

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant is a divorced, 50-year-old employee of a federal contractor, employed as an electronic technician II. On a 1987 security clearance questionnaire, he gave false answers to two questions about prior illegal drug use. He did not disclose the truth about this usage until a third DSS interview, and after failing a polygraph test. He successfully mitigated the alleged false responses to a 2002 security clearance application, and about a job termination for alleged drug use. He failed to mitigate allegations of criminal conduct. He did not mitigate security concerns about his trustworthiness and honesty. Clearance is denied.

CASE NO: 04-00536.h1

DATE: 06/16/2006

DATE: June 16, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-00536

DECISION OF ADMINISTRATIVE JUDGE

CHRISTOPHER GRAHAM

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a divorced, 50-year-old employee of a federal contractor, employed as an electronic technician II. On a 1987 security clearance questionnaire, he gave false answers to two questions about prior illegal drug use. He did not disclose the truth about this usage until a third DSS interview, and after failing a polygraph test. He successfully mitigated the alleged false responses to a 2002 security clearance application, and about a job termination for alleged drug use. He failed to mitigate allegations of criminal conduct. He did not mitigate security concerns about his trustworthiness and honesty. Clearance is denied.

STATEMENT OF THE CASE

On April 27, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR alleged reasons under Guidelines E (personal conduct) and J (criminal conduct) 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 Applicant's security clearance.

In a written statement dated February 10, 2005, Applicant responded to the allegations in the SOR and requested a hearing. The case was previously assigned to another administrative judge on July 18, 2005, but was reassigned to me on September 23, 2005, due to caseload considerations. Notice of the hearing was issued September 30, 2005, scheduling the hearing for October 27, 2005. The hearing was held as scheduled. The transcript (Tr.) was received November 9, 2005. At the hearing, the government offered eight exhibits and Applicant submitted six exhibits. Applicant testified in his own behalf.

FINDINGS OF FACT

Applicant denied the allegations in the SOR. I make the following findings of fact:

Applicant is a divorced 50-year-old employee of a federal contractor employed as an electronic technician II. (1) A 17 year-old daughter and her child reside with him. (2) He is a high school graduate and served in the U. S. Navy from 1973 to 1979, receiving an honorable discharge. (3) He has held a security clearance since 1973. (4)

In January 2001, he was terminated by another contractor for failing a drug test. (5) While he admitted that he was terminated for that reason, he has vehemently denied that he was using drugs at the time of the test. He denied culpability in a DSS interview. (6) He requested a copy of his results and the company has refused to give it to him. His wife had medical bills in excess of \$50,000.00 and he suspects that he was terminated due to these large medical bills. The company was self-insured. (7) He heard comments about being terminated because of his wife's substantial medical bills from his friends. (8)

In response to Standard Form 86 (SF 86) (1987), **Question 18. MEDICAL/FINANCIAL a.** "Have you ever used any narcotic, depressant, stimulant, hallucinogen (to include LSD or PCP) or Cannabis (to include marijuana or hashish) except as prescribed by a licensed physician," he answered "No." (9) During his first and second DSS interview in 2003, he denied using drugs. He took a polygraph exam, but failed when asked if he ever had prescription drugs in his possession that did not belong to him. (10) His wife was a drug addict, he had put her into rehabilitation three times, and he kept her medication locked up and would distribute it to her at the prescribed times. After failing the polygraph, he gave a third statement admitting smoking marijuana while in the Navy. (11) In response to **Question 18. MEDICAL/FINANCIAL b.** "Have you ever been involved in the illegal purchase, possession, or sale of any narcotic, depressant, stimulant, hallucinogen, or Cannabis," he answered "No." (12) He admitted purchasing marijuana while in the Navy during his testimony. (13)

He further admitted that during the 1980's, he sometimes took prescription Motrin or Advil, 800mg strength, for back pain, given him by fellow employees. (14) Motrin or Advil in 200 mg strength may be purchased without prescription. Taking four 200mg tablets is the equivalent strength of one 800 mg tablet. He did both. (15)

In response to SF 86 (2002), **Question 27. Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs** "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example,

marijuana, cocaine, LSD, PCP, or sniffed paint, glue, or hair spray for its effects," he answered "No."⁽¹⁶⁾ He gave the same answer in his DSS interview.⁽¹⁷⁾ He stated he hadn't used any illegal drugs since the 1980's.⁽¹⁸⁾

