

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant gave false information on his security clearance application, answering "No" to a question whether he had used drugs during the past seven years. He admitted deliberately answering the question falsely because he was suffering from attention deficit disorder, anxiety, panic attacks, and fear that he would be prosecuted for any admission of drug use. Clearance is denied.

CASENO: 03-11944.h1

DATE: 08/26/2004

DATE: August 26, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-11944

**DECISION OF ADMINISTRATIVE JUDGE**

**LEROY F. FOREMAN**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Department Counsel

## FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant gave false information on his security clearance application, answering "No" to a question whether he had used drugs during the past seven years. He admitted deliberately answering the question falsely because he was suffering from attention deficit disorder, anxiety, panic attacks, and fear that he would be prosecuted for any admission of drug use. Clearance is denied.

### STATEMENT OF THE CASE

On April 6, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).

The SOR alleges security concerns under Guidelines E (Personal Conduct) and J (Criminal Conduct) of the Directive. Under Guideline E, the SOR alleges that on November 28, 2001, Applicant falsified material facts on his security clearance application by answering "No" to Question 27, asking whether he had used drugs since the age of 16 or in the last seven years, whichever is shorter (para. 1.a). Under Guideline J, the SOR alleges that Applicant's false response on his security clearance application constituted a felony under 18 U.S.C. § 1001 (para. 2.a.) (FORM, Item 1)

Applicant answered the SOR on April 29, 2004. He admitted all the allegations and chose to have his case decided without a hearing. He explained that when he answered Question 27, he was suffering from attention deficit disorder, anxiety, and panic attacks, and he expected to be prosecuted for any admission of drug use. He stated that after an isolated incident of drug use in 1999, he decided not to use illegal drugs again and has not used them since that time.

(FORM, Item 2)

Department Counsel submitted the Government's written case on June 15, 2004. A complete copy of the file of relevant material (FORM) was mailed to Applicant, and he was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant did not respond. The case was assigned to me on August 10, 2004.

### FINDINGS OF FACT

Applicant's admissions of the facts alleged in the SOR are incorporated into my findings of fact. I also make the following findings:

Applicant is a 51-year-old senior scientist with a Ph.D. in physics. He has worked for a defense contractor since October 2001. (FORM, Item 4, pp. 1-2.)

Applicant first used marijuana in 1973. He used it on multiple occasions from 1977 to 1979. He used it "very infrequently" during the 1980's. He smoked marijuana 50-60 times between 1991-1992 and February 1995 and then stopped. He did not smoke marijuana again until one time in 1999. He has not smoked marijuana since 1999, and he asserts that he has no intention of using marijuana in the future because it makes him "sluggish and unable to accomplish things." (FORM, Item 5, pp. 1-2)

Applicant also used "blotter acid" 8-10 times between June 1991 and August 1992. He tried a hallucinogenic mushroom once in May 1989, hashish 2-3 times in 1978, "mood elevator" pills in 1978, and ecstasy twice in 1984. (FORM, Item 5, pp. 2-3)

After Applicant was interviewed by a Defense Security Service (DSS) investigator about his foreign travel and mental health counseling, he contacted the investigator and requested another interview to acknowledge and explain his past drug use. This second interview took place on June 24, 2002. (FORM, Item 5, pp 3-4, 6)

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander-in-Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance

determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

## CONCLUSIONS

Under Guideline E (Personal Conduct), "Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, [or] dishonesty . . . could indicate that the person may not properly safeguard classified information." Directive ¶ E2.A5.1.1. A "deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire" can raise a security concern and may be a disqualifying condition (DC 2). Directive ¶ E2.A5.1.2.2. Under DC 2 there must be "a showing that the applicant acted with intent to mislead or deceive the government by not disclosing the information." ISCR Case No. 00-0302, 2001 DOHA LEXIS 337 at \*5 (App. Bd. Apr. 23, 2001).

Applicant admits that he should have answered the question about drug use in the affirmative, and that he deliberately concealed his drug use because he feared prosecution. Based on Applicant's admissions, DC 2 is established.

In falsification cases, a mitigating condition (MC 3) may apply if "[t]he individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts." Directive ¶ E2.A5.1.3.3. In this case, Applicant contacted the DSS investigator and disclosed his prior drug use before being confronted with his false answer on the security clearance application. Applicant stated that after the DSS investigator interviewed him concerning his activities in foreign countries and his mental health counseling, he "realized that [he] had to be more forthright in [his] response." (FORM, Item 5, p. 3) Applicant's second statement to the DSS agent indicates that, after the first interrogation, he belatedly realized the depth and seriousness of the inquiry being conducted into his past, and he decided to correct the falsification before it was discovered. It suggests that Applicant's primary motivation was to minimize the adverse consequences of his false answer, not to correct the falsification. Applicant has the burden of persuasion on mitigating conditions. Directive ¶ E3.1.15. I conclude that Applicant has not carried his burden of establishing MC 3.

Under Guideline J, "[a] history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness." Directive ¶ E2.A10.1.1. Under DC 2, a single serious crime or multiple lesser offenses can raise a security concern and be disqualifying. Directive ¶ E2.A10.1.2.2. It is a felony, punishable by a fine or imprisonment for not more than 5 years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. Applicant's deliberately false answer on his security clearance application was a serious crime. I conclude that DC 2 is established.

MC 2 applies when the crime was "an isolated incident." Directive ¶ E2.A10.1.3.2. While Applicant's false answer on his security clearance application may be his only crime involving falsification, his falsification was not an isolated

incident of criminal conduct when considered in the context of his drug use. He attempted to conceal his long history of illegal drug use by falsifying his security clearance application. Under these circumstances, I conclude that MC 2 is not established.

MC 6 applies when "[t]here is clear evidence of successful rehabilitation." Applicant has the burden of producing such evidence. Directive ¶ E3.1.15. Applicant admitted to the DSS investigator that he engaged in illegal drug use for almost 20 years. His falsification on his security clearance application must be considered in the context of his long record of illegal activity. Furthermore, there is no evidence in the record that Applicant has faced and overcome the temptation to falsify in other, more recent situations. "Only with the passage of time will there be a track record that shows whether a person, through actions and conduct, is willing and able to adhere to a stated intention to refrain from acting in a way that the person has acted in the past." ISCR Case No. 97-0727, 1998 DOHA LEXIS 302 at \*7 (App. Bd. Aug. 3, 1998). I conclude that Applicant has not produced "clear evidence" of rehabilitation.

Applicant is not an immature youth. He is a highly-educated, mature professional who is expected to act responsibly. *See* Directive ¶ E2.1.4 (age and maturity). He committed a felony to conceal previous illegal activity. *See* Directive ¶ E2.1.7 (motivation for the conduct). His adult life reflects a recurring pattern of questionable judgment and irresponsibility. His explanation for providing false information suggests that he tends to panic and act irresponsibly when under pressure. Applicant has not carried his "ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1, Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Paragraph 2, Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against 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 a security clearance for Applicant. Clearance is denied.

LeRoy F. Foreman

Administrative Judge