

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant received a security clearance in June 1996, while in the U.S. Navy Reserve. In 1997 his clearance was suspended, and he was administratively discharged from the Navy Reserve for using marijuana. He did not disclose the suspension of his clearance on a federal employment application, and he did not disclose his marijuana use on two security clearance applications (SF 86). He resigned from a federal job in lieu of termination after falsifying a request for military leave. Security concerns based on personal conduct and criminal conduct are not mitigated. Clearance is denied.

CASENO: 05-01442.h1

DATE: 03/15/2006

DATE: March 15, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-01442

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Stephanie Hess, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant received a security clearance in June 1996, while in the U.S. Navy Reserve. In 1997 his clearance was suspended, and he was administratively discharged from the Navy Reserve for using marijuana. He did not disclose the suspension of his clearance on a federal employment application, and he did not disclose his marijuana use on two security clearance applications (SF 86). He resigned from a federal job in lieu of termination after falsifying a request for military leave. Security concerns based on personal conduct and criminal conduct are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On September 7, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. 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). The SOR alleges security concerns under Guidelines E (Personal Conduct) and J (Criminal Conduct).

Applicant answered the SOR in writing on October 18, 2005. He admitted the allegations under Guideline E, did not respond to the allegations under Guideline J, and requested a hearing. The case was assigned to me on December 9, 2005 and heard on February 28, 2006. DOHA received the transcript (Tr.) on March 8, 2006.

PROCEDURAL RULING

SOR ¶ 1.a. alleges Applicant "submitted an altered military reserve record of orders . . . and falsified [his] time and leave records." On my own motion, I amended the SOR to allege he submitted "a false statement that he needed one week away from work . . . for U.S. Navy Reserve Training." Applicant admitted the amended allegation.⁽¹⁾

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 40-year-old security officer employed by a defense contractor. He served on active duty in the U.S. Navy from September 1984 to June 1994, attaining the rate of petty officer second class (E-5). He received the Navy Achievement Medal during his active duty service. After his release from active duty, he had difficulty adjusting to civilian life. Unable to return to active duty, he joined the U.S. Navy Reserve.⁽²⁾ In June 1996, he received a security clearance.⁽³⁾ In 1997 he underwent a urinalysis, which tested positive for the metabolite of marijuana. Based on the positive urinalysis, his clearance was suspended by the Navy, and he was administratively discharged from the Navy Reserve.⁽⁴⁾ At the hearing, he testified his marijuana use was a one-time, isolated incident at a time in his life when he was consuming alcohol heavily.⁽⁵⁾

Applicant was employed by the Transportation Security Administration (TSA) from September 2002 until June 2003. On his TSA employment application, he falsely answered "no" to a question whether his clearance had ever been suspended or revoked.⁽⁶⁾ He admitted knowing the Navy had suspended his clearance,⁽⁷⁾ and he attributed his false answer to "convenient memory."⁽⁸⁾ He admitted he knew he might not get the TSA job if he answered "yes" to the question.⁽⁹⁾

While employed by TSA, Applicant asked his supervisor for seven days of military leave to attend U.S. Navy Reserve training. His request was partially false because the training was only on the weekend. He asked for an entire week of leave of military leave, because he wanted to attend a family function and his request for ordinary leave had been denied. When he made the request, he believed the absence would be without pay. When he was paid for the week, he notified his finance office and reimbursed the government. He resigned in lieu of being fired after his false request was discovered.⁽¹⁰⁾

On July 14, 2003, Applicant executed a handwritten SF 86 in connection with his current employment. He falsely answered "no" to question 24b, asking if he had ever illegally used a controlled substance while possessing a security clearance, but he answered "yes" to question 26b, asking if he had ever had a clearance denied, suspended, or revoked. (11) On August 6, 2003, he falsely answered "no" to question 28 on an electronically transmitted SF 86, asking if he had ever illegally used a controlled substance while holding a security clearance. (12) He attributed these false answers to "convenient memory." (13)

Applicant testified he is a "changed man" and an "honest man." He has "found religion," and he believes he has learned from his past mistakes and is worthy of a security clearance. (14)

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)

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 1) may arise from "[r]eliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other associates." Directive ¶ E2.A5.1.2.1. The unfavorable information from Applicant's Navy and TSA records establishes DC 1.

