

KEYWORD: Personal Conduct; Criminal Conduct; Drugs

DIGEST: This 27-year-old computer specialist's list of misconduct includes Time Card violations at work in 2004; the falsification of a drug-related question on his March 2005 security clearance application, a violation of 10 U.S.C. 1001, a felony; three examples of sexual misconduct with minor females in 1997, 2001, and June 2005; his use of marijuana in at least 2000 to 2005; and the denial of access to Sensitive Compartmented Information (SCI) by the National Security Agency in October 2005, makes a strong case against the granting of a security clearance. Mitigation has not been adequately established. Clearance is denied.

CASENO: 06-16865.h1

DATE: 04/03/2007

DATE: April 3, 2007

In Re:)	
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-----)	ISCR Case No. 06-16865
SSN: -----)	
)	
Applicant for Security Clearance)	

**DECISION OF ADMINISTRATIVE JUDGE
BARRY M. SAX**

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 27-year-old computer specialist's list of misconduct includes Time Card violations at work in 2004; the falsification of a drug-related question on his March 2005 security clearance application, a violation of 10 U.S.C. 1001, a felony; three examples of sexual misconduct with minor females in 1997, 2001, and June 2005; his use of marijuana in at least 2000 to 2005; and the denial of access to Sensitive Compartmented Information (SCI) by the National Security Agency in October 2005, makes a strong case against the granting of a security clearance. Mitigation has not been adequately established. Clearance is denied.

STATEMENT OF THE CASE

On October 16, 2006, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On October 27, 2006, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge after a hearing. The case was assigned to me December 15, 2006. A Notice of Hearing was issued on January 8, 2007. The hearing was conducted on February 15, 2007. The Government introduced four exhibits (GX) 1-4. After the hearing, the Government timely submitted an additional exhibit (GX 5). Applicant testified, called an additional witness, and introduced two (2) exhibits (AX) A and B). After the hearing, Applicant submitted two more exhibits (AX C and D). All exhibits were admitted without objection. The transcript was received on February 27, 2007.

FINDINGS OF FACT

Applicant is a 27-year-old computer specialist for a defense contractor. The SOR contains seven (7) allegations under Guideline E (Personal Conduct); one (1) allegation under Guideline J (Criminal Conduct); and one (1) allegation under Guideline H (Drugs), Applicant admits allegations 1.a., 1.b., 1.d., 1.g. and 3.a. He denies allegations 1.c., 1.e., 1.f. and 3.a. All answers are accompanied by explanations. Only the specific admissions are accepted as such and deemed to be findings of fact.

After considering the totality of the evidence, I make the following additional FINDINGS OF FACT as to the status of each SOR allegation.

Guideline E (Personal Conduct)

1.a. - As Applicant admits, he was disciplined for Time Card Violations in October 2004. He did not fill out his timecards every day as required by company policy and was detected three times in 60 days.

1.b. - Applicant falsified material facts on his March 18, 2005 security clearance application (SF 86), in which he responded to Question 27 “Your Use of Illegal Drugs and Drug Activity Since age 16 or in the last seven years, whichever is shorter, have you [used illegal drugs],” to which he answered “No,” and deliberately failed to mention his use of marijuana in 2000 and again in 2005.

1.c. - Applicant used marijuana in May 2005, after he had completed his SF 86 on March 18, 2005. His use of marijuana occurred during a period when he already had a DoD security clearance.

1.d. - Applicant had sexual intercourse with a female under the age of 16 in about June 2005. Applicant was 25 at the time.

1.e. - Applicant resided with a friend in about the fall of 2001 and had a sexual relationship for about three months with his daughter, who was between the ages of 16 and 17. Applicant was about 21 to 22 at the time.

1.f. - Applicant moved into the home of his girlfriend’s family in about 1998, and continued a two-year sexual relationship that had begun earlier. The female was under 18 during the relationship.

1.g. - Applicant was denied a security clearance by the National Security Agency (NSA) in about October 2005, due in part, to the information set forth in allegations 1.b., 1.c., 1.d., 1.e., and 1.f., above.

