the allegations in subparagraphs 3.a through 3.c, and requested a hearing. The case was assigned to me on October 6, 2005. On November 14, 2005, I convened a hearing at which the government presented five exhibits, marked GE 1-5, to support the SOR. [\(2\)](#) Applicant testified and presented four exhibits that were admitted without objection and marked AE 1-4. [\(3\)](#) DOHA received the transcript (Tr.) on November 28, 2005.

FINDINGS OF FACT

Applicant's admissions are incorporated herein as findings of fact. After a thorough review of the pleadings, transcript, and exhibits, I make the following additional findings of fact:

Applicant is 36 years old, has never been married, and lives with his fifteen-year-old son. He obtained a GED in 1989 and, thereafter, held several unskilled jobs. In 1998, he began working as a mail courier for a company that was later acquired by a defense contractor. In light of his good performance, he is now working as an assistant supervisor and requires a clearance upgrade from a postal clearance to a top secret clearance.

From 1988 to 2000, Applicant was charged with criminal misconduct seven times. The charges stem from five different incidents. In 1988, Applicant was convicted of attempted possession of cocaine and sentenced to two years probation. Although he denies ever using drugs, the court required him to complete drug rehabilitation treatment. In 1989, he was charged with possession of an unregistered gun and an ammunition violation. The charges were dismissed. In 1991, he was charged with possession of cocaine with intent to distribute. The charge was later dismissed. In 1994, he was charged with carrying a pistol without a license and receiving stolen property. The charge was dismissed. In 1995, these charges were resurrected and Applicant was again charged with carrying a pistol without a license, possession of a prohibited weapon, and unlawful possession of ammunition. The charges were later dismissed. Finally, in September 2000, Applicant was charged with possession of cocaine with intent to distribute. The charge was initially dismissed and then re-filed in 2001. Applicant entered into a plea agreement and cooperated with the government in the prosecution of his drug supplier. In the process, his case was deferred until October 2004, when he was convicted and placed on probation for five years. Applicant will be on probation until March 2009. [\(4\)](#)

In January 2002, Applicant submitted a SF 86 [\(5\)](#) in which he deliberately provided false answers to questions 21, 22, 23, and 29. He answered "YES" to question 21, which asked whether he had ever been charged with or convicted of any felony offense. [\(6\)](#) He then disclosed his 1988 felony charge for distribution of cocaine as "possession of a controlled substance," and his 2000 charge for possession of cocaine with the intent to distribute as "possession of controlled substance." He failed, however, to disclose his January 1991 felony charge of possession of cocaine with intent to distribute.

Applicant answered "NO" to SF 86 question 22, which asked whether he had ever been charged with or convicted of a firearms offense. He failed to disclose his firearms related charges of 1989, 1994, and 1995. [\(7\)](#) He answered "NO" to question 23, which asked whether he had charges pending against him. He failed to disclose that in December 2001, he had been charged with possession of cocaine with intent to distribute after the original charge of September 2000 was dismissed.

Additionally, he answered "NO" to question 29, which inquired about his use of illegal drugs and drug activity (purchase, sale, transfer, and trafficking) within the last seven years. He failed to disclose he had sold cocaine/crack cocaine for profit from about 1995 to at least September 2000, when he was charged with possession of cocaine with intent to distribute. He also failed to disclose he sold drugs for profit, at least twice, shortly prior to his drug-related arrest in September 2000.

At the hearing, Applicant averred he never intended to falsify his answers or to deceive the government. He claimed he was confused by the SF 86 questions and offered multiple inconsistent explanations for his omissions. Foremost amongst his explanations was that he answered the questions based on his record as it existed in 1998. In June 1998, Applicant applied for his mail clerk job, and knowing that he would be asked about his criminal background, he requested his criminal record from his state's police department.⁽⁸⁾ That document does not list Applicant's 1995, 1994, 1991, and 1989 charges or his 1988 conviction. In January 2002, with full knowledge of his past criminal history, Applicant omitted this from his SF 86 because it was not reflected in his criminal record. His testimony and demeanor leads me to conclude he thought the government or his employer would not find out about his past criminal behavior since it was not reflected in his criminal record.

