

KEYWORD: Drugs; Criminal Conduct; Personal Conduct

DIGEST: In 1998, Applicant was arrested for distribution of marijuana and possession of a firearm, a felony. He pled guilty to and was convicted of possession of marijuana, a misdemeanor, and sentenced as a first offender. After completing all parts of his sentence, the charge was dismissed. Applicant admitted smoking marijuana from 1992 to 1999. On his security clearance application, Applicant answered "no" to the questions concern felony arrests, drug use and convictions, and firearms offenses. Applicant has mitigated the security concerns for his drug use, but has not mitigated the security concerns for the deliberate falsifications on his security clearance application. Clearance is denied.

CASENO: 04-03148.h1

DATE: 07/28/2005

DATE: July 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03148

DECISION OF ADMINISTRATIVE JUDGE

THOMAS M. CREAN

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esq., Department Counsel

FOR APPLICANT

Steven C. Frucci, Esq.

SYNOPSIS

In 1998, Applicant was arrested for distribution of marijuana and possession of a firearm, a felony. He pled guilty to and was convicted of possession of marijuana, a misdemeanor, and sentenced as a first offender. After completing all parts of his sentence, the charge was dismissed. Applicant admitted smoking marijuana from 1992 to 1999. On his security clearance application, Applicant answered "no" to the questions concern felony arrests, drug use and convictions, and firearms offenses. Applicant has mitigated the security concerns for his drug use, but has not mitigated the security concerns for the deliberate falsifications on his security clearance application. Clearance is denied.

STATEMENT OF THE CASE

On August 13, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny a security clearance for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive). Applicant acknowledged receipt of the SOR on August 19, 2004. The SOR alleges security concerns under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) of the Directive.

Applicant answered the SOR in writing on August 26, 2004. He admitted two of the allegations under Guideline H with explanation, and denied one allegation under Guideline H, and all allegations under Guidelines J and E. He requested a hearing before an administrative judge, and the request was received by DOHA on August 30, 2004. Department Counsel was prepared to proceed with the case on May 6, 2005, and the case was assigned to me on May 12, 2005. A notice of hearing was issued on May 25, 2005, and the hearing convened on June 23, 2005. Five government exhibits and the testimony of the Applicant were received during the hearing. The record was kept open for Applicant to submit

additional information. Applicant timely submitted additional documents on July 6, 2005, and Department Counsel had no objection to consideration of the additional documents. DOHA received the transcript on July 5, 2005.

RULING ON PROCEDURE

Department Counsel moved to amend allegation 1.a. in the SOR to remove the allegation for possession of a firearm and substitute an allegation of possession of marijuana with intent to distribute to accurately reflect the criminal court proceedings. Department Counsel also moved for a similar amendment to allegation 2.a. Applicant's counsel had no objection to the amendment of the SOR. Allegations 1.a. and 2.a. were amended as requested.⁽¹⁾ Applicant's counsel also moved to make typographical error changes on Applicant's August 26, 2004, answer to the SOR. Department counsel had no objection. In paragraph 3 of the Answer, 1.b. was amended to read 1.c.; in paragraph 7, 3.b. was amended to read 3.c.; and in paragraph 8, 3.c. was amended to read 3.d.⁽²⁾

FINDINGS OF FACT

Applicant is a 33-year-old college graduate in mechanical design technology. He is employed by a defense contractor as a designer reviewing and modifying construction plans.⁽³⁾

In 1998, Applicant was arrested for possession of a firearm and possession of marijuana. He was indicted for the felony offense of possession of marijuana with intent to distribute.⁽⁴⁾ He pled guilty to and was found guilty of the misdemeanor offense of possession of marijuana and received a first offender sentence and placed on probation for two years, to perform community service, to pay a fine of \$575.50, to attend a substance abuse program, and his driver's license was suspended.⁽⁵⁾ Applicant completed all conditions of his first offender sentence and the charges were order dismissed.⁽⁶⁾ Applicant claims that a passenger in his car was in possession of the marijuana but he knew the passenger had the drugs. Applicant admitted there was a firearm in the car but he had a permit for the weapon. He pled guilty on the advise of his attorney to take advantage of the first offender program and not run the risk of a jail sentence.⁽⁷⁾

As part of his first offender sentence, Applicant attended and completed a substance abuse program in 1999. Applicant was tested for drugs during the program and all tests were negative.⁽⁸⁾ Applicant admitted he started using marijuana in 1992 while a college student, and used the drug approximately ten times a year until the fall of 1999.⁽⁹⁾

Applicant submitted a security clearance application in 2002. He answered "NO" to question 21 asking if he had ever been charged with or convicted of a felony. Applicant answered "NO" to question 22 asking if he had ever been charged with or convicted of a firearms offense. Applicant answered "NO" to question 24 asking if he had ever been charged with or convicted of an offense related to alcohol or drugs. Applicant answered "NO" to question 27 asking if since the age of 16 or in the last seven years had he used a controlled substance, for example, marijuana.⁽¹⁰⁾ Applicant stated he believed he did not need to list the firearm and distribution of marijuana felony arrests, and his conviction for possession of marijuana, since the charges were dismissed under the first offender program. Applicant stated he asked a legal resource business he was using if he had to list the offenses on his application. He was advised he did not have to list the offense since they were dismissed. Applicant could not recall the name of the attorney, the name of the legal resource firm, or the exact question he asked.⁽¹¹⁾ Applicant claimed he answered question 27 wrong because he did not read it carefully.⁽¹²⁾

POLICIES

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."⁽¹³⁾ Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.⁽¹⁴⁾

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions and mitigating conditions for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6.

