

KEYWORD: Personal Conduct

DIGEST: Applicant, a 27-year-old engineer with a major defense contractor, failed to mitigate personal conduct security concerns under Guideline E for failure to report at Question 24 an arrest for marijuana possession in connection with an arrest for gun possession which he did report at Question 23 on his SF 86. He also failed to report occasional marijuana use over a two year period both on his SF 86 at Question 27, and in an interview with an investigator. He only acknowledged the use in response to an interrogatory one year later. Clearance is denied.

CASENO: 06-09738.h1

DATE: 08/23/2007

DATE: August 23, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 06-09738
)	
Applicant for Security Clearance)	

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

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq. , Department Counsel

FOR APPLICANT

Royce Russell, Esq.

SYNOPSIS

Applicant, a 27-year-old engineer with a major defense contractor, failed to mitigate personal conduct security concerns under Guideline E for failure to report at Question 24 an arrest for marijuana possession in connection with an arrest for gun possession which he did report at Question 23 on his SF 86. He also failed to report occasional marijuana use over a two year period both on his SF 86 at Question 27, and in an interview with an investigator. He only acknowledged the use in response to an interrogatory one year later. Clearance is denied.

STATEMENT OF THE CASE

On January 16, 2007, the 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.

In a sworn written statement, received February 8, 2007, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to me on March 28, 2007. A Notice of Hearing was issued June 7, 2007 for a hearing held on June 26, 2007. The Government introduced five exhibits and Applicant introduced seven. All were accepted into evidence. Applicant testified on his behalf and an investigator testified for the government. The transcript was received on July 6, 2007.

FINDINGS OF FACT

_____ Applicant admitted all of the specific facts in the SOR allegations relating to personal conduct security concerns. After a complete review of the record, I make the following additional findings of fact:

Applicant is a 27-year-old employee of a major defense contractor working as an engineer since February, 2005. He graduated from college with a B.S. in electrical engineering and is working on an M.B.A degree. The events that gave rise to this matter occurred the day before his graduation on June 12, 2004, when he and three friends traveled from their home over 100 miles to New York City for an evening to celebrate his graduation. They traveled in a SUV rented by Applicant but driven by one of the others. When they crossed into New York City they were stopped by the police and advised that they were driving recklessly although no such charge was filed. The officers searched the car and found three guns owned by Applicant and two of the others. They all had licenses to carry the guns in the home city but not in New York City.

Also, a small amount of marijuana valued at less than \$10 was found in the vehicle or on the person of another passenger. All four people in the vehicle spent the night in jail and were charged

with illegal gun possession and possession of marijuana (Exh. 2). The marijuana was in the actual possession of one of the other three persons in the car but Applicant was also charged with possession. As a result of these events, Applicant missed his graduation and caused considerable embarrassment to his family and friends. After protracted delays and motions in court over the period of a year, Applicant pled guilty to third degree gun possession, a third degree felony. On May 11, 2005, he was fined \$800 and ordered to perform 25 hours of community service. He completed the service with the Boy Scouts. He was also advised that if he had no further legal difficulties for three years, the conviction would be expunged. The judge gave him a sentence of much less than the prosecutor requested and indicates a compassionate approach to his conduct (Attachment to Exh. 4). The charges and conviction in New York are not alleged in the SOR but only conduct relating to his security clearance process.

Following college graduation, Applicant was hired by his employer and submitted his application for a security clearance (SF 86) on February 10, 2005 (Exh. 1). In response to Question 23 concerning his police record-pending charges, he answered "Yes" and identified the pending matter with the date of the New York events and the nature of the charge as "gun possession." The government alleges in SOR ¶ 1.a. that he failed to honestly report the marijuana charge in his response to Question 24 Your Police Record-Alcohol /Drug Offenses and Question relating to being charged or convicted of any offense relating to alcohol or drugs. He answered "No" to that question.

Applicant was interviewed by an investigator under contract with the government on September 7, 2005, on a variety of subjects but primarily about the events of June 12, 2004, especially the gun possession charges as well as the marijuana charge which he described in great detail. He stated to the investigator that he had never smoked marijuana and never participated in illegal drug use. Subsequently, interrogatories were submitted by the government to Applicant and he responded on October 10, 2006, (Exh. 4) with details of the disposition of the New York charges. He also stated at Question 6 relating the marijuana possession charge that he had experimented with marijuana no more than ten times from 2000 to 2004. This information was at variance with his statement to the investigator a year earlier. This inconsistency resulted in the allegation in SOR ¶ 1.b. that he falsified information on his SF 86 at Question 27 by failing to state his earlier marijuana use.