Applicant's other explanations included: he made the mistake of believing he only had to disclose convictions; he did not know some of the charges were for felony offenses; he was directed by the court not to disclose to anyone that the September 2000 charges had been re-filed because he was cooperating with the government;⁽⁹⁾ and he did not disclose he had been selling drugs during the last seven years because, even though he had been selling drugs on and off, he had not been selling drugs continuously during the seven year period.⁽¹⁰⁾

Applicant testified he sold drugs for profit and expressed remorse for dealing drugs and for the mistakes he made completing the SF 86. He explained his behavior is the product of the bad environment in which he grew up. He comes from a poor family located in a bad neighborhood. His older family members steered him, at early age, into the drug trade. He said his father was a heroin addict who died of an overdose, his cousins, uncles, and brother were addicted to drugs and trafficked drugs. Applicant's brother was shot 16 times as a result of a drug transaction and is now confined to a wheel chair.

As a youngster, Applicant sold cocaine at least twice a month and used his "earnings" to purchase shoes and clothes.⁽¹¹⁾ Applicant also testified he sold drugs six times between 1988 and 2000. He sold drugs whenever he needed clothes or wanted something.⁽¹²⁾ Applicant claimed he decided to stop selling drugs after his mother died in September 2000. He was 30 years old when he was arrested and charged with possession of 50 grams of cocaine with intent to distribute, two days after his mother died. He averred that he was not selling drugs continuously, but that he needed the money to bury his mother. Notwithstanding this last statement, Applicant also testified he sold cocaine a couple of times before his mother died "just to have money in his pocket."⁽¹³⁾ He had been working for his current employer since 1998.

Applicant claimed he no longer sells drugs and that he has changed his lifestyle. He has new friends, and he moved to a different state to avoid associating with other drug users, including those who purchased their drugs from him. Applicant's probation supervisor confirmed he has complied with the conditions of his probation. There is no evidence he has been involved in any additional drug-related misconduct since his arrest in September 2000.

Applicant has dedicated his life to his work, setting a good example for his son, and participating in his son's activities. He loves his job and needs his job to be able to take care of his son. He is considered an excellent employee with extraordinary customer service skills. [\(14\)](#)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's suitability for access to classified information. The administrative judge must take into account both disqualifying and mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive, [\(15\)](#) and the whole person concept. [\(16\)](#) The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the granting or denial of access to classified information. Having considered the record evidence as a whole, I conclude Guideline E (Personal Conduct), Guideline H (Drug Involvement), and Guideline J (Criminal Conduct) are the applicable relevant adjudicative guidelines.

BURDEN OF PROOF

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest [\(17\)](#) for an applicant to either receive or continue to have access to classified information. The government has the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. To meet its burden, the government must establish a prima facie case that it is not clearly consistent with the national interest for the applicant to have access to classified information. The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries a heavy burden of persuasion. [\(18\)](#) A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security. [\(19\)](#)

CONCLUSIONS

Guideline J (Criminal Conduct). A history or pattern of criminal conduct is a security concern because it may indicate an unwillingness to abide by rules and regulations and may show the applicant to be lacking in judgment, reliability and trustworthiness. ⁽²⁰⁾ The government established its case under Guideline J by showing that Applicant was convicted of drug-related offenses in April 1988 and October 2004. Further, he was involved in additional criminal misconduct in November 1989, January 1991, and May 1994. I conclude Guideline J DC 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*, ⁽²¹⁾ and DC 2: *A single serious crime or multiple lesser offenses*, ⁽²²⁾ apply.