In response to **Question 38. Your Financial Delinquencies - 180 Days** "In the last 7 years, have you ever been over 180 days delinquent on any debt(s)," Applicant answered "No". In response to **Question 39. Your Financial Delinquencies - 90 Days** "Are you currently over 90 days delinquent on any debt)," he answered "No".⁽¹⁹⁾ All of the alleged delinquent debts were the same for both questions except for one additional debt under question 39, a cell phone debt of \$726.00 placed for collection in January 2002.⁽²⁰⁾ He was unaware of the cell phone debt and paid it after contracting with a debt consultant in 2003, that established a payment plan with his creditors.⁽²¹⁾ The other debts were those of his former wife.⁽²²⁾ These debts have been removed from his credit report.⁽²³⁾ His other past due debts are paid.⁽²⁴⁾

POLICIES

"[No] one has a 'right' to a security clearance."⁽²⁵⁾ 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."⁽²⁶⁾ 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 coercion, and willingness and ability to abide by regulations governing use, handling, and protection of classified information."⁽²⁷⁾ Eligibility for a security clearance may be adjudicated using the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative factors listed in ¶ 6.3 of the Directive: nature and seriousness of the conduct and surrounding circumstances; frequency and recency of the conduct; age of the Applicant; motivation of the applicant, and the extent to which the conduct was negligent, wilful, voluntary, or undertaken with knowledge of the consequences involved; absence or presence of rehabilitation; and probability that the circumstances or conduct will continue or recur in the future.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information.⁽²⁸⁾ The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying

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conditions listed in the guidelines and an applicant's security suitability.

Once the Government establishes a disqualifying condition, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ⁽³⁰⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ⁽³¹⁾ 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 judgment, reliability and trustworthiness of one who will protect the national interests as his or his 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. ⁽³²⁾ Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, not actual, risk of compromise of classified information.

Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism.

Having considered the evidence as a whole, I find the following guidelines most pertinent to an evaluation of the facts of this case:

Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information; and

Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

CONCLUSIONS

Personal Conduct. The government established its case under Guideline E. Personal conduct disqualifying conditions (PC DC) include PC DC E2.A5.1.2.2. *(the deliberate omission, concealment, or falsification of relevant 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), and PC DC E2.A5.1.2.5. (A pattern of dishonesty).

SOR subparagraph 1.a. alleges a job termination because of a positive drug screen. The government has met its burden to establish this allegation. Applicant admits this is the reason given him for the termination but denies he was taking drugs at the time of the test. He has consistently denied it during interviews and testimony. He requested a copy of the lab report from his employer who has refused him one. He believes he was terminated because his wife had \$50,000.00 in medical bills, which the company had to pay as it was self-insured. While I sympathize with his situation, the burden of proof rests with Applicant to come forward with evidence to either refute or mitigate the allegation. He did neither. Therefore, I find against him on SOR subparagraph 1.a.

The government has established its case as to allegations 1.b. and 1.c. The government questions Applicant's trustworthiness because of his false answers on his 1987 SF 86. SOR subparagraphs 1.b. and 1.c. allege Applicant was not forthright about his conduct, in particular not providing truthful answers to questions 18.a. and 18.b. concerning drug use on a security clearance questionnaire. He denied the allegations in two DSS interviews, and after failing a polygraph, only at a third interview did he admit to prior drug use. SOR subparagraph 1.e. alleges that he purchased drugs. He admitted usage and purchasing marijuana during his testimony.

Applicant failed to make an attempt to correct his omissions on his 1987 security questionnaire until he had a third DSS interview (December 2003), and that after failing a polygraph test. The Appeal Board found the use of Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.3. (*prompt, good faith disclosure*) to be unavailable to applicants seeking mitigation in circumstances (as here) where the applicant has failed to correct his omission much earlier in a good-faith way. ⁽³³⁾ The Government must be able to repose a high degree of trust and confidence in persons granted access to classified information. and Applicant by his omission does not satisfy those high standards at this time. ⁽³⁴⁾

The next set of allegations involved SOR subparagraphs 1.d. and 1.e., the 2002 SF 86 question 27 and his statement in 2003 to the DSS investigator. Question 27 asked about illegal drug use in the last seven years. He testified that he had not used drugs since the 1980's, therefore these allegations are mitigated because there is no evidence of illegal drug use in the seven years prior to his signing the 2002 SF 86. PC MC E2.A5.1.3.1. (*the information was unsubstantiated*) applies. With respect to his statement, he denied *any* drug use. The government established its case as to allegation 1.e., but not 1.d.

