

KEYWORD: Personal Conduct; Drugs

DIGEST: Applicant falsified his 2003 security clearance application by failing to disclose a 2001 denial of eligibility for access to sensitive compartment information. He failed to rebut, explain, extenuate, or mitigate this falsification at the hearing. Clearance is denied.

CASENO: 06-01697.h1

DATE: 06/30/2007

DATE: June 30, 2007

In re:)	
)	
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SSN: -----)	ISCR Case No. 06-01697
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
MARC E. CURRY**

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

_____Applicant falsified his 2003 security clearance application by failing to disclose a 2001 denial of eligibility for access to sensitive compartment information. He failed to rebut, explain, extenuate, or mitigate this falsification at the hearing. Clearance is denied.

STATEMENT OF THE CASE

On March 24, 2006, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a statement of reasons (SOR) explaining why it was not clearly consistent with the national interest to grant or continue a security clearance. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended. Applicant answered the SOR on April 18, 2006. He admitted the allegations in Paragraph 2, denied those in Paragraph 1, and requested a hearing.

The case was assigned to me on March 9, 2007 after having previously been assigned to another administrative judge. DOHA issued a notice of hearing on March 30, 2007, scheduling it for April 24, 2007. During the hearing, I received eight government exhibits, the testimony of a government witness, 14 Applicant exhibits, and Applicant's testimony. DOHA received the transcript on May 2, 2007.

FINDINGS OF FACT

_____The SOR admissions are incorporated into the findings of fact. In addition, I make the following findings of fact.

Applicant is a 28-year-old married man with a three-month-old child. He earned a bachelor of science degree in computer engineering in December 2002, and works as an information technology consultant.¹ According to one of his clients, he is highly reliable, effective, and trustworthy.² His supervisor is similarly impressed with his job performance.³

Applicant used marijuana approximately 20 to 25 times between high school and sophomore years of college, from May 1998 to December 2000.⁴ In the spring of 2000, he applied for a summer internship with a company that required him to obtain a secret clearance and eligibility for access

¹Tr. 48.

²Exhibit G, Reference Letter of Client, dated April 13, 2007.

³Exhibit H, Supervisor's Reference Letter, dated April 13, 2007.

⁴NSA Clearance Decision Statement, dated April 25, 2001, as included in Administrative Records at 3.

to sensitive compartmented information (SCI).⁵ This was the first time he had ever applied for a security clearance.

On May 11, 2000, he completed the security clearance application, fully disclosing his past marijuana use.⁶ Upon being hired, he received a personnel security policy advisory memo explaining the criteria for maintaining a security clearance. He signed it, certifying that he understood the policy, and the consequences of failure to abide by it.⁷

Before beginning the internship, Applicant was required to pass a drug test. In anticipation of the drug screening process, he had stopped using marijuana for three months in advance.⁸ Subsequently, he passed the drug test, but immediately resumed using marijuana after beginning the internship. He used it for its entire duration.⁹

Shortly after beginning the internship, the National Security Agency (NSA) began investigating his eligibility for access to SCI. On August 11, 2000, an NSA investigative agent interviewed him.¹⁰ Applicant elaborated on his past marijuana use. Also, he expressed an intention to continue using it if he did not get the SCI clearance.¹¹

During the time NSA was investigating Applicant for an SCI clearance, the Defense Security Service (DSS) was concurrently investigating the issue of Applicant's secret clearance eligibility. Applicant was granted an interim secret clearance in December 2000, pending the completion of a background investigation.¹² At this time, the NSA's decision regarding Applicant's eligibility for access to SCI was still pending. Applicant was unaware that two DoD agencies were conducting separate investigations.

When DSS granted Applicant the interim secret clearance, he had completed the summer internship, and was scheduled to return to the employer the following summer. On April 25, 2001,

⁵Exhibit 1, Security Clearance Application, executed May 11, 2000.

⁶*Id.* at 7.

⁷Personnel Security Policy Advisory, signed by Applicant May 11, 2000, as included in Exhibit 3, at 5.

⁸Exhibit 4, Applicant's Appeal of federal agency's decision to deny him eligibility for access to SCI, undated, at 1.

⁹*See* Exhibit 4, *supra*.

¹⁰*See* note 3, *supra*.

¹¹Answer, dated April 18, 2000 at 1.

¹²Exhibit 2, DoD Letter of Consent, with Clearance Date of December 15, 2000.