I have considered all Criminal Conduct Mitigating Conditions ⁽²³⁾ and find that none apply. Applicant was raised in a culture of drugs and, by his own admission, has been selling drugs for profit since an early age. He was convicted in 1988, placed on probation, and required to undergo drug rehabilitation treatment. Notwithstanding, he did not learn from his mistake as demonstrated by his illegal possession of firearms in 1989 and 1994, possession of cocaine with intent to distribute in 1991, and his 2004 conviction for possession of cocaine with intent to distribute in 2000. He was 30 years old at the time he perpetrated the last offense, employed and possessed a postal clearance, and committed the drug offense just two days after his mother's death.

Under the totality of the circumstances, I find Applicant's criminal behavior is recent and not isolated. Although Applicant's last offense occurred in 2000, his falsification in 2002 brings to the forefront the security concerns raised by his criminal behavior. Further, even though not alleged in the SOR, I must consider in my analysis under whole person concept ⁽²⁴⁾ that his falsification of the SF 86 is a violation of 18 U.S.C. 1001. ⁽²⁵⁾ As such, his falsification weighs against the presence of rehabilitation and positive behavioral changes. In light of the many years he sold drugs, the nature and seriousness of his behavior, the fact that he has been under the close scrutiny of the courts since 2000, and his recent falsification, Applicant failed to present sufficient evidence to demonstrate his successful rehabilitation and/or that the factors leading to his criminal behavior are not likely to recur. Guideline J is decided against the Applicant.

Guideline H (Drug Involvement). Improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. Such conduct may also be criminal and indicative of a disregard for rules and regulations in place to protect national interests. ⁽²⁶⁾ The government established its case under Guideline H by showing that Applicant sold drugs with varying frequency, from around 1988 until December 2000. Further, the government established that Applicant received drug rehabilitation treatment after his 1988 conviction and continued his drug-related behavior until at least 2000. Applicant's testimony leads me to conclude he sold drugs anytime he needed or wanted extra money. Guideline H DC 2: *Illegal drug possession, ... purchase, sale, or distribution*, ⁽²⁷⁾ and DC 5: *... recent drug involvement* ⁽²⁸⁾ apply.

I considered all the Guideline H Mitigating Conditions and, for the same reasons outlined above under the discussion of the Guideline J Mitigating Conditions (incorporated herein), I conclude none apply. Analyzing Applicant's case under the whole person concept, his falsification of the SF 86 and the fact that he has minimized his drug behavior, weigh against mitigating the Guideline H concerns. His illegal involvement with drugs raises questions about his ability and willingness to follow the law, and ultimately, to protect classified information. I find Guideline H against the Applicant.

Guideline E (Personal Conduct). Personal conduct is always a security concern because it asks the ultimate question - whether a person's past conduct instills confidence the person can be trusted to properly safeguard classified information. An applicant's conduct is a security concern if it involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such behavior could indicate that the person may not properly safeguard classified information. [\(29\)](#)

The government established its case under Guideline E by showing that Applicant deliberately provided false answers when he submitted his SF 86. Applicant chose not to disclose his criminal behavior, seemingly, because of his concern for the adverse impact this information would have had on his qualifications to obtain a security clearance. Applicant's explanations for his failure to disclose the information ring hollow in light of the totality of the facts and circumstances, including his age at the time he submitted the SF 86, his demeanor, and his prior statements. [\(30\)](#) I find Applicant's omissions were knowing and deliberate, and committed with the intent to mislead the government. He believed that because his criminal record was incorrect, the government would not find out about his criminal behavior and, therefore, he deliberately omitted the information. Guideline E Disqualifying Conditions (DC) 2: *The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire ...*, [\(31\)](#) and DC 4: *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress ...*, [\(32\)](#) apply.

