

KEYWORD: Drugs; Personal Conduct; Criminal Conduct; Foreign Preference

DIGEST: Applicant, a 30-year-old woman, is seeking a security clearance for her employment as a program analyst with a defense contractor. Her history of illegal drug involvement is mitigated as not recent coupled with her demonstrated intent not to abuse drugs in the future. But Applicant is unsuitable for a security clearance because she misrepresented her history of illegal drug involvement when completing a security-clearance application and in a sworn statement made during a background investigation. Clearance is denied.

CASENO: 04-01078.h1

DATE: 02/28/2006

DATE: February 28, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-01078

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 30-year-old woman, is seeking a security clearance for her employment as a program analyst with a defense contractor. Her history of illegal drug involvement is mitigated as not recent coupled with her demonstrated intent not to abuse drugs in the future. But Applicant is unsuitable for a security clearance because she misrepresented her history of illegal drug involvement when completing a security-clearance application and in a sworn statement made during a background investigation. Clearance is denied.

STATEMENT OF THE CASE

On March 14, 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 a security clearance for Applicant. (U) The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline H for drug involvement, Guideline E for personal conduct (falsification), Guideline J for criminal conduct, and Guideline C for foreign preference. Applicant replied to the SOR on April 7, 2005, and requested a hearing. The case was assigned to me on June 20, 2005. Thereafter, a notice of hearing was issued scheduling the hearing for August 10, 2005. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript August 18, 2005.

FINDINGS OF FACT

Applicant's Answer to the SOR is mixed. Concerning the drug involvement allegations, she admitted in part, denied in part, and clarified the various dates surrounding her drug involvement. She admitted the two falsification allegations and the related criminal conduct allegation. She denied the foreign preference allegation. 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 30-year-old woman employed as a program analyst for a defense contractor. She is seeking to obtain a security clearance for the first time.

Before her current employment, she was a contract employee of the Embassy of Australia in Washington, D.C. She worked as a foreign military sales case manager from November 1999 to about March 2001. She was paid a salary from the embassy and was also provided health insurance as a benefit of her employment. She took the job to gain enough experience so she could later get a job with the U.S. government or a defense contractor. Sometime during her employment, Applicant was asked to complete a security-clearance application with the Australian government. She terminated her employment before the application was processed to completion and she was not issued a clearance.

Applicant began working for the defense contractor on or about March 1, 2001. To obtain a security clearance, she completed and signed a security-clearance application (Exhibit 1) on or about July 26, 2001. In response to Question 27, Applicant answered "no," thereby denying having used any illegal drug within the last seven years or since the age of 16, whichever is shorter. In signing the application, Applicant certified her statements were true, complete, and correct to the best of her knowledge and belief and made in good faith, and that she understood that a false statement could be punished under federal law.

Applicant was interviewed on multiple occasions as part of the background investigation for a security clearance. She was interviewed twice in October 2001 and once in November 2001. In addition, she was interviewed in May 2003 when she was informed that drug use allegations had been made against her. She denied any illegal drug use or involvement, and she made a sworn statement (Exhibit 4) wherein she stated that she had "never voluntarily used illegal drugs (to include marijuana, ecstasy, or cocaine)."

In December 2003, Applicant was again interviewed. This interview took place in conjunction with a scheduled polygraph examination to resolve the dispute between the drug use allegations and Applicant's denials. The polygraph examination was not conducted, however, because she admitted her illegal drug involvement during the initial interview. She admitted a history of illegal drug use, which included using marijuana, cocaine, Ecstasy, LSD, crystal methamphetamine, and opium. Exhibit 5 is Applicant's sworn statement from December 2003, wherein she detailed her history of illegal drug involvement. With the exception of various dates that she pointed out in her Answer as wrong, Exhibit 5 is an accurate description of her illegal drug history, and it is incorporated herein by reference. Before the December 2003 interview and the execution of Exhibit 5, Applicant did not take any action to correct the false information she provided (Transcript at 67 - 68). She admitted being dishonest or untruthful about her drug involvement, and she admitted she was untruthful because she was afraid she would not receive a security clearance.

It appears her drug of choice was marijuana, which she used with varying frequency from about 1994 to mid-2001 or so. Her last involvement with illegal drugs was in about August 2001, when she used marijuana (Transcript at 60).

Applicant presented favorable character evidence as reflected in Exhibit A, a letter from the president of the company that employs her. The company president has been extremely pleased with Applicant's work performance, noting that she has proven to be a model employee. The company president has a high opinion of Applicant's character and strongly recommends that she be granted a security clearance.

Applicant testified on her own behalf during the hearing. She candidly acknowledged her past mistakes (the drug involvement and false statements). She is no longer involved with illegal drugs or associates with such persons. She is now leading a healthy lifestyle by exercising at a gym and eating organic foods. She is also focused on succeeding in a career, which she hopes will include graduate school.

