

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant is 57 years old, married to his fourth wife, and they have eight children. He has a Ph.D. in electrical engineering and works for a defense contractor. He failed to disclose his 1969 to 1994 illegal drug use on his security clearance applications in 1996 and 2005. He admits he avoided disclosing that information, and that he lied on the 1996 application. Applicant failed to mitigate the personal conduct and criminal conduct security concerns. Clearance is denied.

CASENO: 06-11898.h1

DATE: 07/30/2007

DATE: July 30, 2007

In re:)	
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SSN: -----)	ISCR Case No. 06-11898
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
PHILIP S. HOWE**

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT

David M. Duwel, Esq.

SYNOPSIS

Applicant is 57 years old, married to his fourth wife, and they have eight children. He has a Ph.D. in electrical engineering and works for a defense contractor. He failed to disclose his 1969 to 1994 illegal drug use on his security clearance applications in 1996 and 2005. He admits he avoided disclosing that information, and that he lied on the 1996 application. Applicant failed to mitigate the personal conduct and criminal conduct security concerns. 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 January 19, 2007 detailing the basis for its decision—security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the revised Adjudicative Guidelines (AG) issued on 29 December 2005 and implemented by the Department of Defense effective 1 September 2006. The revised guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR in writing on February 16, 2007, and elected to have a hearing before an administrative judge. The case was assigned to me on May 2, 2007. I convened a hearing on June 5, 2007, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on June 21, 2007.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 57 years old, married for the fourth time, and has eight children with his present wife. He has an older daughter from a prior marriage. He has a Ph.D. in electrical engineering. He works on computers for a defense contractor. He had a security clearance in 1977 and 1978, and then again in 1984 and 1985. (Tr. 26, 31, 32; Exhibits 1, 3, 4)

Applicant first used marijuana in 1968. His last use was in December 1994. He used it on weekends in college between 1969 and 1971. After that time, he continued to use it, but less frequently, often monthly. From 1973 to 1988, he used it three to five times per year. He purchased marijuana between 1968 and 1985, and sold it in high school and college. He also used hashish in high school and college. Between 1975 and 1981, he used hashish sporadically, and then reduced his use to four or five times annually between 1980 and 1981. His most recent use was in 1993. He admits he may have used “speed” in college, and used cocaine three times in 1983. He tried LSD 25 times between 1969 and 1974. He injected heroin and morphine at least once in 1974. Applicant admitted in his statement of December 17, 1996, that he used illegal drugs while holding a security clearance in the past, from 1977 to 1978, and 1984 to 1985. (Tr. 18, 26, 32; Exhibits 3, 5)

On May 28, 1996, Applicant completed a security clearance application (SCA). He answered “no” to Question 27 about any illegal drug use in the past seven years. He answered Question 31 by disclosing his past security clearances. He gave a statement to a Government investigator on December 17, 1996, about his life experiences, including a detailed history of his illegal drug use from 1969 to 1996. On August 31, 2005, Applicant completed his latest SCA and in answer to Question 24 about his illegal drug use in the past seven years, whether he had “ever” used a “controlled substance while possessing a security clearance,” and whether in the past seven years he was involved in the illegal sale, manufacture, etc., of any illegal drug, all three subparts of that question, he gave a negative answer. Question 26 asked Applicant if he had ever been investigated for a security clearance or been granted one. He answered “yes.” Both SCA contained certification areas for Applicant’s signature, in which he stated his answers on the SCA were true, complete, accurate, and correct, and that a knowing and willful false statement could be punished by a fine or imprisonment under Federal law. Applicant signed both SCA. (Tr. 20-29; Exhibits 1, 4)

Applicant admitted in his December 17, 1996, statement to the Government investigator that he deliberately falsified his answers to Question 27 about his past illegal drug use, and admits he “lied.” In his Interrogatories signed November 27, 2006, Applicant stated that he answered “no” to Question 24b on his August 2005, SCA because, “This is part of my past. For years, I have voided (*sic*) talking about my drug past. This is the reason I said “no” to the question.” At the hearing, Applicant claimed he misinterpreted Question 24b, thinking it referred back only seven years, as Questions 24a and 24b did. Applicant admitted at the hearing the answer to Question 24b should have been “yes,” and he should have answered Question 27 in 1996 with a “yes. He could not remember why he answered “no” then. (Tr. 20-29; Exhibits 1, 3-5)

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. The President has 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 the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information with Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. 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. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or.

10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "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* Exec. Or. 12968 § 3.1(b).

