

KEYWORD: Personal Conduct

DIGEST: Applicant was arrested in 1995 for a drug related offense and in 1997 for assault. He regularly purchased and used marijuana from 1991 until 1997. He also purchased methamphetamines in 1996 and 1997. He intentionally omitted his arrests or purchases of illegal drugs and his use of marijuana when he completed his security clearance application. He has not mitigated the government's concerns under Guideline E. Clearance is denied.

CASE NO: 03-18001.h1

DATE: 01/31/2006

DATE: January 31, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-18001

**DECISION OF ADMINISTRATIVE JUDGE**

**MARY E. HENRY**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esq, Department Counsel

## **FOR APPLICANT**

Michael L. Walker, Esq.

### **SYNOPSIS**

Applicant was arrested in 1995 for a drug related offense and in 1997 for assault. He regularly purchased and used marijuana from 1991 until 1997. He also purchased methamphetamines in 1996 and 1997. He intentionally omitted his arrests or purchases of illegal drugs and his use of marijuana when he completed his security clearance application. He has not mitigated the government's concerns under Guideline E. Clearance is denied.

### **STATEMENT OF THE CASE**

On July 6, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Specifically, the SOR set forth security concerns arising under Guideline E, Personal Conduct. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. On September 15, 2005, Applicant submitted a notarized response to the allegations and requested a hearing.

This matter was assigned to me on November 21, 2005. A notice of hearing was issued on November 22, 2005, and a hearing was held on December 14, 2005. Six government exhibits and four Applicant Exhibits were admitted into evidence. Applicant testified. The hearing transcript (Tr.) was received on January 11, 2006.

At the hearing, the government moved to amend the SOR to correct allegation 1.d. at line 7, and Applicant, through

counsel, objected to the government's motion.<sup>(1)</sup> The Motion to Amend the SOR was granted.<sup>(2)</sup> Allegation 1.d., line 7, of the SOR was amended from "...knew and sought to conceal you used..." to "...knew and sought to conceal you purchased...". Applicant was permitted to respond to the change and amend his response to the SOR during his testimony.<sup>(3)</sup>

## FINDINGS OF FACT

Applicant denied that he intentionally falsified his answers in his security application as alleged in subparagraphs 1.a. through 1.d. of the SOR.<sup>(4)</sup> After a complete review of the evidence in the record and upon due consideration, I make the following findings of fact:

Applicant is a 32-year-old senior network maintenance technician for a defense contractor.<sup>(5)</sup> He has worked for this contractor for over five years.<sup>(6)</sup> He completed a security clearance application (SF 86) in December 2001.<sup>(7)</sup>

In 1995, following a traffic stop, the police arrested Applicant for possession of marijuana, violation of probation, and driving with a suspended license.<sup>(8)</sup> The sheriff released him from jail three weeks later.<sup>(9)</sup> On December 15, 1997, he slapped his sister in her face.<sup>(10)</sup> She ran to her room and locked the door.<sup>(11)</sup> She called their mother who told her to call 911.<sup>(12)</sup> The police arrested and charged him with assault/domestic violence.<sup>(13)</sup> He spent one night in jail.<sup>(14)</sup>

While a high school student, Applicant began smoking marijuana in social settings in 1991.<sup>(15)</sup> He continued to use it into 1997.<sup>(16)</sup> In 1996, he began using methamphetamines.<sup>(17)</sup> He used this drug up to ten times a year through 1997.<sup>(19)</sup> In July 1997, he began a substance abuse treatment program.<sup>(20)</sup> He continued with this program until March 1999.<sup>(21)</sup> He has not used drugs since 1997 nor has he been arrested since 1997.<sup>(22)</sup>

Applicant answered "no" to the following questions on the SOR:

Question 26. Your Police Record - Other Offenses

In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) 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.

#### Question 29. Your Use of Illegal Drugs and Drug Activity - Drug Activity

In the last 7 years, have you been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis for you own intended profit or that of another?

While he answered yes to the Question 27 inquiry about his illegal drug use in the past 7 years, he failed to list his use of marijuana from 1991 to 1997.

Applicant stated that he did not fill out his security clearance application.<sup>(23)</sup> Rather, his mother did because she had completed these types of applications in the past, had more time than he to work on the application, and he trusted her.<sup>(24)</sup> He discussed some dates regarding his counseling with her, but not any other dates.<sup>(25)</sup> He did not carefully review the application after his mother prepared it.<sup>(26)</sup> He did sign it, verifying the accuracy of the information contained in the application.<sup>(27)</sup>

The security clearance investigator told Applicant about the discrepancies in his application during their first contact. After meeting with the investigator, Applicant signed a written statement on July 16, 2003.<sup>(28)</sup> He acknowledged that he had not been truthful in filling out the security clearance application.<sup>(29)</sup> He also agreed that his statement contains no reference to his mother filling out his security clearance application, and that by signing it, he verified that it was true, complete, and correct.<sup>(30)</sup> In his response to the SOR, he stated that the inaccuracies resulted from his lack of recollection of dates and specific facts on the events, and his belief his arrests were beyond the seven year time limit.<sup>(31)</sup> Again, he did not opine his mother filled out his security clearance application.<sup>(32)</sup>

Applicant is single.<sup>(33)</sup> He has two children, an eight-year-old daughter and thirteen-year-old son.<sup>(34)</sup> He has significantly improved his relationship with his sister since the incident in 1997, and now often helps her with caring for her three children.<sup>(35)</sup> He attends church and volunteers with a youth sports program.<sup>(36)</sup> His project manager describes

him as a valuable asset to the company.<sup>(37)</sup> A co-worker in the youth sports program also describes him as responsible, hard working, and dependable.<sup>(38)</sup>

## POLICIES

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. In addition, each security clearance decision must be 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, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. 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.

