

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant is a 43-year-old defense contractor. In 1998, her employer received an anonymous letter claiming that Applicant was using drugs. She was sent for drug testing, but quit her job prior to obtaining the positive results. In 2002, she gave false answers on a security clearance application regarding drug use, drug use in a sensitive position, and the conditions under which she left her job in 1998. She did not concede the truth as to these matters until over a year and a half later and after three interviews with a Defense security special agent. Applicant has failed to mitigate the personal and criminal conduct concerns raised. Clearance is denied.

CASENO: 04-02452.h1

DATE: 05/03/2006

DATE: May 3, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-02452

DECISION OF ADMINISTRATIVE JUDGE

ARTHUR E. MARSHALL, JR.

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant is a 43-year-old defense contractor. In 1998, her employer received an anonymous letter claiming that Applicant was using drugs. She was sent for drug testing, but quit her job prior to obtaining the positive results. In 2002, she gave false answers on a security clearance application regarding drug use, drug use in a sensitive position, and the conditions under which she left her job in 1998. She did not concede the truth as to these matters until over a year and a half later and after three interviews with a Defense security special agent. Applicant has failed to mitigate the personal and criminal conduct concerns raised. Clearance is denied.

STATEMENT OF THE CASE

On March 18, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statements of Reasons (SOR) concluding it was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct).

In a notarized statement, dated April 18, 2005, Applicant responded to the SOR allegations and waived her right to an administrative hearing in favor of a decision based on the record. In her SOR responses, Applicant admitted all of the allegations under Guideline E, but denied sub-allegation ¶ 1.a.1. She also denied the allegation under Guideline J. The case was assigned to me on August 25, 2005.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR, are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 43-year-old employee of a defense contractor. She is divorced and a college graduate. She is a former federal government employee, having worked for the government from at least 1991 through 2000 with two brief breaks in service. (2) She has maintained a security clearance throughout much of her career.

In the spring of 1993, Applicant was employed as an investigator for federal personnel matters. She asked an office clerk to access a state data base to find information one of her boyfriend's acquaintances. She reviewed the record and shredded it without showing it to anyone. Applicant subsequently married her boyfriend.

Citing to an error in judgement, she eventually admitted to the request of information. She was suspended for two weeks without pay in 1994. By the autumn of 1995, that issue was behind her and she was granted a security clearance. That was not the end, however, of her interaction with her husband's acquaintance.

Starting in 1994 and continuing through 1999, her husband's acquaintance harassed and stalked Applicant. She also made calls and wrote letters about Applicant in which she made a variety of accusations. Such calls and letters went to a wide range of individuals, including Applicant's parents, coworkers, and employer. These accusations were largely dismissed by Applicant's employer until the summer of 1998, when a supervisor received an "anonymous" letter alleging that Applicant abused drugs. Concerned, he instructed Applicant to be drug tested. She was given the drug test. She quit prior to receiving the results, however, based on the premise that she did not want to dignify the allegations. Those results eventually proved to indicate marijuana and cocaine use.

Earlier that year, starting with a New Year's 1998 party, Applicant started smoking cocaine laced marijuana cigarettes with her husband. Specifically, she shared one with him on New Year's eve, one during a summer 1998 crab feast, and on three or four other occasions. She also began to rely on alcohol, although not to the point of intoxication. She resorted to these substances due to marital stress. That stress was caused by her discovery that her husband had conducted a relationship with a girlfriend since 1993 and had been using drugs himself.

On January 17, 2002, Applicant submitted an application for security clearance (SF-86). On that application, she answered "no" to 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, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?" She similarly answered "no" to question 28: "**Your Use of Illegal Drugs and Drug Activity - Use in Sensitive Positions** Have you EVER illegally used a controlled substance while employed in as a law enforcement officer, prosecutor, or courtroom official, while possessing a security clearance; or while in a position directly and immediately affecting the public

safety?"

On that same SF-86, Applicant answered "no" to question 20. That question specifically queried: "**Your Employment Record** Has any of the following happened to you in the past 10 years? - Fired from job - Quit a job after being told you'd be fired - Left a job by mutual agreement following allegations of misconduct - Left a job for other reason under unfavorable circumstances?" Applicant signed the SF-86 on January 16, 2002, the form was dated the following day, and an investigation was commenced shortly thereafter.

On August 6, 2002, Applicant was interviewed by a Special Agent of the Defense Security Service. The interview gave Applicant the opportunity to expound on some topics, such as issues regarding her former employment, marital and financial concerns, and foreign travel. Of particular concern to the agent was Applicant's access of information in the early 1990s regarding her husband's acquaintance. Applicant stated that the woman in question had been harassing her and spreading lies about her. These purported lies had been disseminated to her superiors and eventually included allegations of drug use. Rather than answer accusations made by a stalker, Applicant said she resigned from her job in 1998.

