

KEYWORD: Personal Conduct; Criminal Conduct; Drugs

DIGEST: Applicant is a 26-year-old security officer employed by a federal contractor. He deliberately falsified answers on a security clearance application. He has a pattern of criminal conduct, most recently a DWI conviction. He also has a history of drug involvement. He failed to mitigate the security concerns about personal conduct, criminal conduct, and drug involvement. Clearance is denied.

CASENO: 05-09388.h1

DATE: 06/30/2007

DATE: June 30, 2007

In re:	)	
	)	
-----	)	
SSN: -----	)	ISCR Case No. 05-09388
	)	
Applicant for Security Clearance	)	
	)	

**DECISION OF ADMINISTRATIVE JUDGE  
CHRISTOPHER GRAHAM**

**APPEARANCES**

**FOR GOVERNMENT**

Gina Marine, Esq., Department Counsel  
Francisco Mendez, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is a 26-year-old security officer employed by a federal contractor. He deliberately falsified answers on a security clearance application. He has a pattern of criminal conduct, most recently a DWI conviction. He also has a history of drug involvement. He failed to mitigate the security concerns about personal conduct, criminal conduct, and drug involvement. Clearance is denied.

## STATEMENT OF THE CASE

On June 5, 2004, Applicant submitted a Security Clearance Application (SF 86).<sup>1</sup> The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program (Directive)*, dated January 2, 1992, as amended, DOHA issued a Statement of Reasons (SOR) on December 1, 2005, detailing the basis for its decision – security concerns raised under Guideline E (Personal Conduct), Guideline J (Criminal Conduct), and Guideline H (Drug Involvement) of the Directive. The President issued revised adjudicative guidelines (AG) on December 30, 2005. DoD implemented them on September 1, 2006. Pending official amendment/reissue of DoD Directive 5220.6, the AG are to be used in all cases when the SOR was issued on or after September 1, 2006. Because the SOR was issued prior to September 1, 2006, DoD policy requires that the case proceed under the former guidelines.

Applicant answered the SOR in writing on January 3, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on February 7, 2007, and a Notice of Hearing was dated on March 5, 2007. I convened a hearing on March 20, 2007, to consider whether it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Applicant made a knowing and voluntary waiver of the 15-day notice rule.<sup>2</sup> The government offered three exhibits, marked as Exhibits 1-3, which were admitted without objection. Applicant offered no exhibits. I kept the record open until March 27, 2007, to allow the government the time to file additional documents. The government filed Exhibit 4 on March 20, 2007, and it was admitted without objection. DOHA received the transcript (Tr.) on March 30, 2007.

## FINDINGS OF FACT

Applicant admitted the allegations contained in SOR.<sup>3</sup> He admitted additional SOR subparagraphs 2.f. through 2.i., that alleged a 2004 charge of marijuana possession which was *nolle prosequi*, and a DWI in August 2006, for which he was convicted.. At the hearing, these allegations were admitted without objection.<sup>4</sup> The admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

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<sup>1</sup>Government Exhibit 1 (Security Clearance Application (SF 86), dated June 5, 2004).

<sup>2</sup>Tr. at 6.

<sup>3</sup>*Id.* at 25.

<sup>4</sup>*Id.* at 24.

Applicant is a 26-year-old security officer employed by a federal contractor.<sup>5</sup> He is single and has no children.<sup>6</sup> He voluntarily participated in the Job Corps.<sup>7</sup> He is a high school graduate and was scheduled to receive his bachelor's degree in information technology network security in June 2007.<sup>8</sup> He has no prior military service and he made his first security clearance application on June 5, 2004.<sup>9</sup>

## Personal Conduct

When Applicant executed his security clearance application (Standard Form 86), on June 5, 2004, he answered "No" to the following question:

**24. Your Police Record - Alcohol/Drug Offenses** For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. §844 or 18 U.S.C. §3607. Have you ever been charged with or convicted any offense related to alcohol or drugs?<sup>10</sup>

He failed to disclose that on January 29, 2003, he was charged with (1) possession of marijuana, and (2) DWI/drugs and alcohol. He answered "No" to this question:

**26. Your police record - other offenses** For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. §844 or 18 U.S.C. §3607. In the last 7 years, have you been arrested for, charged with, or convicted on any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) Have you ever been charged with or convicted of any felony offense(s) related to alcohol or drugs?<sup>11</sup>

Because the offense was properly under question 24, he was not required to list it here. He answered this question:

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<sup>5</sup>*Id.* at 13, 15.

