

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Between 1972 and 1992, Applicant was either charged with or convicted of carrying a concealed weapon and three drug related offenses. He used marijuana from 1991 to 1995, and from 1996 to 2001, and brought drugs into a federal enclave. Further, he used cocaine during 1996-1997, and was fired from his job after testing positive for cocaine. Finally, in 2002, he deliberately failed to disclose parts of his past drug related behavior on his SF 86. The record is not sufficient to overcome the criminal conduct and personal conduct security concerns raised by his actions. Clearance is denied.

CASE NO: 04-03393.h1

DATE: 05/12/2006

DATE: May 12, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03393

DECISION OF ADMINISTRATIVE JUDGE

JUAN J. RIVERA

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

Between 1972 and 1992, Applicant was either charged with or convicted of carrying a concealed weapon and three drug related offenses. He used marijuana from 1991 to 1995, and from 1996 to 2001, and brought drugs into a federal enclave. Further, he used cocaine during 1996-1997, and was fired from his job after testing positive for cocaine. Finally, in 2002, he deliberately failed to disclose parts of his past drug related behavior on his SF 86. The record is not sufficient to overcome the criminal conduct and personal conduct security concerns raised by his actions. Clearance is denied.

STATEMENT OF THE CASE

On July 26, 2005, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). The SOR informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information. ⁽¹⁾ On August 23 and September 29, 2005, Applicant answered the SOR (Answer) and requested a clearance decision based on the written record without a hearing.

Department Counsel prepared a File of Relevant Material (FORM) on November 17, 2005. The FORM was mailed to Applicant on November 23, 2005. He acknowledged receipt of the FORM on December 16, 2005. On January 17, 2006, Applicant submitted a one page statement in response to the FORM, and did not object to anything contained in the FORM. The case was assigned to me on February 17, 2006.

FINDINGS OF FACT

In his August 2005 answer to the SOR, Applicant admitted all SOR allegations. In his September 2005 answer, he denied SOR allegation 2.a and admitted the allegations in subparagraphs 1.a through 1.e, and 2.b through 2.d. His admissions are incorporated herein as findings of fact. After a thorough review of the pleadings, Applicant's statement,

and the evidence, I make the following additional findings of fact:

Applicant is 53 years old, married, and apparently has no children. According to his security clearance application (SF 86), from 1992 through 2001, he worked as a shipfitter for companies doing business with the Department of Defense (DOD) at the Norfolk Naval Shipyard, Norfolk, Virginia (Shipyard). In 2001, he became a marine mechanic, and now works as a surveyor for a company doing business with DOD within the Shipyard. He requires access to classified information at the secret level to retain his current job.

The security concerns in Applicant's case stemmed from his long history of criminal behavior, from 1972, when Applicant was 19 years old, to April 2002, when he was 49. Most of Applicant's incidents of misconduct are related to the possession, use, and sale of illegal drugs. In December 1972, he was convicted of possession of marijuana and sentenced to pay a \$250 fine and 30 days confinement (suspended). In April 1976, he was charged with possession of marijuana. The charge was later dismissed. In June 1980, he was convicted of carrying a concealed weapon and sentenced to pay a \$100 fine and served one-year probation.

In October 1992, Applicant was convicted of possession of marijuana, fined \$1,000, and sentenced to one-year probation. In his November 2003 statement to a DOD investigator,⁽²⁾ Applicant explained that while assisting in the formation of a union at the Shipyard, one of his acquaintances disclosed to authorities that Applicant was selling marijuana at his job site.⁽³⁾ When authorities searched Applicant's truck, they found 3/4 ounce of marijuana.

Applicant stated that from 1991 to 1995 he used marijuana with varying frequency (at least two times a week) as a means to relax. He purchased between 1/8 and 1/4 ounce of marijuana (\$20 to \$40) on a monthly basis. He temporarily stopped using marijuana in 1995 when he began dating a religious girl and attending church. In 1997, his father became terminally ill, and Applicant started using cocaine as a means to cope with his father's illness. He used cocaine with varying frequency, from once a month to three times a week. Applicant purchased \$20 to \$50 worth of cocaine, two to three times a month, and he would inhale one or two lines of cocaine, each hour, for four to five hours. He used the cocaine because it picked him up and gave him energy.⁽⁴⁾

After consuming cocaine, Applicant stated he needed to smoke marijuana at night so he could relax and go to sleep. In September 1996, Applicant tested positive for cocaine during a job-related urinalysis, and his employer suspended him from his employment. He was referred to a one-year drug education/rehabilitation course with the understanding that if Applicant completed the program he could remain in his job. In September 1997, Applicant tested positive for illegal substances twice and was terminated from his employment. From 1997 to 2001, Applicant continued to abuse marijuana, purchasing and using at the same rate he did from 1991 through 1995.