Guideline J (Criminal Conduct)

Applicant’s deliberate falsification of material facts about his marijuana use through January 2005, in his March 18, 2005 security clearance application (SF 86), as alleged in 1.b., above, constitutes a violation of 18 U.S.C. 1001, a felony.

Guideline H (Drugs)

3.a. - Applicant used marijuana in at least 2000, January 2005, and May 2005.

POLICIES

Each 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 in enclosure 2, including as appropriate: (1) Nature and seriousness of the conduct and surrounding circumstances; (2) Frequency and recency of the conduct; (3) Age of the applicant. (4) Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved; (5) Absence or presence of rehabilitation; and (6) Probability that the circumstances or conduct will continue or recur in the future.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is “clearly consistent with the national interest” for an individual to hold a security clearance. An applicant’s admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons.

If the Government meets its burden (either by the Applicant’s admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., “any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation’s security.”

CONCLUSIONS

Applicant is a 27-year-old computer specialist. The overall record compels the conclusion that Applicant has a history of conduct that indicates a serious lack of judgment, reliability and trustworthiness

Guideline E (Personal Conduct)

1.a. - Applicant’s admitted failure to comply with company timecard rules in about October 2004, is relatively minor in itself, but taken in context, becomes part of a series of conduct that brings his judgment, reliability, and trustworthiness into question.

1.b. - The material falsification of his answer to Question 27 on his March 18, 2005 SF 86, in which he omitted any mention of his marijuana in 2000 and at least in January 2005, is both serious and current. It is clear that the falsifications occurred long after Applicant had first obtained DoD security clearance, after he began processing for a position

with the NSA, and after he signed an agreement not to use illegal drugs while employed with that agency (Tr at 22, 23). Applicant admits the false answer, but denies it was deliberate. Applicant claims the false answer was “an unfortunate oversight on [his] part” (Response). He claims that on an earlier SF 86, he had answered “Yes,” but no such SF 86 has been produced.

At the hearing, Applicant did submit two other SF 86s (AX A and AX B), both dated February 7, 2007 on the upper left corner of the first page. Neither SF 86 is signed nor dated at the bottom of the last page. The only apparent differences are that they contain different addresses at Item 4 on the first page, and (2) as to Item/Question 27, the answer in AX A is “No,” while the answer in AX B is “Yes,” and cites marijuana use on three occasions between June 1, 2001 and January 15, 2005. The two SF 86s, including the one in which a “Yes” answer appears are from 2007, almost two years *after* the date of the 2005 SF 86 cited in the SOR.¹ Therefore, they do not support Applicant’s claim in his response to the SOR that he had told the truth on a “previous” SF 86.

I have carefully considered the testimony of Applicants witnesses, a security officer from Applicant’s company (Tr at 64-68). The essence of the testimony is that another security officer, who assisted Applicant with the preparation of the SF 86, cause confusion that led to the “No” answer being entered as to Question 27. The testimony is intended to show what Applicant’s state of mind was when he entered the false answer. I conclude, however, that the testimony does not accomplish that goal. As discussed above, the dates of the SF 86s contradict any link in causation and, most important, Applicant’s signature at the end of the SF 86 (GX 1) certifies that he read and agreed with all entries on the SF 86. Claiming that he simply missed the “No” answer to Question 27 lacks any support in the record, particularly when considered along with other evidence of his poor judgment, unreliability, and untrustworthiness.

1.c. -Applicant now claims his last use of marijuana was in January 2005. Although Applicant denies the allegation in the SOR that he used marijuana as recently as May 2005, which would be after he had completed his March 2005 SF 86, the record support the SOR allegation. In the National Security Agency (NSA) Clearance Decision Statement, dated October 25, 2005, denying Applicant access to Sensitive Compartmented Information (SCI), Applicant is quoted as stating that between 1995 and May 2005 (while possessing SCI clearance granted by NSA, and after his SCI indoctrination under the “CCA program,” he used marijuana on three occasions (GX 4). That document specifies that Applicant “last used marijuana in May 2005” (*Id.*).

