

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant failed to mitigate security concerns over his criminal conduct and personal conduct. He has a history of four arrests and failed to disclose his arrests and his marijuana use on his security questionnaire in 2006, yet, nevertheless, certified that his answers were truthful. While he has taken some steps to reform his conduct and entered a court treatment and diversion program for his 2005 possession of marijuana arrest, he has not completed the program. Thus, he has not yet demonstrated sufficiently his successful rehabilitation. Consequently, security concerns remain over both criminal conduct and personal conduct. Clearance is denied.

CASENO: 06-22066.h1

DATE: 08/30/2007

DATE: August 30, 2007

In Re:)	
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-----)	ISCR Case No. 06-22066
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
KATHRYN MOEN BRAEMAN**

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant failed to mitigate security concerns over his criminal conduct and personal conduct. He has a history of four arrests and failed to disclose his arrests and his marijuana use on his security questionnaire in 2006, yet, nevertheless, certified that his answers were truthful. While he has taken some steps to reform his conduct and entered a court treatment and diversion program for his 2005 possession of marijuana arrest, he has not completed the program. Thus, he has not yet demonstrated sufficiently his successful rehabilitation. Consequently, security concerns remain over both criminal conduct and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on December 11, 2006. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.¹ The SOR alleged specific concerns over personal conduct (Guideline E) in paragraph 1 and over criminal conduct (Guideline J) in paragraph 2 based on the revised (“new”) Adjudicative Guidelines issued on December 29, 2005, and implemented by the Department of Defense, effective September 1, 2006. Applicant responded to these SOR allegations in a notarized Answer of January 9, 2007, where he admitted all allegations in paragraph 1 and all allegations in paragraph 2. He requested a hearing.

Department Counsel indicated the case was ready to proceed on January 30, 2007. The matter was assigned to another Administrative Judge on February 1, 2007. The case was re-assigned to me on March 29, 2007. A March 30, 2007, Notice of Hearing set the case hearing for April 19, 2007.

At the hearing the Government offered two exhibits (Exhibit 1-2) which were admitted into evidence without objection. Applicant testified and submitted Exhibit A, which was admitted into evidence without objection. At the close of the evidentiary portion of the hearing Department Counsel moved to amend the SOR based on paragraph 17 of the Directive to add a new allegation, 2.b.² Applicant initially objected, but later withdrew his objection; he conceded his testimony

¹ This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.

² SOR 2.b. You falsified material facts on your electronic questionnaire for investigation processing (eQIP) executed by you on January 17, 2006, on which you were required to reply to the following question: Section 24, your use of illegal drugs and drug activities. The following questions pertain to the use of illegal drugs or drug activity. You are required to answer the questions fully and truthfully and your failure to do so could be grounds for an adverse employment decision or action against you, but neither your truthful responses nor information derived from your responses will be used as evidence against you in any subsequent criminal hearing; a., since the age of 16 or in the last seven years, which ever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics . . . or prescription drugs?, to which you answered, “No,” whereas in truth you deliberately failed to list that you smoked marijuana as recently as November 2005. (TR 39-41)

supported the new allegation. (TR 41-43) Consequently, I granted the amendment to the SOR. (TR 43) The transcript (TR) was received on April 27, 2007.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 25 years old, began work for a defense contractor in a position classified as Tech I in December 2005 and later was promoted to Tech III. He completed an Electronic Questionnaire for Investigative Processing (e-QIP) (SF 86) in January 2006. (Exhibit 1; TR 30-31; 37-38)

Applicant received a B.S. in electronics engineering technology from a university in February 2005. (Exhibit 1)

Criminal Conduct and Personal Conduct

Applicant's first arrest was for trespassing and unlawful discharge of an air gun in August 2000 when he was 18 and playing paint ball with friends. He completed his four-month supervision. (SOR 1.a.) (Answer; TR 33-34)

His second arrest was in June 2002 when he was twenty as he violated the Liquor Control Act. (SOR 1.b.) He was outside drinking at a college party; he was arrested by an university police officer who saw him with a drink when he was underage. He paid a fine. (Answer; TR 34-35)

His third arrest for consuming alcohol in public on a patio at a bar was in February 2004 when he was 23. He was arrested by an officer on a bicycle and required to do ten hours of community service. (SOR 1.d.) (Answer; TR 35-36)

Applicant began using marijuana in high school and testified his last use of marijuana was in November 2005 when he was arrested. (SOR 1.d.) Applicant certified that his answer were true, complete and correct on his eQIP; however, in response to questions in Section 24, he falsely answered "no" and failed to disclose that he had previously used drugs. He was afraid to report his marijuana usage on the form as this job was his first after college and he feared losing it. After completing the form, he falsely told the security investigator when he was interviewed that he had last use marijuana in high school. (TR 27-30) He admitted he lied. (TR 31)

