

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant is 52 years old and works as a production technician for a defense contractor. In October 2000, she was convicted of possessing illegal drugs for sale. In January 2004, she completed the three-year probationary term imposed by the court. In April 2003, she did not disclose the conviction and arrest in two answers on her security clearance application. Applicant mitigated the security concerns raised by her drug involvement, but did not mitigate the security concerns raised by her personal conduct. Clearance is denied.

CASENO: 04-06811.h1

DATE: 01/30/2006

DATE: January 30, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-06811

**DECISION OF ADMINISTRATIVE JUDGE**

**SHARI DAM**

**APPEARANCES**

**FOR GOVERNMENT**

Jeff A. Nagel, Esq.

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is 52 years old and works as a production technician for a defense contractor. In October 2000, she was convicted of possessing illegal drugs for sale. In January 2004, she completed the three-year probationary term imposed by the court. In April 2003, she did not disclose the conviction and arrest in two answers on her security clearance application. Applicant mitigated the security concerns raised by her drug involvement, but did not mitigate the security concerns raised by her personal conduct. Clearance is denied.

**STATEMENT OF THE CASE**

On June 22, 2005, the Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR, which is essentially an administrative complaint, detailed reasons under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to the Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On August 8, 2005, Applicant filed her Answer and elected to have the case decided on the written record in lieu of a hearing. On August 23, 2005, Department Counsel prepared a File of Relevant Material (FORM), and provided Applicant with a complete copy on September 14, 2005. [\(1\)](#)

Applicant had 30 days from the receipt of the FORM to file objections and submit material in refutation, extenuation, or

mitigation. Applicant received the FORM on September 28, 2005, and on October 19, 2005 submitted a copy of her Order of Discharge From Probation that I marked as Applicant Exhibit A. This case was assigned to me on November 28, 2005.

### **PROCEDURAL MATTERS**

In the FORM filed by the Government, it moved to amend the SOR by changing the date in ¶ 1.a. from June 28, 2000 to January 28, 2000. Applicant did not object to the motion. Said motion is granted.

### **FINDINGS OF FACT**

In her Answer to the SOR, Applicant admitted the allegation pertaining to Drug Involvement under Guideline H, and denied the allegations pertaining to Personal Conduct under Guideline E. The admission is incorporated herein as findings of fact. After a complete review of the evidence in the record, I make the following additional findings of fact:

Applicant is 52 years old and has been employed as a production technician for a federal contractor since 1990. She applied for a security clearance in April 2003.<sup>(2)</sup>

In January 2000, Applicant was arrested and charged with Possession of a Narcotic Drug for Sale (Class 2 Felony), and Possession of Drug Paraphernalia (Class 6 Felony). On October 19, 2000, she pleaded guilty to Facilitation to Unlawfully Possess a Narcotic Drug for Sale, Cocaine, a Class 1 Misdemeanor. She was placed on probation for three years, and ordered to pay a monthly probation service fee of \$40.00 and a \$2,000.00 fine. She was also required to perform 360 hours of community service.<sup>(3)</sup> In January 2004, the court entered an order discharging Applicant from probation.<sup>(4)</sup> According to court documents, she did not have a criminal history and accepted responsibility for her behavior.<sup>(5)</sup>

Throughout the record, Applicant claimed that the cocaine and drug paraphernalia found in her truck belonged to her boyfriend, who was with her at the time of the arrest.<sup>(6)</sup>

When Applicant signed her SCA, she certified her answers were "true, complete, and correct" to the best of her knowledge and belief, and acknowledged that a knowing and willful false statement could be punished by fine and/or imprisonment. In response to Question 21, Your Police Record-Felony Offenses (*Have you ever been charged with or convicted of any felony offenses?*), she answered "No." She did not list the two felonies charged in October 2000. In response to Question 29, Your Use of Illegal Drugs and Drug Activity (*In the last 7 years, have you been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping receiving, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis for you own intended profit or that of another?*), she answered "No," despite the 2000 criminal charges that specifically related to the possession and sale of illegal drugs.