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 a 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

Addressing the drug involvement under Guideline H,⁽¹²⁾ a security concern may exist based on improper or illegal involvement with drugs. Improper or illegal involvement with drugs is relevant to an applicant's security worthiness for various reasons, including that drug abuse indicates unwillingness or inability to abide by the law. If a person is willing to violate the law by using illegal drugs, it follows that person may be willing to ignore or violate the rules and regulations concerning the proper safeguarding and handling of classified information.

Here, based on the record evidence, the government established its case under Guideline H. A security concern is raised by Applicant's history of illegal drug involvement, which included the use of marijuana and other drugs. Her drug of choice was marijuana. Also, her drug involvement included the purchase of marijuana and other drugs. Given these circumstances, both DC 1⁽¹³⁾ and DC 2⁽¹⁴⁾ apply against Applicant. The remaining DC do not apply based on the facts and circumstances here. The concern here is Applicant's illegal drug involvement is indicative of irresponsible behavior and poor judgment, and it calls into question her willingness or ability to follow the law.

Turning to the mitigating conditions under the guideline, MC 1⁽¹⁵⁾ applies in Applicant's favor. Her last involvement with illegal drugs was when she used marijuana in August 2001, which was not recent. Applicant also receives credit under MC 3⁽¹⁶⁾ based on her demonstrated intent not to abuse drugs in the future as shown by approximately four years of abstinence. To sum up, I am persuaded that her drug involvement is a thing of the past and will not recur. Accordingly, Guideline H is decided for Applicant.

Personal conduct under Guideline E⁽¹⁷⁾ 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 genuinely 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. Applicant knowingly and willfully made false statements. She deliberately provided false and misleading information about her history of illegal drug involvement when she completed a security-clearance application and in a sworn statement. Accordingly, both DC 2 [\(18\)](#) and DC 3 [\(19\)](#) apply against Applicant. Her misrepresentations and false statements create doubt about her judgment, reliability, and trustworthiness.

I reviewed the mitigating conditions under Guideline E and conclude none apply. Applicant knowingly and willfully provided a false answer in response to Question 27 on the July 2001 security-clearance application. She continued to withhold information about her drug involvement during multiple interviews, and she provided a false sworn statement in May 2003 when she denied any illegal drug involvement. She made no effort to correct the record until she was confronted with the prospect of taking a polygraph examination in December 2003. Given the totality of facts and circumstances, Applicant failed to successfully explain or mitigate the security concern stemming from her false statements. Accordingly, Guideline E is decided against Applicant.

Under Guideline J, [\(20\)](#) 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 false and misleading information about her illegal drug history in violation of 18 U.S.C. § 1001 (making a false statement within the jurisdiction of a federal agency), which is a felony-level offense. Given these circumstances, both DC 1 [\(21\)](#) and DC 2 [\(22\)](#) apply against Applicant. Her criminal conduct creates doubt about her judgment, reliability, and trustworthiness. No mitigating conditions apply. Accordingly, Guideline J is decided against Applicant.

Under Guideline C, [\(23\)](#) a security concern may exist when a person acts in such a way as to indicate a preference for a foreign country over the U.S. Here, the government established its case

under Guideline C. This is an unusual case, because it does not involve the active exercise of dual citizenship, which is

the typical case under this guideline. Nevertheless, Applicant's employment with a foreign embassy, including accepting a salary and employee benefits (health insurance), and applying for a security clearance with a foreign government, are circumstances that raise a security concern. Her actions then amounted to performing duties or otherwise acting so as to serve the interests of a foreign government in preference to the interests of the U.S., and thus, DC 9⁽²⁴⁾ applies against Applicant.

I reviewed the formal mitigating conditions under the guideline and conclude none apply. That does not end the analysis, however, as other facts and circumstances may explain away or mitigate the security concern. First, when Applicant started working for the embassy in 1999, she was a relatively young woman who likely did not appreciate the potential consequences of working for a foreign embassy and applying for a foreign security clearance. Second, this matter is old news at this point. She terminated her job at the embassy more than four years ago and has had no further contact with the embassy. Third, there is no other indication that Applicant prefers a foreign country over the U.S. Given these circumstances, she successfully explained and mitigated the security concern. Accordingly, Guideline C is decided for Applicant.

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 H: For Applicant

Subparagraphs a - p: For Applicant

SOR ¶ 2-Guideline E: Against Applicant

Subparagraphs a - b: Against Applicant

SOR ¶ 3-Guideline J: Against Applicant

Subparagraph a: Against Applicant

SOR ¶ 4-Guideline C: For Applicant

Subparagraph a: For 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. Directive, Enclosure 2, Attachment 8.
13. E2.A8.1.2.1. Any drug abuse.

14. E2.A8.1.2.2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.
15. E2.A8.1.3.1. The drug involvement was not recent.
16. E2.A8.1.3.3. A demonstrated intent not to abuse any drugs in the future.
17. Directive, Enclosure 2, Attachment 5.
18. 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.
19. 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.
20. Directive, Enclosure 2, Attachment 10.
21. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
22. E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
23. Directive, Enclosure 2, Attachment 3.
24. E2.A3.1.2.9. Performing or attempting to perform duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.