

KEYWORD: Criminal Conduct; Drugs; Personal Conduct

DIGEST: Applicant is 26 years old and has worked as a repair technician for a federal contractor since December 2004. He has a history of criminal conduct and drug use. He no longer uses drugs and does not intend to in the future. He falsified information on his security clearance application. Applicant mitigated the security concerns raised under Guideline H, drug involvement, but failed to mitigate the security concerns raised under Guideline J, criminal conduct, and Guideline E, personal conduct. Clearance is denied.

CASENO: 06-09162.h1

DATE: 05/03/2007

DATE: May 3, 2007

In re:	)	
	)	
	)	
-----	)	ISCR Case No. 06-09162
SSN: -----	)	
	)	
Applicant for Security Clearance	)	
	)	

**DECISION OF ADMINISTRATIVE JUDGE  
CAROL G. RICCIARDELLO**

**APPEARANCES**

**FOR GOVERNMENT**

Braden Murphy, Esq., Department Counsel

**FOR APPLICANT**

Dennis L. Moreno, Esq.

**SYNOPSIS**

Applicant is 26 years old and has worked as a repair technician for a federal contractor since December 2004. He has a history of criminal conduct and drug use. He no longer uses drugs and does not intend to in the future. He falsified information on his security clearance application. Applicant mitigated the security concerns raised under Guideline H, drug involvement, but failed to mitigate the security concerns raised under Guideline J, criminal conduct, and Guideline E, personal conduct. Clearance is denied.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on November 29, 2006 detailing the basis for its decision—security concerns raised under Guideline J (criminal conduct), Guideline H (drug involvement) and Guideline E (personal conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR in writing on December 14, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on February 13, 2007. With the consent of the parties, I convened a hearing on March 19, 2007, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government offered three exhibits that were marked as GE 1-3 and admitted without objections. Applicant testified on his behalf and offered three exhibits that were marked as AE A-C and were admitted without objections. DOHA received the hearing transcript (Tr.) on March 30, 2007.

### **FINDINGS OF FACT**

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 26 years old and has been employed as a repair technician for a federal contractor since December 2004. He is divorced and remarried in 2004. He and his wife have a young son. He earned a General Equivalency Diploma and later an associate's degree from college.

Applicant has a history of criminal conduct beginning on August 25, 1998, when he was arrested and charged with burglary of a vehicle. He and friends decided to burglarize a vehicle. The police were called and his friends fled the scene. Applicant's testimony was evasive at first, but he did admit he knew his friends intended to break into the vehicle and he acted as the "lookout."<sup>1</sup> He pled guilty and the adjudication was deferred.

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<sup>1</sup>Tr. 125-126.

On July 13, 1999, Applicant was charged with consumption of alcohol by a minor. Applicant was drinking alcohol under age while at a party. He was taken into custody. He was issued a citation and paid the fine. Three months later on October 18, 1999, Applicant was arrested and charged with felony possession of a controlled substance, cocaine, and possession of marijuana. He was leaving a party and was stopped by the police. He stated he had less than a gram of cocaine and one marijuana cigarette.<sup>2</sup> He was taken into custody, retained counsel and pled guilty to the charge. He received deferred adjudication for two years and was placed on probation.<sup>3</sup>

Approximately eight months later, on May 20, 2000, Applicant was arrested and charged with felony possession of a controlled substance, marijuana. He was still in his deferred adjudication status and on probation from his last offense. He pled guilty and his adjudication was again deferred. His probation was extended until 2001. He was required to meet with a probation officer and participate in a drug testing program. When asked if he ever tested positive for drugs while on probation and taking drugs tests he stated: "I believe one time."<sup>4</sup> He attended court ordered rehabilitation counseling and attended Narcotics Anonymous.

