

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant is a 25-year-old man employed as a mechanic. He is unable to successfully mitigate the security concerns of personal conduct (falsification of a security-clearance application) and a history of criminal conduct. Clearance is denied.

CASENO: 03-25729.h1

DATE: 10/17/2005

DATE: October 17, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-25729

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 25-year-old man employed as a mechanic. He is unable to successfully mitigate the security concerns of personal conduct (falsification of a security-clearance application) and a history of criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On January 25, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline E for personal conduct (falsification) and Guideline J for criminal conduct. Applicant replied to the SOR with a complete Answer on or about March 6, 2005. He admitted the allegations in the subparagraphs of the SOR, except for subparagraph 2.e, which he neither admitted nor denied. Also, he indicated he desired a decision without a hearing.

On April 6, 2005, Department Counsel submitted his written case consisting of all relevant and material information that could be adduced at a hearing. This so-called File of Relevant Material (FORM) was mailed to Applicant and it was received by him on April 14, 2005. Applicant did not submit any information within the 30-day period after receiving the FORM. The case was assigned to me on May 31, 2005. Issuing a decision was delayed due to a heavy caseload.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the

record, I make the following findings of fact:

Applicant is a 25-year-old man who is a native-born U.S. citizen. He is employed as a mechanic. The record is silent concerning the character or quality of his work performance. He is single with no children. He earned a high-school diploma in July 1998.

It appears Applicant is seeking to obtain a security clearance for the first time. On or about April 29, 2003, Applicant completed and signed a security-clearance application. In doing so, he was required to certify that his statements on the application were true, complete, and correct to the best of his knowledge and belief and made in good faith. Applicant has a history of criminal conduct and marijuana use, and he answered certain questions on his security-clearance application as follows:

1. In response to Question 24, ⁽²⁾ Applicant answered "no" denying any drug- or alcohol-related offenses.
2. In response to Question 26, ⁽³⁾ Applicant answered "no" denying any arrests, charges, or convictions within the last seven years that were not reported elsewhere.
3. In response to Question 27, ⁽⁴⁾ Applicant answered "no" denying using marijuana and any other illegal drugs within the relevant period.

To sum up, Applicant submitted a "clean" security-clearance application that did not disclose any derogatory or negative information about himself.

The background investigation revealed Applicant has a history of marijuana use and criminal conduct. Concerning marijuana use, Applicant began using marijuana sometime in 1997 and continued until about June 1999. He typically smoked marijuana with his friends. He typically used a pipe, rolled joints or blunts, or a bong to smoke it. He typically smoked marijuana about once a month, and he would purchase marijuana about once every three months for his personal use or to share with friends. He denies using marijuana since his June 1999 arrest. Applicant did not report his marijuana use in response to Question 27 or any other question on his security-clearance application.

Concerning criminal conduct, Applicant has been arrested by the police four times starting in June 1999. His last arrest was in January 2002. None of these incidents were reported on Applicant's security-clearance application.

In June 1999, Applicant was arrested for the offenses of possession with intent to distribute marijuana, possession of drug paraphernalia, and possession of marijuana. Applicant was taken to jail where he sat for several days until he was able to post bond. Applicant was never tried, and the charges against him were *nolle prossed*. Applicant was told by his lawyer that the prosecution took such action due to an illegal search. Applicant did not report these drug charges in response to Question 24 or any other question on his security-clearance application.

In February 2000, Applicant was drinking beer in a bar where he got into an argument with another customer. A fight ensued, resulting in a brawl involving others. The police arrived and broke up the brawl. The police arrested Applicant, took him to jail, and charged him with second-degree assault. Subsequently, Applicant was found guilty of the charge, and the state court sentenced him to 90 days in jail, with 83 days suspended. He served seven days in county jail, and he was placed on probation for one year and six days. Applicant did not report this arrest and conviction in response to Question 26 or any other question on his security-clearance application.

In July 2000, after three hours of drinking shots of tequila at a bar, Applicant and a friend were walking back to their hotel when Applicant bet his friend he could jump over an oncoming car. He lost the bet when he landed on the roof of an unmarked police car, and he arrested and charged with malicious destruction of property and disorderly conduct. Subsequently, Applicant appeared in court, and the charges against him were *nolle prosequitur*. Applicant did not report these charges in response to Question 26 or any other question on his security-clearance application.

In January 2002, Applicant was arrested and charged with driving under the influence (DUI). He was taken to jail and released the next day. In June 2002, he appeared in court and was placed on probation for 18 months without a finding of guilt (probation before judgment). Also, he was required to attend a 20-week alcohol-education program and pay a fine. Applicant did not report the DUI offense in response to Question 24 or any other question on his security-clearance application.

In September 2003, Applicant was interviewed during the background investigation. The interview produced a sworn statement wherein he addressed his marijuana use and criminal history. Concerning why such information was not reported on his security-clearance application, he offered the following explanation:

I tried to go back and correct myself, but the computer I was working on would not let me go back and fix it. I knew that the information I gave was going to be checked by the government, so I really had no reason to lie. I know also that a couple of questions were hard for me to understand. I did not intend to falsify the security paperwork not did I intend to hide any of this information.