I note also Applicant’s testimony that he may have used marijuana once after January 2005, but that he “honestly [doesn’t] remember” (Tr at 52). He concedes, however, that his last use occurred “after he had been given a clearance” in 2002 and after he had signed NSA’s Personnel Security Policy Advisory form (*Id.*)

¹ The “2207/02/07” date appears on the top left of the first page of each SF 86, but neither one is signed or dated on the last page, and there is no evidence either one was ever submitted to DoD.

Under allegations, 1.d., 1.e., and 1.f., the record supports the conclusion that Applicant had consensual sex with three different underage females, in 1998, 2001, and June 2005, when Applicant was about 18, 21, and 25 years old, respectively. I have carefully considered his most recent explanations, including a claim that at least one girl's parents knew of the sexual relationship and did not object to it.

I have compared Applicant's recent statements with his earlier statements to NSA. I give more weight to the earlier statements since they were given before Applicant realized that his conduct might be viewed as raising questions about his judgment, reliability, and trustworthiness.

1.g. - Applicant's sexual conduct and marijuana use, as described in detail in GX 4, compelled NSA's conclusion that Applicant was not eligible for SCI access. The record suggests no reason to reject NSA's evaluation and the recently obtained evidence makes the case against Applicant even stronger.

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 failure to cooperate with the security clearance process.

Disqualifying Conditions: (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 (d.3) A pattern of dishonesty or rule violations.

Mitigating Conditions that could mitigate security concerns include: None that are established by the record.

Based on the totality of the record, I conclude that all of the allegations under Guideline E are supported by the record and that none of them have been mitigated by anything Applicant has said or done. I agree with NSA's evaluation, but my decision is based on my independent evaluation of the evidence, including the most recent documents and testimony.

Guideline J (Criminal Conduct)

2.a. - The deliberate falsification of his answer to Question 27 constitutes a violation of 18 U.S.C. 1001, a felony.

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.

Disqualifying Conditions: (a) a single serious crime or multiple lesser offenses; and © Allegations or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted. Mitigating Condition: None that are

established by the record evidence.

Guideline H (Drugs)

3.a. - Applicant used marijuana on a number of occasions, in 2000, January 2005, and lastly, in about May 2005. The overall evidence establishes the dates of use shown above and at least suggests there may have been more drug use.

The Concern: 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 law, rules, and regulations.

Disqualifying Conditions: (a) any drug abuse; © illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and (g) any illegal drug use after being granted a security clearance.

Mitigating Conditions: None that are established by the record.

Overall, the record evidence establishes that Applicant committed the sexual, personal, drug-related, and criminal misconduct alleged in the SOR; also that he knew and had reason to know that his answer to Question 27 was false. Looking at Applicant in the context of the whole person concept, he has not come close to overcoming the evidence supporting the Government's concerns, as stated in the SOR. It is basic to the security clearance adjudication process that the ultimate burden of proof is on the Applicant to demonstrate that he is eligible to possess a security clearance. The record compels the conclusion that Applicant has simply not demonstrated he currently possesses the good judgment, reliability, and trustworthiness required of anyone seeking access to the nation's secrets.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline E (Personal Conduct)	Against the Applicant
Subparagraph 1.a.	Against the Applicant
Subparagraph 1.b.	Against the Applicant
Subparagraph 1.c.	Against the Applicant
Subparagraph 1.d.	Against the Applicant
Subparagraph 1.e.	Against the Applicant
Subparagraph 1.f.	Against the Applicant
Subparagraph 1.g.	Against the Applicant
Guideline J (Criminal Conduct)	Against the Applicant

Subparagraph 2.a.	Against the Applicant
Guideline H (Drugs)	Against the Applicant
Subparagraph 3.a	Against the 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.

BARRY M. SAX
ADMINISTRATIVE JUDGE