

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: On his security clearance application dated August 26, 1998, Applicant denied using drugs since age 16 or during the last seven years. He later admitted to a security investigator that he used marijuana on a daily basis from 1987 to 1995 and used methamphetamine from 1990 to 1991. In a second interview he again stated that he last used marijuana in 1995. In a third interview, he admitted using marijuana frequently until 1995 and "only about four times yearly until 1998. In his answer to the SOR, Applicant eventually admitted that he used marijuana, with varying frequency including daily use, from 1983 to 1998, and he used methamphetamine with varying frequency including weekly use, from 1990 to 1993. No mitigating conditions were established. Clearance is denied.

CASENO: 03-17843.h1

DATE: 09/30/2004

DATE: September 30, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-17843

**DECISION OF ADMINISTRATIVE JUDGE**

**LEROY F. FOREMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer Campbell, Esq., Department Counsel

## FOR APPLICANT

*Pro Se*

### SYNOPSIS

On his security clearance application dated August 26, 1998, Applicant denied using drugs since age 16 or during the last seven years. He later admitted to a security investigator that he used marijuana on a daily basis from 1987 to 1995 and used methamphetamine from 1990 to 1991. In a second interview he again stated that he last used marijuana in 1995. In a third interview, he admitted using marijuana frequently until 1995 and "only about four times yearly until 1998. In his answer to the SOR, Applicant eventually admitted that he used marijuana, with varying frequency including daily use, from 1983 to 1998, and he used methamphetamine with varying frequency including weekly use, from 1990 to 1993. No mitigating conditions were established. Clearance is denied.

### STATEMENT OF THE CASE

On May 10, 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 Applicant falsified a material fact on his security application by answering "no" to the question whether he had been used drugs since the age of 16 or the last seven years, whichever is shorter, and by providing false information regarding the duration and frequency of his drug and marijuana use in three successive interviews with a Defense Security Service (DSS) investigator. Under Guideline J, the SOR alleges that Applicant's falsification on the security clearance application and false statements to a DSS investigator were felonies under Title 18, United States Code, Section 1001.

Applicant answered the SOR in writing on June 2, 2004, admitted all the allegations in the SOR, submitted explanations for his conduct, and elected to have the case decided on the written record in lieu of a hearing.

Department Counsel submitted the Government's written case on July 21, 2004. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on August 12, 2004 and responded on August 19, 2004. The case was assigned to me on September 17, 2004.

## FINDINGS OF FACT

Applicant is a 35-year-old technician for a defense contractor. On August 26, 1998, he executed a security clearance application (SF 86) in which he answered "no" to a question whether he had used drugs since the age of 16 or in the last seven years, whichever is shorter.

In a signed, sworn statement to a Defense Security Service (DSS) investigator on April 13, 1999, Applicant admitted that he used marijuana on a daily basis from 1987 to 1995 and used methamphetamine from 1990 to 1991. (Government Exhibit 5, pp. 1-2) On May 4, 1999, Applicant orally told a DSS investigator that he last used marijuana in July 1995. In a signed, sworn statement to a DSS investigator on July 13, 1999, Applicant told the investigator that he used marijuana "only about four times yearly" from July 1995 to May 1998. (Government Exhibit 6, p. 2)

Based on Applicant's admissions in his answer to the SOR, I find that he used marijuana with varying frequency, including daily use, from approximately 1983 to 1998, and he used methamphetamine with varying frequency, including weekly use, from approximately 1990 to 1993.

## 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. Similarly, "[d]eliberately providing false or misleading information concerning relevant and material matters to an investigator . . . in connection in a personnel security or trustworthiness determination" may be a

disqualifying condition (DC 3). When deliberate falsification is alleged 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).

In his answer to the SOR, Applicant admitted falsely answering Question 27 on the SF 86 in the negative, explaining that he was embarrassed to admit the past use of illegal substances. (Government Exhibit 3, p. 1) Based on his admission, DC 2 is established.

In a signed, sworn statement to a Defense Security Service (DSS) investigator on April 13, 1999, Applicant admitted that he used marijuana on a daily basis from 1987 to 1995 and used methamphetamine from 1990 to 1991. (Government Exhibit 5, pp. 1-2) In his answer to the SOR, Applicant admitted that the dates in this statement are "incorrect," and he admitted that he used marijuana from approximately 1983 to 1998 and used methamphetamine from 1990 to 1993. (Government Exhibit 3, p. 1)

In an interview on May 4, 1999, Applicant told a DSS investigator that he last used marijuana in July 1995. In his answer to the SOR, Applicant admitted that the date in this statement was incorrect because he used marijuana from 1983 to 1998. (Government Exhibit 3, p. 1)

In a signed, sworn statement to a DSS investigator on July 13, 1999, Applicant stated that he used marijuana "only about four times yearly" from July 1995 to ay 1998. (Government Exhibit 6, p. 2) In his answer to the SOR, Applicant admitted that he used marijuana "with varying frequency, to include daily use" during that period. (Government Exhibit 3, p. 1)

In his response to the FORM, Applicant asserted that the information given to the DSS investigator during the three inquiries was given to the best of his ability. He states that he never intended to falsify material facts. In this case, Applicant did not totally omit the information regarding drug use. Instead, he misrepresented the frequency and duration of his drug use. Proof that Applicant omitted material facts shifted the burden to him to negate a finding that the omission was deliberate. *See* ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004). Based on this record, I conclude that Applicant has not negated knowing and deliberate falsification. Accordingly, I conclude that DC 3 is established with respect to each of the three interviews by DSS investigators (SOR, paras. 1.b., 1.c., and 1.d.).

Under Guideline E, a mitigating condition (MC 3) may apply if the applicant "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 made partial disclosure each time he was confronted, but he never fully disclosed the extent of his drug and marijuana use until he responded to the SOR. I conclude that MC 3 is not established. I also conclude that no other mitigating factors are established by the evidence.

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 and his omission of material facts in each of the three DSS interviews were serious crimes. I conclude that DC 2 is established. I also conclude that no mitigating conditions are established.

### **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

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: 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 to Applicant. Clearance is denied.

LeRoy F. Foreman

Administrative Judge