After meeting with a government investigator in July 2003, regarding her answers to the SCA,

Applicant submitted a supplemental explanation, which specifically addressed those criminal charges and other matters in the SCA. She said, "I did intentionally omit my arrest information from my security form. I did falsify the form because I did not know how to put the incident in writing . . . I decided that I would leave it off and I would tell someone when I had an interview. I felt more comfortable explaining my situation in person."<sup>(7)</sup>

In August 2005, Applicant filed an Answer that contradicted her 2003 statement. She denied that she deliberately intended to conceal the drug charge or drug related activity. She thought Question 21 was an inquiry limited to felony convictions. Because the felony charges were reduced to misdemeanors when she pleaded guilty, she did not think she was required to answer affirmatively and overlooked the inquiry as to "felony" charges. Based on her misunderstanding of Question 21, she made a similar mistake in answering Question 29.<sup>(8)</sup> I do not find this subsequent explanation credible, given her previous admission and the clear language of both questions.

## **POLICIES**

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth the criteria that must be evaluated when determining security clearance eligibility. Within those guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence to reach a fair, impartial and common sense decision.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Section E.2. of Enclosure of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct of the applicant, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not just the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information.<sup>(9)</sup> The decision to deny an individual a security clearance request to an individual is not necessarily a judgment of the applicant's loyalty.<sup>(10)</sup> Instead, it is a determination that the applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information.<sup>(11)</sup> The Directive presumes a rational connection between past proven conduct under any disqualifying condition and an applicant's present security suitability.<sup>(12)</sup>

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the position of the government.<sup>(13)</sup> An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his clearance."<sup>(14)</sup>

Based upon a consideration of the evidence, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

**Guideline H - Drug Involvement:** A security concern may exist when 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: A security concern may exist when conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

The applicable qualifying and mitigating conditions, raising either security concerns or mitigating security concerns applicable to this case, are set forth and discussed in the Conclusions section below.

## CONCLUSIONS

Upon consideration of all the facts in evidence, and the application of the appropriate adjudicative factors and legal standards, including the "whole person" concept, I conclude the following with respect to the allegations set forth in the SOR:

### Guideline H: Drug Involvement

The Government established its case under Guideline H. Based on the evidence and Applicant's admission that she was arrested and convicted of a misdemeanor involving the possession of illegal drugs for sale, Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.2. (*Illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution*) applies as a disqualifying condition.

In mitigation of this condition, Applicant presented evidence that she successfully completed the terms of criminal probation in January 2004, and has not been involved in any other criminal matter since 2000, six years ago. Hence, she mitigated the concern under Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.3.1. (*The drug involvement was not recent*), and DI DC E2.A8.1.3.2. (*The drug involvement was an isolated or aberrational event*).

## Guideline E: Personal Conduct

Based on the evidence, the Government established its case under Guideline E, specifically, 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*). Applicant admitted that she intentionally concealed information when she completed her 2003 SCA, but later contradicted that admission in her Answer and fabricated an excuse for the omission.

I reviewed all of the mitigating conditions under this guideline, specifically Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.3.2. (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*), and concluded it does not apply. Although Applicant falsely answered questions in the SCA, she was truthful during her interview about her criminal history. However, after she created another falsehood in her Answer, the initial concealment was no longer an isolated incident, and she failed to mitigate the security concerns raised by her personal conduct under this condition. Accordingly, Guideline E is decided against Applicant.

I considered all of the evidence in this case, including Applicant's age, a long work history, the successful completion of the court-imposed probation, and her acceptance of responsibility for the criminal conduct. However, all of those factors are insufficient to mitigate her intention to conceal information when she completed the SCA in 2003, and her subsequent 2005 denial that she did so intentionally. Therefore, I am persuaded by the totality of the evidence that it is not consistent with the national interest to grant Applicant a security clearance.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

### **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 as follows:

Paragraph 1: Guideline H (Drug Involvement) FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Paragraph 2: Guideline E (Personal Conduct) AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

**DECISION**

In light of all of 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.

Shari Dam

Administrative Judge

1. The Government submitted seven items in support of its case.



2. Government Item 1 (Security Clearance Application, dated April 21, 2003) at 2.
3. Government Item 6 (State court documents pertaining to the arrest and conviction) at 5.
4. Applicant Exhibit A (Court Order, dated January 24, 2004).
5. Government Item 6, *supra* note 3, at 16.
6. Government Item 7 (Statement of Applicant, dated July 23, 2003) at 2.
7. *Id.* at 4-5.
8. Government Item 3 (Applicant's Answer (with enclosures), dated August 8, 2005).
9. Directive, Enclosure 2, ¶ E2.2.2.
10. Executive Order 10865, § 7.
11. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
12. ISCR Case No. 95-0611 at 3 (App. Bd., May 2, 1996).
13. ISCR Case No. 01-20700 at 3 (App. Bd., Dec. 19, 2002); *See* Directive ¶ E3.1.15.
14. *Id.*