

KEYWORD: Criminal Conduct; Drugs; Personal Conduct

DIGEST: From age 15 in 1995, to age 21 in 2001, Applicant used and sold illegal drugs. During this period of time, he was convicted of five felony offenses, three of them drug related. He was also convicted of two misdemeanor offenses, one drug related, and was cited for another drug offense. The information in the record is not sufficient to overcome the criminal conduct, drug involvement, and personal conduct security concerns raised by his actions. Clearance is denied.

CASENO: 04-04107.h1

DATE: 04/14/2006

DATE: April 14, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-04107

DECISION OF ADMINISTRATIVE JUDGE

JUAN J. RIVERA

APPEARANCES

FOR GOVERNMENT

Jeff A. Nagel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

From age 15 in 1995, to age 21 in 2001, Applicant used and sold illegal drugs. During this period of time, he was convicted of five felony offenses, three of them drug related. He was also convicted of two misdemeanor offenses, one drug related, and was cited for another drug offense. The information in the record is not sufficient to overcome the criminal conduct, drug involvement, and personal conduct security concerns raised by his actions. Clearance is denied.

STATEMENT OF THE CASE

On May 2, 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), Guideline H (Drug Involvement), 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 July 1, 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 August 5, 2005. The FORM was mailed to Applicant on August 18, 2005, and he acknowledged receipt of the FORM on August 31, 2005. Applicant provided his one page response on September 9, 2005, and included three documents for consideration. He did not object to anything contained in the FORM. The case was assigned to me on October 11, 2005.

FINDINGS OF FACT

Applicant admitted the SOR allegations in subparagraphs 1.a - 1.k, and 2.b - 2.d. He failed to respond to subparagraphs 2.a, and 3.a. I considered these allegations denied. His admissions are incorporated herein as findings of fact. After a

thorough review of the pleadings and exhibits, I make the following additional findings of fact:

Applicant is 26 years old and single. He attended high school from 1994 to 2000, but apparently obtained his high school diploma through an adult education program in March 2000. (2) He described himself as a troubled teenager mixed up with drugs and criminal activity and attributed his past behavior to his lack of adequate direction and supervision in life. According to his SF 86, he has lived at his current address since 1984.

His security concerns stemmed from his long history of criminal behavior, largely related to his illegal drug abuse. Applicant began to use marijuana when he was 15 years old. (3) From age 15 to 16, he use marijuana at social events with his high school friends. From Age 17 to 18, he used marijuana on a daily basis, smoking one or two marijuana cigarettes a day. From age 19 to 21, Applicant used marijuana on what he described as a sporadic-frequent basis, sometimes daily, sometimes once a month. He enjoyed using marijuana because it made him feel mellow. Applicant purchased his own marijuana and spent between \$100 and \$200 a month. In 2001, he stopped using marijuana.

Applicant started using cocaine when he was 17 years old. By age 18, he would binge on cocaine, consuming it for two days in a row. He purchased and sold cocaine to support his own habit, spending approximately \$200 a month for personal use. He stopped using cocaine because it was too expensive, and he did not like the fact that it made him too hyper. Applicant stated he has not used cocaine since 2001. He also used several amphetamines during high school and until 2001, when he stopped using illegal drugs.

Applicant's documented criminal behavior began in April 1997, at age 17. He and some of his friends were arrested and charged with two felonies for breaking into cars to steal their contents. He pled guilty to receiving stolen property, a felony, and possession of burglary tools, a misdemeanor. He was sentenced, in part, to pay a \$1,000 fine and to serve 30 days in jail. In March 1998, a car in which he was a passenger was stopped by police officers. Applicant was searched and found to be in possession of 10 grams of marijuana. He pled guilty to possession of marijuana, a misdemeanor. In May 1998, after binging on cocaine at a party, he was arrested for driving under the influence of intoxicants. He pled guilty to charges of driving under the influence of cocaine, a misdemeanor, and possession of cocaine, a felony. He was sentenced, in part, to pay a \$1,500 fine and to serve seven days in jail under a sentence diversion program.