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person.⁽¹⁵⁾ An administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation of recurrence.⁽¹⁶⁾

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to

classified information. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant.⁽¹⁷⁾ 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.

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the Applicant from being eligible for access to classified information.⁽¹⁸⁾ Thereafter, Applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts.⁽¹⁹⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."⁽²⁰⁾ "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability."⁽²¹⁾ "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."⁽²²⁾

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

Guideline H - Drug Involvement: There is a security concern because the improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

Guideline J - Criminal Conduct: There is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Guideline E - Personal Conduct: There is a security concern because conduct involving questionable judgment, untrustworthiness, or unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

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

CONCLUSIONS

I carefully considered all of the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

The government has established its case under both Guidelines H and J. Applicant's admitted use of marijuana, and his plea and finding of guilty to possession of marijuana establishes Drug Involvement Disqualifying Conditions E2.A8.1.2.1 (*any drug abuse*); E2.A8.1.2.2 (*illegal drug possession, . . .*) and Criminal Conduct Disqualifying Conditions E2.A10.1.2.1 (*allegations or admission of criminal conduct, regardless of whether the person was formally charged*), and E2.A10.1.2.2 (*a single serious crime or multiple lesser offenses*).

I have considered Drug Involvement Mitigating Conditions E2.A8.1.3.1 (*the drug involvement was not recent*), E2.A8.1.3.3 (*a demonstrated intent not to abuse any drugs in the future*), and Criminal Conduct Mitigating Conditions E2.A10.1.3.1 (*the criminal behavior was not recent*), and E2.A10.1.3.6 (*there is clear evidence of successful rehabilitation*). The last time Applicant used marijuana was in 1999, almost six years ago. His criminal conduct and drug use is not recent. Applicant is now older, mature, and a steady worker in a highly technical position. He has stated his intent not to use drugs again and there is no evidence he has used drugs. He completed all sentencing requirements and successfully completed his drug treatment and counseling. Applicant has demonstrated successful rehabilitation from his possession and use of marijuana. I conclude Applicant has mitigated security concerns for drug involvement and criminal conduct.

The government has established its case under Guideline E. Applicant's false answers to four questions on his security clearance application brings the matter under Personal Conduct Disqualifying Condition 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 security clearance eligibility or trustworthiness. . .*). When Applicant submitted his security clearance application in 2002, he knew of his felony arrest for a firearms violation and drug possession with intent to distribute, and his misdemeanor conviction for possession of marijuana. He knew he used drugs. His false answers to the four questions are a deliberate attempt to conceal the information from security investigators so as to present a clear record for his security and trustworthiness determination. In ordinary circumstances, it may be reasonable for a person to conclude they did not have to list certain offenses since the offenses were processed and dismissed under a first offender program. Applicant went much further. He stated he checked with legal counsel to see if he needed to list the offense. Only two years later, he could not recall the name of the lawyer or the firm or even the question he posed to them. His lack of memory is not reasonable and is a further indicator that he deliberately decided to conceal the information. Applicant's deliberate concealment of his use of drugs and felony and firearm arrest shows questionable judgment and indicates untrustworthiness, lack of candor, and is dishonest. I conclude Applicant has not mitigated the security concerns for his deliberate false answers to relevant and material facts.

I carefully considered all of the circumstances in light of the "whole person" concept. I conclude Applicant is not eligible for access to classified information.

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 H: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2, Guideline J: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Paragraph 3, Guideline E: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

Subparagraph 3.c.: Against Applicant

Subparagraph 3.d.: Against Applicant

DECISION

In light of all of the circumstances in 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.

Thomas M. Crean

Administrative Judge

1. Tr. 7-9; Government exhibit 5 (Department counsel's amendment to SOR).
2. Tr. 10-11.
3. Tr. 25-26; Government exhibit 1 (Security clearance application, dated Dec. 5, 2002).
4. Tr. 20-21; Government exhibit 3 (Warrant of arrest, dated Nov. 14, 1998); Government exhibit 4 (Grand jury indictment, dated Feb. 3, 1999).
5. Applicant's answer to SOR (Trial order, dated Mar. 18, 1999).
6. Applicant's answer to the SOR (Felony order - Dismissal of first offender, dated Mar. 9, 2001).
7. Tr. 20-21.
8. Applicant's additional documents (Discharge summary, dated Nov. 15, 1999).
9. Tr. 26-31; Government exhibit 2 (Applicant's statement, dated, Feb. 11, 2003) at 2-3.
10. Government exhibit 1 (Security clearance application, dated Dec. 5, 2002).
11. Tr. 35-39.
12. Tr. 39.
13. *Department of the Navy v. Egan*, 484 U.S. 518 (1988).
14. Directive ¶ E2.2.1.
15. *Id.*
16. Directive ¶¶ E2.2.1.1 through E2.2.1.9.
17. *See* Exec. Or. 10865 § 7.

18. Directive ¶ E3.1.14.

19. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15.

20. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

21. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993))

22. *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.