<sup>6</sup>*Id.* at 14.

<sup>7</sup>*Id.* at 26-27.

<sup>8</sup>*Id.* at 14, 48.

<sup>9</sup>*Id.* at 15-16.

<sup>10</sup>Government Exhibit 1, *supra*, note 1, at 6.

<sup>11</sup>Government Exhibit 1, *supra*, note 1, at 7.

**27. Your Use of Illegal Drugs and Drug Activity -Illegal Use of Drugs** Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenic (LSD, PCP, etc.), or prescription drugs?

He answered “Yes” and listed marijuana use on February 1, 2002, but failed to disclose that he also used marijuana in January 2003.<sup>12</sup>

Applicant stated he did not include the arrests because he believed he could answer “No” as he had not been convicted. The 1998 shoplifting charge was handled in juvenile court, he received a suspended imposition of sentence (SIS), so there is no conviction, nor is there an adult record of this case. He did not ask anyone to help him interpret the questions.<sup>13</sup>

### **Criminal Conduct**

Applicant was arrested in October 1998 and charged with shoplifting. He entered a plea of guilty and was placed on probation for six months. In November 1999, he was charged with a probation violation. On February 9, 2000, he was again charged with a probation violation. Probation was continued. As stated earlier, this was a juvenile court matter, and is not a conviction as it was an SIS.

Applicant was arrested January 29, 2003, and charged with (1) possession of marijuana, and (2) the DWI/drugs and alcohol. The charges were *nolle prosequi*.

Applicant was arrested December 21, 2004 and charged with possession of marijuana. The charge was *nolle prosequi*.

On August 11, 2006, Applicant was arrested and charged with DWI/1st. On November 2, 2006, he was charged with failure to appear on a misdemeanor charge, and a bench warrant was issued. On December 7, 2006, he was found guilty of the DWI, sentenced to 30 days in jail, suspended, and fined \$300. His driver’s license was suspended for 12 months.<sup>14</sup> I assume that the failure to appear charge must have been dismissed.

For failing to truthfully answer questions 24, 26, and 27 on the SF 86, the government alleges three violations of 18 U.S.C. §1001.

### **Drug Involvement**

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<sup>12</sup>Government Exhibit 1, *supra*, note 1, at 7.

<sup>13</sup>Tr. at 28.

<sup>14</sup>Amendment to SOR, dated March 19, 2007.

Applicant used marijuana in February 2002 and January 2003.<sup>15</sup> He claimed he did not care for it but smoked it once or twice more “to relax.”<sup>16</sup> Even after the second and third time, he did not like it. But he used it “out of curiosity and was still curious.”<sup>17</sup> The charges pertaining to the two arrests in 2003 and 2004 for possession of marijuana were dismissed, but he admitted using marijuana at or about the time of the arrest.<sup>18</sup>

## POLICIES

In an evaluation of an applicant’s security suitability, an administrative judge must consider Enclosure 2 of the Directive, which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant’s eligibility for access to classified information.

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed below. An administrative judge’s overarching adjudicative goal is a fair, impartial and common sense decision.

Because the entire process is a conscientious scrutiny of a number of variables known as the “whole person concept,” an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Directive ¶ E2.2.1: (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 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 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.

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that the issuance of the clearance is “clearly consistent with the interests of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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<sup>15</sup>Tr. at 25.

<sup>16</sup>*Id.* at 36.

<sup>17</sup>*Id.* at 37.

<sup>18</sup>*Id.* at 37-42.

In the decision-making process, facts must be established by “substantial evidence.” The government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to the applicant to produce evidence and prove a mitigating condition.<sup>19</sup> Directive ¶ E3.1.15 provides, “The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” The burden of disproving a mitigating condition never shifts to the government.<sup>20</sup>

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The scope of an administrative judge’s decision is limited. Applicant’s allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism.

## CONCLUSIONS

### **Personal Conduct**

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<sup>19</sup>“Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “Substantial evidence” is “more than a scintilla but less than a preponderance.” *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994).

