

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant failed to mitigate criminal conduct and personal conduct security concerns arising from four drug related arrests in 1996, 2000, 2001, and 2002 resulting in convictions as recently as 2006 for which he is on probation until 2009. He failed to report all but two usages of marijuana on his SF 86 dated in 2000 on Questions 22, 24, and 27 even though he had used cocaine from 1982 to 1999. Clearance is denied.

CASENO: 03-23671.h1

DATE: 05/21/2007

DATE: May 21, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 03-23671
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
CHARLES D. ABLARD**

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq. , Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

____ Applicant failed to mitigate criminal conduct and personal conduct security concerns arising from four drug related arrests in 1996, 2000, 2001, and 2002 resulting in convictions as recently as

2006 for which he is on probation until 2009. He failed to report all but two usages of marijuana on his SF 86 dated in 2000 on Questions 22, 24, and 27 even though he had used cocaine from 1982 to 1999. Clearance is denied.

STATEMENT OF CASE

_____ On September 19, 2006, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On October 26, 2006, Applicant responded to the SOR allegations, and requested a hearing. The matter was assigned to me on January 6, 2007. A notice of hearing was issued on March 2, 2007, for a hearing on March 21, 2007, and held that day. The government offered eleven exhibits into evidence. Applicant offered nine which were appended to his answer and seven more at the hearing. All were accepted in evidence. Applicant testified on his own behalf. The transcript was received on March 30, 2007.

FINDINGS OF FACT

_____ Applicant admitted with explanation all but one of the four SOR allegations concerning criminal conduct. He denied the two allegations concerning personal conduct. After a complete review of the record, I make the following findings of fact:

Applicant is a 44-year-old employee of a defense contractor. He has worked for his present employer and its predecessor companies as a senior computer operator since 1989. He has held a security clearance since that date. He has a record of four arrests relating to drugs during his employment in 1996, 2000, 2001, and 2002. The first offense concerned prowling in a neighborhood known for drug use. He was given a fine and Safe Neighborhood assessment.

Applicant used marijuana in the 1980's until the mid-1990's. He used cocaine from 1982 to 1999 at various times and was diagnosed as cocaine dependent in October 2000 (Exh. 7). This occurred after his March 2000 arrest and conviction for possession of rock cocaine, a felony. He was fined received pre-trial intervention and given one year probation, drug and alcohol education, and required to perform 50 hours of community service. The probation was terminated in March 2002 and the charge dismissed. He was evaluated by a licensed clinical social worker in 2006 and found not to require further treatment (Exh. A).

In June 2001, while serving probation from the 2000 arrest, Applicant was arrested in another county in the same state for aggravated criminal sexual contact, a felony. He plead guilty to a lesser drug charge in April 2002 and was placed on probation for one year with 100 hours of community service.

The last arrest in September 2002, while on probation from the third offense, did not result in a conviction until 2006. It related to purchase via the internet of a controlled dangerous substance, GBL, from Canada. This substance is known as a “date rape” drug but advertised as a performance enhancer. He was convicted of conspiracy to acquire an illegal drug since he never possessed it. He was sentenced to three years probation and fined over \$1,000 and he remains on probation until June 2009.

When Applicant submitted his application for security clearance (SF 86) in December 2000 he listed two uses of marijuana in 1994 but did not list his cocaine use, or the October 2000 finding of cocaine dependence at Question 27 relating to illegal use of drugs. He did not list the cocaine use as he was concerned about his job. He did not list the 1996 and March 2000 arrests in his answers to Questions 21 and 24, relating to his police record for felony offenses and alcohol/drug offenses as he was required to do. The two later arrests and convictions occurred after filing his SF 86. He did not report any of the arrests and convictions to the company security office as he admitted he was required to do (Tr. 79). Officials and colleagues at his employer do not know of any of his offenses. He had one minor security violation at his company in 2002. It was not alleged in the SOR but was discussed at the hearing. It is not a factor for consideration in this matter. He does not intend to use drugs in the future and has had no difficulties with the law since the arrest in 2002 that led to the 2006 conviction.

Applicant has owned his own home for 14 years. His mother lived with him for three years and this caused some stress in his life. She recently moved to her own home. He is single with a high school education but has taken computer courses through his employer. His salary is \$40,000 per annum. He is well regarded in his company and is knowledgeable about his job helping to train others (Exhs. K-P). He has been involved in a number of charitable and civic activities in his town (Exhs. H-J).

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.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual’s age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other 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. Security clearances are granted only when “it is clearly consistent with the national interest to do so.” Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

_____ Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist 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. The applicant bears the burden of demonstrating it is clearly consistent with the national interest to grant or continue a security clearance. “Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.” Directive, ¶ E2.2.2. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b).

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to all allegations set forth in the SOR:

Guideline J (Criminal Conduct) is alleged both as to the four arrests and convictions and as a violation of 18 U.S.C. §1001 by falsifying answers to Questions 21, 24, and 27 on his SF 86. Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. It calls into question a person’s ability or willingness to comply with laws, rules and regulations (AG ¶ 30). Conditions that could raise a security concern and may be disqualifying include allegations or admissions of criminal conduct (AG ¶ 31 c), the fact that an individual is currently on probation (AG ¶ 31 d), and violation of probation (AG ¶ 31 e). The allegations could be mitigated if the criminal behavior was not recent (AG ¶ 32 a), or there is evidence of successful rehabilitation without recurrence of criminal activity, good employment record, or constructive community involvement (AG ¶ 32 d). Applicant no longer uses cocaine but did so while holding a security clearance and deliberately withheld the information on the SF 86 for fear of jeopardizing his job. Since he is still on probation for the last arrest and conviction, it is premature to grant a clearance. Two of his offenses occurred while he was still on probation from a prior conviction. Proof of changed conduct was offered but in view of the continued probation and the fact that he was not sentenced for the 2002 offense until 2006, a greater period of time is required to establish mitigation.

Applicant’s failure to report his police record at Question 21, his alcohol/drug offenses at Question 24, and his drug use and diagnosis of cocaine dependence at Question 27 on his SF 86 raises issues under Guideline E that might indicate questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could raise questions about the individual’s reliability, trustworthiness and ability to properly safeguard classified information (AG ¶ 15). Specifically, the deliberate omission, concealment, or falsification of relevant facts from a personnel security application could raise a security concern and may be disqualifying. (AG ¶ 16 a). None of the mitigating factors are applicable in this matter but I find that he was not required to list the diagnosis in response to Question 27 since that question does not require anything but use of drugs.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information.

The "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. While Applicant is making progress at resolving his problems of drug use and conduct that resulted in his arrests and convictions, this is insufficient to grant a clearance. His work performance has remained good despite his criminal misconduct but that provides an insufficient basis for granting a clearance. The fact that his company is unaware of any of the offenses particularly the fact that he is on probation and will remain so until next year makes him vulnerable for exploitation.

After considering all the evidence in its totality, including the whole person of Applicant, I conclude he should not be granted a security clearance.

FORMAL FINDINGS

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

_____ Paragraph 1. Guideline J:	AGAINST APPLICANT
Subparagraph 1.a.:	Against Applicant
Subparagraph 1.b.:	Against Applicant
_____ Subparagraph 1.c.:	Against Applicant
Subparagraph 1.d.:	Against Applicant
Subparagraph 1.e.:	Against Applicant
_____ Paragraph 2. Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Subparagraph 2.b.1.:	Against Applicant
Subparagraph 2.b.2.:	For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or renew a security clearance for Applicant. Clearance is denied.

Charles D. Ablard
Administrative Judge

