

KEYWORD: Criminal Conduct; Drugs; Personal Conduct

DIGEST: Applicant is 32 years old and has worked for a federal contractor since 2000. When he filled out his security clearance application he deliberately concealed his past criminal and drug history. When providing a sworn statement to the Defense Security Service's investigator he admitted to some of his past criminal conduct, but concealed other parts of his background. Applicant's explanations and testimony at his hearing was not credible. Applicant mitigated the security concerns under Guideline H, drug involvement, but failed to mitigate the security concerns under Guidelines J, criminal conduct, and Guideline E, personal conduct. Clearance is denied.

CASENO: 04-04518.h1

DATE: 02/02/2006

DATE: February 2, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-04518

**DECISION OF ADMINISTRATIVE JUDGE
CAROL G. RICCIARDELLO**

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant is 32 years old and has worked for a federal contractor since 2000. When he filled out his security clearance application he deliberately concealed his past criminal and drug history. When providing a sworn statement to the Defense Security Service's investigator he admitted to some of his past criminal conduct, but concealed other parts of his background. Applicant's explanations and testimony at his hearing was not credible. Applicant mitigated the security concerns under Guideline H, drug involvement, but failed to mitigate the security concerns under Guidelines J, criminal conduct, and Guideline E, personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On May 2, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline J (criminal conduct), Guideline H (drug involvement), and Guideline E, (personal conduct).

In a sworn statement, dated June 3, 2005, Applicant responded to the SOR allegations and requested a hearing. In his SOR response, Applicant admitted all of the allegations under Guidelines J, H, and E. The case was assigned to me on November 22, 2005. A notice of hearing was issued on December 21, 2005, scheduling the hearing for January 12, 2006. The hearing was conducted as scheduled. The government submitted thirteen exhibits that were marked as Government Exhibits (GE) 1-13. The exhibits were admitted into the record without objection. Applicant testified on his own behalf, and had one witness testify. He submitted two exhibits that were marked as Applicant's Exhibits A-B. The exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on January 19, 2006.

FINDINGS OF FACT

Applicant's admitted all of the allegations in the SOR, and they are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 32 years old, married and has worked for a federal contractor since 2000. He started with the company as a janitor and has worked his way up to the position of material handler. He finished high school and has taken some college classes. On September 25, 2000, approximately a week after starting his job, he was provided a security clearance application.⁽²⁾ Applicant claimed he had no idea what the form was for even though the top of the form reads "security clearance application." He claims he was afraid to provide accurate information because he would have to divulge his past criminal and drug history, and he did not know what the information would be used for. He did not seek advice from the security manager. Rather he asked the advice of his father, a long time and now retired employee of the same company. Applicant claims his father told him to falsify information on the form and not put down his drug history.⁽³⁾ Applicant listened to his father and falsely answered "no" to Question 27 inquiring about past illegal drug activity.⁽⁴⁾ Applicant had used marijuana, with varying frequency, from about 1993 to about September 2000. He had used cocaine, with varying frequency, from about 1998 to September 2000, and had he used methamphetamines, with varying frequency, from about 1996 to about September 2000. Applicant stated "I have used marijuana, cocaine, methamphetamines, although I did not list this on my security forms. I left this information off because I was afraid that it might be held against me."⁽⁵⁾ Applicant's father testified at the hearing and when questioned about his advice to his son, he was evasive and feigned not to understand very simple and basic questions about the incident, finally stating he could not recall if he told his son to lie.⁽⁶⁾ His testimony was not credible.

In addition to intentionally lying about his drug use Applicant also intentionally and deliberately falsified his answers to questions 21,⁽⁷⁾ 24,⁽⁸⁾ and 26,⁽⁹⁾ answering "no" to each. Question 21 asked about prior felony charges or convictions. Applicant was charged with felony burglary on September 30, 1988, and felony larceny on about May 17, 1991. No information was provided regarding the disposition of the 1988 case. To the felony larceny charge, Applicant pled guilty to theft by control and was sentenced to 14 hours of community service.

Question 24 asked about Applicant's police record with regards to alcohol or drug offenses. Applicant failed to divulge he had been arrested on about October 1992 and charged with minor in possession of alcohol. He pled guilty and paid a fine of \$201.

