

KEYWORD: Personal Conduct

DIGEST: Applicant is 46 years old and has worked for the same defense contractor for 26 years. In 1986, while holding a Secret clearance, he was convicted of possession of marijuana with intent to sell and deliver. He did not divulge his conviction to his employer. In 2004 and 2005, Applicant executed security clearance applications and failed to disclose his felony drug conviction for possession of marijuana. He also failed to list his outstanding and delinquent debts on both security clearance applications. Applicant has not mitigated the personal conduct security concerns. Clearance is denied.

CASENO: 06-15661.h1

DATE: 08/31/2007

DATE: August 31, 2007

In re:)	
)	
)	
-----)	ISCR Case No. 06-15661
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
JACQUELINE T. WILLIAMS**

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Reid H. Ervin, Esq.

SYNOPSIS

Applicant is 46 years old and has worked for the same defense contractor for 26 years. In 1986, while holding a Secret clearance, he was convicted of possession of marijuana with intent to sell and deliver. He did not divulge his conviction to his employer. In 2004 and 2005, Applicant executed security clearance applications and failed to disclose his felony drug conviction for possession of marijuana. He also failed to list his outstanding and delinquent debts on both security clearance applications. Applicant has not mitigated the personal conduct security concerns. Clearance is denied.

STATEMENT OF THE CASE

On March 2, 2005, Applicant executed a Security Clearance Application (SF 86).¹ On December 11, 2006, the Defense Office of Hearings and Appeals (DOHA) declined to grant a security clearance and issued a Statement of Reasons (SOR)² to Applicant, detailing the basis for its decision—security concerns raised under Guideline E (Personal Conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense for SORs issued after September 1, 2006. The revised AG were provided to Applicant when the SOR was issued.

In a sworn, written statement dated January 16, 2007, Applicant responded to the SOR allegations and requested a hearing. Department Counsel was ready to proceed on February 26, 2007. The case was assigned to another Administrative Judge on February 28, 2007. Applicant's attorney filed a Notice of appearance on March 15, 2007. A Notice of Hearing was issued on April 8, 2007, scheduling the hearing for May 2, 2007. An Amended Notice of Hearing was issued on April 10, 2007, correcting Applicant's attorney's address. The case was reassigned to me on April 30, 2007. The hearing was conducted as scheduled. At the hearing, the Government offered four exhibits, Exs. 1-4. Applicant offered 10 exhibits (Exs. A-J). All exhibits were admitted into the record without objection. The record was left open through to allow Applicant to submit additional documents. By letter dated May 21, 2007, the Government forward an eight-page document received by facsimile from Applicant. The Government did not object to these documents. The documents have been admitted in the record and marked as Ex. K. The transcript (Tr.) was received on May 18, 2007.

FINDINGS OF FACT

Applicant admitted the factual allegations under subparagraphs 1.a-1.e, 1.g-1.i. Those admissions are incorporated herein as findings of fact. He denied the remaining factual allegations. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Applicant is 46 years old and has worked as a general foreman for a defense contractor since 2003. He has been employed by the same defense contractor for the past 27 years. He is divorced and has three daughters, aged 22, 21, and 17. He has had a secret security clearance since October 1980.

Applicant used marijuana from 1985 until 1986, while possessing a Secret clearance. On March 28, 1986, at the age of 24, Applicant was charged with (1) possession of marijuana, a felony and (2) possession of marijuana with intent to sell and deliver. On July 21, 1986, he was found guilty of possession of marijuana with intent to sell and deliver. He was sentenced to four years imprisonment, suspended. He was placed on probation for four years and fined approximately \$900. The remaining charge was dismissed.

¹Ex. 1 (Security Clearance Application, signed March 2, 2005). *See also*, Ex. 2 (Security Clearance Application, signed April 1, 2004).

²Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (Directive).

Applicant executed a SF 86 on April 1, 2004 and March 2, 2005. In response to question 21 on both SF 86s (*Your Police Record - Felony Offenses. Have you ever been charged with or convicted of any felony offense? (Include those under the Uniform Code of Military Justice.) For this item, report information regardless of whether the record in your case has been “sealed” or otherwise stricken from the 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*), he failed to disclose the felony drug charges for possession of marijuana.

In response to question 24 on the SF 86s signed in 2004 and 2005 (*Your Police Record - Alcohol/Drug Offenses. Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been “sealed” or otherwise stricken from the 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*), Applicant failed to disclose the felony drug charges for possession of marijuana.

In response to question 28 on the SF 86s signed in 2004 and 2005 (*Your Use of Illegal Drugs and Drug Activity - Use in Sensitive Positions. Have you EVER illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official, while possessing a security clearance; or while in a position directly or immediately affecting public safety?*), Applicant failed to disclose that he used marijuana from 1985 until late 1986, while possessing a secret clearance.

In response to question 37 on the SF 86s signed in 2004 and 2005 (*Your Financial Record - Unpaid Judgments. In the last 7 years, have you had any judgments against you that have not been paid?*), Applicant failed to disclose that in March 2001, a judgment was entered against him in favor of a homeowner’s community for \$289. He indicated that this bill belongs to his ex-wife. When they divorced, he agreed to pay the mortgage, utilities, and child support. She was responsible for the homeowner’s fee and it was forgotten about and not paid. She currently owes approximately \$130 to the homeowner’s association, and Applicant promised to pay this in June 2007.

In response to question 38 on the SF 86s in 2004 and 2005 (*Your Financial Delinquencies - 180 days. In the last 7 years, have you been over 180 days delinquent on any debts(s)?*), Applicant failed to disclose that he had two delinquent debts placed for collection. The debt for \$551 was for purchase of a family computer. The other debt was for \$472. These two debts were also more than 90 days delinquent. The \$551 debt has been paid in full. The debt for \$472 was to be paid in June 2007.³

In response to question 39 on the 2004 SF 86 (*Your Financial Delinquencies - 90 Days. Are you currently over 90 days delinquent on any debt(s)?*), he failed to disclose the delinquent debts for \$551 and \$472.