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.<sup>(39)</sup> The government has the burden of proving controverted facts.<sup>(40)</sup> The burden of proof is something less than a preponderance of the evidence.<sup>(41)</sup> Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>(42)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(43)</sup>

No one has a right to a security clearance<sup>(44)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(45)</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>(46)</sup> 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.<sup>(47)</sup> 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

**Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulation could indicate that the person may not properly safeguard classified information.**

### CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

The Applicant has controverted the government's allegation of falsification under Guideline E, subparagraph 1.a. through 1.d. of the SOR. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omissions occurred. [\(48\)](#)

The government has established its case under Guideline E. Personal Conduct Disqualifying Conditions (PC DC) E2.A5.1.2.2. (*The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire...*) applies. Applicant failed to acknowledge his arrests in 1995 and 1997, his long-term use of marijuana, and his purchases of methamphetamines and marijuana on his security clearance application, facts which are relevant and material to a determination of his security worthiness. He knew that he spent three weeks in jail in 1995, and one night in jail in 1997 after being charged with assault for hitting his sister. He also knew he smoked marijuana for a number of years, and to do so, he purchased it. Likewise, he knew that as a user, he had purchased methamphetamines.

I have considered Personal Conduct mitigating Conditions (PC MC) and conclude that none apply. Applicant had two opportunities to advise that his mother had completed his security clearance application and that he had not reviewed it carefully: when met with the investigator, and when he submitted his answer to the SOR. He did not. At the hearing and for the first time, he stated that his mother completed his security clearance application, and that he did not review it

carefully. I do not find his testimony credible as it is inconsistent with his prior sworn statements. Based on my observations at the hearing, I find his attempts to shift the errors concerning his deliberate omission of past unfavorable conduct to his mother troublesome and lacking in credibility. He has simply manufactured another explanation to try and explain his conduct. Applicant has not mitigated the government's security concerns under Guideline E.

Finally, I have considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. Applicant's decision to quit using drugs and to successfully complete substance abuse counseling weighs in his favor. As a result of this decision, he has changed his life in a positive manner, another favorable factor. These factors, however, do not outweigh his acknowledged failure to accurately answer the unfavorable questions in his security clearance application about known arrests and drug use. A security clearance requires a high level of trust and confidence, which has not been demonstrated in this case. I am not persuaded by the totality of the evidence that Applicant should be granted a security clearance. Accordingly, for the reasons stated, I find that it is not clearly consistent with the national interest to grant a security 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 2, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant a security clearance for Applicant. Clearance is denied.

Mary E. Henry

Administrative Judge

1. Tr. at 11-13.

2. *Id.* at 13.

3. *Id.* at 14.

4. Applicant's Response to SOR, dated September 15, 2005 at 1-4.

5. Government Exhibit 1 (Applicant's Security Clearance Application, dated April 18, 2001) at 1.

6. *Id.* at 2.

7. *Id.* at 1.

8. Government Exhibit 2 (Applicant's signed statement, dated July 16, 2003) at 3; Government Exhibit 5 (Police Report, dated June 7, 1995) at 1; Tr. at 47.

9. *Id.*

10. Government Exhibit 4 (Police report, dated December 16, 1997) at 7.

11. *Id.*

12. *Id.*

13. *Id.* at 1-2; Government Exhibit 2, *supra* note 8, at 3.

14. Government Exhibit 4, *supra* note 10, at 2.

15. Tr. at 18; Government Exhibit 2, *supra* note 8, at 2.

16. *Id.*

17. Tr. at 45; [\(18\)](#)

18. Tr. at 18; Government Exhibit 2, *supra* note 8, at 2.

19. *Id.*

20. Government Exhibit 2, *supra* note 8, at 3.

21. *Id.*; Tr. at 49.



22. Tr. at 22; Government Exhibit 2, *supra* note 8, at 2.

23. Tr. at 18-19.

24. *Id.*; Applicant Exhibit D (Affidavit of his mother, dated December 13, 2005); Applicant Exhibit C (Affidavit of his sister, dated December 13, 2005).

25. Tr. at 19.

26. *Id.* at 32.

27. *Id.* at 31.

28. Government Exhibit 2, *supra* note 8, at 2.

29. *Id.*

30. *Id.* at 4; Tr. at 32-33.

31. *Supra* note 4.

32. *Id.*

33. Tr. at 31; Government Exhibit 1, *supra* note 5, at 3.

34. Tr. at 31; Government Exhibit 1, *supra* note 5, at 4.

35. Tr. at 28-29; Applicant Exhibit C, *supra* note 23.

36. Tr. at 22-23.

37. Applicant Exhibit A (Letter from project manager, dated December 12, 2005).

38. Applicant Exhibit B (Letter dated, December 13, 2005).

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

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

41. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

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

43. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.

44. *Egan*, 484 U.S. at 531.

45. *Id.*

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

47. Executive Order No. 10865 § 7.

48. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun.9, 2004)).