<sup>20</sup>*See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, [evaluates] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and [decides] whether Applicant [has] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

Conduct involving questionable judgment, unreliability, lack of candor, or dishonesty could indicate that the person may not properly safeguard classified information.

The government established its case under Guideline E. Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2. (*The 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*). The operative word is “deliberate.” The questions were unambiguous. They clearly asked if a person had ever been “charged” with a crime. He completed his SF 86 on June 5, 2004. No mitigating conditions apply. His conduct is recent and significant. I find his omissions are not the result of a faulty memory, but were done in an attempt to mislead the government. I conclude Guideline E against Applicant.

### **Criminal Conduct**

The government established its case under Guideline J. Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) and E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*) apply. Applicant admitted the shoplifting, probation violations, possession of marijuana, and DWI. I also conclude that his false answers on his SF 86 about his offenses was material and violated 18 U.S.C. §1001.

Criminal Conduct Mitigating Conditions (CC MC) E2.A6.1.3.1. (*The criminal behavior was not recent*), E2.A10.1.3.3. (*The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*), E2.A10.1.3.4. (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*), and E2.A10.1.3.5. (*Acquittal*) do not apply. This DWI was committed in 2006. He has a pattern of illegal drug use. And I am not convinced he will not use marijuana again. His 2004, 18 U.S.C. §1001 violations are particularly important because they pertain to the core of security clearance determinations - falsifications relating to a security matter.

Criminal Conduct Mitigating Conditions E2.A10.1.3.2. (*The crime was an isolated incident*) does not apply, nor does CC MC E2.A10.1.3.6. (*There is clear evidence of successful rehabilitation*). He has a history of arrests over the past nine years. Even though he had three charges dropped, he admitted the underlying criminal conduct of smoking marijuana. He produced no evidence of rehabilitation. I conclude Guideline J against Applicant.

### **Drug Involvement**



The government established its case under Guideline H. Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1. (*Any drug abuse*)<sup>21</sup> is applicable, because Applicant admitted multiple uses of marijuana.

Drug Involvement Mitigating Condition E2.A8.1.3.2. (*The drug involvement was an isolated or aberrational event*) does not apply because his use followed a pattern over a two year period.

Drug Involvement Mitigating Conditions (DIMC) E2.A8.1.3.1. (*The drug involvement was not recent*), E2.A8.1.3.3. (*A demonstrated intent not to abuse any drugs in the future*), and E2.A8.1.3.4. (*Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional*) do not apply. Applicant has not used marijuana since December 2004. His answer about his continued use of marijuana even though he didn't like it. He said he did it out of curiosity, and that he was "still curious." His statements about ending his marijuana use are not persuasive. I conclude Guideline H against Applicant.

### **Whole Person Analysis**

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance."<sup>22</sup> "Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination."<sup>23</sup> In evaluating Applicant's case, in addition to the disqualifying and mitigating conditions, I also considered the "whole person concept" in evaluating Applicant's risk and vulnerability in protecting our national interests.<sup>24</sup>

Applicant falsified two questions on his SF 86. This is problematic because candor with the government about a person's negatives is important in a security clearance determination. If a person discloses the adverse information about himself, he may be more likely to put the governments' interests ahead of his own to protect classified information. If he is still curious about the effects of smoking marijuana, he is more likely to use drugs in the future. His attempt to explain his false answers was evasive, and he never provided a clear explanation of why he answered falsely when the word "charged" is easy to understand. For these reasons, the totality of the record raises reasonable and persistent doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests and secrets. I conclude it is not clearly consistent with the national interest to grant Applicant a security clearance.

### **FORMAL FINDINGS**

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<sup>21</sup>E2.A8.1.1.3. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

<sup>22</sup>Directive ¶ E.2.2.1.

<sup>23</sup>*Id.*

<sup>24</sup>*Id.*

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2. Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.e:	Against Applicant
Subparagraph 2.f:	Against Applicant
Subparagraph 2.g:	Against Applicant
Subparagraph 2.h:	Against Applicant
Subparagraph 2.i:	Against Applicant
Paragraph 3. Guideline H:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	Against Applicant

**DECISION**

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

Christopher Graham  
Administrative Judge