

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is employed by a defense contractor. He was charged with and convicted of possession of marijuana in 2002. On his security application in 2003, he responded "NO" to the question concerning being charged with or convicted of any offense involving alcohol or drugs. He did inform security investigators of the offense when interviewed by them. Applicant has not mitigated the security concerns for his criminal conduct and his personal conduct. Clearance is denied.

CASENO: 04-03677.h1

DATE: 09/23/2005

DATE: September 23, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03677

DECISION OF ADMINISTRATIVE JUDGE

THOMAS M. CREAN

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is employed by a defense contractor. He was charged with and convicted of possession of marijuana in 2002. On his security application in 2003, he responded "NO" to the question concerning being charged with or convicted of any offense involving alcohol or drugs. He did inform security investigators of the offense when interviewed by them. Applicant has not mitigated the security concerns for his criminal conduct and his personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On April 21, 2005, the Defense Office of Hearing 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 April 29, 2005. The SOR alleges security concerns under Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) of the Directive.

Applicant answered the SOR in writing on May 18, 2005, denying all of the allegations under both guidelines, and providing an explanation. He elected to have the matter decided on the written record in lieu of a hearing.

Department Counsel submitted the Government's written case on June 23, 2005. Applicant received a complete file of relevant material (FORM) on July 1, 2005, and was provided the opportunity to file objections and submit material to

refute, extenuate, or mitigate the disqualifying conditions. Applicant responded on July 23, 2005, with an explanation of his actions under both guidelines, consist with the explanation he provided in response to the SOR. The case was assigned to me on August 1, 2005.

FINDINGS OF FACT

Applicant is a 22-year-old employee of a defense contractor. In August 2002, he was stopped by police for a traffic violation. Applicant granted police permission to search his car, and they found a bag of marijuana. Applicant contends the bag was left in the car by a friend. He appeared in court as scheduled, sentenced to probation for six months, 50 hours of community service, fined \$150.00, and his driver's license was restricted. After paying the fine, passing drug tests for a few months, and performing community service, Applicant was released from the sentence and his records were expunged. ⁽¹⁾

In 2003, Applicant submitted a security clearance application. ⁽²⁾ In response to question 24 which asked: "Have you ever been charged with or convicted of an offense (s) related to alcohol or drugs? For this item, report information regardless of whether the record in your cases has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the federal Controlled Substance Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607." Applicant answered "NO."

Applicant was interviewed by an agent of the Defense Security Service on January 20, 2004. Applicant gave a written statement discussing the circumstances of being stopped by police, the search of his vehicle, and the disposition of the case in court. He stated in his statement that he did not list the information concerning the arrest on the application, because the charges had been expunged, and friends and family advised him he did not have to list it. ⁽³⁾ There is no other information in the file concerning the circumstances of Applicant's interview by the agent.

In his answer to the SOR, Applicant stated:

When I saw the single exception was if the court issued an expungement, I thought I was legally answering correctly when I stated "NO" on the application. When I talked to the investigator, I told him the same thing when he asked why I stated no. I thought I didn't have to disclose that information because it was expunged. Otherwise, I would've put that information on the application at that time.

In his response to the FORM, Applicant expanded on his thoughts. He stated that he did not think receiving a citation was considered an arrest. He thought for an arrest he had to be read his rights and sent to jail.

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."⁽⁴⁾ Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.⁽⁵⁾

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.⁽⁶⁾ 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.⁽⁷⁾

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.⁽⁸⁾ 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.⁽⁹⁾ Thereafter, Applicant is responsible
⁽¹⁰⁾

for presenting evidence to rebut, explain, extenuate, or mitigate facts. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." (11) "[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." (12) "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (13)

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

Guideline E - Personal Conduct: A security concern exists for conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Any of these characteristics in a person 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. Since the allegations under both guidelines are connected, I will discuss them together.

