

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant was arrested for or charged with criminal conduct six times between 1983 and 1999. Also, he deliberately omitted information about his criminal conduct when he completed a security clearance application (SF 86) and when he was interviewed by a Defense Security Service (DSS) special agent. He has failed to mitigate security concerns under Guideline E (personal conduct) and Guideline J (criminal conduct). Clearance is denied.

CASENO: 03-17692.h1

DATE: 08/31/2005

DATE: August 31, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-17692

**DECISION OF ADMINISTRATIVE JUDGE**

**MATTHEW E. MALONE**

**APPEARANCES**

**FOR GOVERNMENT**

Jason Perry, Esquire, Department Counsel  
Francisco Mendez, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant was arrested for or charged with criminal conduct six times between 1983 and 1999. Also, he deliberately omitted information about his criminal conduct when he completed a security clearance application (SF 86) and when he was interviewed by a Defense Security Service (DSS) special agent. He has failed to mitigate security concerns under Guideline E (personal conduct) and Guideline J (criminal conduct). Clearance is denied.

**STATEMENT OF THE CASE**

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>(1)</sup> it is clearly consistent with the national interest to give Applicant a security clearance. On December 28, 2004, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline E (personal conduct) and Guideline J (criminal conduct). Applicant timely answered the SOR, admitted with explanation all of the SOR allegations, and requested a hearing.

The case was assigned to me on February 16, 2005, and I convened a hearing March 25, 2005. The parties appeared as scheduled and the government presented seven exhibits (GE 1 through 7), which were admitted without objection. Applicant testified in his own behalf. DOHA received the transcript (Tr) on April 7, 2005.

**PROCEDURAL ISSUE**

At hearing, Department Counsel moved to amend the SOR. Specifically, the government requested that SOR ¶ 2.b be

changed to delete reference to Applicant's 1999 arrest as also listed in SOR ¶ 1.a. Without objection, I granted the motion. <sup>(2)</sup>

### **FINDINGS OF FACT**

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is 44 years old and employed as a technician for a defense contractor. He requires a security clearance as part of his job description, which includes physical access to DoD sites for cable installation projects.

Applicant used marijuana with varying frequency from about 1976 until 1999. During that time, he was arrested for possession of marijuana in 1999 (SOR ¶ 1.a), possession of marijuana in 1989 (SOR ¶ 1.b), possession of a weapon and carrying prohibited narcotic equipment in 1985 (SOR ¶ 1.d), and possession of marijuana in 1982 (SOR ¶ 1.f). When he was arrested in 1999, rather than "rat" on a friend, Applicant lied to police by stating the very small amount of marijuana found in his car belonged to him.

Applicant submitted a security clearance application (SF 86) in January 2002. In response to question 24, which asked whether he had ever been charged with or convicted of any alcohol or drug-related offense, Applicant disclosed only his 1999 arrest. Applicant did not ask for help or advice before he submitted the SF 86. However, at or after the time he submitted the form, his boss asked him if he had told the truth. Applicant answered he had been truthful given his understanding he only had to go back seven years. His boss corrected Applicant and made clear Applicant was required to disclose his drug arrests even beyond seven years. <sup>(3)</sup>

During the background investigation conducted after he submitted his SF 86, agents from the Defense Security Service (DSS) interviewed Applicant three times. During the first interview in June 2002, Applicant described his use of marijuana and his 1999 arrest. In a follow-up interview in July 2002, Applicant discussed much of the same information, but also asserted he had "never had any other adverse contacts with law enforcement agencies." <sup>(4)</sup> In his next interview in June 2003, Applicant stated he omitted his other arrests from his SF 86 and during his July 2002 interview because he thought he only had to disclose such adverse information if it had occurred in the preceding seven years.

When Applicant was arrested for carrying a weapon in 1985, the weapon in question was a night stick. There is no information in the record to the effect that he has ever been arrested for having a firearm. Nor is there any information in the government's documents identifying the weapon he was carrying when arrested. In response to SF 86 question 22, which asked if Applicant had ever been charged with or convicted of a firearms charge, Applicant answered "no."

In December 1989, Applicant was charged with contempt of court after he failed to appear in court pursuant to a moving violation (SOR ¶ 1.c). Applicant had also been charged with the same offense in April 1981 (SOR ¶ 1.g). In 1983, Applicant was charged with leaving the scene of an accident, driving on a suspended license, and careless driving. He was eventually fined \$500 (SOR ¶ 1.e).

