

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant failed to mitigate the personal and criminal conduct concerns raised by his deliberate falsification of information submitted to the government in a recent security clearance application (SF 86), and his false statements to the government through subject interviews during his background investigation. Clearance is denied.

CASENO: 04-06256.h1

DATE: 04/18/2006

DATE: April 18, 2006

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-06256

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esquire, Department Counsel

FOR APPLICANT

William J. Holmes, Esquire

SYNOPSIS

Applicant failed to mitigate the personal and criminal conduct concerns raised by his deliberate falsification of information submitted to the government in a recent security clearance application (SF 86), and his false statements to the government through subject interviews during his background investigation. Clearance is denied.

STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to give Applicant a security clearance. On May 6, 2005, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline E (personal conduct) and Guideline J (criminal conduct). Applicant timely submitted a responsive pleading, and requested a hearing.

The case was assigned to me on October 3, 2005, and I convened a hearing on November 16, 2005. The parties appeared as scheduled and the government presented six exhibits (GE 1 - 6), which were admitted without objection. Applicant presented seven exhibits (AE A - G), which were admitted, with AE F being admitted over Department Counsel's objection.⁽²⁾ He also testified in his own behalf and presented the testimony of three other witnesses. DOHA received the transcript (Tr) on December 1, 2005.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is 37 years old and has been employed as a heating, air conditioning, and ventilation (HVAC) designer and

production manager by defense contractors since 1995. His work supports Navy shipyard, surface ship, and aviation configuration, maintenance, and modification programs. Applicant has held his current position since October 2001. He is highly regarded by his employer having recently received several awards, such as Employee of the Year and Employee of the Quarter. He has been married since 1998, and they have a four-year-old child.

Applicant used marijuana beginning in 1986. Through 1988, he used the drug about three times each month. In 1988 and 1989, he used as often as everyday, and sometimes bought small quantities of marijuana for his personal use. From 1989 until 2000, Applicant used marijuana on what is best described as a sporadic basis. He used marijuana once in 1999 and once in 2000 with a neighbor.

Applicant has been arrested twice for drug-related offenses. In June 1987, he was arrested and charged with possession of marijuana after a police officer found a small quantity of the drug in Applicant's car during a search incident to a traffic stop. The charge was eventually dismissed. He was also arrested in June 1991 and charged with conspiracy to sell marijuana. Applicant had been riding in a car with a friend who he knew was a small-scale drug dealer. They made a stop so the friend could sell some marijuana to a customer who turned out to be an undercover police officer. Applicant was arrested two weeks later and eventually sentenced to serve 15 weekends in jail.

Applicant submitted a security clearance application (SF 86) on or about October 30, 2002. In response to question 24 (Your Police Record - Alcohol / Drug Offenses), he disclosed he had been arrested for three alcohol-related offenses, but did not list his two drug-related arrests. In response to question 27 (Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs), Applicant did not disclose, as required by the plain language of the question, that he had used marijuana in the preceding seven years.

Applicant was interviewed on February 19, 2004 by an agent of the Defense Security Service (DSS) about adverse information in his background. He gave a written, sworn statement to the agent wherein he discussed his alcohol use and alcohol-related arrests. He also stated he had "never been charged with any offenses related to drug offenses."⁽³⁾

Applicant was re-interviewed in July 2004. He apparently still did not fully disclose his involvement with illegal drugs, because DSS asked, and Applicant agreed, to take a polygraph examination to resolve discrepancies in his background.⁽⁴⁾ Incident to that examination, Applicant gave another written, sworn statement to DSS on August 5, 2004, wherein he discussed in detail his involvement with drugs and his drug-related arrests. He claimed in that statement he did not disclose his drug arrests because a security official at a company he worked for before hiring on with his current employer in October 2001 advised him he did not have to list them. Applicant also stated he did not list the drug arrest information because he was too embarrassed to disclose it.⁽⁵⁾ But in his hearing testimony, Applicant acknowledged the security official in question had nothing to do with his SF 86, as the form was submitted after he left the company for whom the security official worked.⁽⁶⁾ He gave a third written, sworn statement to DSS on August 9, 2004. In that statement, Applicant explained his SF 86 omissions occurred "because [he] either did not recall [the drug-related arrests] or did not realize that some of them may have been Felonies that were reduced."⁽⁷⁾

In response to the SOR allegation that he deliberately falsified his SF 86 by answering "no" to question 27 regarding use of illegal drugs during the prior seven years (SOR 1.a), Applicant asserted "[t]he environment (company computer workstation in open workplace) did not provide proper conditions that promoted focused recollection of information due to the creation of nervousness, emotion and lack of privacy."⁽⁸⁾ In response to the SOR allegation that he deliberately falsified his statement to a DSS investigator in February 2004, by stating he had never been charged with a drug-related offense (SOR 1.b), Applicant averred that the interview was emotionally taxing for him and that he "was unable to comprehensively focus [his] attention on reviewing the contents of the statement prior to signing it but could only offer the best of my ability available under this circumstance."⁽⁹⁾

Applicant's wife and neighbors testified he is a great father and member of the community. They trust Applicant implicitly. None of the witnesses, including his wife, knows Applicant has used marijuana in the past seven years or that he may have lied to DSS about his past.