The following year, on August 14, 2003, Applicant was again interviewed. This time, she expanded her version of what happened after her former employer received an allegation that Applicant used drugs. Applicant conceded she was sent for drug testing, but stated she quit her job prior to learning the results of the test.⁽³⁾ She denied ever using cocaine and stated she had not smoked marijuana since high school. She suggested that she might have been exposed to marijuana through her then-husband's use of the substance.

On August 20, 2003, Applicant was interviewed for a third time. In this interview, the questions were directly related to drug use and the terms of her 1998 departure from employment. Applicant confessed that she was not truthful in her prior interviews. She admitted she used both marijuana and cocaine since high school. Specifically, she noted that she had used marijuana during her period of marital difficulties⁽⁴⁾ in 1998. She stated that she shared a marijuana cigarette with her then-husband on New Year's 1998 and noticed that it had an odd taste. Her husband confided that the marijuana was laced with cocaine. She shared another cocaine laced marijuana cigarette with him that summer after a summer crab feast, then three or four times afterwards. After that period was over, she said she quit using the illegal drugs. She further stated that she increasingly relied on alcohol at this time as well, but that reliance passed after her marital problems were behind her. Neither drugs nor alcohol have otherwise been a problem with her life or career.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to

hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁵⁾ The government has the burden of proving controverted facts.⁽⁶⁾ The burden of proof is something less than a preponderance of evidence.⁽⁷⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽¹²⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽¹³⁾

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.

Based upon consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

Guideline E - Personal Conduct. *The Concern:* 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.

Guideline J - Criminal Conduct. *The Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline E and Guideline J.

GUIDELINE E - Personal Conduct:

Personal conduct is a major concern because it assesses whether a person's past conduct justifies confidence that the person can be trusted to properly safeguard classified information. Personal 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. The Regulation sets out certain conditions relating to personal conduct that could raise security concerns.

In the SOR, DOHA alleged Applicant falsified material facts on a security clearance application with regard to illegal drug use, including the use of marijuana and cocaine, in the seven years prior to the application (question 27); illegal use of a controlled substance while possessing a security clearance (question 28); and quitting a job after being told she would be fired, leaving a job by mutual agreement following allegations of misconduct, or leaving a job for other reason under unfavorable circumstances (question 20).

Applicant admits answering "no" on questions 27, 28, and 20 of her security clearance application. She also admits to using marijuana from approximately January 1998 to November 1998, to using cocaine no more than five to six times between January 1998 and November 1998, to using these drugs while in a sensitive position and holding a security clearance, and quitting a job under allegations of misconduct or unfavorable circumstances. The Government's evidence, admitted by the Applicant, thus establishes a potentially disqualifying condition under Guideline E. Specifically, such

facts give rise to Personal Conduct Disqualifying Condition (PC DC) 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*).

Applicant admits to all the allegations, but one. She disputes the time frame alleged for her marijuana use and has narrowed it to the year 1998, rather than to have been with "varying frequency to November 1998." Regardless, she has confirmed the allegations as true. Therefore, personal conduct mitigating condition (PC MC) E2.A5.1.3.1 (*The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability*) does not apply.

Moreover, Applicant submitted her security clearance application with multiple false answers as recently as January 2002. At no time prior to, or during, her August 2002 interview did she indicate that some of her answers might be in error or misleading. In her first interview in 2003, she conceded some, but not all of the facts that would eventually prove her answers to be false. It was not until August 2003, after she was confronted with many of the facts, that she told the truth regarding her use of drugs, the drug test, and her separation from employment in 1998. Under these facts, neither PC MC E2.A5.1.3.2 (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*), nor PC MC E2.A5.1.3.3 (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*) apply.

In making her false and incorrect answers on her security clearance application, Applicant acted on her own. Indeed, as she noted with regard to her answer concerning her employment record: "I knew the circumstances surrounding my resignation . . . would be fully investigated. I can only say this was a poor choice, made in fear, and with no criminal or malicious intent." ⁽¹⁴⁾ Consequently, neither PC MC E2.A5.1.3.4 (*Omission of material facts was caused or significantly contributed to by improper or inadequate advice of unauthorized personnel, and the previously omitted information was promptly and fully provided*), nor PC MC E2.A5.1.3.6 (*A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information*) apply.

While Applicant was eventually truthful with regard to her employment record and drug use, it took three interviews before she confirmed the known facts. Therefore, PC MC E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*) applied only to a limited extent. More to her credit is that she no longer associates with her ex-husband, whose influence and extramarital affair helped give rise to the drug use at issue. To that extent, PC MC E2.A5.1.3.7 (*Association with persons involved in criminal activities has ceased*) applies. Given all the facts and circumstances, however, these two mitigating conditions, without more, are insufficient to mitigate the personal conduct overall.

GUIDELINE J - Criminal Conduct:

Criminal conduct poses a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. In the SOR, DOHA alleges that the information set forth regarding fraud and false statements during the security clearance process gives rise to a violation under Title 18, United States Code, Section 1001, a felony.

