

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: This 49 -year-old software engineer committed three crimes (two drug-related, in 1994 and 2004 and one for spousal abuse in 1994. He also knowing omitted any mention of the 1994 drug arrest in his 2003/2004 security clearance application, in violation of 10 U.S.C. 1001, a felony. Mitigation has not been adequately established. Clearance is denied.

CASENO: 06-17335.h1

DATE: 03/15/2007

DATE: March 15, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 06-17335
)	
Applicant for Security Clearance)	
)	

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

APPEARANCES

FOR GOVERNMENT

Jennifer I. Goldstein, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 49 -year-old software engineer committed three crimes (two drug-related, in 1994 and 2004 and one for spousal abuse in 1994. He also knowing omitted any mention of the

1994 drug arrest in his 2003/2004 security clearance application, in violation of 10 U.S.C. 1001, a felony. Mitigation has not been adequately established. Clearance is denied.

STATEMENT OF THE CASE

On August 31, 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 November 2, 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 16, 2007. The Government introduced nine exhibits (GX) 1-9 and one timely submitted post hearing exhibit (GX 10). Applicant testified and introduced 16 exhibits (AX) A - P). The transcript was received at DOHA on February 27, 2007.

FINDINGS OF FACT

Applicant is a 40-year-old employee of a defense contractor. The February 24, 2005 SOR contains four (4) allegations under Guideline J and two (2) allegations under Guideline E (Personal Conduct). Applicant admits the basic fact of allegations 1.a.- 1,d, but adds explanations. Only the specific admissions are accepted as such and deemed to be findings of fact. He denies allegation 2.a.

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

Guideline J (Criminal Conduct)

1.a. - Applicant was arrested on or about June 2, 1994, in State A, and charged with being "Under the Influence of a Controlled Substance." His criminal proceedings were suspended for one year and he was granted diversion. When he had successfully completed the diversion program, the charge against him was dismissed. Applicant explains the problem as arising during a "particularly bitter divorce" (Response).

1.b. - Applicant was arrested on or about September 29, 1994, in State A, and charged with (1) Inflict Injury/Spouse; (2) Inflict Corporal Injury; and (3) Battery. The criminal proceedings were suspended for one year, he was granted diversion, and he was required to perform 20 hours of volunteer service. Applicant views his wife as the instigator of the situation leading to his arrest.

1.c. - Applicant was arrested on or about July 27, 2004, in State A, and charged with Possession of a Controlled Narcotic Substance (Cocaine/Base Rock). He was observed by undercover officers buying rock cocaine. The criminal proceedings were suspended for six months, he was granted drug diversion, ordered to participate in substance abuse classes for six months, to participate in random drug testing, and to pay a \$500 fee. He was also issued a Restraining Order to stay away from the drug dealer. On or about February 3, 2005, the charge was dismissed. Applicant admits the incident and he has “no excuse for [his] actions” (*Id.*).

1.d. - The falsification alleged in 2.b., below, constitutes a violation of 18 U.S.C. 1001, a felony.

Guideline E (Personal Conduct)

2.a. - Applicant falsified material facts on his security clearance application (SF 86), dated July 30, 2003, and resigned by him on July 2, 2004, his response to the following question: “**24. Your Police Record - Alcohol/Drug Offenses** For this item, report information regardless of whether the record in your case has been ‘sealed’ or otherwise stricken from the court record. [The only exception is not applicable under the facts of this case]. Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs,” to which he answered “No,” and intentionally failed to disclose his 1994 drug use, as alleged in 1.a., above.

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 49-year-old software engineer.

Guideline J (Criminal Conduct)

The three criminal offenses that led to his arrest occurred in June and September 1994 and lastly, in July 2004. The June 1994 arrest (SOR 1.a.) involved Applicant's use of a Controlled Substance (GX 3 and GX 4). The case was dismissed after Applicant successfully completed a diversion program (GX 4). This arrest is now some 13 years old. The July 2004 arrest involved his purchase of rock cocaine, which was admitted by Applicant and observed by undercover police officers (Response, GX 3). The circumstance of the 2004 arrest is discussed by Applicant in considerable detail in his sworn statement (GX 2). This arrest shows incredibly poor judgment on his part in buying drugs from a person he did not know on behalf of individuals he did not know (Tr at 41-44).

Other adverse factors relating to the 2004 arrest are (1) it came after he first signed the security clearance application in 2003; (2) there is now evidence of Applicant's using illegal drugs, "from high school to 1989" ("rarely, because he was in the military at the time"), including attending the U.S. Air Force Academy from 1975-1979) (Tr at 35), and again in 1993-1994 (about a gram a week), while he working for his present employer, a defense contractor (GX 1). In the context of the entire record, it is impossible to conclude that the incidents cited in the SOR are the only times Applicant has possessed, used, and/or purchased illegal drugs. In addition, the 1994 arrest occurred when Applicant possessed a DoD security clearance (Tr at 36-38).

I have carefully considered Applicant's documentation. One letter, from a "recovery center" dated April 4, 1995, cites his successful completion of the program and his discharge on November 14, 1994. The letter expresses the Center's hope that Applicant would learn from his mistake and avoid involvement with illegal drugs in the future (AX A). It is clear

he did not do so. The record makes it impossible to conclude with any level of confidence that Applicant's drug involvement is unlikely to happen again. To the contrary, I conclude that Applicant's drug use/involvement remains current.

The second 1994 arrest (SOR 1.b.) involved spousal abuse (AX DAX E, AX F, AX G). While Applicant claims the charges were false, and contrived by his angry wife (Tr at 56-59), the arrest is supported by the police report citing "red marks" on the wife's arms, and no apparent injury to Applicant (GX 6 and AX B), and is not refuted by contrary evidence.

I have also carefully considered Applicant's letters of recommendation (AX H - AX J) and work evaluations (AX K and AX P). It is obvious that he is viewed as an asset to his company, but none of the documents address or mitigate the concerns expressed in the SOR.

The Concern: A history of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

Disqualifying Conditions: (1) any criminal activity, regardless of whether the individual was actually charged; and (2) a single serious crime or multiple lesser offenses.

Mitigating Conditions: None that are established by the record.

Guideline E (Personal Conduct)

Applicant admits he knew about the September 1994 arrest, but did not report it (Tr at 62-64). His explanation is basically that his attorney told him that he could properly say that he had never been convicted since he had successfully completed a diversion program. However, the language of Question 24 was explicitly designed to cover this situation: "For this item, report information regardless of whether the record in your case has been sealed or otherwise stricken from the court record. The single exception [involving a Federal drug statute, is clearly not applicable in this case]." Applicant read this question and answered "No" without any explanation. In his testimony, he did not provide any basis for concluding that he had innocently misconstrued or misinterpreted the operative language of Question 24. His explanation lacks any support in the record and is simply not credible.

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Disqualifying Condition: (2). The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire [SF 86], 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.

Mitigating Conditions: None that are supported by the record; e.g., (2). The falsification remains recent, and the individual did not subsequently provide correct information voluntarily; or (3). The individual did not make a prompt, good-faith efforts to correct the falsifications before being confronted with the facts.

Overall, the record evidence establishes that Applicant committed the crimes alleged in the SOR and that he knew and had reason to know that his answer to Question 24 was false. Looking at Applicant in the context of the whole person concept, he has simply 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, as he did in the past. The record compels the conclusion that he 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 J (Criminal 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
Guideline E (Personal Conduct)	Against the Applicant
Subparagraph 2.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