SOR subparagraphs 1.f. (1-9) and 1.g. (1-10) allege false answers to SF 86 (2002) questions 38 and 39 which ask about delinquent debts more than 180 and 90 days respectively. There was one additional debt under question 39 which he admitted was his and he paid it. The others were debts of his former wife and his divorce decree ordered both he and his ex-wife to pay their own debts. He had these debts removed from his credit report (see Applicant's Exhibit F, credit report dated May 23, 2005, which shows no past due accounts) and there are no allegations under Guideline F (financial considerations.) The 2002 SF 86 asks about his debts, not those of his spouse or former spouse. He stated he was unaware of these debts and subsequently had them removed from his credit report. If the debts aren't his, then he did not answer falsely. He has no duty to know or disclose the debts of another. PC MC E2.A5.1.3.1. (*the information was unsubstantiated*) applies.

In summary, Applicant did not mitigate SOR subparagraphs 1.b., 1.c., and 1.e. I conclude Guideline E against Applicant.

Criminal Conduct The government has established its case under Guideline J. Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) applies. He lied on his 1987 SF 86 and in his DSS interview in 2003. False answers, both oral and written, constitute a violation of 18 U.S.C. §1001. Criminal Conduct Mitigating Conditions CC MC E2.A6.1.3.1. (*The criminal behavior was not recent*) does not apply. There is a continuing history or pattern of false answers, and the truth came to light only after he failed a polygraph test. I find no other mitigating factors that apply. I conclude Guideline J against Applicant.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant. Applicant has made considerable efforts to change his habits regarding finances and I believe that this type conduct is not likely to occur in the future. However, there is a question of Applicant's honesty. His dishonesty raises reasonable and persistent doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Clearance is denied.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a. Against Applicant

Subparagraph 1.b. Against Applicant

Subparagraph 1.c. Against Applicant

Subparagraph 1.d. For Applicant

Subparagraph 1.e. Against Applicant

Subparagraph 1.f.(1) For Applicant

Subparagraph 1.f.(2) For Applicant

Subparagraph 1.f.(3) For Applicant

Subparagraph 1.f.(4) For Applicant

Subparagraph 1.f.(5) For Applicant

Subparagraph 1.f.(6) For Applicant

Subparagraph 1.f.(7) For Applicant

Subparagraph 1.f.(8) For Applicant

Subparagraph 1.f.(9) For Applicant

Subparagraph 1.g.(1) For Applicant

Subparagraph 1.g.(2) For Applicant

Subparagraph 1.g.(3) For Applicant

Subparagraph 1.g.(4) For Applicant

Subparagraph 1.g.(5) For Applicant

Subparagraph 1.g.(6) For Applicant

Subparagraph 1.g.(7) For Applicant

Subparagraph 1.g.(8) For Applicant

Subparagraph 1.g.(9) For Applicant

Subparagraph 1.g.(10) For 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 or continue Applicant's security clearance. Clearance is denied.

Christopher Graham

Administrative Judge

1. Tr. at 13-14.

2. *Id.* at 13.

3. *Id.* at 13-15; Government Exhibit 8 (Security Clearance Application (SF 86), dated July 23, 2002) at 8.

4. *Id.* at 25.

5. *Id.* at 16.

6. Government Exhibit 3 (Applicant's Statement, dated November 5, 2003) at 3.

7. Tr. at 16-17; Response to the SOR, dated May 23, 2005, at 2.

8. *Id.* at 43.

9. Government Exhibit 7 (*DOD Personnel Security Questionnaire (Industrial)*), DD Form 49, signed June 22, 1987) at 3.

10. Tr. at 46.

11. Government Exhibit 6 (Applicant's Statement, dated December 2, 2003) at 1-3.

12. Government Exhibit 7, *supra*, at 3.

13. Tr. at 31.

14. *Id.* at 46-50.

15. *Id.* at 48-50.

16. Government Exhibit 8, *supra*, at 11.

17. Government Exhibit 3, *supra*, at 2.

18. Tr. at 20, 50.

19. Government Exhibit 8, *supra*, at 12.

20. Tr. at 21-22.

21. *Id.* at 22; Applicant's Exhibit C (Statement from Debt Consultant, dated March 5, 2004) at 1; Government Exhibit 5A (Documents from, Debt Consultant, dated October 20, 2003) at 1-3.
22. Applicant's Exhibit A (Divorce Decree, dated December 30, 2002) at 4.
23. Response to the SOR (Credit Report, dated May 23, 2005) at 1-16.
24. Tr. at 23.
25. See *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1998).
26. *Id.* at 527.
27. Exec. Or. 12968, *Access to Classified Information*, § 3.1(b) (Aug. 4, 1995).
28. *Egan, supra*, at 531.
29. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).
30. See ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).
31. *Id.*, at 3.
32. See *Egan*; Directive ¶ E2.2.2.
33. See ISCR Case No. 97-0289 (January 1998).
34. See *Snepp v. United States*, 444 U.S. 507, 511n.6 (1980).