³Ex. K (Letter from Applicant’s attorney, dated May 16, 2007).

At the time of his arrest in 1986, Applicant told his wife what occurred. He did not tell any other family member, friend, or his place of employment. In his Answer, he indicated why he did not answer the SF 86s truthfully:

These events were nearly twenty years old at the time I executed the application for a security clearance and was no longer representative of my character. I was trying to put my past mistakes behind me and move forward with my life. Nevertheless, I should have disclosed this information. I apologize to the Department for any confusion or misapprehension my lack of candor may have caused, and I ask the Department to please consider my otherwise 27 years of faithful and loyal service to the United States.

Applicant's wife testified at the hearing. He is still a good provider in spite of their divorce. She did claim responsibility for the homeowner's debt.⁴ Applicant discussed his 1986 conviction with two of his daughters on May 5, 2007.⁵ His oldest daughter is away at college. On May 10, 2007, Applicant disclosed his 1986 conviction to his employer, which is the date that Human Resources Department asked to meet with him. The Human Resources' representatives indicated "there would be no problem with respect to his employment because of his failure to disclose the prior conviction previously."⁶

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. 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 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 adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

⁴Tr. 64.

⁵Ex. K (Statement from daughters, dated May 5, 2007).

⁶Ex. K (Letter from Applicant's attorney, dated May 16, 2007). *See also*, Ex. K (Letter from Human Resources, dated May 20, 2007).

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁷ The Government has the burden of proving controverted facts.⁸ The burden of proof is something less than a preponderance of evidence.⁹ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.¹⁰ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹¹

No one has a right to a security clearance¹² and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹³ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.¹⁴ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.¹⁵ 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.

CONCLUSIONS

I have carefully considered all facts in evidence and the legal standards, and I reach the following conclusions.

Personal conduct is always a security concern because “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.”

The Government has proved a *prima facie* case as for personal conduct. On July 21, 1986, Applicant was found guilty of possession of marijuana with intent to sell and deliver. He was sentenced to four years of imprisonment, of which four years were suspended. He was placed on probation for four years and fined approximately \$900. This occurred while he possessed a Secret

⁷ISCR Case No. 96-0277 (July 11, 1997) at 2.

⁸ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.

⁹*Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

¹⁰ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.

¹¹ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.

¹²*Egan*, 484 U.S. at 531.

¹³*Id.*

¹⁴*Id.*; Directive, Enclosure 2, ¶ E2.2.2.

¹⁵Executive Order 10865 § 7.

clearance. Subsequently, in 2004 and 2005, he completed SF 86s. In response to questions about his police record and use of illegal drugs and drug activity, he failed to disclose his use of marijuana from 1985 to 1986 while possessing a Secret clearance. Moreover, he failed to disclose on both SF 86s, his felony conviction for possession of marijuana. In response to several questions on the SF 86s regarding his delinquent debts, he failed to acknowledge that he had debts over 90 or 180 days. Thus, Personal Conduct Disqualifying Conditions ¶ 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*) and ¶ 16(e) (*personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group*) apply.

Applicant has not used drugs since his 1986 felony drug conviction. Since his conviction, he has been a law-abiding citizen. He was ashamed of using, selling, and being convicted and decided to put those incidents behind him and move forward with his life. The only person he confided in was his wife. For 27 years, he continued to work for the same employer and received several promotions with more responsibility, and never said a word about his drug use or conviction. In 2004 and 2005, he executed SF 86s and deliberately failed to disclose his use of marijuana from 1985 to 1986, as well as his conviction. For 27 years, Applicant has lived with his secret. He failed to take responsibility for his drug activity and simply failing to self-report will did not make his problem go away. He has failed to be truthful to his family, his employer, and the United States. His failure to divulge the truth regarding his drug behavior as well as his outstanding and delinquent debts, reflects badly on his reliability, trustworthiness, candor, and ability to protect classified information. When he decided not to provide truthful answers in his SF 86s, he continued a pattern of dishonesty. By hiding his drug activity, he engaged in behavior, which, if known, could affect his personal, professional, or community standing. Moreover, his failure to disclose material facts and his drug use and conviction made him vulnerable to exploitation, manipulation, or duress by others. Applicant waited too long to acknowledge the behavior to his employer. I conclude that it is too late for Applicant to get credit for acknowledging his bad behavior and lies. Consequently, Mitigating Conditions ¶ 17(c) (*the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt o the individual's reliability, trustworthiness, or good judgment*) and ¶ 17(e) (*the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*) do not apply.

I considered carefully all the potentially disqualifying and mitigating conditions in this case in light of the "whole person" concept, keeping in mind that any doubt as to whether access to classified information is clearly consistent with national security must be resolved in favor of the national security. Since his felony drug conviction in 1986, Applicant has led an exemplary life. He has not participated in any illegal drug activity. He and his wife divorced, and they worked out a child support payment between themselves, which he has honored faithfully and provided more financial resources than agreed on when it was necessary. He has excelled at the same job for the past 27 years. Applicant is not an honest man. He hid his 1986 conviction from his employer and only self-reported in May 2007. He cleaned up his financial debts in 2007. In 2007, Applicant finally accepted responsibility for

his deceptive behavior but it is a little too late. I conclude Applicant has not mitigated the potential security concerns arising from personal conduct. I find that it is not clearly consistent with the national interest to grant a clearance to Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	Against Applicant
Subparagraph 1.k:	Against Applicant
Subparagraph 1.l:	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.

Jacqueline T. Williams
Administrative Judge