Question 26 asked Applicant to list whether he had been arrested, charged or convicted of any offense in the last 7 years that had not already been listed. Applicant was arrested on about July 16, 1995, and charged with theft under \$1,200 and disorderly conduct. He was found guilty to the disorderly conduct and failure to appear and was sentenced to one day in jail. He was arrested on about May 19, 1996, and charged with assault, disorderly conduct and weapons misconduct. He was found guilty of disorderly conduct and was placed on 12 months' unsupervised probation. Applicant was arrested on about December 5, 1996, and charged with criminal trespass. He was found guilty and placed on twelve months unsupervised probation and fined. Applicant was again arrested on about July 19, 1998, and charged with disorderly conduct, simple assault, trespassing, and threaten/stalking. No information was provided regarding the disposition of these charges.

Applicant made a sworn statement to a Defense Security Services (DSS) investigator on April 2, 2003, over two and one

half years after he submitted his SCA in September 2000. He admitted to being arrested three times and stated "Other than the above three arrests, the only police involvement I have had is a speeding ticket that I got in [State A]." (11) He went on to say "I have had no other arrests." (12) Later during the same interview, when confronted by the investigator about his numerous other arrests, Applicant finally admitted to them. (13)

Applicant claimed he was immature when he provided the false information, he could not remember his past arrests, he did not want to remember them, he probably did remember some, but thought they were not important, and with regard to his criminal conduct he was either not really involved in it or he minimized his involvement. (14) He admitted he used poor judgment in providing false answers. He did so because he was embarrassed by his past, stress, carelessness, and stupidity. (15) He also attributed his failures to his supervisors and management because they should have better informed him and given him better direction and perhaps he would not have made an error. Applicant attributes his criminal and drug problems to being easily susceptible to peer pressure. He claims he was also coerced, but provided no specifics. He no longer associates with those who influenced him in this way.

Applicant provided character statements from co-workers, a supervisor, and tenants, who believe he is an exemplary employee, hard worker, has a good work ethic, and is a professional. He is believed to have a high level of cognitive and verbal skills and demonstrates them in his job. (16) Applicant's tenants attest to him being an excellent landlord. Applicant claims to be a changed man, who is now a responsible adult. He no longer uses drugs and does not intend to do so in the future, and although he does drink alcohol, he does so responsibly. He is now committed to being a good citizen.

Applicant intentionally and deliberately falsified information on his sworn SCA. He intentionally and deliberately falsified information on his sworn statement made two years later to DSS. At his hearing, Applicant was evasive, lacked candor, was unbelievable, and consistently untruthful. He consistently blamed others for his past criminal conduct, and minimized or denied his involvement. Applicant had numerous explanations for his falsifications, none of which were believable. Applicant's false statements were felonies in violation of 18 U.S.C. § 1001.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, Guideline H, pertaining to drug involvement, and Guideline E, pertaining to personal conduct, with their respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the

applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽¹⁷⁾ The government has the burden of proving controverted facts.⁽¹⁸⁾ The burden of proof is something less than a preponderance of evidence.⁽¹⁹⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him.⁽²⁰⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽²¹⁾

No one has a right to a security clearance⁽²²⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽²³⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽²⁴⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽²⁵⁾ 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.

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

Guideline J-Criminal Conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Guideline H-Drug Involvement is a security concern because 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 E-Personal Conduct is a security concern when an individual's conduct involves questionable judgment,

untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that 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 guideline are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guidelines J, H and E.

Based on all the evidence, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*) both apply.

Applicant has a long history of arrests, charges and convictions, both felony and misdemeanor. Applicant intentionally falsified his SCA and later lied in his sworn statement to the DSS investigator. Applicant's falsifications were a violation of 18 U.S.C. § 1001, a felony.

I have considered all the mitigating conditions and especially considered Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1 (*The criminal behavior was not recent*), CC MC E2.A10.1.3.2 (*The crime was an isolated incident*), CC MC E2.A10.1.3.3. (*The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*) CC MC E2.A10.1.3.4 (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*), and conclude none apply. Although Applicant's last formal charge was in 1998, his falsification of his SCA and his statement to the DSS investigator are felonies, and therefore his criminal conduct is recent. Applicant has numerous arrests, charges and convictions and therefore his criminal activity was not an isolated event. Applicant claimed he was coerced, but provided no specifics or corroborating evidence to support his position. His actions, including his latest falsifications, were done voluntarily and, although he sought advice from his father, he made the decision how to answer all the questions on his SCA and chose to deliberately provide false information. Due to his recent falsifications I find there is not clear evidence of successful rehabilitation. Applicant failed to mitigate the security concerns under Guideline, J, criminal conduct.

