

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Between 1981 and 1999, Applicant was charged with three criminal offenses. He also used illegal drugs from at least 1982 until 1998. In 2002, he deliberately failed to disclose two of the offenses and the full extent of his drug use in his security clearance application, including the fact that he used drugs while possessing a clearance. Applicant failed to present sufficient evidence to mitigate security concerns raised by his criminal conduct and personal conduct. Clearance is denied.

CASE NO: 04-12148.h1

DATE: 06/16/2006

DATE: June 16, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-12148

DECISION OF ADMINISTRATIVE JUDGE

JUAN J. RIVERA

APPEARANCES

FOR GOVERNMENT

Richard Stevens, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

Between 1981 and 1999, Applicant was charged with three criminal offenses. He also used illegal drugs from at least 1982 until 1998. In 2002, he deliberately failed to disclose two of the offenses and the full extent of his drug use in his security clearance application, including the fact that he used drugs while possessing a clearance. Applicant failed to present sufficient evidence to mitigate security concerns raised by his criminal conduct and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On August 10, 2005, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal 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 him access to classified information. ⁽¹⁾

Applicant answered the SOR (Answer) on August 25, 2005, and requested a hearing. The case was assigned to me on January 30, 2006. On March 22, 2006, I convened a hearing at which the government admitted without objection four exhibits, marked governments exhibits (GE) 1-4, to support the SOR. ⁽²⁾ Applicant testified and presented one exhibit that was admitted without objection and marked Applicant's exhibit (AE) 1. DOHA received the transcript (Tr.) on March 30, 2006.

FINDINGS OF FACT

In his answer to the SOR, Applicant admitted, with explanations, SOR allegations 1.a - 1.c, and 2.c (1). He failed to address SOR allegation 1.d, and I considered it denied. He denied allegations 2.a, 2.b, 2.c (2), and 2.d. He admitted the

underlying facts alleged in subparagraphs 2.a, 2.b, and 2.d, and claimed his failure to disclose the information in his June 2002 security clearance application (SF 86) was a mistake. His admissions are incorporated herein as findings of fact. After a thorough review of the pleadings, Applicant's testimony, and the evidence, I make the following additional findings of fact:

Applicant is 47 years old, divorced, and has two adult children. Since 1980, he has worked as a rigger at a Navy shipyard for a Department of Defense (DOD) contractor, and has had a security clearance since 1982. (3)

Applicant's security concerns arose out of three different assault charges, his use of illegal drugs, and the deliberate falsification of his SF 86. In May 1981, at age 21, Applicant was charged with assault. Applicant explained he was working the night shift at a gas station when he felt threatened by some customers and flashed his revolver. The customers complained to the police, and he was charged with assault. After explaining the circumstances to the judge, the charge was dismissed.

In April 1988, Applicant was involved in an argument with his then wife. Because she would not stop arguing or leave him alone, he doused his wife and the couch she was lying on with gasoline. He explained he never intended to harm her. Rather, he just wanted her to be quiet. Applicant was charged with attempted murder, a felony. He was convicted of simple assault and battery and sentenced to serve 12 months in jail, suspended. In September 1999, Applicant was charged with assault and battery for fighting, apparently in self-defense, with his brother-in-law. The charge was later dismissed in court.

In May 1998, Applicant was scheduled to participate in an annual substance abuse test ordered by his employer. Knowing that he had been using cocaine and that he had trouble controlling his use of the drug, Applicant attempted to self-refer himself for treatment the day before the test. After he tested positive for cocaine, he was referred by his employer to substance abuse counseling/treatment. He successfully participated in a 30 day outpatient treatment program. Applicant's drug counselor indicated in her treatment report (4) that Applicant had accomplished a major change in his life, that he was participating in after care treatment, and that he was doing a good job, showing progress in his rehabilitation. In addition to the May 1998 positive cocaine test, the government introduced Applicant's substance abuse testing records for 1995, 1996, 1997, 1998 (he had three additional follow-up tests in 1998), 1999, 2000, 2001, and 2002 showing negative results for drugs or alcohol. There is no evidence Applicant has been arrested for or charged with any illegal drug related misconduct since 1998.

