

KEYWORD: Personal Conduct; Drugs

DIGEST: Applicant admitted using marijuana three or four times a year for seven to ten years. He intentionally did not disclose his marijuana use and a bankruptcy on his security clearance application (SF 86). Security concerns based on personal conduct and drug involvement are not mitigated. Clearance is denied.

CASENO: 04-12281.h1

DATE: 03/23/2006

DATE: March 23, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-12281

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant admitted using marijuana three or four times a year for seven to ten years. He intentionally did not disclose his marijuana use and a bankruptcy on his security clearance application (SF 86). Security concerns based on personal conduct and drug involvement are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On July 28, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to not grant a security clearance to Applicant. ⁽¹⁾ The SOR alleges security concerns under Guidelines E (Personal Conduct) and H (Drug Involvement). Applicant answered the SOR in writing on August 4, 2005, and elected to have the case decided on the written record in lieu of a hearing. Applicant admitted using marijuana three or four times a year for several years (SOR ¶¶ 1.b.(1), 1.c.(1), and 2.a.). He admitted failing to disclose an alcohol-related arrest and a drug-related arrest on his SF 86 (SOR ¶¶ 1.b. and 1.c.) but offered explanations. He admitted failing to disclose his marijuana use and a bankruptcy (SOR ¶¶ 1.c. and 1.d.).

Department Counsel submitted the Government's written case on January 9, 2006. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on January 12, 2006, but he did not respond. The case was assigned to me on March 2, 2006.

FINDINGS OF FACT

Based on the entire record, I make the following findings of fact:

Applicant is a 42-year-old financial analyst working for a defense contractor. He has worked for his present employer since November 1993. He received a clearance in December 1993. He served in the U.S. Navy from September 1985 to September 1989, attaining the rate of petty officer second class (E-4).⁽²⁾

On May 14, 2003, Applicant executed a SF 86. He answered "no" to question 24, asking if he had ever been charged with any offenses related to alcohol or drugs. He failed to disclose an arrest for driving while intoxicated (DWI) in August 1982 and an arrest for possession of marijuana in July 1998.⁽³⁾ In a signed and sworn statement on September 25, 2003, he told a security investigator he did not think he was required to list the two arrests.⁽⁴⁾ In his answer to the SOR, he explained that he did not disclose the DWI because it was more than 10 years old, and he did not disclose the arrest for possession of marijuana because he was sentenced to community service and told the arrest would be expunged from the records.⁽⁵⁾

On the same SF 86, Applicant answered "no" to questions 27 and 28 pertaining to illegal use of drugs.⁽⁶⁾ In his signed and sworn statement to the security investigator, he admitted his failure to disclose his use of marijuana, explaining he "didn't want anyone to know about it."⁽⁷⁾

Finally, Applicant answered "no" to question 33 on his SF 86, asking if he had filed a bankruptcy petition in the last seven years.⁽⁸⁾ In his statement to the security investigator as well as his answer to the SOR, he admitted filing for bankruptcy in September 1999, but he offered no explanation for not disclosing it on his SF 86.⁽⁹⁾

In his interview with the security investigator, Applicant expressed his reluctance to give up his longtime marijuana-smoking friends, but he promised he would "attempt to stay away from settings where any illegal substances are being used."⁽¹⁰⁾

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 has 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), as amended and modified. 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 (App. Bd. Dec. 19, 2002).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

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.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[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. ISCR Case No. 01-20700 at 3; *see* Directive ¶ E3.1.15. 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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline E (Personal Conduct)

Under this guideline, conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. A disqualifying condition (DC 2) applies where there has been a deliberate omission or falsification of relevant and material facts from any personal security questionnaire. Directive ¶ E2.A5.1.2.2.

Applicant admitted failing to disclose his arrests for DWI and marijuana possession, but asserted he did not think he was required to disclose them on his SF 86. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)). Applicant's explanation for his negative answer to question 24 on his SF 86 is plausible. I resolve SOR ¶ 1.a. in his favor.

Applicant's admissions that he intentionally omitted facts regarding his marijuana use and bankruptcy petition from his SF 86 prove the allegations in SOR ¶¶ 1.b. and 1.c. and establish DC 2, shifting the burden to Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Two mitigating conditions (MC) are relevant to this case. MC 2 applies when the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. Directive ¶ E2.A5.1.3.2. MC 3 applies when the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts. Directive ¶ E2.A5.1.3.3. Neither condition is established. Applicant's falsifications were recent, involving his current application for continuance of his clearance, and he did not make any effort to correct the falsification until he was questioned by a security investigator.

After considering the disqualifying conditions and the absence of mitigating conditions, and evaluating the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concern based on falsification of his

security clearance application.

Guideline H (Drug Involvement)

Under this guideline, improper or illegal involvement with drugs raises questions regarding an applicant'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. Directive ¶ E2.A8.1.1. Any illegal use of a controlled substance can raise a security concern and may be a disqualifying condition (DC 1). Directive ¶ E2.A8.2.1. Illegal drug possession also is a disqualifying condition (DC 2). Directive ¶ E2.A8.2.2. DC 1 and DC 2 are established.

Security concerns based on possession and use of marijuana can be mitigated by showing that it was not recent (MC 1). Directive ¶ E2.A8.1.3.1. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the record. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.* Applicant told a security investigator he used marijuana three or four times a year for a period of seven to ten years. He also told the investigator he last used marijuana in February 2003, shortly before he executed his SF 86. Since that time, he has been under the pressure of maintaining his clearance, but there is no evidence he has completed a drug rehabilitation program or made any significant lifestyle changes. He is unwilling to abandon his marijuana-smoking friends. The most he has promised is to "attempt to stay away from settings where any illegal substances are being used." Three years without using marijuana is a "significant period of time" in the abstract, but it is less significant in the context of seven to ten years of regular marijuana use and Applicant's reluctance to distance himself from his marijuana-using friends. I conclude MC 1 is not established.

MC 2 applies if "drug involvement was an isolated or aberrational event." Directive E2.A8.1.3.2. Applicant's marijuana use was neither isolated nor aberrational. I conclude MC 2 is not established.

MC 3 applies if there is "demonstrated intent not to abuse drugs in the future." Applicant stated his intent to stop using marijuana in his interview with the security investigator. For the reasons stated above under the discussion of MC 1, I am not satisfied he has demonstrated his intent by a track record of changed conduct.

After considering the absence of mitigating circumstances and evaluating all the evidence under the whole person concept, I conclude Applicant has not mitigated the security concern based on drug involvement.

FORMAL FINDINGS

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

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

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Paragraph 2. Guideline H (Drug Involvement): AGAINST APPLICANT

Subparagraph 2.a.: 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 Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).
2. FORM Item 4 at 1, 2, 4, 7.
3. *Id.* at 6.
4. FORM Item 5 at 3-4.
5. FORM Item 3.
6. FORM Item 4 at 7.
7. FORM Item 5 at 4.
8. FORM Item 4 at 7.
9. FORM Item 3, Item 4 at 1, Item 6.
10. FORM Item 5 at 3.