

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: In 2003, Applicant submitted a SF 86 in which he deliberately failed to disclose that between 1993 and 1998 he sold drugs for profit and was arrested and charged five times for drug-related offenses. On one of those occasions, he was convicted and placed on probation. He failed to mitigate the personal conduct and criminal conduct security concerns. Clearance is denied.

CASENO: 04-11356.h1

DATE: 03/31/2006

DATE: March 31, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-11356

DECISION OF ADMINISTRATIVE JUDGE

JUAN J. RIVERA

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

In 2003, Applicant submitted a SF 86 in which he deliberately failed to disclose that between 1993 and 1998 he sold drugs for profit and was arrested and charged five times for drug-related offenses. On one of those occasions, he was convicted and placed on probation. He failed to mitigate the personal conduct and criminal conduct security concerns. Clearance is denied.

STATEMENT OF THE CASE

On June 16, 2005, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns under Guideline E (Personal Conduct) and Guideline J (Criminal 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 his access to classified information. [\(1\)](#)

On August 27, 2005, Applicant answered the SOR (Answer). He admitted (with explanations) the underlying facts of the allegations in subparagraphs 1.a.(1), 1.b.(1), and 1.c; denied that he deliberately falsified his SF 86; [\(2\)](#) and requested a hearing. He failed to answer the allegation in subparagraph 2.a, and I considered the allegation denied. The case was assigned to me on October 6, 2005. On November 8, 2005, I convened a hearing at which the government presented five exhibits, marked GE 1-5, to support the SOR. [\(3\)](#) Applicant testified and presented two exhibits that were admitted without objection and marked AE 1-2. DOHA received the transcript (Tr.) on December 1, 2005.

FINDINGS OF FACT

Applicant's partial admissions are incorporated herein as findings of fact. After a thorough review of the pleadings, transcript, and exhibits, I make the following additional findings of fact:

Applicant is 28 years old, has never been married, and is the father of two children: a fifteen -year-old boy and a four-year-old girl. Applicant graduated from high school in June 1997. In 1999, he began working as a voice and data cable installer. He has been working in that capacity for a defense contractor since November 2002, and requires a clearance to access his job sites.

Since birth, Applicant lived with his maternal grandparents, who financially supported him and his mother. In 1993, his grandfather became very ill, was not able to work, and developed financial difficulties. Applicant began to illegally sell cocaine and crack cocaine to generate income and provide financial support for his grandparents and his mother, who was then receiving welfare. He was 16 years old. Applicant's grandfather died in 1995. Applicant continued to sell drugs until at least 1998 to support his son (born in 1994) and his mother, as well as to prevent the foreclosure of his grandfather's home mortgage. His income from the sale of drugs was between \$200 and \$500 a week. Applicant also used marijuana, at least twice, between June and December 1996.

From 1993 to 1998, Applicant was arrested five times for drug related offenses (possession of controlled substances (cocaine/crack cocaine) and possession with the intent to distribute controlled substances). On four of those occasions, the charges were dismissed. On one occasion, he was convicted and placed on probation for six months. He was charged with assault after a woman filed charges against him when he attempted to collect drug money from her. Applicant was also charged with leaving the scene of an accident with injuries and failing to have a drivers license. He had borrowed a friend's car and was involved in an accident. When questioned by police officers, he attempted to mislead the officers by using a friend's identity since he did not have a driver's license.

Applicant stopped selling drugs around 1998 when he realized he was setting the wrong example for his son. He claimed he has not used marijuana since 1996. (4) He lives in his late grandfather's home, located in the same neighborhood where he used to sell drugs. He claims, however, he no longer associates with other drug users, including those who purchased their drugs from him.

In February 2003, Applicant submitted a security clearance application (SF 86) in which he answered "NO" to question number 24, which asked whether he had ever been charged with or convicted of any offense related to alcohol or drugs.

(5) Applicant failed to disclose that between 1993 and 1998, he had been charged five times for possession of cocaine-crack cocaine and/or possession of controlled substances with the intent to distribute. More importantly, he failed to disclose that, on one of those occasions, he was convicted of a drug related offense and placed on probation for six months. Additionally, he answered "NO" to question number 29, which inquired about his use of illegal drugs and drug activity (purchase, sale, and trafficking) within the last seven years. (6) He failed to disclose he had sold cocaine and crack cocaine for profit from about 1993 to at least 1998. Applicant also failed to disclose he had lied to police officers during a traffic stop subsequent to a traffic accident.

At the hearing, Applicant claimed he was confused by SF 86 question 24 and made the mistake of believing he was required to disclose only those charges or convictions that fell within the last seven years. He also claimed he made the mistake of believing he was required to disclose only alcohol and drug related convictions and failed to disclose that he was charged with such offenses. He averred he never intended to falsify his answers or to deceive the government.

Regarding question 29, Applicant claimed he did not disclose his drug use/activity because he thought his drug use and drug activity fell outside of the seven year period covered by the question. He explained that when he provided his two statements to the defense investigators, he was not sure of the period of time covered by his drug use and drug activity and gave the investigators his best estimate. Applicant admitted he exercised poor judgment when answering SF 86 questions 24 and 29. (7)

At the hearing, Applicant expressed remorse for dealing drugs and what he called "his childish and foolish" behavior for thinking he could support his family by selling drugs. He claimed he has not used marijuana since 1996, and has not purchased or sold drugs since around 1998. Applicant has dedicated his life to setting a good example for his children, his work, and participating in church activities. He is living with a woman who is carrying his child and they expect to be married in the near future. Applicant testified he has matured and knows what he did is wrong and does not intend to use or sell drugs ever again. There is no evidence he has been involved in any additional drug related misconduct.

