

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Because Applicant did not deliberately omit material information from the his security clearance application (SCA) in August 2001, I find in his favor under the personal conduct guideline. Applicant's three drug offenses in the 1980s establish a pattern of criminal conduct that has not been mitigated. His lengthy 10-year sentence and eight year probation term for the December 1989 cocaine sales conviction indicates the extent of Applicant's involvement in the selling of drugs. In addition, under 10 U.S.C. 986, the Department of Defense is prohibited from granting Applicant a security clearance based on his actual incarceration for eight years of his 10 years sentence. While the Secretary of Defense may waive the statutory prohibition in meritorious cases, a waiver is not recommended. Clearance is denied.

CASENO: 03-12930.h1

DATE: 08/31/2005

DATE: August 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-12920

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Nygina T, Mills, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Because Applicant did not deliberately omit material information from the his security clearance application (SCA) in August 2001, I find in his favor under the personal conduct guideline. Applicant's three drug offenses in the 1980s establish a pattern of criminal conduct that has not been mitigated. His lengthy 10-year sentence and eight year probation term for the December 1989 cocaine sales conviction indicates the extent of Applicant's involvement in the selling of drugs. In addition, under 10 U.S.C. 986, the Department of Defense is prohibited from granting Applicant a security clearance based on his actual incarceration for eight years of his 10 years sentence. While the Secretary of Defense may waive the statutory prohibition in meritorious cases, a waiver is not recommended. Clearance is denied.

STATEMENT OF CASE

On October 23, 2003, 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 November 14, 2003. Applicant elected to have his case decided on a written record. The Government provided Applicant a copy of the File of Relevant Material (FORM) on June 24, 2004. Applicant received the FORM on September 13, 2004. His response to the FORM was due by October 13, 2004. No response was received. The case was assigned to me on November 10, 2004.

FINDINGS OF FACT

Criminal Conduct (CC). The SOR contains five allegations of criminal conduct and two allegations of personal conduct. Applicant admitted the criminal conduct but claimed he did not understand the personal conduct allegations. Applicant is 48 years old and has been employed since September 1999 as a key operator for a defense contractor. He seeks a secret security clearance.

On January 19, 1980 (1.a.), Applicant was arrested and charged with possession of marijuana. Even though Applicant admitted the charge, he did not admit or imply he had actually been using marijuana on this occasion. However, I am going assume he was using the drug when he was arrested because he acknowledges in his sworn statement (Item 7) he used both marijuana and cocaine during the 1970s and 1980s. I make the same finding with regard to subparagraph 1.b. that reflects Applicant was arrested and charged on November 24, 1987 with two counts of Distribution of Cocaine. He was convicted of Attempt to Distribute Cocaine, and sentenced to one to three years confinement, less one year probation.

On December 13, 1989, Applicant was charged with (1) Possession of Cocaine, and (2) Possession with Intent to Distribute (1.c.). He was 33 years old when arrested. He was sentenced to 10 years in prison and served eight before a discharge to probation on March 15, 1998. Applicant's probation is scheduled to expire on August 14, 2006.

While on probation, Applicant was arrested on April 10, 1998 for disorderly conduct (1.d.). Applicant paid a \$10.00 fine.

In his sworn statement dated April 24, 2003, Applicant provided the following explanation about his history of using marijuana and cocaine:

In the late 70's and early 80's I participated in the use of marijuana and cocaine with friends. My involvement with these substances let (sic) to my arrest and being charged with possession with intent to distribute around December 1989. I was incarcerated and served a sentence of eight and a half years at [three prison facilities]. During this period of incarceration I underwent counseling. I was released after serving my sentence in March 1998 and have no ill feelings toward law enforcement, laws, or ordinances. (Item 7)

In the conclusion of his sworn statement, Applicant indicated he was complying with all probation requirements. He asserted he had not used drugs since his arrest in 1989 and had no intention of using drugs in the future.

Personal Conduct (PC). On August 17, 2001, Applicant completed a security clearance application (SCA). In response to question 21, requiring information about felony offenses, Applicant listed the 1.c. offense but did not list the 1.b. offense. In response to question 24 of the same form, requiring information about being charged of convicted of any offense involving alcohol or drugs, Applicant identified the 1.c. conviction but did not list the 1.a. and 1.b. offenses. While the omission of the 1.a. and 1.b. offenses is self-evident, a finding for Applicant is based on the fact he provided sufficient detail in his listing of the December 1989 conviction. Listing the most serious crime and sentence in two locations of his SCA satisfies me Applicant was not trying to conceal the remaining offenses from the governmental security investigation.

Character Evidence. Applicant furnished no current information about his lifestyle, marital situation or job status other than the information in his SCA.

