

KEYWORD: Personal Conduct

DIGEST: In a 1993 National Agency Questionnaire and in a 2003 security clearance application, Applicant failed to fully disclose his arrests and use of illegal drugs. Clearance is denied.

CASENO: 04-06596.h1

DATE: 01/30/2006

DATE: January 30, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-06596

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In a 1993 National Agency Questionnaire and in a 2003 security clearance application, Applicant failed to fully disclose his arrests and use of illegal drugs. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. Pursuant to Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on 13 April 2005 detailing the basis for its decision-security concerns raised under Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 23 May and 10 June 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on 12 October 2005. On 15 December 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 28 December 2005.

FINDINGS OF FACT

Applicant is a 55-year-old test data controller for a defense contractor. He served on active duty with the U.S. Army for 24½ years from February 1973 to September 1999. Ex. 1 at 3. After a "brilliant" career (Tr. 38), he retired at the grade of CW-3. He has held a security clearance from 1975 until he retired. Ans. at 1; Ex. 1 at 6.

In September 1971, Applicant was convicted of obtaining money under false pretenses for writing a bad check. In 1972,

he was convicted of attempting to carry a concealed weapon on his person. He was also arrested in 1972 and charged with simple larceny of auto parts.

Applicant was eligible for induction into the military as part of the Selective Service Act. He had seen body bags coming back from Vietnam and did not want to end up in one. So between the date of his induction physical and the time he was to enter the Army, he used heroin on approximately 10 occasions, hoping it would prevent the draft board from selecting him. In August and December 1972, he was arrested for failing to report for induction into the U.S. armed forces. He was given a choice to enter the Army or face trial. He chose to enter the Army and the indictment was dismissed.

In 1976, Applicant was arrested at an airport for disorderly conduct. On the advice of his commander, Applicant pled no contest by mail and paid court costs. Applicant was arrested in March 1977 at a military installation and charged with possession of marijuana and transportation of alcoholic liquor.

Applicant completed a Department of Defense National Agency Questionnaire on 15 April 1992 by certifying the entries were "true, complete, and accurate" to the best of his knowledge and belief, and acknowledging that a knowing and willful false statement could be punished by fine and/or imprisonment under 18 U.S.C. § 1001. Applicant was asked if he had ever been arrested, charged, held, or detained by any law enforcement authorities. Applicant answered "yes" and listed two offenses. He failed to list his arrests for obtaining money under false pretenses, simple larceny, failing to report for induction on two occasions, and possession of marijuana. Question 20.a asked if Applicant had ever tried or used any narcotic, including heroin, or marijuana. Applicant answered "no."

Applicant was arrested in September 2000 after he was involved in a physical altercation with his wife. He pled nolo contendere to a charge of assault with bodily injury and was sentenced to three days in jail, with credit given for time served. As a result of the altercation, Applicant's wife went to court and obtained a protective order against him and filed for divorce. The order gave her custody of their daughter and their house and ordered him to move out of the house. Ex. 3 at 2.

In July 2001, Applicant was arrested and charged with violation of a protective order. He claims he did not know about the protective order. He insists the court mailed it to him, but he "never opened it because [he] was only interested in getting [his] family back together and moving on with [his] life." Ex. 3 at 2. In December 2001, he pled guilty to violating the protective order and was fined.

In November 2001, police received a report of a disturbance between a father and his daughter, who was under a court order of protection from him. Shortly after a police officer arrived on the scene, Applicant pulled up in his motor vehicle. When Applicant exited the vehicle, the police officer smelled a strong odor of alcoholic beverages on his person, and noted Applicant appeared to be "extremely off balance." The officer arrested Applicant for driving while

intoxicated (DWI) and for being in violation of the protective order. After he was booked, Applicant was given an opportunity to provide a breath sample. He refused. He claimed he had not been drinking nor driving a car. Applicant's wife indicated to police that he had been drinking all day long. Applicant was convicted of attempted DWI. The violation of the protective order charge was dismissed-the protective order had been lifted a few days before the arrest, but the police data base had not yet been updated to reflect the lifting of the order.

On 7 April 2003, Applicant completed a security clearance application by certifying that his answers were "true, complete, and correct" to the best of his knowledge and belief, and acknowledging that a knowing and willful false statement could be punished by fine and/or imprisonment under 18 U.S.C. § 1001. Question 24 asked if he had ever been charged with or convicted of any offenses related to alcohol or drugs. Applicant answered "no." Ex. 1 at 5. Question 26 asked if, in the previous seven years, Applicant had been arrested for, charged with, or convicted of any offenses not listed elsewhere on the SCA. Applicant answered "yes," but only listed a December 2000 arrest for assaulting a family member. *Id.*

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, 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." *Id.* at 527. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

In the SOR, DOHA alleged Applicant falsified the SCA he executed on 7 April 2003 by failing to list his alcohol and drug offenses (¶ 1.a) and failing to list other offenses for which, in the previous seven years, he had been arrested, charged, or convicted (¶ 1.b); and falsified the NAQ he executed on 15 April 1992 by failing to list all of his arrests (¶ 1.c) and failing to list his use of heroin (¶ 1.d). In his Answers, Applicant admitted each of the allegations, some with explanation. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The deliberate omission of relevant and material facts from any SCA is a security concern and may be disqualifying. DC E2.A5.1.2.2. Information is material if it would impede a thorough and complete investigation of an applicant's background or affect a final agency decision on whether to grant the applicant a clearance. ISCR Case No. 01-06870, 2002 WL 32114535 (App. Bd. Sep. 13, 2002). An applicant's criminal history and history of drug and alcohol abuse are matters that could affect a final agency decision on whether to grant a clearance, and his failure to disclose such matters would impede a thorough investigation of the applicant's background.

Applicant insists that he never deliberately lied on his SCA and NAQ. He has many excuses for not accurately completing the forms. He claims he had always been told he did not need to list anything he had reported earlier, and that he had listed all of the missing material in previous SCAs or NAQs. He asserts he reported use of heroin in an early Army physical, so the Army actually knew he had used it before he entered the service. It is difficult to believe someone with a "brilliant" Army career, who rose to the grade of CW-3 as a personnelist, could believe that providing such information on a physical was equivalent to correctly answering the questions on his NAQ and SCA. Furthermore, his credibility is undermined by statements he made to police officers in November 2001-he claimed he had been neither drinking nor driving. But a police officer saw him driving and smelled alcohol on his breath, and Applicant's wife reported he had been drinking alcoholic beverages all that day. Applicant presented no evidence to support his position that he had previously reported his use of drugs and his arrests on other NAQs or SCAs.

After carefully reviewing all the evidence, I conclude Applicant failed to mitigate the security concerns raised by his deliberate falsification of his NAQ and SCA. I found for him on SOR ¶ 1.b(2) as it reflects the same incident alleged in ¶ 1.b(1). I find against Applicant all the other allegations.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.a(1): Against Applicant

Subparagraph 1.a(2): Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.b(1): Against Applicant

Subparagraph 1.b(2): For Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.c(1): Against Applicant

Subparagraph 1.c(2): Against Applicant

Subparagraph 1.c(3): Against Applicant

Subparagraph 1.c(4): Against Applicant

Subparagraph 1.c(5): Against Applicant

Subparagraph 1.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.

James A. Young

Administrative Judge