

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: The record evidence shows Applicant deliberately concealed or omitted his history of illegal drug use in response to a specific question on his security-clearance application requiring that information. Applicant failed to successfully explain or mitigate the resulting security concern. Clearance is denied.CASENO: 04-00815.h1

DATE: 02/09/2006

DATE: February 9, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-00815

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Ray Blank, Jr., Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

The record evidence shows Applicant deliberately concealed or omitted his history of illegal drug use in response to a specific question on his security-clearance application requiring that information. Applicant failed to successfully explain or mitigate the resulting security concern. Clearance is denied.

STATEMENT OF THE CASE

On February 23, 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 related to the falsification. Applicant replied to the SOR on March 25, 2005, his response was incomplete, and he requested a hearing. The case was assigned to me on June 17, 2005, and a notice of hearing was issued scheduling the hearing for September 14, 2005. Applicant appeared without counsel and the hearing took place as scheduled. I kept the record open to allow Applicant to submit additional documentary evidence, and that document is marked and admitted, without objections, as Exhibit C. DOHA received the transcript September 27, 2005.

FINDINGS OF FACT

At the start of the hearing, I clarified Applicant's response to the SOR, and Applicant admitted to the falsification allegation in SOR subparagraph 1.a, and his admissions are incorporated herein. In addition, I make the following findings of fact:

Applicant is a 32-year-old married man employed as a small craft operator for a contractor providing services to a military installation. Applicant's job is to maintain and operate patrol boats and landing craft used to patrol a river

adjoining the military installation. He is seeking to obtain a security clearance for the first time, although he held an interim security clearance for some time without a negative incident or problem.

To obtain a security clearance, Applicant completed and signed a security-clearance application on or about March 16, 2001 (Exhibit 1). In response to Question 27, Applicant answered "no," thereby denying having used any illegal drug (including marijuana and cocaine) within the last seven years or since the age of 16, whichever is shorter. This means Applicant was required to disclose any illegal drug use dating back to about March 16, 1994. In signing the application, Applicant certified his statements were true, complete, and correct to the best of his knowledge and belief and made in good faith, and that he understood that a knowing and willful false statement could be punished under federal law.

In March 2002, Applicant was interviewed during the official security clearance investigation. The interview produced a sworn statement (Exhibit 4), wherein Applicant addressed several subjects, including his history of illegal drug use. Concerning marijuana, he admitted using it on a monthly basis from 1989 to August 1998. Concerning cocaine, he admitted using it on two to three occasions, once in 1992, and the other two between September 1995 and February 1996. He stated he had no intention of being involved with illegal drugs in the future. Concerning his security-clearance application, he admitted not listing his drug use because he was afraid he would not obtain a clearance and he would lose his job. Also, he admitted he knew he was providing false information about his past illegal drug use.

Applicant addressed his falsification during his hearing testimony. He made no excuses and apologized for lying. His last use of any illegal drug was in 1998. During cross-examination, Applicant admitted he had not attempted to contact anybody to correct his false answer to Question 27. Likewise, he admitted it was not until he was confronted during the March 2002 interview that he admitted his false answer to Question 27. Applicant presented favorable documentary evidence (Exhibits A, B, and C) attesting to his good work history. Also, he presented a witness who vouched for Applicant's good character.

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.⁽²⁾ Instead, it is 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.⁽³⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁶⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ 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.⁽⁹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

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."⁽¹¹⁾ 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 information 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 provided false information about his history of illegal drug use when he denied such use during the last seven years in response to Question 27 of his security-clearance application. His denial was a knowing and willful falsification. Accordingly, DC 2-(12) applies against Applicant. His falsification of his security-clearance application creates 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 explained away. Indeed, Applicant's concerns about not obtaining a clearance or loss of employment neither explain nor mitigate the matter. 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 engaged in criminal conduct by providing a false answer on his security-clearance application in violation of 18 U.S.C. § 1001, which is a felony-level offense. Given these circumstances, both DC 1-(13) and DC 2-(14) apply against Applicant. His criminal conduct creates doubt about his judgment, reliability, and trustworthiness. No mitigating conditions apply. Accordingly, Guideline J is decided against Applicant.

To conclude, this is yet another case involving an Applicant whose past illegal drug use is mitigated as not recent and a clearance in all likelihood would have been granted, but for Applicant's false statement about his background. In reaching my decision, I 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

SOR ¶ 2-Guideline J: Against Applicant

Subparagraph 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 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. Executive Order 10865, § 7.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

11. *Egan*, 484 U.S. at 528, 531.

12. 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.

13. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

14. E2.A10.1.2.2. A single serious crime or multiple lesser offenses.