In his 2002 security clearance application, (5) Applicant answered "No" to question 21, which asked whether he had ever been charged with or convicted of a felony. Applicant failed to disclose his 1988 charge for attempted murder. At his hearing, Applicant claimed he failed to disclose the felony charge because he believed that since the charge was dismissed, it was no longer in his criminal record, and he was not required to disclose it.

Applicant answered "No" to question 26, which asked whether in the last seven years he had been arrested for, charged with, or convicted of any offense not otherwise disclosed in the SF 86. He failed to disclose his 1999 charge for assault

and battery. Applicant averred he misread/misunderstood the question. He also believed he did not have to disclose the charge because it had been dismissed, and it fell outside of the 7 year period covered by the question.

SF 86 question 27 asked whether in the last seven years Applicant had used any controlled/illegal substances. He answered "Yes" and disclosed he used cocaine twice in May 1998. Applicant failed to disclose that he used cocaine with varying frequency from at least 1995 to 1998.⁽⁶⁾ He also failed to disclose he used marijuana with varying frequency between 1995 and 1996.⁽⁷⁾

Applicant answered "No" in response to question 28, which asked whether he had ever illegally used any controlled substance while possessing a security clearance. He failed to disclose that he had used marijuana, with varying frequency, from approximately 1982 to 1996, and that he used cocaine, with varying frequency, between 1983 and 1998, while holding a security clearance.⁽⁸⁾

In October 2002, Applicant was interviewed by a government investigator concerning his SF 86 omissions and his use of illegal drugs. He provided a written, sworn statement in which he disclosed he began smoking marijuana at age 14. From age 14 in 1973 to age 30 in 1989, he smoked marijuana socially at least twice a month, and contributed money to purchase marijuana. From age 30 in 1989 to age 36 in 1995, Applicant used marijuana "almost on a daily basis," spending approximately \$35 a week to support his habit. At his hearing, Applicant testified he has not used marijuana since age 36, and averred he does not intend to use marijuana ever again.⁽⁹⁾

Applicant began using cocaine in 1983, at age 24. He initially snorted cocaine on a monthly basis, spending approximately \$55 a month on his habit. There were months, however, when he did not use cocaine. In 1997, Applicant became depressed and his consumption of cocaine increased substantially. In 1998, he started to make crack cocaine by mixing cocaine with baking soda and water, because it provided him with a more intense high. Applicant estimated he was using crack cocaine on an average of two times a month, and spending approximately \$225 each time.⁽¹⁰⁾ At his hearing, Applicant testified he estimated his lifetime use of cocaine to be approximately 100 times.⁽¹¹⁾

Applicant averred that thanks to his 1998 drug counseling/treatment he was able to turn his life around and is now rehabilitated and completely cured. He claimed he has not used cocaine, or any other illegal drugs, since 1998. Applicant testified that after his drug counseling, he participated in Narcotics Anonymous (NA) for several years, and continues to "drop by" NA about once a month. He testified he used to participate in NA three times a month, but due to his work schedule, that includes regular overtime, he reduced his attendance.

In light of Applicant's demeanor, testimony, and available evidence, I find Applicant's omissions to SF 86 questions 21, 26, 27, and 28 were deliberate and made with the intent to mislead the government. I also find Applicant used illegal drugs after he was granted access to classified information.

POLICIES

The Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility 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. The guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive, and the whole person concept.⁽¹²⁾ Having considered the record evidence as a whole, I conclude Guideline J (Criminal Conduct) and Guideline E (Personal Conduct), are the applicable relevant adjudicative guidelines.

BURDEN OF PROOF

The purpose of a security clearance decision is to determine whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.⁽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 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 government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish, by substantial evidence,⁽¹⁴⁾ 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.⁽¹⁵⁾ 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.⁽¹⁶⁾

CONCLUSIONS

Under 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⁾ The government established its case under Guideline J by showing that Applicant was implicated in three criminal offenses between 1981 and 1999. I also find, as discussed below under Guideline E, that Applicant deliberately falsified his 2002 security clearance application. His falsification of the SF 86 is a violation of 18 U.S.C. 1001, a felony.⁽¹⁸⁾ Disqualifying Condition (DC) 1: *Allegations or admission of criminal conduct*,⁽¹⁹⁾ and DC 2: *A single serious crime or multiple lesser offenses*⁽²⁰⁾ apply.