Applicant provided another sworn statement in October 2003. Concerning why his marijuana use and criminal history was not reported, Applicant offered another explanation:

I think that I initially put the wrong answer to the arrest, drug and alcohol questions because I was quickly skimming over the questions, trying to get done. It took me about three hours to complete. I was at work, after hours, trying to finish to get home. I did not purposely omit this information from my security paperwork, nor did I intend to falsify my security paperwork.

In his Answer to the SOR, Applicant admitted the falsification allegations. He offered no further explanation or justification for not reporting his marijuana use and criminal history in response to Questions 24, 26, and 27.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.⁽⁵⁾ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁶⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁷⁾ The government has the burden of proving controverted facts.⁽⁸⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁹⁾ The DOHA ⁽¹⁰⁾

Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.

"Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹¹⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽¹²⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹³⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁴⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully.

An omission of relevant and material information, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or thought the arrest had been expunged from the record and did not need to be reported.

Here, based on the record evidence as a whole, the government established its case under Guideline E. I conclude Applicant deliberately falsified his answers to Questions 24, 26, and 27. I reach this conclusion based on his admissions to the falsification allegations in his Answer coupled with his inconsistent statements, as quoted above, explaining why he did not report the information. His first story was he had difficulty using the computer program. His second story was he missed the questions due to skimming over them too quickly. His inconsistent statements undermine his credibility. In addition, considering his periodic use of marijuana during 1997 - 1999 (which ended in June 1999 when he was arrested for drug-related offenses), and with his four run-ins with the law, Applicant's claim in his sworn statements that he did not intend to falsify his "security paperwork" is a completely far-fetched statement. In other words, given the totality of facts and circumstances, I cannot conclude Applicant made a good-faith effort to complete his security-clearance application in an accurate and truthful way. Accordingly, DC 2⁽¹⁵⁾ applies against Applicant. His falsifications create doubt about his judgment, reliability, and trustworthiness.

I reviewed the mitigating conditions under Guideline E and conclude none apply. Falsification of a security-clearance application is a serious matter, not easily mitigated or extenuated. Accordingly, Guideline E is decided against Applicant.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Here, based on the record evidence as a whole, the government established its case under Guideline J. Applicant's criminal history includes (1) the marijuana charges that were *nolle processed*, (2) the bar fight resulting in a second-degree assault conviction, (3) the car-vaulting incident where the charges were *nolle processed*, and (4) the DUI offense in 2002. Also, Applicant's falsification of three questions on his security-clearance application violates 18 U.S.C. § 1001 (making a false statement within the jurisdiction of a federal agency), which is a felony-level offense. Accordingly, DC 1-(16) and DC 2-(17) apply against Applicant. His criminal conduct creates doubt about his judgment, reliability, and trustworthiness.

I reviewed the mitigating conditions under Guideline J and conclude none apply. In particular, MC 1 (18) does not apply given the DUI offense in 2002 and the falsification of the security-clearance application in 2003. MC 2 (19) does not apply due to the multiple incidents of criminal conduct over a period of years. And C 6 (20) does not apply, because insufficient time has passed without recurrence of further criminal conduct to conclude that Applicant has truly reformed his ways. Accordingly, Guideline J is decided against Applicant.

To conclude, I considered Applicant's age when he engaged in his four instances of criminal conduct. Ordinarily, I would be inclined to view such behavior as the product of youthful indiscretion. Applicant's criminal conduct, however, combined with lying on his security-clearance application, generates too much doubt to allow for a favorable decision. Applicant may be able to prove otherwise in the future, but now it is simply too soon to tell if he possesses the maturity, good judgment, reliability, and trustworthiness that are essential for holding a security clearance. In reaching my decision, I have considered the evidence as a whole, both favorable and unfavorable, the whole-person concept, the clearly-consistent standard, and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline E: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

SOR ¶ 2-Guideline J: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

Subparagraph d: Against Applicant

Subparagraph e: 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 or continue a security clearance for Applicant. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Question 24 states, in relevant part, "Have you ever been charged with or convicted of any offense(s) related to drugs or alcohol?".
3. Question 26 states, in relevant part, "In the last seven years have you been arrested for, charged with, or convicted of any other offense(s) not listed" in the security-clearance application?
4. Question 27 states, in relevant part, "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, . . .?".

5. Executive Order 10865, § 7.
6. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
7. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
8. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
9. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
10. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
11. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
12. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
13. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
14. *Egan*, 484 U.S. at 528, 531.
15. E2.A5.1.2.2. The deliberate omission, concealment, of 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.
16. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
17. E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
18. E2.A10.1.3.1. The criminal behavior was not recent.
19. E2.A10.1.3.2. The crime was an isolated incident.
20. E2.A10.1.3.6. There is clear evidence of successful rehabilitation.