On October 8, 2002, Applicant was charged with possession of marijuana, a misdemeanor. He pled guilty, adjudication was again deferred, and he was sentenced to one year probation. Terms of his probation were to not get in any trouble and refrain from alcohol and drug use.<sup>5</sup>

Applicant was arrested on May 18, 2003, and charged with two counts of purchasing/furnishing alcohol to a minor. Applicant violated his probation from his previous conviction. He pled guilty, adjudication was deferred, and he was sentenced to one year probation, and was required to pay a fine and court costs. Applicant brought two minors to a party where alcohol was present. He was taking them home when he was stopped by the police. Both minors were intoxicated. Applicant stated he was not intoxicated and did not purchase alcohol for the minors. Applicant sought counsel and pled guilty to the charge.<sup>6</sup>

While on probation Applicant was arrested on April 16, 2004, and charged with (1) unlawful possession of a firearm-a felony, (2) prohibited weapons, and (3) possession of marijuana. Applicant lived in an apartment with his wife and two other people. The police were called by neighbors due to excessive noise. Applicant's wife permitted the police to search their apartment. The police confiscated an AR-15 assault rifle, armor piercing bullets, and marijuana. Applicant stated the gun belonged to his wife and the bullets were not armor piercing, but ballistic silver tipped that he purchased at Wal-Mart. He stated he was aware that there was marijuana in the apartment, but it did not belong to him. He stated it belonged to one of the other roommates. Applicant admitted he

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<sup>2</sup>Tr. 60-65.

<sup>3</sup>Tr. 69-70.

<sup>4</sup>Tr. 72.

<sup>5</sup>Tr. 83.

<sup>6</sup>Tr. 85.

purchased the bullets and the firearm was registered under his wife's name.<sup>7</sup> Applicant was on probation when he was arrested. The charges were later dismissed.

On April 1, 2005, Applicant was charged with driving while intoxicated. He admitted he had been drinking alcohol, and was driving, but claimed he was not intoxicated. He pled not guilty and the case was continued several times. The charge was never adjudicated. Applicant filed a speedy trial motion and the case was dismissed based on the motion.<sup>8</sup>

When questioned about when was the last time Applicant used marijuana he stated it was when he lived in his apartment in 2004.<sup>9</sup> On Applicant's security clearance application (SCA) he listed under Question 27 that his last use was May 20, 2000.<sup>10</sup> He admitted the date he listed on the SCA was not true.<sup>11</sup> In his answer to the SOR Applicant stated "I admit that I used marijuana, at least 30 times, from about August 1998 until at least October 2002."<sup>12</sup> Applicant then changed his testimony and stated his last use was in 2002 and he was confused.<sup>13</sup> Applicant's testimony was not credible.

Applicant testified he first began using marijuana in 1995-1996, when he was in high school.<sup>14</sup> Applicant listed in his SCA that he first began using marijuana in 1998.<sup>15</sup> He confirmed this date a second time in his answer to the SOR.<sup>16</sup> He explanation for the discrepancy was that he accidentally put down the wrong date.<sup>17</sup> He confirmed the correct date to be 1995-1996. Applicant's testimony conflicts with his sworn statement and admissions on his SCA.

Question 27 of the SCA asked Applicant to list any illegal use of a controlled substance since the age of 16 or in the last seven years which ever is shorter. The question then lists examples of controlled substances, including marijuana and cocaine, among other illegal substances. Applicant listed his marijuana use from August 1, 1998 to May 20, 2000. He failed to list he had also used cocaine on two occasions. His explanation was that he thought the question only referred to marijuana. His explanation was not credible.

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<sup>7</sup>Tr. 87.

<sup>8</sup>Tr. 103; AE B.

<sup>9</sup>Tr. 104-105.

<sup>10</sup>GE 1, Question 27.

<sup>11</sup>Tr. 106.

<sup>12</sup>Answer p. 2.

<sup>13</sup>Tr. 106.

<sup>14</sup>Tr. 75.

<sup>15</sup>GE 1, Question 27.

<sup>16</sup>Answer p. 2

<sup>17</sup>Tr. 77.

Question 24 of the SCA asks Applicant if he has ever been charged with or convicted of any offenses related to alcohol or drugs. Applicant listed his offenses dated October 8, 2002 and May 20, 2000. He did not list the charges from April 16, 2004 for possession of marijuana, May 18, 2003, furnishing/purchasing alcohol to a minor, October 18, 1999, felony possession of a controlled substance, and July 13, 1999, consumption of alcohol by a minor.<sup>18</sup> Applicant conducted an internet search through a commercial company to determine what records they had that listed his offenses.<sup>19</sup> He claimed this was the document he used to provide the information requested in Question 24. This document was incomplete, in that it did not list all of Applicant's arrests, charges and convictions. At one point in the hearing when he became confused as to which charge was being discussed and requested to speak with his attorney, Applicant stated "ma'am, you've got to understand. There's been so many charges."<sup>20</sup> Applicant was aware he had more than the three arrests (an additional arrest was included in answering Question 26) he listed on his SCA and failed to report them.<sup>21</sup>

