

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant's intentional falsification of material information from his security application in July 2003, and his sworn statement in February 2004 have not been mitigated. Applicant's criminal record involving fraudulent activity in 1986, in 1996, in 2003, and in February 2004, are not mitigated either. Clearance is denied.

CASENO: 04-12154.h1

DATE: 04/17/2006

DATE: April 17, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-12154

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's intentional falsification of material information from his security application in July 2003, and his sworn statement in February 2004 have not been mitigated. Applicant's criminal record involving fraudulent activity in 1986, in 1996, in 2003, and in February 2004, is not mitigated either. Clearance is denied.

STATEMENT OF CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On September 30, 2005, under Executive Order 10865 and Department of Defense Directive 5200.6, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-security concerns raised under the personal conduct guideline (Guideline E) and the criminal conduct guideline (Guideline J) of the Directive. Applicant's undated, notarized answer was received by DOHA on October 17, 2005; he requested a decision be made on the record in lieu of a hearing. A copy of the Government's File of Relevant Material (FORM, the Government's evidence in support of the SOR) was sent to Applicant on January 12, 2006. Applicant received the FORM on January 23, 2006. He did not submit any information within the required time period. On March 17, 2006, the case was assigned to me for decision.

FINDINGS OF FACT

The SOR has three allegations under the personal conduct guideline and six allegations under the criminal conduct guideline. Applicant admitted all allegations except for subparagraph 1.b. Following his answer, he supplied additional information for not disclosing information on his security clearance application (SCA):

When I filled out the Security Clearance Information I was basing my answers on the statement "in the last 7 years." In my mind all the incidences occurred longer than 7 years ago. I did not have any written documentation on these facts, so I was sure that I had exceeded the 7 year time limit. I still do!! (supplemental statement to SOR)

Applicant is 32 years old and has worked for his current employer since 2001; Applicant's current job is a senior assembly mechanic. He seeks a secret security clearance.

Personal Conduct. Applicant signed an SCA on July 24, 2003. In response to question 27 (illegal drug use since 16 years old or in the last 7 years), Applicant answered "no" (subparagraph 1.a.) even though he knew he used marijuana and crack cocaine within the 7 year period before he signed the SCA. According to Item 8 (sworn statement dated June 29, 2004), Applicant denied drug use in three earlier interviews/ sworn statements because he was ashamed and did not want his job to know.

In the same SCA dated July 24, 2003, Applicant answered "no" (subparagraph 1.b.) to question 26 (arrests, charges, convictions for any offense(s) in the last 7 years, which are not listed in modules 21, 22, 23, 24, or 25). As noted at the outset of this section, he did not furnish an answer to this allegation. However, his additional explanation in his answer to the SOR indicates he thought the offenses listed under paragraph 2 occurred outside the seven-year time frame. Applicant was arrested for two counts of unemployment fraud (subparagraph 2.e.) on about September 17, 1996, inside the seven-year time period before he signed the SCA in July 2003. Applicant claims he did not intentionally conceal this information from question 26 of his SCA.

Applicant provided a signed sworn statement (subparagraph 1.c.) on February 25, 2004 (Item 7). In the statement, Applicant was questioned about his drug use. As he had done in two earlier sworn statements, Applicant only discussed his marijuana use.

In his sworn statement dated June 29, 2004 (Item 8), Applicant explained he did not talk about his crack cocaine use in the February 25, 2004 statement (subparagraph 1.b. of the SOR) and two earlier interviews/sworn statements because the investigator never asked him whether he had used other drugs besides marijuana. Applicant used and purchased marijuana occasionally for over a year between 1996 and 1998. During that time, he used marijuana during lunch periods and on breaks. Applicant also used and purchased crack cocaine three times during the same period. Applicant's use of both drugs was the reason he sought inpatient treatment for a two-month period between August and September

1998.

Also in his statement dated June 29, 2004, Applicant admitted he fabricated his high school degree in his employment application. His employer discovered the false information after conducting a background check. According to Applicant, his good job performance persuaded his employer to allow Applicant to complete a high school equivalency degree so that his scholastic record would match the inaccurate information he provided in the application. Applicant received the degree in October 2002. [\(1\)](#)

Criminal conduct. On September 9, 1986, Applicant was arrested for writing a worthless check (subparagraph 2.a.). He was found guilty and ordered to pay restitution and a \$27.00 fine. On December 20, 1987, Applicant was charged with domestic violence (subparagraph 2.b.). He was found guilty and received a suspended 30-day-jail sentence. On September 17, 1989, Applicant was charged with assaulting his wife (subparagraph 2.c.). He vaguely remembered fighting with his wife before she called the police.

On May 25, 1992, Applicant was charged with second degree burglary, felony, and grand theft (subparagraph 2.d.). He was sentenced to six years incarceration, suspended, and placed on five years probation. The crime occurred after Applicant purchased a car from his employer, a machine shop company. After being late for work on several occasions, Applicant was fired from work and his former employer demanded he pay the outstanding balance owed on the vehicle. When he could not pay, his former employer seized his tools as collateral. Applicant became angry and burgled his former employer's business and took various hand tools, other pieces of heavy equipment, and a truck to haul the items away. Arrest records and affidavits reflect the dollar amount stolen by Applicant totaled approximately \$30,000.00.

In September 1996, Applicant was arrested and charged with two counts of unemployment fraud (subparagraph 2.e.). Applicant claimed the judge dismissed the charges for three reasons: (1) the welfare agency made a mistake of continuing to send Applicant unemployment checks after he

had obtained employment; (2) Applicant agreed to make restitution; and, (3) he was on probation for the burglary (subparagraph 2.d.) in 1992.