Applicant's past behavior, from 1973 to 2002, forms a pattern of disturbing criminal activity that cannot be ignored. His falsification brings to the forefront the criminal conduct concerns raised by his past criminal behavior, including his illegal drug use. Applicant possessed, purchased, and used illegal drugs from 1973 until 1998. Although not alleged in the SOR, I am required to consider Applicant's illegal drug behavior when evaluating the seriousness of the conduct alleged in the SOR to determine factors such as the extent to which his behavior is recent; whether it is isolated; the likelihood of recurrence; the credibility of Applicant's testimony concerning the circumstances of the incidents alleged; and his rehabilitation.⁽²¹⁾

Under the totality of the circumstances, I find Applicant's criminal behavior is recent and not isolated. Applicant engaged in criminal misconduct over a period of at least 21 years, from the time he was 22 until he was 43. As such, his behavior cannot be attributed to youthful exuberance. The available evidence indicates he has not been involved in criminal misconduct since 2002. However, considering his 21 year history of criminal behavior, the nature and seriousness of his misconduct, and his prolonged, disregard for the law, I find his favorable information is not sufficient to mitigate the Guideline J security concerns. His behavior raises questions about his ability and willingness to follow the law, and ultimately, to protect classified information. His falsification weighs against a finding of rehabilitation and positive behavioral changes.

Under Guideline E, 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.⁽²²⁾

The government established its case under Guideline E by showing that Applicant deliberately failed to disclose material information in his answers to SF 86 questions 21, 26, 27, and 28. In light of Applicant's demeanor, testimony, and available evidence, I find Applicant's omissions were made with the intent to mislead the government. Disqualifying Conditions (DC) 2: *The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . .*,⁽²³⁾ and DC 4: *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress . . .*,⁽²⁴⁾ apply.

I specifically considered all Guideline E Mitigating Conditions (MC) and conclude that none applies. Applicant disclosed the omitted information only after being confronted with the facts, and there is no evidence he has reduced his vulnerability to coercion, pressure, or duress. Additionally, for the same reasons outlined above under the discussion of Guideline J, incorporated herein, I conclude none of the MC apply. Guideline E is decided against Applicant.

I have carefully weighed all evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. Considering all relevant and material facts and circumstances present in this case, including Applicant's testimony, his misconduct, the whole person concept, and the adjudicative factors listed in the Directive, I find Applicant has not mitigated the security concerns.

FORMAL FINDINGS

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

Paragraph 1, Criminal Conduct (Guideline J) AGAINST APPLICANT

Subparagraphs 1.a - 1.d Against Applicant

Paragraph 2, Personal Conduct (Guideline E) AGAINST APPLICANT

Subparagraphs 2.a - 2.d Against 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 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. I marked the government's exhibit list as GE 5 for Identification. The government's memorandum, dated April 12, 2006, forwarding to me Applicant's post-hearing submissions, was marked Appellate Exhibit 1. Applicant's post-hearing submission was marked Applicant's Exhibit (AE) 1.
3. Tr. 66.
4. GE 3.
5. GE 1.
6. GE 2.
7. GE 2.
8. GE 2.
9. GE 2. In his response to the SOR, Applicant denied using cocaine twice a month from 1995 to 1998. He admitted he used cocaine socializing "possibly every three months but only on occasion it was not a routine thing."
10. GE 2.
11. Tr. 62.
12. Directive, ¶ E2.2.1. ". . . The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ."
13. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
14. ISCR Case No. 98-0761, at p. 2 (December 27, 1999) (Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.); ISCR Case No. 02-12199, at p. 3 (April 3, 2006) (Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.); Directive, ¶ E3.1.32.1.
15. *Egan*, 484 U.S. 518, at 528, 531.
16. Directive, ¶ E2.2.2.

17. Directive, ¶ E2.A10.1.1.

18. 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. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. (*Egan*, 484 U.S. at 527).

19. Directive, ¶ E2.A10.1.2.1.

20. Directive, ¶ E2.A10.1.2.2.

21. ISCR Case No. 04-09959 (May 19, 2006), p.3. I did not consider Applicant's illegal drug related behavior as a basis for disqualification.

22. Directive, ¶ E2.A5.1.1.

23. Directive, E2.A5.1.2.2.

24. Directive, E2.A5.1.2.4.