## POLICIES

The Directive sets forth adjudicative guidelines<sup>(5)</sup> for consideration when evaluating an Applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. 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 grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (personal conduct) and Guideline J (criminal conduct).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>(6)</sup> for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for the Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden 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 bears a heavy burden of persuasion.<sup>(7)</sup> 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 in ensuring 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 in favor of the government.<sup>(8)</sup>

## CONCLUSIONS

Under Guideline E, a security concern arises where it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information.<sup>(9)</sup> Here, the government questions Applicant's trustworthiness because it appears he deliberately falsified his SF 86 and a statement he gave to DSS during one of his subject interviews. SOR 2.a alleges he deliberately falsified his answer to SF 86 question 22 regarding firearms charges. However, other than Applicant's testimony, there is no available information about the weapon in question. I conclude the government has failed to establish the allegation in SOR ¶ 2.a.

As to the remaining allegations in SOR 2.b and 2.c, the government has established that Applicant deliberately omitted from his SF 86 and his second DSS interview his drug-related arrests from 1989, 1985, and 1982. Applicant insists he thought the scope of question 24 was limited to the preceding seven years; however, I conclude from the weight of all the available information about Applicant's truthfulness that Applicant intended to mislead the government about these incidents.

Specifically, after he submitted his SF 86, but before his first DSS interview, his boss told him the scope went beyond seven years to include any drug or alcohol-related offenses in his past. Nonetheless, when Applicant was interviewed by DSS a second time about his drug use and arrest record, Applicant denied having been arrested at any time other than the 1999 arrest alleged in SOR ¶ 1.a. Further, Applicant lied to the police about whose drugs were in his car when he was arrested in 1999.

While it may be understandable that Applicant did not understand the SF 86 questions, once his boss clarified the scope of the inquiries, Applicant could not then use the same rationale to withhold the information during his DSS interview. I conclude Applicant deliberately attempted to mislead the government about the true extent of his arrest record in both his SF 86 and during his interview with DSS. In light of the foregoing, Guideline E disqualifying condition (DC) 2<sup>(10)</sup> and DC 3<sup>(11)</sup> apply. By contrast, Applicant's Answer and hearing testimony are not sufficient to support application of any of the listed mitigating conditions (MC) under Guideline E. I conclude this guideline against the Applicant.

Criminal conduct, as addressed under Guideline J, 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 reliability and trustworthiness.<sup>(12)</sup> Here, the government has established through record evidence and Applicant's own admissions that Applicant was arrested for or charged with various minor criminal offenses between 1981 and 1999. Guideline J DC 1<sup>(13)</sup> and DC 2<sup>(14)</sup> apply.

By contrast, Applicant's criminal conduct was generally related to his drug use, which ceased in 1999. The absence of any recent similar conduct,<sup>(15)</sup> combined with Applicant's more stable lifestyle, supports Application of Guideline J mitigating condition (MC) 1<sup>(16)</sup> and MC 6.<sup>(17)</sup>

I have carefully weighed all of the available evidence, and I have applied the appropriate disqualifying and mitigating conditions. Further, I have tried to make a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. Based on available information about Applicant's unwillingness to fully disclose information about his arrest record, reasonable doubts persist about his ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Given the record before me, I conclude Applicant has not overcome the government's case.

### **FORMAL FINDINGS**

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline J (Criminal Conduct): FOR THE APPLICANT

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: For the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d: For the Applicant

Subparagraph 1.e: For the Applicant

Subparagraph 1.f: For the Applicant

Subparagraph 1.g: For the Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 2.a: For the Applicant

Subparagraph 2.b: Against the Applicant

Subparagraph 2.c: 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.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Tr., p. 13 - 15.
3. Tr., p. 46 - 47.
4. GE 3.
5. Directive, Enclosure 2.
6. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
7. *See Egan*, 484 U.S. at 528, 531.
8. *See Egan*; Directive E2.2.2.
9. Directive, E2.A5.1.1.
10. Directive, E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;
11. Directive, E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination;
12. Directive, E2.A10.1.1.
13. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
14. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
15. In closing argument, the government urged me to consider Applicant's deliberate falsifications, which violate 18

U.S.C. § 1001, as recent criminal conduct. I decline to do so in the absence of such an SOR allegation. The government had information about Applicant's falsifications available when it made the preliminary decision to deny Applicant's request for clearance. The bases for that decision are expressed in the SOR.

16. Directive, E2.A10.1.3.1. The criminal behavior was not recent;

17. Directive, E2.A10.1.3.6. There is clear evidence of successful rehabilitation.