Applicant denied ever using any other illegal drugs, abusing prescription medications, or being addicted to any

controlled substance. Although Applicant did not complete his drug counseling or rehabilitation, he claimed to have been drug free for a long time. The only drug he takes now is back pain medication. Applicant stated he does not intend to use drugs in the future, because he does not want to jeopardize his family or his job. He considers his present job the best job he has ever had. Applicant averred he has no desire to ever resume a drug user lifestyle, that he has matured since he married in 2002, and the welfare of his family is his foremost priority.

In April 2002, Applicant submitted a SF 86 in which he deliberately provided false answers to questions 24 and 27. He answered "Yes" to question 24, which asked whether he had ever been charged with or convicted of any offenses related to alcohol or drugs, and disclosed his 1992 conviction for possession of marijuana. In his November 2003 statement to a government investigator, Applicant explained that prior to completing his SF 86 he was told that he would need a secret clearance as a condition of his employment. Afraid of losing his job, Applicant intentionally omitted or fabricated entries in the security clearance application concerning his use of drugs, because he did not want to adversely affect his chances of being hired.⁽⁵⁾ In his response to the FORM, Applicant recanted, in part, his 2003 statement. He admitted he did not provide full disclosure for fear of losing his job. Notwithstanding, Applicant also claimed he did not remember all his past convictions, and stated he regretted not requesting his criminal record prior to submitting the SF 86 to ensure accurate disclosure of his charges or convictions. I find that Applicant deliberately failed to disclose that in 1972 he was convicted for possession of marijuana, and that in 1976 he was charged with possession of marijuana.

Applicant answered "Yes" to question 27, which asked whether in the last seven years he had illegally used any controlled substance. He disclosed using marijuana 25 times from January 1991 to January 1997. Applicant deliberately failed to disclose, however, that he used marijuana with varying frequency from 1991 to at least 2001, and that he used cocaine with varying frequency during 1996-1997. Although not directly asked for in question 27, he also failed to disclose his 1996 job suspension for using cocaine, that his employer required him to attend a drug education/rehabilitation course, and that he was fired from his job after testing positive twice for illegal drugs in 1997 while participating in drug rehabilitation.

POLICIES

The Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility for access to classified information. The administrative judge must take into account both disqualifying and mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. The guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the granting or denial of access to classified information. However, the guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive, and the whole person concept.⁽⁶⁾ Having considered the record evidence as a whole, I conclude Guideline J (Criminal Conduct) and Guideline E (Personal Conduct), are the applicable relevant adjudicative guidelines.

BURDEN OF PROOF

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.⁽⁷⁾ 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 to ensure each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own.

The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish by substantial evidence⁽⁸⁾ a prima facie case that it is not clearly consistent with the national interest for the applicant to have access to classified information. The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries a heavy burden of persuasion.⁽⁹⁾ The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.⁽¹⁰⁾

CONCLUSIONS

Under Guideline J (Criminal Conduct), a history or pattern of criminal conduct is a security concern because it may indicate an unwillingness to abide by rules and regulations and may show the applicant to be lacking in judgment, reliability and trustworthiness.⁽¹¹⁾ The government established its case under Guideline J by showing that Applicant was charged with/convicted of three illegal drug offenses in 1972, 1976, and 1992, and carrying a concealed weapon in 1980. Additionally, Applicant possessed, purchased, and used illegal drugs from 1991 through 1995, and from 1996 through 2001. I also find, as discussed below under Guideline E, that Applicant deliberately falsified his 2002 security clearance application. His falsification of the SF 86 is a violation of 18 U.S.C. 1001, a felony offense.⁽¹²⁾ Disqualifying Condition (DC) 1: *Allegations or admission of criminal conduct*,⁽¹³⁾ and DC 2: *A single serious crime or multiple lesser offenses*,⁽¹⁴⁾ apply.

After considering all Mitigating Conditions (MC), I find only MC 1: *The criminal behavior is not recent*,⁽¹⁵⁾ applies. There is no evidence he has been involved in any misconduct since 2002. As such, his actions are not recent.