In August 1998, Applicant was searched during a traffic stop and found to be in possession of 18 grams of methamphetamine. He pled guilty to transportation of controlled substances, a felony. The charge of possession of controlled substances was dismissed. He was sentenced to 120 days confinement and a \$500 fine. In April 1999, Applicant was snorting cocaine with friends. When police officers arrived at the location, he elected to run away. He pled to possession of a controlled substance, a felony, and resisting arrest, a misdemeanor. He was sentenced to 180 days in jail and a \$740 fine. In June 2001, Applicant pled guilty to driving under the influence of alcohol. He was sentenced to pay a \$1,900 fine and served two days in jail. Finally, in August 2001, he was cited for possession of marijuana while driving a car. He paid a \$305 fine. There is no evidence Applicant has been involved in any further criminal misconduct since August 2001.

In November 2001, Applicant was hired as a maintenance trade helper for a technology company doing business with the Department of Defense. He averred he has received outstanding performance reviews for the last four years and has been promoted twice. He manages a small department and is the administrator of a computer network.

In his answer to the FORM, Applicant claimed that as a result of his mistakes and experiences, he realized he had no future and decided to change his lifestyle. He averred he has taken responsibility for his actions and participated in several rehabilitative programs that taught him positive ways to look at life. To support his assertions, he included certificates of completion for three different programs in August 2000. Applicant claimed he has learned from his mistakes and will not repeat his criminal behavior. He averred that through his participation in diversion programs, he has matured and developed strong discipline, ethics, and morals.

Applicant disclosed, in large part, his drug abuse and criminal behavior on the security clearance application he submitted in March 2002.

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, (4) and the whole person concept. (5) Having considered the record evidence as a whole, I conclude Guideline J (Criminal Conduct) Guideline H (Drug Involvement), 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 (6) for

an applicant to be eligible to either receive or continue to have access to classified information. The government has the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. To meet its burden, the government must establish 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.⁽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 "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.⁽⁸⁾

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.⁽⁹⁾ The government established its case under Guideline J by showing that from age 15 in 1995, to age 21 in 2001, Applicant used, transported, and sold illegal drugs. During this period of time, he was convicted of five felony offenses, three of them drug related. Additionally, he was convicted of two misdemeanor offenses, one drug related, and was cited for another drug offense. I conclude Guideline J Disqualifying Condition (DC) 1: *Allegations or admission of criminal conduct*,⁽¹⁰⁾ and DC 2: *A single serious crime or multiple lesser offenses*,⁽¹¹⁾ apply.

Applicant engaged in criminal misconduct between the ages of 15 and 21. As such, his behavior could be attributed, to a certain extent, to youthful exuberance or stupidity. Further, there is no evidence he has been involved in any further drug related incidents or criminal misconduct since 2001. After considering all of the Guideline J Mitigating Conditions (MC), I find that only MC 1: *The criminal behavior is not recent*,⁽¹²⁾ applies. It has been five years since the Applicant committed a criminal offense. 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's record evidence is not sufficient for him to overcome the security concerns raised by his behavior. Applicant's available information indicates he has not used drugs or been involved in any drug related incident or any other criminal misconduct since 2001. However, considering his long history and frequency of substance abuse, the nature and seriousness of his criminal misconduct, and the lack of information to establish he had been fully rehabilitated and is participating in aftercare programs to prevent recurrence, I find his favorable information is not sufficient to mitigate the Guideline J security concerns.

Under Guideline H (Drug Involvement), 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. Such conduct may also be criminal and indicative of a disregard for rules and regulations in place to protect national interests.⁽¹³⁾ The government established its case under Guideline H by showing that Applicant used marijuana, cocaine, and methamphetamine, with varying frequency, including daily, from 1995 until around November 2001. The government further established that Applicant purchased and sold drugs. Guideline H DC 1: *Any drug abuse*,⁽¹⁴⁾ and DC 2: *Illegal drug possession, . . . purchase, sale, or distribution*,⁽¹⁵⁾ apply.

I considered all the Guideline H Mitigating Conditions and, for the same reasons outlined above under the discussion of the Guideline J Mitigating Conditions, I conclude MC 1: *The drug involvement was not recent*,⁽¹⁶⁾ and MC 3: *A demonstrated intent not to abuse any drugs in the future*,⁽¹⁷⁾ apply. I also find, however, that Applicant's behavior was not isolated as it spanned a period of six years.