Based on all the evidence, Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1 (*Any drug abuse* ⁽²⁶⁾), applies. Applicant used marijuana, cocaine and methamphetamines, with varying frequency until September 2000. I

considered all the mitigating conditions and especially considered Drug Involvement Mitigating Condition (DI MC) E2.A8.1.3.1 (*The drug involvement was not recent*); DI MC E2.A8.1.3.2 (*The drug involvement was an isolated or aberrational event*), DI MC E2.A8.1.3.3 (*A demonstrated intent not to abuse any drugs in the future*). Applicant's last drug use was in September 2000, a period of over five years, and therefore I find his drug use was not recent. Based on the extended period from 1993 to 2000, and the variety of drugs he used, I find his drug involvement was not an isolated or aberrational event. Because there is no evidence of recent drug use, and Applicant has expressed a commitment that he does not intend to use drugs in the future, I find DI MC E2.A8.1.3.1. and DI MC D2.A8.1.3.3 apply. Applicant has successfully mitigated Guideline H, drug involvement.

Based on all the evidence, Personal Conduct Disqualifying Condition (PC DC) 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, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*), PC DC 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 personnel security or trustworthiness determination*), PC DC E2.A5.1.2.4 (*Personal conduct or concealment of information 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*), and PC DC E2.A5.1.2.5 (*A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*) apply in this case.

Applicant deliberately concealed relevant information on his SCA. Later he deliberately provided false and misleading statements to a DSS investigator. Applicant was embarrassed by the information and believed it would hurt his chances of obtaining a clearance. His conduct shows a consistent disregard for the truth and a pattern of dishonesty. All of the above personal conduct disqualifying conditions apply. His actions raise serious questions about Applicant's character, judgment, and honesty.

I have considered all the mitigating conditions and especially considered Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.2 (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*), PC MC E2.A5.1.3.3 (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*), PC MC 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*), and PC MC E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). I conclude none of the mitigating conditions apply. Applicant's falsifications were not isolated, as evidenced by him first lying on his SCA, then later on his sworn statement to DSS, and also at his hearing. Applicant did not make a good faith effort to correct the falsifications on his SCA, but rather continued to mislead and conceal information during his interview with DSS and in a subsequent sworn statement. It was not until he was confronted repeatedly with the facts did he finally provide all the required information. Although it is likely that Applicant's father did tell him to lie on his SCA, Applicant was 27 years old at the time. Certainly an age where he realized lying on a document under oath merits serious ramifications. Applicant did not consult an authorized person to assist him with questions he may have had, but rather chose the route of concealment. Based on Applicant's consistent conduct and his testimony where he repeatedly attempted to provide explanations for why he lied, none of which were credible, I find he has not taken steps to reduce his vulnerability to coercion, exploitation or duress. I find none of the mitigating conditions apply. Applicant failed to mitigate the security concerns raised by his personal conduct.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I considered the whole person and I find Applicant failed to mitigate the security concerns regarding criminal conduct and personal conduct, but did mitigate the concerns regarding his drug involvement. Therefore, I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guideline H is decided for Applicant and Guidelines J and E are decided against Applicant.

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

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Paragraph 2. Guideline H FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: 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 this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Carol G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. GE 1.

3. Tr. 27-28.

4. Question 27 states: *Your Use of Illegal Drugs and Drug Activity-illegal Use of Drugs-Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.) hallucinogenics (LSD, PCP, etc.), or prescription drugs.*

5. GE 2 at 3.

6. Tr. 63-69.

7. Question 21 states: *Your Police Record-Felony Offenses-For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607. Have you every been charged with or convicted of any felony offense?*

8. Question 24 states: *Your Police Record-Alcohol/Drug Offenses-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 court record. The single e3xception to this requirement is for certain convictions under the Federal Controlled Substances Act for which te court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S. C. 3607*

9. Question 26 states: *Your Police Record-Other Offenses-For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607. In the last 7 years, have you been arrested for, charged with, or convicted of nay offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.)*

10. GE 2.

11. GE 2 at 3.

12. *Id.*

13. *Id.* at 4.

14. Tr. 21.

15. *Id.*

16. AE A at 4.

17. ISCR Case No. 96-0277 at 2 (App. Bd. Jul 11, 1997).

18. ISCR Case No. 97-0016 at 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.

19. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

20. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.

21. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.

22. *Egan*, 484 U.S. at 531.

23. *Id.*

24. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

25. Executive Order 10865 § 7.

26. E2A8.1.1.2.1 defines drug abuse as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.