In response to Question 26, which asked Applicant to list any arrests, charges or convictions of any offense(s) not previously listed. He was required to report any information regardless of whether the record was sealed or otherwise stricken from the record. Applicant listed his 1998 burglary offense, but failed to list the offenses on April 14, 2004, May 18, 2003, October 18, 1999 and July 13, 1999. Applicant's explanation was the same as above for why he failed to list all of his offenses. He stated it was not his intention to deceive the government. He had his father assist him in filling out the SCA and it took him approximately two weeks to complete the application.

Applicant listed on his SCA that he lived at the same address from August 1, 1995, to the present. This information was not correct. During his testimony Applicant admitted he had lived in an apartment for approximately three years. His explanation for the incorrect information was that he was listing his "billing" address.<sup>22</sup> Applicant stated he understood the importance of providing accurate information on his SCA and it would be used for the purpose of doing a background check. He also affirmed the importance of providing his correct residence.<sup>23</sup>

Applicant admitted he made poor decisions and foolish mistakes in his past. He testified that he was hanging around with the wrong crowd and has now changed his ways. He no longer associates with his old friends. He has changed his lifestyle and is a devoted husband and father who

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<sup>18</sup>Applicant's inconsistencies and failure to provide correct information on this question was not alleged in the SOR and will not be considered for disqualifying purposes. However, Applicant's inconsistent testimony will be considered when determining his credibility and in analyzing the "whole person."

<sup>19</sup>AE A.

<sup>20</sup>Tr. 62

<sup>21</sup>Applicant also admitted he purchased cocaine once and marijuana. He purchased the drugs for himself and others. He failed to list this activity in response to Question 29 of the SCA which requires he list any illegal purchase, transfer, or sale, among other things, of an illegal drug. I have not considered this information for disqualifying purposes, but have considered it when determining the Applicant's credibility and when analyzing the "whole person."

<sup>22</sup>Tr. 93.

<sup>23</sup>Tr. 89-96. This information is not considered for disqualifying purposes, but is considered when determining Applicant's credibility and in analyzing the "whole person."

is interested in providing for his family, conforming to the laws and enhancing his career. Applicant's performance evaluation represents that he is a very good to excellent worker.<sup>24</sup>

## POLICIES

“[N]o one has a ‘right’ to a security clearance.”<sup>25</sup> 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.”<sup>26</sup> The President 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.”<sup>27</sup> An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”<sup>28</sup> “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>29</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>30</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>31</sup> It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.<sup>32</sup>

The revised Adjudicative Guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive to be considered in evaluating a person's eligibility to hold a security clearance. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. 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

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<sup>24</sup>AE C.

<sup>25</sup>*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>26</sup>*Id.* at 527.

<sup>27</sup>Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960).

<sup>28</sup>ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*; Directive, Enclosure 2, ¶ E2.2.2.

<sup>31</sup>Executive Order 10865 § 7.

<sup>32</sup>*See* Exec. Or. 10865 § 7.

of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the revised adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

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

## CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Based upon consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

Guideline J-Criminal Conduct is a security concern because criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Guideline H-Drug Involvement is a concern because use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

Guideline E-Personal Conduct is a concern because conduct involving questionable judgment, lack of candor, dishonest, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Based on all the evidence, Criminal Conduct Disqualifying Conditions (CC DC) 31(a) (*a single serious crime or multiple lesser offenses*) and 31 (b) (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*), apply. Applicant has pled guilty and been convicted of a series of crimes beginning in 1998. The convictions include drug offenses, burglary and providing alcohol to minors.

I have considered all the mitigating conditions and especially considered Criminal Conduct Mitigating Condition (CC MC) 32 (a) (*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 judgment*), and CC MC 32 (d) (*there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*).