Applicant presented two reference letters from friends that characterized him as a church-going and trusted friend. They affirmed he has matured and is now a reliable friend and loving father.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's suitability 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. Each

decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive,⁽⁸⁾ and the whole person concept.⁽⁹⁾ 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 granting or denial of access to classified information. Having considered the record evidence as a whole, I conclude Guideline E (Personal Conduct) and Guideline J (Criminal 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⁽¹⁰⁾ for an applicant 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.⁽¹¹⁾ 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.⁽¹²⁾

CONCLUSIONS

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.⁽¹³⁾

The government established its case under Guideline E by showing that Applicant deliberately falsified his SF 86. He was arrested and charged with possession and/or possession of drugs with intent to distribute at least five times. On one of those occasions, he was convicted and received six months' probation. Further, he sold drugs for profit from 1993 to

at least 1998. Applicant chose not to disclose these facts and behavior, seemingly, because of his concern for the adverse impact this information would have had on his qualifications to obtain a security clearance. Applicant's explanations for his failure to disclose the information ring hollow in light of the totality of the facts and circumstances, including his age at the time he submitted the SF 86, his demeanor, and his prior statements.⁽¹⁴⁾ I find Applicant's omissions were knowing and deliberate, and omitted with the intent to mislead the government. Additionally, Applicant used an alias to mislead police officers after being involved in a traffic accident. Guideline E Disqualifying Conditions (DC) 2: *The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire ...*,⁽¹⁵⁾ and DC 4: *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress ...*⁽¹⁶⁾, apply.

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.⁽¹⁷⁾ Despite Applicant's claims to the contrary, I conclude the government established its case under Guideline J by showing that Applicant deliberately provided false answers when he submitted his SF 86 in February 2003. It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation, or knowingly make or use a false writing in any matter within the jurisdiction of the executive branch of the Government of the United States.⁽¹⁸⁾ Security clearances are within the jurisdiction of the executive branch of the Government of the United States.⁽¹⁹⁾ I conclude Guideline J Disqualifying Condition (DC) 1: *Allegations or admission of criminal conduct ...*;⁽²⁰⁾ and DC 2: *A single serious crime or multiple lesser offenses*, apply.

Applicant was 26 years old at the time he submitted the SF 86. In light of his past behavior - i.e., selling drugs on the streets for a profit and his run-ins with the law - his falsifications cannot be attributed to youthful exuberance, foolishness, or stupidity. He deserves credit for changing his lifestyle, for his concerns regarding the welfare of his children, and for his desire to set a good example for them. Notwithstanding, his current behavior is not sufficient to mitigate the security concerns raised by his falsifications. I have considered all the Personal Conduct⁽²²⁾ and Criminal Conduct⁽²³⁾ Mitigating Conditions, and find that none apply. In light of all the facts and circumstances, I conclude Applicant's falsifications are relatively recent and that the motive that led him to falsify the SF 86 - i.e., his desire to cover up his drug use and drug related behavior - remains a viable factor that could influence Applicant's future behavior. I also find Applicant's evidence was not sufficient to clearly establish that he has been successfully rehabilitated. As such, he is likely susceptible to influence, pressure, or coercion to cover up his past behavior.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. A fair and commonsense assessment⁽²⁴⁾ of the record before me reflects a young man who is not fully attuned to what the government expects of persons it trusts with access to sensitive information. Considering all relevant and material facts and circumstances present in this case, including Applicant's testimony, the circumstances that caused his misconduct, the whole person concept, and the adjudicative factors listed in the Directive, I find Applicant has not mitigated this security concerns. Guideline E and Guideline J are decided against the Applicant.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

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

Subparagraphs 1.a(1), 1.b(1), and 1.c Against the Applicant

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

Subparagraph 1.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.

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. Office of Personnel Management Security Clearance Application, Standard Form 86.
3. I marked the government's exhibit list as GE 5 for Identification.
4. Applicant claimed the only drug he ever used was marijuana.
5. I note that SOR allegation subparagraph 1.a(1) mistakenly alleged that Applicant failed to disclose he was arrested five times. Consistent with SOR question 24, it should have alleged that Applicant failed to disclose he had been charged or convicted of an alcohol or drug related offense. Notwithstanding the error, I find that the allegation provided Applicant with adequate notice, that he understood the government's concerns, was prepared for his hearing, and addressed the government's concerns. In his testimony, Applicant attempted to explain and mitigate his failure to disclose he had been charged with and/or convicted of a drug-related offense.
6. SOR allegation 1.b(1).
7. Tr. 35.
8. 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.
9. Directive, E2.2.1.
10. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
11. *Id.* at 528, 531.
12. *See Egan*; Directive E2.2.2.
13. Directive, E2.A5.1.1.
14. GE 3 and 4.
15. Directive, E2.A5.1.2.2.
16. Directive, E2.A5.1.2.4.
17. Directive, E2.A10.1.1.
18. 18 U.S.C. Section 1001.
19. *See Egan*, 484 U.S. at 527.
20. Directive, E2.A10.1.2.1.
21. Directive, E2.A10.1.2.2.
22. Directive, E2.A5.1.3.
23. Directive, E2.A10.1.3.
24. Directive, E2.2.3.