

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant, a 22-year-old employee of a defense contractor for the past five years, failed to mitigate security concerns under Guideline E arising from failure to report his drug use at Question 27 on his 2002 SF 86 yet provided detailed information on many other matters on the application. He also was alleged to have given inconsistent information to two investigators in 2004 and 2006 regarding the drug use as to frequency and dates but this allegation was mitigated since the evidence was not persuasive that he did so deliberately as required by Guideline E. He mitigated allegations under Guideline J of criminal conduct in 2002 for criminal trespass because of the passage of time and his positive conduct for the past four years, and mitigated a criminal violation of 18 U.S.C. 1001 because the evidence did not rise to the level of proof of criminal conduct. Clearance is denied.

CASENO: 05-02292.h1

DATE: 07/30/2007

DATE: July 30, 2007

In Re:)	
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-----)	ISCR Case No. 05-02292
SSN: -----)	
)	
Applicant for Security Clearance)	

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

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq. , Department Counsel

FOR APPLICANT

John F. Adamson, Personal Representative

SYNOPSIS

Applicant, a 22-year-old employee of a defense contractor for the past five years, failed to mitigate security concerns under Guideline E arising from failure to report his drug use at Question 27 on his 2002 SF 86 yet provided detailed information on many other matters on the application. He also was alleged to have given inconsistent information to two investigators in 2004 and 2006 regarding the drug use as to frequency and dates but this allegation was mitigated since the evidence was not persuasive that he did so deliberately as required by Guideline E. He mitigated allegations under Guideline J of criminal conduct in 2002 for criminal trespass because of the passage of time and his positive conduct for the past four years, and mitigated a criminal violation of 18 U.S.C. 1001 because the evidence did not rise to the level of proof of criminal conduct. Clearance is denied.

STATEMENT OF CASE

_____ On September 22, 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 13, 2006, Applicant responded to the SOR allegations, and requested a hearing. The matter was assigned to me on March 26, 2007. A notice of hearing was issued on May 8, 2007, for a hearing on May 30, 2007, and held that day. The government offered four exhibits and Applicant offered two at the hearing. All were admitted into evidence. Two investigators testified for the government. Applicant testified on his own behalf. The transcript was received on June 13, 2007.

FINDINGS OF FACT

_____ Applicant admitted one allegation (SOR ¶ 2.b.) and denied the other three with explanatory information. After a complete review of the record, I make the following findings of fact:

Applicant is a 22-year-old employee of a defense contractor who has worked for the company for five years since age 17. He filed his application for a security clearance (SF 86) on October 15, 2002, when he first began work as a sheet metal worker. When he filed his SF 86 he answered “no” to Question 27 asking if he had used drugs in the past seven years or since age 16. He had used marijuana while in high school. The exact dates and frequency for that use was in dispute in the hearing arising from two interviews he had with two government investigators.

The first interview with Applicant was on January 20, 2004. He was a source and reference in connection with a national agency check (NACLC) on a person he knew who also was applying

for clearance. In the one page information summary sheet (Exh. 4) prepared by the investigator who testified at the hearing it was reported that Applicant stated he used marijuana a couple of times a week between 1999 until the winter of 2002 when he would have been between ages 15 and 17. He denied telling the investigator the frequency and date of 2002.

The investigator was uncertain as to whether the interview was in person or telephonic (Tr. 119), and Applicant was not given an opportunity to read and review the statement because he was only a source and not the subject of the investigation. While the investigator expressed certainty that the information in the report accurately reflected what she was told by Applicant (Tr. 105), I give limited weight to its accuracy since Applicant had no opportunity to review the report.

The second investigation on May 16, 2006, related to Applicant's own security clearance and in that personal subject interview (Exh. 3) the investigator reported that Applicant stated he had used marijuana only twice during 1999 and 2000 while in the woods with friends, had not used it since, and had no intention of using it again.

The personal subject interview for Applicant also focused on an arrest for criminal trespass and criminal mischief in September 2002 one month before his SF 86 was submitted. That incident was reported in detail by Applicant at Questions 23 and 26 on the SF 86 where he noted that action was still pending on the case. He also reported in detail one delinquent debt at Questions 38 and 39. The 2002 arrest is also alleged under Guideline J Criminal Conduct in SOR ¶ 2.b., his only admitted allegation. As a result of this arrest, he was placed on one year unsupervised probation as a youthful offender.