Applicant has exhibited a pattern of misconduct, rules violations and criminal conduct beginning in 1998. His latest charge was dismissed because the case took too long to come to trial. Applicant admitted he was drinking and driving, but claims he was not intoxicated. This is risky conduct and exhibits questionable judgment for a person who states he has changed his ways and has a long history of criminal conduct. The same is true for the charges that were dismissed regarding the weapons and possession of marijuana. This offense was in April of 2004. Although the charges were dismissed, it demonstrates very risky behavior on the part of Applicant to have marijuana in his apartment. Applicant claims to be a changed person, but his history reflects a person that when given a second or third chance by having his charges deferred or being placed on probation, he abused it and was back in trouble shortly thereafter. It does appear that Applicant is interested in turning life around, but at this point not enough time has lapsed to ensure he is truly committed and it is not fleeting. I find CC MC 32 (a) does not apply. There has been insufficient time to judge Applicant's commitment to obeying the law and following the rules.

Although there is evidence that Applicant has been a good worker and has not been arrested in the last year, I found Applicant's testimony was especially troubling because it was inconsistent and he clearly provided contradictory answers, both during his testimony and with regard to his sworn answer. He changed his testimony during his hearing several times. He had weeks to complete his SCA, yet failed to provide correct information. I find he failed to show successful rehabilitation, and therefore CC MC 32 (d) does not apply.

Based on all the evidence, Drug Involvement Disqualifying Conditions (DI DC) 25 (a) (*any drug abuse*), DI DC 25 (b) (*testing positive for illegal drug use*), and 25 (c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*), apply. Applicant began using drugs in 1995-1996 and continued to use them to 2004. I find Applicant had drugs in his apartment in 2004 and based on his testimony that he used them while living there. He used both cocaine and marijuana and purchased both for himself and others in the past.

I have considered all the Drug Involvement Mitigating Conditions (DI MC), and especially considered DI MC 26 (a) (*the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*), 26 (b) (*a demonstrated intent not to abuse any drugs in the future, such as (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation*).

Applicant used illegal drugs from June 1995 or 1996 to 2004. He tested positive for drug use while being drug screened as part of his probation. He used drugs after he was arrested and placed on probation. It appears Applicant has not used drugs since 2004, and is committed to not using them in the future. He no longer associates with his friends who used drugs. It appears he has made positive changes in his life. However, the concern raised at his hearing was Applicant's lack of credibility. He changed his story regarding when he ceased using drugs. Perhaps this was to appear more committed to his abstinence. It does raise doubts as to his judgment and reliability. Therefore I cannot find DI MC 26 (a) applies.



It has been approximately three years since his last drug use and Applicant has demonstrated his intention not to use drugs in the future. He no longer associates with the same friends and he spends most of his time with his family. Therefore, I find DI MC 26 (b) applies.

Based on all the evidence, Personal Conduct Disqualifying Condition (PC DC) 16 (a) (*deliberate omission, concealment, or falsification of relevant 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. Applicant intentionally failed to list all of his criminal activity on his SCA. He admitted he had many criminal charges and the onus was on him to ensure he included all of his conduct. Although he took some initiative, he was aware he had other criminal charges in his past that he failed to divulge.

I have considered all of the Personal Conduct Mitigating Conditions (PC MC ) and especially considered PC MC 17 (a) (*the individual made prompt, good faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*) and PC MC 17 (e) (*the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation or duress*). I find neither applies. Applicant's testimony at his hearing was not credible and not believable. He repeatedly contradicted his own testimony and his sworn statement and sworn SCA. His testimony for why he failed to list all of his offenses was not believable. Although only one allegation regarding his failure to provide correct information was alleged, there was other information that he provided that was inaccurate and false. I did not consider these for disqualifying purposes, but I did weigh them to determine if Applicant made an innocent mistake or deliberately withheld important information. I find he deliberately failed to provide accurate information. He did not make a good faith effort to correct the information. He failed to offer any positive steps he has take to reduce or eliminate vulnerability to exploitation, manipulation or duress. I find neither of the above mitigating conditions apply.

### **Whole Person Analysis**

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I considered the whole person in evaluating the case. I considered Applicant's credibility, demeanor and responsiveness when testifying. Applicant has a very good work record and appears to be a devoted family man. Applicant also has a long history of criminal conduct, rules violations, and drug use. Applicant falsified his security clearance application and his testimony was not credible. After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has failed to mitigate the security concerns based on his criminal conduct and personal conduct. I conclude he has mitigated the security concerns raised by his drug involvement.

**FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

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
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Paragraph 2. Guideline H:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3. Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	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.

Carol G. Ricciardello  
Administrative Judge