A disqualifying condition (DC 2) under this guideline also may be established by "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." Directive ¶ E2.A5.1.2.2. When a falsification allegation is controverted, the government has the burden of proving it. DC 2 is established, because

Applicant admitted falsifying the TSA employment application and his two SF 86s.

Finally, a disqualifying condition (DC 5) may be established by a "pattern of dishonesty or rule violations." Directive ¶ E2.A5.1.2.5. Applicant's illegal use of marijuana while in the Navy and holding a security clearance, falsification of his TSA employment application, falsification of his request for military leave while employed at TSA, and two falsifications of a SF 86 in connection with his current position establish DC 5.

Since the government produced substantial evidence to establish DC 1, DC 2 and DC 5, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. 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 Applicant's falsifications. 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. Applicant falsely omitted the suspension of his security clearance from his TSA application in September 2002, but he disclosed it on his SF 86 in July 2003. Nevertheless, I conclude MC 2 does not apply because the falsification of the TSA application was not an isolated incident, but one of a series of four incidents of falsification between September 2002 and August 2003. *See* ISCR Case No. 99-0417 at 3, 2000 WL 288420 (App. Bd. Feb. 24, 2000) (four acts of dishonesty over a span of several years not "isolated").

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. This mitigating condition is not established, because Applicant did not provide correct information about his marijuana use until confronted with the facts.

On the other hand, Applicant's use of marijuana appears to be an isolated nine-year-old incident. Directive ¶ 6.3.2 (frequency and recency of conduct). There is no evidence of subsequent substance abuse. *See* Directive ¶¶ E2.2.1.6. (rehabilitation), E2.2.1.9. (likelihood of recurrence). The suspension of his security clearance and discharge from the Navy Reserve were consequences of his marijuana use and do not raise independent security concerns, except with respect to Applicant's efforts to conceal them, discussed above.

After evaluating the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on illegal marijuana use, and I resolve SOR ¶¶ 1.b. and 1.c. in his favor. However, I conclude he has not mitigated the security concerns based on his false request for military leave (SOR ¶ 1.a.), false TSA employment application (SOR ¶ 1.d.), and two false SF 86s (SOR ¶¶ 1.e. and 1.f.).

Guideline J (Criminal Conduct)

Under this guideline, a single serious crime or multiple lesser offenses can raise a disqualifying condition concern (DC 2). Directive ¶ E2.A10.1.2.2. It is a felony, punishable by a fine or imprisonment for not more than five years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the government of the United States. 18 U.S.C. § 1001. Security clearances and federal employment applications are within the jurisdiction of the executive branch of the government of the United States. *See Egan*, 484 U.S. at 527. Deliberately false answers on these documents are serious crimes within the meaning of this guideline. Applicant's admitted falsification of his TSA application and two SF 86s establish DC 2.

A security concern based on criminal conduct may be mitigated by showing the criminal behavior was not recent (MC 1) or was an isolated incident (MC 2). Directive ¶ E2.A10.1.3.1., E2.A10.1.3.2. *See also* Directive ¶ E2.2.1.3. (frequency and recency of conduct). Neither mitigating condition is established. Applicant's conduct was repeated and recent, the last falsification involving his current security clearance application.

Criminal conduct also may be mitigated (MC 6) by showing "clear evidence of successful rehabilitation." Directive ¶ E2.A10.1.3.6. Applicant testified he is a changed man, worthy of a security clearance. The issue under MC 6 is whether there has been a significant period of time without any evidence of misconduct, and whether the evidence shows changed circumstances or conduct. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

MC 6 is not established. The latest falsification occurred recently, in Applicant's current application for a clearance. At the hearing, he equivocated and minimized his culpability, characterizing his false answers as "convenient memory," but stopping short of admitting deliberate falsification. The record does not support his protestations that he is a changed man.

After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concern based on criminal conduct.

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.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Paragraph 2. Guideline J (Criminal Conduct): 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. Tr. 43-44.
2. Tr. 38.
3. Government Exhibit 1 at 10.
4. GX 4, 5.
5. Tr. 53.
6. GX 6 at 9.
7. Tr. 35.
8. Tr. 36.
9. Tr. 44-45.
10. Tr. 30-31.
11. GX 3 at 8.
12. GX 1 at 8.
13. Tr. 37.
14. Tr. 27, 53.