POLICIES

Enclosure 2 of the Directive sets forth policy conditions which must be given binding consideration in making security clearance decisions. These conditions must be considered in every case with the nine general factors of the whole person concept and the Administrative Judge's commonsense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the conditions exhaust the entire realm of human experience or that the conditions apply equally in every case.

Criminal Conduct

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

Title 10 United States Code Section 986

On June 7, 2001, Section 986 (c) (1) was added to Title 10 of the United States Code. Section 986 (c) (1) precludes the Department of Defense from the initial granting or renewal of a security clearance if the individual has been convicted

in any court of the United States of a crime and sentenced to imprisonment for a term exceeding a year, regardless of the amount of time they actually served. However, the prohibition may be waived in meritorious cases by the Secretary of Defense. On October 9, 2004, Section 986, (c) (1) was modified by adding the following clause, "***and was incarcerated as a result of that sentence for not less than a year.***" (Emphasis and italics added). On December 14, 2004, DOHA established a moratorium on all cases involving 10 U.S.C. 986, (c) (1). That moratorium was lifted on August 3, 2005.

Personal Conduct

Poor judgment, dishonesty and rule violations are the primary concerns of this guideline.

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 a 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.

CONCLUSIONS

Criminal Conduct (CC). A pattern of criminal conduct may disqualify an individual from being granted a security clearance because if he can defy the criminal laws to satisfy his self-interests, then there a risk he may choose the same course of action about security rules and regulations he decides not to comply with. Between 1980 and 1989, Applicant was arrested for three increasingly serious drug offenses. In 1980, Applicant was arrested for possession of marijuana. Applicant's drug involvement became more serious in November 1987 because he was charged with two counts of distribution of a cocaine, generally considered a dangerous drug. Obviously, the drug laws did not concern Applicant because in December 1989, he was arrested for a two counts of Possession of Cocaine with Intent to Distribute. Though Applicant has supplied no details of the surrounding circumstances of this offense, it is probable that his long sentence and eight-year period of probation was due to (1) his past record for the same type criminal conduct, (2) his arrest of a large amount of cocaine, and (3) the extent of his involvement in the criminal enterprise. Applicant's criminal conduct falls within the scope of CC disqualifying condition (DC) E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*).

In addition to the regulatory guidance provided under the CC guideline of the Directive, Applicant's Possession of Cocaine and Possession with Intent to Distribute convictions in federal court, his sentence of 10 years, and his actual incarceration for eight years, falls within the scope of 10 U.S.C. 986. Absent a waiver, by the Secretary of Defense, Applicant is prohibited from security clearance access.

CC mitigating condition (MC) E2.A10.1.3.1. (*the criminal behavior was not recent*) is applied with the criminal behavior occurred some time ago. The condition has negligible application to these circumstances because Applicant was in prison or on probation since December 1989. He has been aware that he could return to prison for a serious criminal infraction should he violate the law. Therefore, negligible weight can be given to his clean record since 1989. While the behavior was confined to the 1980s, and could be interpreted as being isolated, Applicant was charged with five drug offenses in the 10-year period. The 15 year period since Applicant's last drug conviction must be weighed against the fact Applicant has been in jail or under probation. Hence, Applicant receives no consideration under CC MC E2.A10.1.3.2. (*the crime was an isolated incident*).

Considering the record as a whole, the only evidence I find on the subject of rehabilitation is Applicant's statement that he participated in counseling while in prison, and he has no desire to use drugs in the future. Those two statements do not satisfy Applicant's burden of showing clear evidence of rehabilitation. CC C E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). Applicant did not describe the kind of counseling he had in prison. Applicant did not express any reason why he has remained drug free in the period since his discharge. Applicant has not provided any information about his job or any facet of his lifestyle. The lack of sufficient evidence of successful rehabilitation under CC MC E2.A10.1.3.6. requires a finding against Applicant under the CC guideline. Even if the record had demonstrated sufficient rehabilitation, 10 U.S.C. 986 would still apply because Applicant's federal court sentence was more than a year, and the period of incarceration as a result of that sentence was at least a year. Applicant is ineligible for a security clearance under 10 U.S.C. 986, and a waiver is not recommended.

Personal Conduct (PC). A finding for Applicant is based on the fact he listed the most serious crime in reply to both questions of the SCA. Hence, PC DC E2.A5.1.2.2. (*the deliberate omission of relevant and material facts from any personnel security questionnaire to determine security clearance eligibility*) is inapplicable as I do find the essential element of deliberateness is missing. My decision against Applicant under the CC guideline and for him under the PC guideline has included an evaluation of this case under the general factors of the whole person concept.

FORMAL FINDINGS

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

- a. Against the Applicant.
- b. Against the Applicant.
- c. Against the Applicant.
- d. Against the Applicant.
- e. Against the Applicant.

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

- a. For the Applicant.
- b. For 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. I do not recommend further consideration of this case for a waiver under 10 U.S.C. 986.

Paul J. Mason

Administrative Judge