Also, in response to questions in Section 23, Applicant failed to disclose that he had been charged and convicted of offenses related to alcohol or drugs. Despite his certification that his answer were true, complete and correct, he falsely answered "no" to that question. In June 2002 he had pleaded guilty to a violation of the Liquor Control Act and was fined \$300; in February 2004 he was charged with Consuming Alcohol in Public; and in November 2005 he was arrested and charged with Possession of Marijuana and Possession of Drug Paraphernalia. (Answer; Exhibits 1, 2) He was arrested when a bicycle police offer came to his car window and saw a marijuana pipe on his dashboard. He was booked at the police station. (TR 20)

Applicant conceded he was arrested in November 2005, a month before he filled out the security form in January 2006. He had not heard anything more about the case since his arrest, so he hoped he would not have to report it as he was afraid to disclose the arrest. He believed he could answer “no” as he had been charged, but had not yet been to court and been convicted of the 2005 arrest. He thought he was “still in the clear” when he filled out the form. After he received the SOR in December 2006, he checked with the local courts and found that there was a warrant for him as he had missed a court date. He had moved, so had not received the notice of the hearing. He went to court in March 2007 and was allowed to enter the Treatment Assessment Screening Center (TASC) program. If he completes the program, all charges will be dismissed. He entered the TASC diversion program and is now in a program and trying to “make a turnaround.” (Exhibit A; TR 14-15; 16-19; TR 21-25) To reform his life he moved to a new city for his job in December 2005 and away from his previous friends with whom he used drugs. He is paying \$250 per month to be in the TASC program. In March 2007 he took a drug education seminar. (TR 25-27; 30-31; 32)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility which are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns. In deciding whether to grant or continue an individual's access to classified information, the mere presence or absence of any adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole in evaluating this case, I weighed these relevant Revised Adjudication Guidelines:

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant.³ 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 security clearance.

CONCLUSIONS

³Executive Order No. 10865 § 7.

Guideline J: Criminal Conduct

30. *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.

The government established security concerns under criminal conduct disqualifying conditions as detailed in ¶ 31.(a), *a single serious crime or multiple lesser offenses*. Applicant had four misdemeanor arrests from ages 18 to 24. The last arrest in November 2005 was for possession of marijuana and drug paraphernalia when he was 24 and is more serious. In December 2006, he checked with the local courts and found that there was a warrant for him as he had missed a court date. He went to court in March 2007 and was allowed to enter the TASC treatment program. If he completes the program, all charges will be dismissed.

With the government's case established, the burden shifted to Applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. It is possible to mitigate security concerns under this guideline: ¶ 32. Conditions that could mitigate security concerns include: ¶ 32.(a) *so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individuals reliability, trustworthiness, or good judgment*. While his earlier arrests can be mitigated under this test, the recent arrest in 2005 does not meet this test. To his credit, Applicant finally entered TASC and sought therapy in March 2007 to address the underlying issues that led to his drug use. Applicant has taken some steps on the path to successful rehabilitation but he has not completed the TASC program; so does not yet meet the test that his rehabilitation is successful under MC ¶ 32.(d) *there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*. No one yet can conclude with certainty that his misconduct is unlikely to recur. Thus, doubt does persist over his reliability, trustworthiness, or good judgment. While he reported a satisfactory employment record and has been promoted, doubts persist over his suitability to have access to classified information. Consequently, after looking at him as a whole person and considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 1.a, 1.b., and 1.c., but against Applicant on subparagraph 1.d. under SOR Paragraph 1.

Guideline E: Personal Conduct

15. *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.

The Government provided substantial evidence that Applicant's personal conduct raised security concerns under disqualifying condition (DC) ¶ 16: he falsified his answers to two questions on the security questionnaire even though he certified that his answers were true. He failed to disclose his November 2005 drug-related arrest and his marijuana use that continued to November

2005.

With the government’s case established, the burden shifted to Applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. However, he admitted he put his self-interest first and intentionally falsified, so he provided no basis to mitigate.

Whole Person Analysis

Having considered both the record and Applicant in light of the “whole person” concept, I conclude he is an earnest person who has finally made progress by entering the TASC program, but he has not completed it. Even though he has reported a favorable employment history, he failed to be truthful on the security questionnaire which raises doubts as to his trustworthiness.

Thus, after weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has failed to mitigate the security concerns pertaining to personal conduct considerations. I rule against Applicant on subparagraphs 2.a. and 2.b. under SOR Paragraph 2.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline J:	AGAINST APPLICANT
Subparagraph 1.a.:	For Applicant
Subparagraph 1.b.:	For Applicant
Subparagraph 1.c.:	For Applicant
Subparagraph 1.d.:	Against Applicant
Paragraph 2. Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Subparagraph 2.b.:	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 the Applicant. Clearance is denied.

Kathryn Moen Braeman
Administrative Judge