

KEYWORD: Drugs; Personal Conduct; Criminal Conduct

DIGEST: In August of 2001, the Applicant was arrested for Making or Uttering a False or Forged Prescription or Written Order. He subsequently pled guilty to this charge. The Applicant was less than candid with the Government, however, as to his forging of the prescription, in a sworn statement executed in December of 2001, and again in a sworn statement executed in February of 2002. These wilful falsifications are violations of 18 U.S.C. 1001. Although the Applicant's isolated Drug Involvement is not recent, there is a fairly recent pattern of Personal Conduct and Criminal Conduct. Mitigation is not shown; and as such, his clearance is denied.

CASENO: 03-17531.h1

DATE: 01/18/2005

DATE: January 18, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17531

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In August of 2001, the Applicant was arrested for Making or Uttering a False or Forged Prescription or Written Order. He subsequently pled guilty to this charge. The Applicant was less than candid with the Government, however, as to his forging of the prescription, in a sworn statement executed in December of 2001, and again in a sworn statement executed in February of 2002. These wilful falsifications are violations of 18 U.S.C. 1001. Although the Applicant's isolated Drug Involvement is not recent, there is a fairly recent pattern of Personal Conduct and Criminal Conduct. Mitigation is not shown; and as such, his clearance is denied.

STATEMENT OF THE 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, issued a Statement of Reasons (SOR) to the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

Applicant filed an Answer to the SOR on January 5, 2004.

Applicant elected to have this case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) on July 6, 2004. Applicant was instructed to submit objections or information in rebuttal, extenuation or mitigation within 30 days of receipt of the FORM. Applicant received his copy on July 29, 2004, and Applicant's reply was received on August 27, 2004. The case was received by the undersigned for

resolution on January 6, 2005. The issues raised here are whether the Applicant's past Drug Involvement, and his Criminal and Personal Conduct militate against the granting of a security clearance. [The Applicant denies the underlying facts upon which his guilty plea was predicated, and denies any wilful falsifications.]

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the File of Relevant Material and Applicant's Response. The Applicant is 37 years of age, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact.

Guideline H - Drug Involvement

1.a. The Applicant was prescribed the drug, Percocet, in August of 2001 (Item 5 at page 1). The Applicant avers the following: "My normal doctor was not in town at the time, and I was due to go on a trip. When I got the prescription I decided to alter it from twelve of the Percocet pills to reflect 120 of the pills. When I took the prescription to the pharmacy, I was arrested with the forged prescription" (*id*). In January of 2002, the Applicant pled guilty to Making or Uttering a False or Forged Prescription or Written Order (Items 9 and 10). The case was continued for one year; and upon a showing of drug free good behavior, the charge was reduced (*id*, and Item 3 at page 1).

Guideline E - Personal Conduct & Guideline J - Criminal Conduct

2.a. and 3.a. In a signed sworn statement executed in December of 2001, the Applicant averred, "I did not pay attention to the prescription nor the amount" (Item 7 at page 4). This was a wilful falsification as the Applicant had, in fact, altered the prescription (Item 5 at page 1). This wilful falsification is also a violation of 18 U.S.C. 1001.

2.b. and 3.a. In a second signed sworn statement executed in February of 2002, the Applicant averred, "I was arrested . . . and charged with uttering a false prescription. . . . I was innocent of this charge" (Item 6 at page 1). This was a wilful falsification as the Applicant had, in fact, altered the prescription (Item 5 at page 1). This wilful falsification is also a violation of 18 U.S.C. 1001.

2.c. and 3.a. Finally, in a third signed sworn statement executed in September of 2002, the Applicant admitted, "When I got the prescription I decided to alter it from twelve of the Percocet pills to reflect 120 of the pills" (Item 5 at page 1). There is no evidence that the Applicant did not also tell the truth during his interview, as is alleged, prior to executing this sworn statement.

Mitigation

The Applicant offers little in the way of mitigation. In his reply to the Government's FORM, the Applicant maintains his innocence, despite his admission in his September 2002 sworn statement that he altered the prescription (Item 5 at page 1).

POLICIES

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. The conditions should be followed in every case according to the pertinent criterion, however, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security clearance case presents its own unique facts and circumstances, it should not be assumed that these conditions exhaust the realm of human experience, or apply equally in every case.

As set forth in the Directive, "[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:

- a. Nature, extent, and seriousness of the conduct, and surrounding circumstances.

- b. Frequency and recency of the conduct.

c. Age and maturity of the applicant.

d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.

e. Absence or presence of rehabilitation.

f. Probability that circumstances or conduct will continue or recur in the future."

The Administrative Judge, however, can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must make out its case under Guideline E (Personal Conduct), Guideline H (Drug Involvement), and Guideline J (Criminal Conduct), which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

Personal Conduct is conduct involving questionable judgement, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations. The commission of Criminal Conduct also reflects a lack of judgment and discretion. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an applicant has demonstrated a lack of respect for the law in his private affairs, there then exists the possibility that an applicant may demonstrate the same attitude towards security rules and regulations.

CONCLUSIONS

Considering first the Applicant's Drug Involvement, he altered a drug prescription in August of 2001. The first disqualifying condition is therefore applicable as there was "drug abuse;" i.e., "use of a legal drug in a manner that deviates from approved medical direction." However, the first and second mitigating conditions are also applicable as the "drug involvement was not recent," more than three years ago, and it "was an isolated . . . event." As mitigation is shown, Guideline H is found for the Applicant.

The same can not be said, however, as to his Personal Conduct and related Criminal Conduct. The Applicant was not truthful as to his altering the prescription when he executed his December 2001 sworn statement, and he continued this ruse when he executed his February 2002 sworn statement. The third disqualifying condition under Personal Conduct is therefore applicable; i.e., "[d]eliberately providing false or misleading information concerning relevant and material to an investigator . . . in connection with a personnel security or trustworthiness determination." Under Criminal Conduct, the first disqualifying condition is clearly applicable as there are "[a]llegations . . . of criminal conduct, regardless of whether the person was formally charged." I can find no countervailing mitigating conditions here as the last violation of 18 U.S.C. 1001 was fairly recent, less than two years ago; and as there were repeated violations of this Federal Statute, the criminality was not "an isolated incident." The Applicant's repeated lack of candor is clearly of security significance; and as such, Guidelines E and J are found against the Applicant.

Considering all the evidence, the Applicant has not rebutted the Government's case regarding his Personal Conduct and related Criminal Conduct. The Applicant has thus not met the mitigating conditions of Guidelines E and J, and of Section E.2.2. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Guidelines E and J.

FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: FOR THE APPLICANT

a. For the Applicant.

Paragraph 2: AGAINST THE APPLICANT

- a. Against the Applicant.
- b. Against the Applicant.
- c. For the Applicant.

Paragraph 3: AGAINST THE APPLICANT

- a. Against the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

In light of 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.

Richard A. Cefola
Administrative Judge