The Government has established its case under Guideline J. Applicant's arrest and conviction for possession of marijuana, and a false response concerning the conviction on a security clearance application brings the matter under Criminal Conduct Disqualifying Conditions E2.A10.1.2.1 (*allegation 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*). Applicant was convicted of and sentenced for possession of marijuana. Applicant omitted this offense from his security clearance application, which is providing false information to the Government, and a felony offense in violation of 10

U.S.C. § 1001. The disqualifying conditions have been established.

The government has established its case under Guideline E, for only one of the allegations. Applicant's false answer to question 24 on his security clearance application brings this 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 employment qualifications, . . . determine security clearance eligibility or trustworthiness*). Applicant was charged with and convicted of possession of marijuana. He should have answered "YES" to question 24 because of this conviction. The disqualifying condition has been established as to his answer to question 24 on the security clearance application.

The government has not established its case as to the allegation Applicant provided false information to a security agent. The Personal Conduct Disqualifying Condition to consider is 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 personal security or trustworthiness determination*). There is no information that Applicant did not tell the security agent about the offense. Applicant's statement to the agent discusses the details and circumstances of the automobile stop, request for permission to search the vehicle, and finding the marijuana. There is no evidence of any other statement to the security agent or another response by Applicant to questions from the agent. The evidence shows Applicant revealed the circumstances of the incident to the agent. The fact that in his statement Applicant denied he was arrested because he believed he had to be read his rights and taken to jail for an arrest is not proof he lied to the agent. I conclude the disqualifying condition as it pertains to the statement to the security agent has not been established.

As to the allegations under Guideline J, I have considered Criminal Conduct Mitigating Conditions E2.A10.1.3.1 (*the criminal behavior was not recent*), E2.A10.1.3.2 (*the crime was an isolated incident*), and E2.A10.1.3.6 (*there is clear evidence of successful rehabilitation*). Applicant's arrest for possession of marijuana was in 2002, and his security clearance application was submitted in 2003. The two criminal behaviors only happened two and three years ago, respectively. Since the false statement on the security clearance application stems from the possession of marijuana offense, the criminal conducts are linked and not isolated incidents. Since Applicant was convicted of the possession of marijuana offense, I conclude he was in possession of the drugs. Applicant did pass drug screening while serving his sentence, and stated he does not use drugs, but he provided no other information concerning his drug use. While there is some evidence of rehabilitation, I conclude Applicant has not provided sufficient information to meet his heavy burden to mitigate the criminal conduct by showing successful rehabilitation. In addition, Applicant has not provided information to show successful rehabilitation from providing incorrect information on his security clearance application. Applicant has not mitigated the security concerns for his criminal conduct.

I have considered Personal Conduct Mitigating Conditions E2.A5.1.3.3 (*the individual made prompt, good-faith efforts to correct the falsification before confronted with the facts*); and E2.A5.1.3.4 (*omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided*) in regard to his answer to question 24 on the security clearance application. Applicant answered "NO" to question 24 concerning drug charges or convictions because he believed the offense had been expunged from his records. Applicant had questions concerning the proper response to the question because he asked family and friends if he had to include the offense. Family and friends are not the authorized personnel

from which to seek advice, as contemplated by MC 4. Applicant did not disclose the omission until questioned about it by the security agents. Applicant has not mitigated the security concern for his personal conduct in providing false information on his security clearance application.

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 J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: For 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. Item 5 (Applicant's statement, dated, Jan. 20, 2004); Item 6 (FBI Information Sheet, dated May 30, 2003).
2. Item 4 (Security clearance application, dated Aug. 4, 2003).
3. Item 5 (Applicant's statement, dated Jan 20, 2004).
4. *Department of the Navy v. Egan*, 484 U.S. 518 (1988).
5. Directive ¶ E2.2.1.
6. *Id.*
7. Directive ¶¶ E2.2.1.1 through E2.2.1.9.
8. *See* Exec. Or. 10865 § 7.
9. Directive ¶ E3.1.14.
10. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15.
11. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).
12. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993))
13. *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.