Applicant provided no character evidence from his employer or any other source. Applicant is a professional stock car driver.

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Personal Conduct (PC)

Deliberately omitting or falsifying information during the security investigation demonstrates poor judgment.

Criminal Conduct (CC)

A history of criminal activity indicates poor judgment while also suggesting the individual may not be a suitable candidate to possess a security clearance.

CONCLUSIONS

Personal Conduct (PC). Conduct involving questionable judgment or dishonesty could indicate the person may not comply with security rules and regulations. Applicant's deliberate omission of material information from his July 2003 SCA (subparagraph 1.a.) and his February 2004 sworn statement (subparagraph 1.c.) activates PC disqualifying condition (DC) E2.A5.1.2.2. (*the deliberate omission of relevant and material facts from any personnel security questionnaire used to determine security clearance eligibility*) and PC DC E2.A5.1.2.3. (*deliberately providing false or misleading information concerning relevant and material matters to an investigator in connection with a personnel or trustworthiness determination*). Applicant denied drug use altogether in his SCA. In his subsequent sworn statements, Applicant only provided a partial account of his drug history. Applicant's explanations of embarrassment and not wanting his employer to know about his past drug use do not excuse his deliberate falsification of his SCA and sworn statement, two important segments of the security investigation where an applicant should provide truthful information about his past. If an applicant is willing to supply false information to enhance his chances of obtaining a security clearance, then he may also be willing to demonstrate the same dishonest behavior toward security rules he chooses not to follow.

I have carefully evaluated the mitigating conditions (MC) but I conclude they do not mitigate the disqualifying evidence under the PC guideline. PC MC E2.A5.1.3.1. (*the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability*) does not apply because Applicant admitted he deliberately concealed material information about his drug history. Furthermore, providing false information during the security investigation demonstrates poor judgment. Because the record shows a pattern of dishonest behavior that is recent, PC MC E2.A5.1.3.2. (*the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*) does not apply. PC MC E2.A5.1.3.3. (*the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*) is also inapplicable. In three earlier interviews/sworn statements, including the February 25, 2004 sworn statement, Applicant knew that his drug use was a concern to the government. Yet, he did not divulge his "crack" cocaine use because the agent never asked him whether he used other drugs besides marijuana. By not providing a full account of his drug history when first queried, his disclosure in June 2004 does not qualify as a good-faith effort to correct his earlier omissions before being confronted with the facts.

Having weighed and balanced all the evidence under the personal conduct and criminal conduct guidelines, specifically Applicant's intentional falsifications under subparagraphs 1.a. and 1.c., coupled with his dishonest conduct in 1986 (worthless check) and September 1996 (unemployment fraud), I conclude Applicant deliberately concealed his September 1996 arrest (subparagraph 1.b.) from his SCA in July 2003. *See*, PC DC E2.A5.1.2.2. In 1986, Applicant was convicted of writing a worthless check when he knew he did not have the necessary funds to cover the check. In September 1996, Applicant committed unemployment fraud by receiving the public funds even though he had been working for several months. Applicant knew or should have known he could not continue to accept the unemployment checks after he had returned to work. As none of the mitigating conditions apply, I find against Applicant under the PC guideline.

Criminal conduct (CC). Applicant has engaged in a pattern of criminal conduct that makes CC DC E2.A10.1.2.1.

(allegations or admission of criminal conduct, regardless of whether the person was formally charged) and CC DC E2.A10.1.2.2. (a single serious crime or multiple lesser offenses) applicable because of his record of criminal convictions or criminal conduct from 1986 to February 2004. First, Applicant's deliberate omission of material information under the PC guideline also constitutes a violation of 18 United States Code (U.S.C.) Section 1001. See, CC DC E2.A10.1.2.1. Applicant committed felonious conduct by concealing material information on his SCA and sworn statement. The information was material in that it had the potential to influence the direction of the security investigation by the government.

The three mitigating conditions that are pertinent to Applicant's criminal conduct are (1) CC DC E2.A10.1.3.1. (the behavior was not recent), (2) CC DC E2.A10.1.3.2. (the crime was an isolated incident), and (3) CC MC E2.A10.1.3.6. (there is clear evidence of successful rehabilitation). CC MC E2.A10.1.3.1. and CC MC E2.A10.1.3.2. do not apply because there is a long pattern of criminal conduct between 1986 and February 2004. Given Applicant's fraudulent behavior in 1986, 1996 and February 2004, CC MC E2.A10.1.3.6. is also inapplicable to the circumstances of this case. In reaching my adverse findings under the personal and criminal conduct guidelines, I have examined this case under the whole person model described in E.2.2. of the Directive. The deliberate omission of material information less than two years ago precludes a finding in Applicant's favor at this time.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

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

Subparagraph 1.a. Against the Applicant.

Subparagraph 1.b. Against the Applicant.

Subparagraph 1.c. Against the Applicant.

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

Subparagraph 2.a. Against the Applicant.

Subparagraph 2.b. Against the Applicant.

Subparagraph 2.c. Against the Applicant.

Subparagraph 2.d. Against the Applicant.

Subparagraph 2.e. Against the Applicant.

Subparagraph 2.f. 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 Applicant. Clearance is denied.

Paul J. Mason

Administrative Judge

1. Even though Applicant's intentional falsification was not alleged in the SOR, the lack of candor carries a negative impact on his overall credibility.