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

Guideline E: Personal Conduct: The Concern: 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. 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. ¶15

Guideline J: Criminal Conduct: The Concern: 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. ¶30

CONCLUSIONS

Guideline E—Personal Conduct

This cases depends heavily on Applicant's credibility. On two SCA he deliberately failed to disclose his past illegal drug use. Looking at the two SCA from 1996 and 2005, no one would know of his extensive drug use history. He admitted he deliberately lied in 1996 when confronted by the Government investigator. He admitted on the Interrogatories in 2006 that he deliberately failed to disclose his drug use history again because it was in his past and he willfully avoided talking about his drug use history. He also failed to fully disclose information to the Government investigator in 1996 about his LSD and marijuana use.

While Applicant's attorney attempts to mitigate these deliberate falsifications by stating the Government learned of them in 1996 during the investigation and gave Applicant a security clearance, the issuance of one clearance is not an automatic guarantee of a subsequent one. The SCA asked Applicant in 2005 to give truthful answers, and he certified on the SCA his answers were true, complete, and correct. Yet they were not. Again, Applicant deliberately hid his past illegal drug use.

Applicant has a Ph.D. in electrical engineering. He now claims he misinterpreted Question 24b. With his education level, and the type of work he does, if he misreads or misinterprets manuals and instructions, he could do himself and others harm. Someone that well educated cannot claim he cannot read a simple question on a government form, especially one that had the keyword "ever" underlined as it does.

The Government established its *prima facie* case. I conclude the Disqualifying Conditions applicable are ¶16a involving "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, or determine trustworthiness," ¶16b by "deliberately providing false or misleading information concerning relevant facts to an investigator or other official government representative," and ¶16e "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing." Applicant is not credible in his explanations about why he failed to make full disclosure of his drug use history. His testimony at the hearing demonstrated a lack of contrition for his actions, or no remorse for his falsifications. His attempts to explain how he, as a Ph.D. holder, could not understand Question 24b, and could not remember when he had previous security clearances, were not persuasive or believable.

I examined the Mitigating Conditions in ¶17. Applicant made no efforts to correct his concealment. His 1996 statement was made only after the Government investigator confronted him. In November 2006, his statement clearly was that he avoided telling anyone about his drug history, showing a conscious, willful, and knowing concealment and falsification. There was no bad advice given him. His drug history was not minor, or infrequent, nor were there unique circumstances. He claims he has not used illegal drugs since December 1994, but he also admitted he is a liar, so he is not believable. He has not obtained any type of drug counseling to verify his claimed present abstinence, nor has he demonstrated any positive steps he took to reduce his vulnerability. None of the other Mitigating Conditions remotely could be applicable. The burden of proof of Mitigating Condition applicability is on Applicant, and he showed nothing to support a contention that any might apply.

Guideline J—Criminal Conduct

Applicant committed a series of offense involving illegal drug use between 1969 and 1994, at least. There are allegations of these offenses, regardless of whether he was formally charged, formally prosecuted or convicted. He admitted he lied on the 1996 SCA and the 2005 SCA because he avoids disclosing his drug use history. Disqualifying Conditions ¶31a and ¶31c apply.

Considering the mitigating conditions under ¶32, while time has elapsed since Applicant claims he last used illegal drugs, he continues to lie about his history. There is not evidence of any rehabilitation for his mendacity on the SCA. While ¶32(a) and ¶32(d) might have applied, there is no mitigating evidence to support them. None of the other mitigating conditions apply.

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.” AG ¶ 2(a). “Each security clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy.” Directive ¶ 6.3. “Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.” AG ¶ 2(a). In evaluating Applicant’s case, I have considered the adjudicative process factors listed in the AG ¶ 2(a).

Applicant’s age and educational level show he was mature at the time he committed the falsifications. He should have known better than to falsify his SCA after having answered investigator’s questions in 1996, based on his age and education. He lied to the Government investigator in 1996 about his drug history. His drug use was extensive, and he continues to lie about it to the Government. His mendacity was voluntary and repeated. His motivation for lying was to retain his job and hide his past. There is substantial potential for pressure, coercion, exploitation, and duress in such circumstances. He repeated his lying twice, so there is the great likelihood that he will repeat it again. He has shown he does not have the self-discipline and integrity to be trusted with classified information, and that he is unreliable.

I conclude the Personal Conduct security concern against Applicant. I conclude the Criminal Conduct security concern against Applicant. I conclude the “whole person concept” against Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline E:	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
Paragraph 2. Guideline J:	AGAINST APPLICANT
Subparagraph 2.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.

Philip S. Howe
Administrative Judge