In the summer of 2003, Applicant was arrested for underage beer drinking at a beach and, in the course of the arrest, the police officer discovered marijuana in the pocket of the pants he was wearing. He was charged with underage beer drinking and drug possession (Tr. 91-95). This was during his probation period resulting from the 2002 arrest. He was fined for both offenses. While this matter was not alleged in the SOR, it was argued by the government at the hearing in an effort to impeach the credibility of Applicant. He said he had borrowed dry clothing from a friend after they had swam, and the marijuana was in the pocket of the borrowed trousers.

The 2006 investigative report (Exh. 3) noted that Applicant stated that "he did not have any other problems during his one year probation." He was not given an opportunity to review the report when it was written, but at the hearing Applicant reviewed it and said no parts were inaccurate or incomplete (Tr. 70). He contended he was never specifically asked about the 2003 incident by the investigator. He did not report the 2003 arrest to either of the investigators, his employer, or his supervisor. He submitted evidence of a company sponsored drug test on October 28, 2002, showing no drugs in his system on that date (Exh. A).

Applicant is single with a high school degree and technical education for the skills he performs. His family consists of his parents, one older brother who lives across the country, and a two year-old brother with whom he is very close. His family has a long history with the same company as his grandfather also worked there his entire working life. He is well regarded at his work by his supervisor and, despite a few un-excused absences, has good work habits (Exh. B). Applicant

does not use drugs, believes they endanger his career at his company, and does not consort with people who do use drugs. He hopes to marry and have a home (Tr. 64).

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 then 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:

Applicant’s admitted drug use within seven years of filing his SF 86, his failure to report it at Question 27 of his SF 86, and alleged failure to fully inform investigators of frequency and dates of his drug use, prompted security concerns under Guideline E (Personal Conduct) of the revised adjudicative guidelines (AG) effective September 1, 2006. Such conduct might indicate questionable judgment, unreliability, and unwillingness to comply with rules and regulations and could indicate that the person may not properly safeguard classified information (AG 15). Specifically, conditions that could raise a security concern and be disqualifying include the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire (AG 16 a). Also the deliberate omission, concealment, or falsification of relevant and material facts in a

personnel security interview could raise a security concern and be disqualifying (AG 16 b).

There are several mitigating conditions in Guideline E, but none are applicable. In view of the detail of other answers he gave on the SF 86 to other questions, the omission of information about drug use at Question 27 is difficult to explain. Thus, I conclude against Applicant as to SOR ¶ 1.a. As to the allegation in SOR 1.b. relating to the inconsistent reports of the two investigators in 2004 and 2006, the differences in the detail given to the two investigators as stated in their reports is understandable since the first was only a character reference inquiry for another person and the detail of the response of Applicant as to his own conduct was secondary to the purposes of the inquiry and not of great significance to either Applicant or the investigator. I find in his favor as to that allegation.

Also alleged is security concern under Guideline J (Criminal Conduct) relating to (SOR 2.a.) the criminal trespass arrest in 2002, five years ago when he was 17-years-old, and (SOR 2.b.) as a criminal violation of 18 U.S.C. § 1001 regarding the allegations in SOR ¶ 1 relating to the failure to report marijuana use on his SF 86 and the inconsistency in information provided to the two investigators regarding the dates and frequency of use. Such conduct might create doubts 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 an allegation or admission of criminal conduct (AG 31 c).

Mitigating conditions (MC) might apply if so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgement (AG 32 a). Another MC provides mitigation if there is evidence of successful rehabilitation without recurrence of criminal activity, remorse, and a good employment record. Since the allegation of criminal conduct alleged in SOR ¶ 2.b. occurred five years ago and the second un-alleged arrest during his probation, occurred four years ago, and under circumstances unlikely to recur since Applicant is now older and more mature with a good employment record, I find that both mitigating conditions are applicable.

As to the allegation in SOR ¶ 2.a. relating to 18 U.S.C. 1001, I conclude that the evidence produced regarding SOR ¶ 1 does not rise to level required for establishing criminal conduct.

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. Applicant is a young man who, at age 22, has already been employed in a stable and productive position for five years. The events that gave rise to this proceeding occurred during his teenage years. His drug use occurred during high school years. However, the failure to report drug use on the SF 86, when he was recently in high school when the use occurred despite the accuracy of other responses on the SF

86, precludes application of the whole person mitigation. The failure to report the 2003 drug possession arrest during his period probation in the 2006 investigation indicates his intention to minimize drug use at the expense of the requirement to provide full and frank answers to an investigator.

After considering all the evidence in its totality, including the whole person of Applicant, I conclude that it is premature to grant a security clearance.

FORMAL FINDINGS

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

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