In this case, Applicant admits to having failed to answer questions 27, 28, and 20 on her security application correctly (15) and in such a way as to reflect the truth as she knew it to be. She denies that Guideline J applies, stating that her conduct does not demonstrate a pattern of criminal activity and denying that her conduct was performed with the intention of wilfully committing a felonious act, a malicious act, or an intentional violation of the law. (16)

Under Guideline J (Criminal Conduct), however, it is not just a pattern of criminal activity that can raise security concerns, but a history of criminal activity. Putting aside the issue of criminality with regard to marijuana and cocaine abuse, Applicant knowingly provided false answers on her security clearance application. Moreover, she exacerbated the investigative process by withholding the truth until she was confronted with it. Admission to these falsehoods need not rise to a level from which a successful criminal prosecution may be pursued. Under the guidelines, the Government need only establish criminal conduct disqualifying condition (CC DC) E2.A10.1.2.1. (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) or CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*). The SOR allegations regarding falsification of answers on her security application, supported by her subsequent purposeful evasiveness, constitute fraud and false statements under the United States Code. That is sufficient to give rise to CC DC E2.A10.1.2.1.

The conduct at issue did not begin and end with the submission of the application for security clearance in January 2002. The subsequent coverup lasted through three post-application interviews and through much of 2003. Therefore, neither CC MC E2.A10.1.3.1 (*The criminal behavior was not recent*), nor CC C E2.A10.1.3.2 (*The crime was an isolated incident*) apply.

Furthermore, as noted above with regard to Personal Conduct, Applicant did not attempt to circumvent the truth at the suggestion or guidance of another, nor was she forced to answer and act as she did. Her conduct was voluntary and intentional. Therefore, neither CC MC E2.A10.1.3.3 (*The person was pressured or coerced into committing the act and those pressures are no longer present in that persons life*), nor E2.A10.1.3.4 (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*) apply.

Additionally, proof of this conduct is predicated on allegations and admission. It is not based on a litigated criminal prosecution. Therefore, CC MC E2.A10.1.3.5 (*Acquittal*) is inapplicable.

Remaining is CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*). In her answer to the SOR, Applicant concedes that her application answers were "incorrect," then details how, interview by interview, the truth slowly emerged. She admits using drugs while in a sensitive position, but describes her "incorrect" answer as "a poor choice." A similar "poor choice" was her decision to not be forthcoming with regard to how and why she quit her job in 1998. Such posturing may help redeem a fresh novice, new to the sphere of government service or security clearances. It does not, however, indicate rehabilitation for one savvy with regard to such clearances and one who formerly served as a personnel investigator. In her failure to blend her contrition with more personal responsibility, along with her failure to demonstrate a fuller appreciation for what she did, I find that CC MC E2.A10.1.3.6 does not apply. In sum, none of the mitigating conditions apply.

I have reviewed the record as a whole and considered Applicant under the "whole person" concept. Applicant is a seasoned, mature professional with experience both in the federal government and with government contract support. She has superior knowledge of the processes involved in personnel investigations and record-keeping.

She is also a woman who faced extreme difficulties in her premarital courtship, then suffered as the victim of an untrustworthy husband. The stress of the marital infidelity and problems led to her drug abuse. What is difficult to understand, and what gives rise to concerns regarding her judgment and trustworthiness, is two-fold: why, at the time, did she not seek comfort through counsel, rather than drugs. And why, given her background, did she not simply answer the questions honestly and directly, in full knowledge that she would later be afforded the opportunity to explain the situation and circumstances. To gain access to government information and secrets requires the highest level of trustworthiness and judgment. Given the evidence presented in this matter, I do not find that Applicant has met her burden and mitigated the security concerns raised. Clearance is denied.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline E (Personal Conduct) 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 (Criminal Conduct) AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant a security clearance for Applicant. Clearance is denied.

Arthur E. Marshall, Jr.

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. One of her jobs in the early 1990s was as an investigator with one of the leading governmental entities conducting personnel investigations.
3. She would subsequently characterize her negative answer on her SF-86 regarding her employment record as "a poor choice." Applicant's Answer to the SOR, dated April 18, 2005, at paragraph 1.c.
4. Applicant's husband had been using drugs and was unfaithful to her, causing her stress.
5. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
6. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
7. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, ¶ E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15.
10. *Egan*, 484 U.S. at 531.
11. *Id.*
12. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
13. Executive Order 10865 § 7.
14. Applicant's Answer to the SOR, dated April 18, 2005, at paragraph 1.c.
15. Applicant does not concede that she falsified her answers on the SF-86, but rather couches her conduct with the phrase "I failed to answer the following question, correctly." The remainder of her answers demonstrate, however, that this *failure* was not without some active thought and intentional effort.
16. Applicant's Answer to the SOR, dated April 18, 2005, at paragraph 2.a.