Applicant was 32 years old at the time he submitted the SF 86. In light of his past behavior - i.e., selling drugs for profit and his other run-ins with the law - his falsifications cannot be attributed to youthful exuberance or stupidity. He deserves credit for changing his lifestyle, for cooperating with the government, and for his concerns regarding the welfare of his son. Notwithstanding, his current behavior is not sufficient to mitigate the security concerns raised by his falsifications. I have considered all the Personal Conduct [\(33\)](#) Mitigating Conditions, and find that none apply. In light of all the facts and circumstances, I conclude Applicant's falsifications are relatively recent and that the motive that led him to falsify the SF 86 - i.e., his desire to cover up his criminal behavior - remains a viable factor that could influence Applicant's future behavior. As such, he is likely susceptible to influence, pressure, or coercion in order to cover up his past criminal behavior from prospective employers and others in his community. Guideline E is decided against the Applicant.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. A fair and commonsense assessment [\(34\)](#) of the record before me reflects a man who is not fully attuned to what the government expects of persons it trusts with access to sensitive information. Considering all relevant and material facts and circumstances present in this case, including Applicant's testimony, the

circumstances that caused his misconduct, the whole person concept, and the adjudicative factors listed in the Directive, I find Applicant has not mitigated his security concerns.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Criminal Conduct (Guideline J) AGAINST THE APPLICANT

Subparagraph 1.a -f Against the Applicant

Paragraph 2, Drug Involvement (Guideline H) AGAINST THE APPLICANT

Subparagraph 1.a Against the Applicant

Paragraph 3, Personal Conduct (Guideline E) AGAINST THE APPLICANT

Subparagraphs 1.a - d 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 the Applicant. Clearance is denied.

Juan J. Rivera

Administrative Judge

1. Required by Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended.
2. I marked the government's exhibit list as GE 6 for Identification.
3. AE 1-3 were admitted at the hearing, and AE 4 was submitted after the hearing. The government's response to Applicant's post-hearing submission was marked Appellate Exhibit 1.
4. AE 4.
5. Office of Personnel Management Security Clearance Application, Standard Form 86.
6. I note that SOR allegation subparagraph 3.a mistakenly alleged that Applicant failed to disclose he was arrested in January 1991, for a felony charge. Consistent with SOR question 21, it should have alleged that Applicant failed to disclose he had been charged with or convicted of a felony offense. Notwithstanding the error, I find that the allegation provided Applicant with adequate notice, that he understood the government's concerns, was prepared for his hearing, and addressed the government's concerns. In his testimony, Applicant attempted to explain and mitigate his failure to disclose he had been charged with other felony offenses.
7. The 1994 and 1995 firearm charges were based on the same incident. Notwithstanding, Applicant was, in fact, charged twice for the same facts and should have been aware of those firearm charges.
8. AE 1.
9. He presented no evidence, other than his testimony, to support this claim.
10. Tr. 97.
11. Tr. 43.
12. Tr. 92.
13. Tr. 55-56.
14. AE 4.
15. Directive, Section 6.3. Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate: the nature and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the age of the applicant; the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation; and the probability that the circumstances or conduct will continue or recur in the future.
16. Directive, E2.2.1.

17. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).

18. *Id.* at 528, 531.

19. *See Egan*; Directive E2.2.2.

20. Directive, E2.A10.1.1.

21. Directive, E2.A10.1.2.1.

22. Directive, E2.A10.1.2.2.

23. Directive, E2.A10.1.3.

24. Directive, Para. 6.3, E2.2.1.

25. It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation, or knowingly make or use a false writing in any matter within the jurisdiction of the executive branch of the Government of the United States. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. (*Egan*, 484 U.S. at 527).

26. Directive, E2.A8.1.1.1.

27. Directive, E2.A8.1.2.2.

28. Directive, E2.A8.1.2.5.

29. Directive, E2.A5.1.1.

30. GE 3 and 4.

31. Directive, E2.A5.1.2.2.

32. Directive, E2.A5.1.2.4.

33. Directive, E2.A5.1.3.

34. Directive, E2.2.3.