For the same reasons outlined above under the discussion of the Guideline J Mitigating Conditions (incorporated herein), I conclude Applicant's illegal involvement with drugs raises questions about his ability and willingness to follow the law, and ultimately, to protect classified information. The record evidence suggests Applicant had a serious drug abuse problem. He abused a variety of drugs for six years, and his abuse was frequent. Most of the time he was using drugs on a daily basis. Applicant showed no regard for the consequences of his actions even though he was convicted, fined and incarcerated on numerous occasions. Although his drug related behavior is not recent and he has stated he intends never to use drugs again, under the totality of the circumstances, Applicant's available information failed to show he has been rehabilitated and/or that he has taken steps to prevent future recurrence. I find Guideline H against the Applicant.

Under Guideline E (Personal Conduct), 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.⁽¹⁸⁾

The Guideline E allegation is based on the same identical facts that give rise to the security concerns alleged under Guideline J. The government established its case under Guideline E by showing the facts already discussed under Guidelines J, above, incorporated herein. Personal Conduct DC 4: *Personal conduct . . . that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*; ⁽¹⁹⁾ and DC 5: *A pattern of dishonesty or rule violations*,⁽²⁰⁾ apply.

I considered all the Guideline E Mitigating Conditions (MC) and conclude that only MC 5: *The individual has taken*

positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress, (21) applies. There is no evidence Applicant has been involved in any drug related incidents or criminal misconduct since 2001, and he disclosed his past criminal behavior and drug abuse in his SF 86.

Notwithstanding, for the same reasons outlined above under the discussion of the Guideline J and Guideline H Mitigating Conditions, I conclude Applicant is not able to mitigate the security concerns. His disclosure of his drug related misconduct and criminal behavior, absent evidence of rehabilitation and efforts to prevent recurrence of his past criminal and drug related behavior, is not sufficient to mitigate the Guideline E concerns. A single incident of illegal drug use calls into question a person's judgment. Repeated drug involvement after several convictions and subsequent confinement demonstrates an absolute lack of judgment and complete disregard for the law, rules and regulations. 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. He failed to meet his burden to refute, extenuate, or mitigate the government's concerns. The "clearly consistent with the national interest" standard requires any reasonable doubt about this Applicant's suitability for a security clearance to be resolved in favor of protecting national security.

I have carefully weighed all of the evidence, and I have 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 statement, 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, Criminal Conduct (Guideline J) AGAINST APPLICANT

Subparagraph 1.a - 1.k Against Applicant

Paragraph 2, Drug Involvement (Guideline H) AGAINST APPLICANT

Subparagraph 2.a - 2.d Against Applicant

Paragraph 3, Personal Conduct (Guideline E) AGAINST APPLICANT

Subparagraph 3.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. 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. Applicant's sketchy personal information was obtained from his Office of Personnel Management Security Clearance Application (SF 86), FORM Item 5.
3. FORM, Item 7. Applicant described his criminal misconduct and history of drug abuse in his February 2004 statement. The information is corroborated in Items 6 and 8 - 14.
4. Directive, Section 6.3. Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate: the nature and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the age of the applicant; the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation; and the probability that the circumstances or conduct will continue or recur in the future.
5. 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. . . ."

6. See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

7. *Id.* at 528, 531.

8. See *Egan*; Directive E2.2.2.

9. Directive, E2.A10.1.1.

10. Directive, E2.A10.1.2.1.

11. Directive, E2.A10.1.2.2.

12. Directive, E2.A10.1.3.1.

13. Directive, E2.A8.1.1.1.

14. Directive, E2.A8.1.2.1.

15. Directive, E2.A8.1.2.2.

16. Directive, E2.A8.1.3.1.

17. Directive, E2,A8.1.3.3.

18. Directive, E2.A5.1.1.

19. Directive, E2.A5.1.2.4.

20. Directive, E2.A5.1.2.5.

21. Directive, E2.A5.1.3.5.