A second set of interrogatories was sent to Applicant and he responded on November 9, 2006, (Exh. 5) in which he responded to questions concerning his inconsistent statements regarding marijuana use. In it he stated again that he had experimented with marijuana in college but not a regular or consistent drug user. He described it as a youthful indiscretion and that he had reflected on his earlier answers given to the investigator and wanted to ensure that he was being completely honest so had corrected the information given to the investigator in the answers to his first interrogatory. These circumstances led to the allegation in SOR ¶ 1.c. that he had deliberately falsified material facts when he stated to the investigator in September 2005, that he had never used marijuana.

Applicant did not believe that the marijuana possession charge was sufficiently important to report on the SF 86 since the drug was not his but was owned by a fellow passenger. He also felt that the drug use was only experimental and random over the four year period so unnecessary to report it on the SF 86 or to the investigator. However, on reconsideration he desired to make a full disclosure of the drug use and thus gave a full answer in his first interrogatory one year after his statement to the investigator.

Applicant is single and on an excellent career path with his company. The New York charges were his only instance of criminal conduct. He was hired under a minority engineering program that his company sponsors and he is highly regarded by his supervisors (Exhs. A-D). He volunteers as mentor and works with high school students to interest them in engineering. He has worked with science fairs and has been commended for his efforts.

Applicant held an interim security clearance with his company until this matter arose and now he works on unclassified projects. This limits his ability to function to the highest level and impedes promotion prospects although he has received four increases in salary since he began his employment.

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:

The Government established each of the allegations under Guideline E Personal Conduct alleged in the SOR. The revised Adjudicative Guidelines (AG) are applicable to cases with an SOR dated after September 1, 2006. The specific condition applicable to this case is AG ¶ 16 (a) involving Applicant’s failure to report his drug arrest at Question 24 and his drug use at Question 27 on his SF

86. Applicant's statement to the investigator in 2005 that he had never used marijuana followed by the admission one year later that he had used it over a four year period, also prompted the allegations of security concerns under Guideline E (Personal Conduct) These omissions and false statements raise issues under Guideline E that 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, the deliberate omission, concealment, or falsification of relevant and material facts from a personnel security application (AG ¶ 16 a), or to an investigator (AG ¶ 16 b) could raise a security concern and be disqualifying.

Mitigating conditions (MC) that might be applicable include under AG ¶ 17(a) that the individual made prompt, good faith efforts to correct the omission, concealment, or falsification before being confronted with the facts, and under AG ¶ 17(c) if the fact that the offense is so minor, or so much time has passed, or happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

While I am sympathetic to Applicant's belief that the gun possession charge was the more significant of the New York charges which he reported at Question 23. However, he should have reported the marijuana possession charge at Question 24 since he knew about it at least two weeks after the arrest (Tr. 69). I cannot accept his statement that he regarded four years of occasional drug experimentation as unworthy of being reported at Question 27 when the question clearly asks for such information. Had he answered it fully and frankly, it is likely there would have been no serious security concern because of his age at the time of use, the frequency of use, and the passage of time since the use. But he did not and I conclude that he should have reported it and the omission was not inadvertent. I reach the same conclusion as the denial of use to the investigator that he corrected only one year later when he was asked to submit the first interrogatory. Thus MC 17 (a) is inapplicable since the correction was not prompt and submitted only in response to a government interrogatory.

While I am also sympathetic to Applicant's lack of any criminal behavior before the New York arrest, I cannot regard the offense as minor, or that enough time has passed since the investigative interview to justify application of MC 17 (c) to the denial of drug use in that interview. While the circumstances surrounding the events in New York in 2004 leading to the omissions and misstatements to the investigator, were unique in that it involved a graduation, a trip of over 100 miles to go to a club, and carrying three guns in a rented vehicle, the seriousness of the charges outweigh application of the mitigating factor as to the subsequent omissions regarding the arrest.

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.

In evaluating his behavior in terms of the "whole person concept"(AG ¶ 2), an applicant may mitigate security concerns by demonstrating the factors leading to the violation are not likely to recur(¶ 9), the nature and extent of the conduct (¶ 1), and there is evidence of rehabilitation and other permanent behavioral changes (¶ 6). The incidents that gave rise to this proceeding may not be likely

to recur. However, the SOR allegations all relate to the security clearance process which, if his career continues, will recur. There certainly is evidence of remorse for the arrest and his failure to fully report the incident as indicated in his written statements in the record and his testimony. His knowledge of the security process should improve as a result of this proceeding.

After considering all the evidence in its totality, and as an integrated whole to focus on the whole person of Applicant, I conclude it is premature to grant a security clearance to him at this time.

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.:	Against Applicant
Subparagraph 1.c.:	Against 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