Nevertheless, under the totality of the circumstances, I find Applicant's criminal behavior is not isolated, and that he has not demonstrated clear evidence of successful rehabilitation. Applicant engaged in criminal misconduct over a period of 30 years, from the time he was 19 until he was 49. As such, his behavior cannot be attributed to youthful exuberance or stupidity. The available evidence indicates he has not been involved in illegal drug use since 2001. However, considering his 30-year history of criminal behavior, the fact he brought illegal drugs into the Shipyard, the nature and seriousness of his misconduct, and his disregard for rules and regulations, I find his favorable information is not sufficient to mitigate the Guideline J security concerns. His behavior raises questions about his ability and willingness to follow the law, and ultimately, to protect classified information.

Applicant's falsification of his SF 86 brings to the forefront the security concerns raised by his criminal behavior. Applicant's falsification is relatively recent and his conduct is aggravated by his minimization of his falsification in his answer to the FORM. Under the totality of the circumstances, I find Applicant's criminal behavior is not isolated, and he has not demonstrated clear evidence of successful rehabilitation. Furthermore, the pressures that led him to falsify the SF 86, i.e., his desire to cover up his drug abuse, are still present in his life. As such, his falsification weighs against the presence of rehabilitation and positive behavioral changes. Concerning Applicant's judgment, a single criminal incident calls into question a person's judgment. Repeated misconduct after several charges/convictions demonstrates an absolute lack of judgment and complete disregard for the law, rules and regulations. Even if Applicant's criminal behavior could be considered remote, under the totality of the circumstances of this case, the passage of time alone is not sufficient to demonstrate Applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interest as his own. Guideline J is decided against the Applicant.

Under Guideline E, personal conduct is always a security concern because it asks the ultimate question - whether a person's past conduct instills confidence the person can be trusted to properly safeguard classified information. An applicant's conduct is a security concern if it involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such behavior could indicate that the person may not properly safeguard classified information. [\(16\)](#)

The government established its case under Guideline E by showing that Applicant deliberately provided false answers when he submitted his SF 86. Applicant chose not to disclose his past criminal behavior because of his concern for the adverse impact this information would have on his qualifications to obtain a security clearance. Applicant's explanations for his failure to disclose the information, i.e., that he forgot his prior charges/convictions, ring hollow in light of the totality of the facts and circumstances, including his age at the time he submitted the SF 86, his past disregard for the law, his statements, and his answer to the SOR. I find Applicant's omissions were knowing and deliberate, and committed with the intent to mislead the government. Disqualifying Conditions (DC) 2: *The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . .*, [\(17\)](#) and DC 4: *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress . . .*, [\(18\)](#) apply.

Applicant was 49 years old at the time he submitted the SF 86. His past behavior and his other run-ins with the law aggravate his falsifications. He deserves credit for changing his lifestyle since 2001, and for his efforts to be a family man. Notwithstanding, his current behavior is not sufficient to mitigate the security concerns raised by his falsifications.

I have considered all the Personal Conduct ⁽¹⁹⁾ Mitigating Conditions, and find that none apply. In light of all the facts and circumstances, I conclude Applicant's falsifications are recent and that the motive that led him to falsify the SF 86, i.e., his desire to cover up his criminal behavior, remains a viable factor that could influence Applicant's future behavior. As such, he is likely susceptible to influence, pressure, or coercion in order to cover up his past criminal behavior from prospective employers and others in his community. Guideline E is decided against the Applicant.

I have carefully weighed all evidence, and applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. Considering all relevant and material facts and circumstances present in this case, including Applicant's statements, his misconduct, the whole person concept, and the adjudicative factors listed in the Directive, I find Applicant has not mitigated the security concerns.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Personal Conduct (Guideline E) AGAINST APPLICANT

Subparagraph 1.a - 1.e Against Applicant

Paragraph 2, Criminal Conduct (Guideline J) AGAINST APPLICANT

Subparagraph 2.a - 2.d 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.

Juan J. Rivera

Administrative Judge

1. Required by Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended.
2. FORM, Item 7.
3. FORM, Item 9.
4. FORM, Item 7.
5. FORM, Item 7.
6. Directive, E2.2.1. ". . . The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ."
7. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2 (Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.); ISCR Case No. 02-12199 (April 3, 2006) p. 3 (Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.); Directive, ¶ E3.1.32.1.
9. *Id.* at 528, 531.
10. *See Egan*; Directive E2.2.2.
11. Directive, E2.A10.1.1.
12. It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation, or knowingly make or use a false writing in any matter within the jurisdiction of the executive branch of the Government of the United States. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. (*Egan*, 484 U.S. at 527).
13. Directive, E2.A10.1.2.1.
14. Directive, E2.A10.1.2.2.
15. Directive, E2.A10.1.3.1.
16. Directive, E2.A5.1.1.

17. Directive, E2.A5.1.2.2.

18. Directive, E2.A5.1.2.4.

19. Directive, E2.A5.1.3.