

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant exhibited poor judgement and a lack of credibility, as he has not been truthful or candid with information that he has furnished to the United States Government regarding his arrest for the usage of an illegal substance, and his using cocaine while possessing a Security Clearance. Mitigation has not been shown. Clearance is denied.

CASENO: 04-03759.h1

DATE: 01/23/2006

DATE: January 23, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03759

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant exhibited poor judgement and a lack of credibility, as he has not been truthful or candid with information that he has furnished to the United States Government regarding his arrest for the usage of an illegal substance, and his using cocaine while possessing a Security Clearance. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On April 31, 2005, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted or denied.

In a signed and sworn statement, dated April 22, 2005, Applicant responded to the SOR allegations. He requested that his case be decided on the written record in lieu of a hearing. On July 29, 2005, Department Counsel prepared the Department's written case. A complete copy of the File of Relevant Material (FORM) was provided to Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did

not submit a response to the FORM. The case was assigned to this Administrative Judge on September 20, 2005.

In the FORM, Department Counsel offered four documentary exhibits (Exhibits 1-4), which have been admitted without objection. Applicant offered no documentary evidence into the record.

FINDINGS OF FACT

The Government opposes Applicant's request for a security clearance, based upon the allegations set forth in the SOR. The SOR contains four allegations, 1.a. through 1.d., under Guideline E (Personal Conduct), and one allegation, 2.a., under Guideline J (Criminal Conduct). In his Response to the SOR (Exhibit 1), Applicant admitted all of the SOR allegations. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR and the admitted documents, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 48 years old. He is employed as a maintenance worker by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he exhibited conduct involving questionable judgement, untrustworthiness, unreliability and dishonesty.

1.a. Applicant completed a signed, sworn Security Clearance Application (SCA) on August 27, 2003 (Exhibit 3). Question #24 of the SCA asked, "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been sealed or otherwise stricken from the record." Applicant answered "No" to this question. Applicant did not list his arrest on October 20, 1989, for which he was charged with and plead guilty to Violating a Controlled Substance Law-Possession, which is a Felony. He received a suspended sentence and was placed on three years probation (Exhibits 1, 3, and 4).

1.b. Question #28 asks, "Have you EVER illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance . . .?" Applicant answered "No" to this question. He failed to provide the information that he used cocaine, by his own estimate "no more than 300 times" from 1988 until his arrest in 1989, a period during which he possessed a Security Clearance, which was granted on June 20, 1988 (Exhibits 1, 3, and 4).

1.c. Applicant used and purchased cocaine, from 1988 until 1989, a period during which he possessed a Security Clearance, which was granted on June 20, 1988 (Exhibits 1, 3, and 4).

1.d. During an interview on October 2, 2003, Applicant initially made false statements to a Special Agent of the Defense Security Service (DSS) by claiming that he had furnished incorrect information on his SCA because he did not have the exact dates of his arrest and a secretary filled out the SCA form. In fact, he knowingly and deliberately failed to disclose his arrest on the SCA as a result of his embarrassment (Exhibits 1, 3, and 4).

Paragraph 2 (Guideline J - Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal conduct. Applicant's conduct involved furnishing information to the Government in the form of written, signed, and sworn completed questionnaire, and statements made to Government investigators that were less than complete and truthful, as alleged in the SOR as 1.a., 1.b., and 1.d. These misrepresentations are a violation of Federal Law, Title 18, United States Code Section 1001, a felony.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- I. The likelihood of continuation or recurrence.

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in acts of alcohol abuse and conduct that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be

a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegation set forth in the SOR:

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

Paragraph 1 (Guideline E - Personal Conduct)

With respect to Guideline E, the evidence establishes that Applicant furnished to the Government less than complete, honest answers, regarding his cocaine usage and arrest, especially during a time when he held a Security Clearance, in a SCA, completed on August 27, 2003, and subsequently to a Government investigator.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts or fails to furnish relevant information to a Government investigator, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, I conclude that Applicant knowingly and willingly failed to give complete, honest answers to the Government.

In reviewing the Disqualifying Conditions (DCs) under Guideline E, I conclude that DC (E2.A5.1.2.2.) applies because Applicant deliberately provided false and misleading information to the Government in a SCA. Applicant's conduct also falls within DC (E2.A5.1.2.3.), because of false and misleading statements made by Applicant to a Government investigator. No MC applies in this paragraph. Applicant's conduct, considered as a whole, including his drug usage, especially while holding a Security Clearance, and the misinformation that he provided to the Government, both in the SCA and to the DSS Agent, exhibit questionable judgement, unreliability, and a lack of candor. I resolve Paragraph 1, Guideline E, against Applicant.

(Guideline J -Criminal Conduct)

The Government also established by substantial evidence that Applicant engaged in criminal conduct, as he furnished information to the Government that was not complete and truthful, which is a violation of Federal Law, Title 18, United States Code Section 1001.

DC (E2.A10.1.2.1.), allegations or admissions of criminal conduct, regardless of whether the person was formally charged, and DC (E2.A10.1.2.2), a single serious crime or multiple lesser offenses, apply in this case. Applicant has not mitigated this allegation. Paragraph 2 is found against Applicant.

In this case, the Government has met its burden of proving by substantial evidence that Applicant has exhibited poor judgement and untrustworthy behavior by ingesting illegal substances while holding a Security Clearance and furnishing untruthful information to the Government (Guideline E), and that he has engaged in criminal conduct (Guideline J). Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him. Accordingly, the evidence supports a finding against Applicant.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Paragraph 2: AGAINST APPLICANT

Subparagraph 2.a.: 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.

Martin H. Mogul

Administrative Judge