

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant knew that information which he provided to the Government in a Security Clearance Application (SCA) in January 2002, regarding his marijuana usage, was materially incorrect and incomplete. Mitigation has not been shown. Clearance is denied.

CASENO: 03-17029.h1

DATE: 03/29/2005

DATE: March 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17029

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant knew that information which he provided to the Government in a Security Clearance Application (SCA) in January 2002, regarding his marijuana usage, was materially incorrect and incomplete. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On November 5, 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, issued a Statement of Reasons (SOR) to Applicant which 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 granted, denied or revoked.

In a signed and sworn statement, dated November 16, 2004, Applicant responded to the SOR allegations. He requested that his case be decided on the written record in lieu of a hearing. Department Counsel submitted the Department's written case, which was prepared on December 28, 2004. A complete copy of the File of Relevant Material (FORM) was provided to Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not file a response to the FORM. The case was assigned to this Administrative Judge on March 17, 2005.

In the FORM, Department Counsel offered six documentary exhibits (Exhibits 1- 6), which have been admitted without objection. Applicant offered no documentary evidence into the record.

Since this matter is being decided without a hearing, my evaluation is necessarily limited to the contents of the various documents that are found in the case file.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the Directive. The SOR contains one allegation, 1.a., under Guideline E, and one allegation, 2.a., under Guideline J. In his Response to the SOR (RSOR), Applicant admitted both of the SOR allegations (Exhibit 3). The admitted allegations are incorporated herein as Findings of Fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR and the admitted documents, and upon due consideration of that evidence, I make the additional Findings of Fact:

Applicant is 26 years old. He is employed by a defense contractor, and he seeks to retain a DoD security clearance in connection with his employment in the defense sector.

Applicant first used marijuana at the age of 17, when he was a senior in high school. He continued to use marijuana, two to four times a week, until he became 19, in August 1997. From then until June 2000, he only used marijuana two or three times at parties. Finally, from June 2000, until February or March 2001, he used marijuana approximately two times a week, after which, he contends, he stopped using marijuana (Exhibit 5).

Applicant purchased much of the marijuana that he used, at times spending as much as \$50 in a month (Exhibit 5).

Paragraph 1 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for a clearance because he furnished untruthful

information to the Government in a response when Applicant completed a signed, sworn SCA on January 24, 2002 (Exhibit 4).

Question #27 asks, "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance . . . ?" Applicant answered "No" to this question. He did not provide any information regarding his marijuana usage which , as discussed above, extended from 1995 to at least March 2001.

Applicant only conceded his marijuana usage when confronted by a Special Agent of the Defense Investigative Service (DSS). In a signed, sworn statement, he declared, "My prior use of marijuana was not previously reported because I was afraid that this information would be reported out of proportion, be misconstrued or wrongfully portrays me as a drug user" (Exhibit 5).

Paragraph 2 (Guideline J - Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal conduct.

As stated in Paragraph 1, on January 24, 2002, Applicant completed a SCA. The Government alleges under 2.a. of the SOR that Applicant furnished to the Government materially incorrect or untrue information, and that such conduct constitutes a violation of Federal Law, Title 18, United States Code 1001, which is a felony.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2)

the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual'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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented.. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

Burden of Proof

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance. This the Applicant has not done.

(Guideline E - Personal Conduct)

With respect to Guidelines E, the evidence establishes that Applicant intentionally and knowingly provided false material information to the Government in a response to a question on a SCA that he executed in January 2002. The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts on a SCA, it is extremely difficult to conclude that he nevertheless possesses the judgment, reliability and trustworthiness required of clearance holders.

In reviewing the Disqualifying Conditions (DCs) under Guideline E, I conclude that DC E2.A5.1.2.2. applies because the information that Applicant provided in his SCA was known by him to be an intentional omission and concealment of relevant and material facts. No Mitigating Conditions (MCs) apply. I resolve Guideline E against Applicant.

(Guideline J - Criminal Conduct)

The Government has established by substantial evidence that Applicant's failure to list his marijuana usage on the SCA is criminal conduct under Title 18 of the United States Code, Section 1001. Both DC E2.A10.1.2., allegations or admissions of criminal conduct, regardless of whether the person was formally charged, and DC E2.A10.1.2.1., a single serious crime or multiple lesser offenses, apply in this case. Applicant has not mitigated this allegation. Guideline J is found against the Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1. a: Against Applicant.

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a: For 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.

Martin H. Mogul

Administrative Judge