

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant's deliberate falsifications of his 17 June 2002 clearance application and his 10 September 2002 subject interview render him unsuitable for a security clearance. Clearance denied.

CASENO: 06-21118.h1

DATE: 07/30/2007

DATE: July 30, 2007

In Re:)	
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-----)	ISCR Case No. 06-21118
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
JOHN GRATTAN METZ JR**

APPEARANCES

FOR GOVERNMENT

Robert C. Coacher, Esquire, Department Counsel

FOR APPLICANT

Joseph P. Smith III, Esquire

SYNOPSIS

Applicant's deliberate falsifications of his 17 June 2002 clearance application and his 10 September 2002 subject interview render him unsuitable for a security clearance. Clearance denied.

STATEMENT OF THE CASE

Applicant challenges the 3 January 2007 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of personal conduct and criminal conduct.¹ Applicant's undated answer initially requested a decision without hearing, but on 25 May 2007, he requested a hearing. DOHA assigned the case to me 12 June 2007, and I convened a hearing 2 July 2007. DOHA received the transcript (Tr.) 11 July 2007.

FINDINGS OF FACT

Applicant admitted the SOR allegations except for 1.d. and 2.c. Accordingly, I incorporate his admissions as findings of fact. He is a 26-year-old geoscientist employed by a defense contractor since June 2002. He seeks to retain the security clearance he obtained fraudulently in fall 2002.

When Applicant applied for an industrial clearance in June 2002 (G.E. 1), he deliberately concealed his marijuana use between October 1998 and April 2002 by answering "no" to question 27 (illegal drug use, last seven years). In fact, he had a significant history of marijuana use during his college years—sometimes as often as twice per week—and had contributed money to purchase marijuana for group use.²

Applicant had better reason than most to know that illegal drug use was a security concern for the government and that he would be asked about illegal drug use on his clearance application. In spring 2002, Applicant had been listed as a reference on a friend's clearance application, and had been interviewed by a government investigator about the friend's reported marijuana use. During this interview, Applicant reported all the details he knew of his friend's marijuana use, but also learned how major a security concern past illegal drug use could be.

Applicant stated (Answer) that he falsified his drug history on his clearance application because if the government was that concerned about his friend's drug use (only 3-4 times), "then there would be no way **the government or my company would understand using it a few more times over a couple of years.**" [Emphasis added.] At hearing, he claimed he was concerned that he would be prosecuted for his drug use (Tr. 64, 75).

In September 2002, Applicant was interviewed by a government investigator. Given a specific opportunity to disclose his drug use, he categorically denied using any illegal drugs, including marijuana, from 1996 to the present—the relevant time period for illegal drug use. Applicant was ultimately granted a clearance.

¹Required by Executive Order 10865 and Department of Defense Directive 5220.6, as amended (Directive).

²The extent of Applicant's marijuana use is unimportant to this case, except that it was relevant and material to his clearance application in June 2002 and was sufficiently significant that it would likely have resulted in further investigation into his drug use and issuance of an SOR addressing his drug involvement.

In October 2005, Applicant's company nominated him for a higher level of clearance, and he completed a second clearance application (G.E. 2). This time, he disclosed that he had used marijuana between October 1998 and April 2002. However, when asked about his frequency of use, he answered "unknown." In doing so, he stated that he relied on the advice of a friend who was a facility security officer (FSO) at another company (Tr. 76, 78). Not until March 2006, when he was again interviewed by a government investigator, did any government agent know the full extent of Applicant's illegal marijuana use.

The SOR alleges, and Applicant admits, three additional instances of minor misconduct. In November 1998, he was cited for underage possession of alcohol, a civil offense under state law, was awarded a year of unsupervised probation, and fined. In May 2004, he was verbally counseled by the company FSO after he downloaded music files onto the company's classified hard drive.³ In September 2004, he was charged with disorderly conduct after a college football game, but the charges were dismissed after he completed 32 hours of community service.

One of Applicant's character references (A.E. A) has known him as a student, co-worker, and supervisor, and praises his handling of classified information. He recommends Applicant for a clearance. However, he does not appear to be aware of Applicant's falsifications. Applicant's other character reference praised him in similar terms, but was only made aware of Applicant's falsification of his clearance application the morning of the hearing. He had not been made aware of Applicant's failure to disclose his drug use during the September 2002 interview.

POLICIES AND BURDEN OF PROOF

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guidelines are Guideline E (Personal Conduct) and Guideline J (Criminal Conduct).

³Applicant had asked a previous FSO if they could listen to a music CD on company computers at work, and had been given permission to do so provided the CD reader was un-writeable—i.e., incapable of transmitting data. Despite this limitation, Applicant decided it would be permissible to download the music files into the company computers. His new FSO discovered this and Applicant received verbal instruction to not download any more files onto the company computer. SOR ¶1.d. alleges that Applicant answered falsely when he denied having any disciplinary actions at his company when asked by a government investigator in March 2006. Applicant stated that this incident did not come to mind when the investigator posed the question, and my reading of the circumstances leads me to conclude that this incident did not rise to the level of a disciplinary incident that should have been reported in response to the question. However, the incident does demonstrate the degree to which Applicant was prepared to ignore the instructions given to him, and reinterpret them to permit conduct that had not been specifically authorized (l.c.).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁴

CONCLUSIONS

The government established a case for disqualification under Guideline E and J, and Applicant did not mitigate the security concerns. He deliberately concealed his illegal drug use from the government.⁵ He did so knowing that his illegal drug use was of major security concern to the government, and believing that his job and clearance were at risk if he told the truth. Further, none of the Guideline E mitigating conditions apply. The concealed information was relevant to a clearance decision. Applicant's falsifications prohibited the government from evaluating his illegal drug use in a timely fashion, and at a time when such recent drug use would have raised significant security concerns. In addition, the government detrimentally relied on Applicant's falsifications in granting his clearance. Finally, his disclosure of illegal drug use in October 2005 was neither prompt nor forthright. It was merely convenient for Applicant, having now worked for his employer for several years and having put some distance between him and his drug use.

Applicant's Answer clearly establishes that he intended to conceal his illegal drug use from the government and effect the course of his background investigation. This conduct violated 18 U.S.C. §1001,⁶ whether he was successful in effecting the course of his investigation or not. However, in this case his falsifications did influence the investigation, and he was granted his clearance.

⁴See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵¶16.(a) deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, . . . [or] determine security clearance eligibility or trustworthiness. . . ;

⁶¶31.(a) a single serious crime or multiple lesser offenses; (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;

Applicant's failure to disclose his illegal drug use demonstrates a lack of candor required of cleared personnel. The government has an interest in examining all relevant and material adverse information about an Applicant before making a clearance decision. The government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when it is perceived to be prudent or convenient. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the government relies on to perform damage assessments and limit the compromise of classified information. Applicant's conduct suggests he is willing to put his personal needs ahead of legitimate government interests. I resolve Guideline E and J against Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline E: **AGAINST APPLICANT**

 Subparagraph a: Against Applicant
 Subparagraph b: Against Applicant
 Subparagraph c: Against Applicant
 Subparagraph d: For Applicant

Paragraph 2. Guideline J: **AGAINST APPLICANT**

 Subparagraph a: For Applicant
 Subparagraph b: For Applicant
 Subparagraph c: Against 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. Clearance denied.

**John G. Metz, Jr.
Administrative Judge**