NSA denied his access to SCI.¹³ Applicant appealed.¹⁴ He did not return to work for his employer that summer, as scheduled.¹⁵

While the appeal was pending, on July 16, 2001, a DSS agent, as part of the investigation into Applicant's eligibility for a secret-level clearance, canvassed his neighborhood in search of neighbors to interview.¹⁶ Applicant saw the investigator, and told him he had already been denied a clearance, and that any additional investigation was a waste of time.¹⁷ Later, he faxed the agent the NSA paperwork.¹⁸

In September 2001, the NSA issued a final decision denying Applicant's access to an SCI clearance.¹⁹ In April 2002, another DSS agent interviewed Applicant. He told the agent he had never been denied a clearance, and that he had never been briefed in regard to a security clearance and safeguarding classified information.²⁰ The agent then confronted him with the NSA report.²¹ According to the agent, Applicant appeared confused.²² He asked to terminate the interview until he could confirm whether NSA's denial of access to SCI was indeed a denial of a clearance that he would have to list on future security clearance questionnaires.²³ He never contacted NSA.²⁴

For the next year and half, Applicant was employed by a number of companies that did not require him to have a security clearance.²⁵ In December 2003, he was hired by a company that required one.²⁶ He then completed a security clearance application on December 29, 2003.²⁷ He answered "No" in response to Question 32 (*Your Investigation Record - Clearance Actions To your knowledge have you ever had a clearance or access authorization denied, suspended, or revoked,*

¹³Exhibit 3, Letter from NSA to Applicant, regarding Denial of SCI access, dated April 25, 2001.

¹⁴Exhibit 4

¹⁵Exhibit 7 at 3.

¹⁶ Exhibit 6, Report of Investigation, dated July 16, 2001, at 2.

¹⁷*Id.* at 3.

¹⁸*Id.*

¹⁹Exhibit 5, Letter from NSA to Applicant, Re: Denying Appeal, dated September 21, 2001.

²⁰*Id.* at 2.

²¹*Id.*

²²*Id.*

²³*Id.*, Tr. 58, 83

²⁴Tr. 83, 86.

²⁵Tr. 85.

²⁶Exhibit 8 at 3.

²⁷Exhibit 8.

or have you ever been debarred from government employment? (Note: An administrative downgrade or termination of a security clearance is not a revocation). He disclosed the college drug use in response to Question 27.²⁸

At the hearing, Applicant stated that he thought he did not need to list the denial of eligibility for access to SCI because he was not sure whether it constituted a denial,²⁹ and had somehow “between [the NSA security office] and the security officer [of his employer] . . . become under the impression”³⁰ there was a probationary period in which young college students who were denied clearances for using drugs in limited amounts could wait three years and reapply for a clearance without having to list the original denial.³¹ Also, he testified that he met with the FSO of his new employer to confirm the accuracy of his impression.³² She told him to enter “no,” and that the investigator would flag his response if it created a problem.³³

The FSO testified that she did not recall any conversation with Applicant about his security clearance application, and that in her 18 years at the company no employee had ever asked her about Question 32.³⁴

On the December 2003 SF 86, Applicant was also required, among other things, to disclose whether the government had ever conducted a background investigation into his security clearance eligibility.³⁵ He did not disclose the NSA investigation.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, they are divided into those that may be considered in deciding whether to deny or revoke an individual’s eligibility for access to classified information (disqualifying conditions) and those that may be considered in deciding whether to grant an individual’s eligibility for access to classified information (mitigating conditions).

²⁸Your 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 substances . . . or prescription drugs?

²⁹Tr. 70.

³⁰Tr. 89.

³¹Tr. 89.

³²Tr. 85.

³³Tr. 86.

³⁴Tr. 32.

³⁵Question 31 (Your Investigation Record - Investigations/Clearances Granted Has the United States Government ever investigated your background and/or granted you a security clearance? (If you can’t recall the investigating agency and/or the security clearance received, enter (Y)es and follow instructions in the help text for the fields on the next screen. If you can’t recall whether you’ve been investigated or cleared, enter (N)o.).

Because the entire process is a scrutiny of a number of variables known as the “whole person concept,” all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future.

The following adjudicative guidelines are raised:

Guideline E - Personal Conduct: Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.

Guideline H: Improper or illegal involvement with drugs, raises questions regarding an individual’s willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of unauthorized disclosure of classified information.

Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, are set forth and discussed in the conclusions below.

Since the protection of national security is the paramount consideration, the final decision in each case must be reached by applying the standard that the issuance of the clearance is “clearly consistent with the national interest.”³⁶ In reaching this decision, I have drawn only those conclusions that are based on the evidence contained in the record.

The Government is responsible for presenting evidence to establish facts in the SOR that have been controverted. The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by the Government, and has the ultimate burden of persuasion as to obtaining a favorable security decision.

CONCLUSIONS

Personal Conduct

When Applicant met with an investigative agent in April 2002, he failed to tell him, when asked, that he had been denied access to SCI in September 2001. This omission raises the issue of whether Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.3 (*Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security*

³⁶See generally, Directive, Sec. 2.3, Sec. 2.5.3, Sec. 3.2, and Sec. 4.2.

official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination) applies.

When Applicant completed the 2000 SF 86, he was 21 years old, and had never previously applied for a security clearance application. Also, he was unaware that the government initiated two separate investigations after he completed the application. Moreover, agents continued to investigate his eligibility for a secret-level clearance while his appeal of the NSA denial of SCI eligibility was pending, and after NSA issued a final denial of SCI eligibility in September 2001. Under these circumstances, his April 2002 statement to the agent that he had never been officially denied a clearance was based upon a reasonable, but mistaken misunderstanding of the effect of the 2001 denial of access to SCI, and did not constitute a deliberate falsification.

Conversely, Applicant completed his most recent SF 86 approximately 18 months after he spoke with the agent in 2002. This constituted ample time to resolve any lingering confusion about the meaning of his denial of SCI access. Nevertheless, Applicant failed to list the denial of access to SCI in response to Question 32 of the SF 86.

Also, Applicant's contention that he believed he was under some sort of probationary period that negated the requirement to list the 2001 denial of SCI access on the SF 86 was not credible. The NSA documents unequivocally indicate that he was investigated in the summer of 2000, issued an initial denial in April 2001, and issued a final denial in September 2001 after an appeal. They do not reference a probationary period. Moreover, he never mentioned anything about a probationary period when he spoke with an agent in 2002.

Applicant's assertion that someone from either NSA or his old employer told him of a probationary period was uncorroborated. Moreover, his assertion that he spoke with the FSO about this issue was contradicted by the FSO's testimony.

Applicant falsified the SF 86 by failing to disclose the 2001 denial of SCI access in response to Question 32. 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*), applies without mitigation.

Drug Involvement

Applicant's marijuana use triggers the application of Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1 (*Any drug abuse*). The significance of Applicant's marijuana use is exacerbated by his continued use after gaining a job in May 2000 that required a security clearance and expressly prohibited illegal drug use.

Applicant was a 21-year-old college student when he began working for the company that required the security clearance. He has not smoked marijuana since December 2000. In the years he has been marijuana-free, he has graduated from college, held steady jobs, gotten married, and started a family. Drug Involvement Mitigating Condition (DI MC) E2.A8.1.3.1 (*The drug involvement was not recent*), and DI MC E2.A8.1.3.3 (*A demonstrated intent not to abuse any drugs in the future*), apply. He has mitigated the drug involvement security concern. For the same reasons, any concerns

his past drug use posed with respect to his personal conduct, as cross-alleged in SOR subparagraph 2.c, are also mitigated.

Whole Person Concept

Applicant’s youth and immaturity when he smoked marijuana, combined with the amount of time that has elapsed since he last used it, mitigates the drug involvement security concern. Also, the severity of his failure to disclose his earlier denial of SCI on his SF 86, as required, is offset somewhat by his disclosure of his marijuana use that triggered the denial. I am unable to conclude, however, that the security concern has been mitigated. Upon comparing Applicant’s testimony with the FSO’s testimony, and reviewing the investigative agents’ reports of their respective meetings with Applicant, I conclude that he is a bright, talented individual who deliberately omitted information from the SF 86 that he did not want to disclose, and chose to concoct a clever, yet specious explanation for the omission rather than telling the truth. Clearance is denied.

FORMAL FINDINGS

Paragraph 1 – Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2 - Guideline H:	FOR APPLICANT
Subparagraphs 2.a through 2.g:	For 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 or continue a security clearance for Applicant. Clearance is denied.

Marc E. Curry
Administrative Judge