POLICIES AND BURDEN OF PROOF

The Directive sets forth adjudicative guidelines⁽¹⁰⁾ for consideration in evaluating an applicant's suitability for access to classified information. Further, security clearance decisions must reflect consideration of disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive.⁽¹¹⁾ The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (personal conduct) and Guideline J (criminal conduct).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽¹²⁾ for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for the Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden 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 bears a heavy burden of persuasion.⁽¹³⁾ 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 in ensuring 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

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doubt about an Applicant's suitability for access in favor of the government.

CONCLUSIONS

Under Guideline E, a security concern may arise if it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information.⁽¹⁵⁾ Here, the government questioned Applicant's trustworthiness by alleging he deliberately omitted from his SF 86 the fact he had used marijuana within seven years before he submitted his SF 86 (SOR ¶ 1.a), and that he lied to a DSS agent who interviewed him in February 2004 when he denied having ever been charged with any drug-related offense (SOR ¶ 1.b). The government has presented sufficient evidence, and the record as a whole as it bears on this issue supports the government's decision, to deny Applicant's request for clearance. Specifically, the facts established herein support application of Guideline E disqualifying condition (DC) 2⁽¹⁶⁾ and DC 3.⁽¹⁷⁾ Applicant deliberately omitted the fact of his drug use in 1999 and 2000 from his SF 86 by answering "no" to question 27. He also deliberately lied when he submitted a statement to DSS in February 2004 by denying in that statement he had ever been arrested for a drug-related offense.

By contrast, Applicant offered various, sometimes conflicting reasons why he omitted his drug use from his SF 86 and why he falsified his statement to DSS in February 2004. Applicant claimed in his response to the SOR that he made a prompt, good-faith effort to correct the error in his SF 86. However, his interview with DSS occurred nearly 16 months after he submitted his SF 86, and he failed to disclose his drug-related arrests even then. It was not until Applicant was faced with a polygraph examination that he elected to be forthcoming about his arrests and his drug use. Applicant's completion of his security clearance application was the initial step in requesting a security clearance. Because false or incomplete information given in the SF 86 is capable of affecting the way in which government investigators obtain complete and accurate information about an applicant, it is material. Applicant's omissions from his SF 86 and his first subject interview extended his background investigation and required application of additional resources that would not have been needed had he been honest in the first place.

Applicant has also averred he was concerned about his privacy and embarrassed about disclosing his drug use and drug-related arrests. This is not an acceptable reason for withholding relevant information from the government in these circumstances. By doing so, Applicant clearly demonstrated he was willing to place his own interests and concerns ahead of the government's interest in ensuring he is an acceptable risk for access to classified information. Such conduct is directly at odds with the fiduciary nature of one's responsibilities when holding a clearance. The totality of the available information about Applicant's candor also shows he has not yet accepted responsibility for his misleading statements. Accordingly, none of the Guideline E mitigating conditions (MC) apply, and I conclude Guideline E against the Applicant.

The government also alleged Applicant's deliberate falsifications constituted criminal conduct insofar as they violated

federal law under 10 U.S.C. § 1001 (SOR ¶ 2.a). Criminal conduct is a security concern because a person who is willing to disregard the law and risk fines or incarceration may also be willing to disregard rules and regulations governing the protection of classified information.⁽¹⁸⁾ Available information is sufficient to support this allegation as it relates back to SOR ¶¶ 1.a and 1.b. Based on these allegations, Guideline J DC 1⁽¹⁹⁾ and DC 2⁽²⁰⁾ apply.

As discussed under Guideline E, above, this conduct was recent, done knowingly and deliberately, and there are multiple instances of falsification at issue here. Further, Applicant has not accepted responsibility for his conduct, choosing instead to offer multiple, contradictory explanations for why his conduct was not intentional. The record does not support application of any of the mitigating conditions for criminal conduct, and I conclude Guideline J against the Applicant.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guideline. A fair and commonsense assessment⁽²¹⁾ of information about Applicant's personal conduct and the criminal aspects of that conduct, taken in the context of all of the information before me shows that he has failed to overcome the government's reasonable doubts about his judgment and reliability. I am particularly mindful of the outstanding record Applicant has established at work, and of the numerous positive recommendations from friends, relatives, and co-workers. However, his falsifications of his SF 86 and his statements to investigators raise legitimate questions about his judgment and trustworthiness. These issues bear directly on an applicant's ability to protect classified information, and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Absent substantial information to mitigate these doubts, which Applicant has failed to provide, I conclude he has failed to overcome the government's case.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Paragraph 2, Guideline J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 2.a: Against the 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 the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Tr. 23 - 28.
3. GE 2, at p. 5.
4. GE 3; AE F.
5. GE 3.
6. Tr. 70 - 71, 75 - 76.
7. GE 4.
8. Answer to SOR, dated June 2, 2005.
9. *Id.*
10. Directive, Enclosure 2.
11. Commonly referred to as the "whole person" concept, these factor are as follows:

1. Nature and seriousness of the conduct and surrounding circumstances.
2. Frequency and recency of the conduct.
3. Age of the applicant.
4. Motivation of the applicant, and the extent to which the conduct was negligent,

willful, voluntary, or undertaken with knowledge of the consequences involved.

5. Absence or presence of rehabilitation.

6. Probability that the circumstances or conduct will continue or recur in the future.

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

13. *See Egan*, 484 U.S. at 528, 531.

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

15. Directive, E2.A5.1.1.

16. Directive, 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.

17. Directive, 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.

18. Directive, E2.A10.1.1.

19. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.

20. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

21. Directive, E2.2.3.