

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant is 26 years old and has worked as a facilities operations assistant for a federal contractor since November 2004. As a juvenile and young adult he was involved in a gang. He was charged with aggravated assault with a deadly weapon and was on probation for five years. He had other minor criminal offenses and traffic violations checkered throughout his youth. He has changed his behavior and is committed to leading a law abiding life and has proved he can do so. He divulged his serious offense on his security clearance application, but was confused in answering some other questions. I find Applicant has successfully mitigated security concerns raised under Guidelines E, personal conduct, and Guideline J, criminal conduct. Clearance is granted.

CASENO: 06-22272.h1

DATE: 05/21/2007

DATE: May 21, 2007

In re:)	
)	
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SSN: -----)	ISCR Case No. 06-22272
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
CAROL G. RICCIARDELLO**

APPEARANCES

FOR GOVERNMENT

John B. Glendon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 26 years old and has worked as a facilities operations assistant for a federal contractor since November 2004. As a juvenile and young adult he was involved in a gang. He was charged with aggravated assault with a deadly weapon and was on probation for five years. He had other minor criminal offenses and traffic violations checkered throughout his youth. He has changed his behavior and is committed to leading a law abiding life and has proved he can do so. He divulged his serious offense on his security clearance application, but was confused in answering some other questions. I find Applicant has successfully mitigated security concerns raised under Guidelines E, personal conduct, and Guideline J, criminal conduct. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on December 28, 2006, detailing the basis for its decision—security concerns raised under Guideline E (personal conduct) and Guideline J (criminal conduct) of the revised Adjudicative Guidelines issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR in writing on February 20, 2007, and elected to have a hearing before an administrative judge. The case was assigned to me on March 13, 2007. With the consent of the parties, I convened a hearing on April 19, 2007, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government offered three exhibits that were marked as GE 1-3 and admitted without objections. Applicant testified on his own behalf and had no exhibits. DOHA received the hearing transcript (Tr.) on April 30, 2007.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 26 years old and has worked as a facilities operations assistant for a federal contractor since November 2004. He graduated from high school in 2000. He is married and has a four-year-old child.

Applicant was a member of a gang from 1998 to 2000. Gang membership was based on geography and what neighborhood you lived in. He was involved in drawing graffiti, but backed away when any fighting ensued.¹ The gang was not involved in any other illegal activities.

Applicant was arrested on June 23, 1998, and charged with possession of marijuana. He was sitting in a car with three friends. The marijuana was in between the driver's seat and passenger's

¹Tr. 61.

seat. Applicant was sitting in the back seat. He stated it was not his marijuana, in that he did not purchase it, but took responsibility for it and was arrested.² He was placed on probation.

On September 17, 1999, Applicant received a citation for being in possession of alcohol as a minor. He was attending a party and the police arrived. Many of the other attendees also received citations.³ He paid the fine.

Applicant and a student from his school were involved in a fight at school. The day before the fight Applicant was accosted by the student and his adult brother. The older brother reached into a car that Applicant was sitting in and hit him.⁴ Applicant and the driver of the car drove away. The next day at school Applicant and the other student went into the restroom. Applicant stated the other student took a swing at him first so Applicant punched him in the jaw with his fist.⁵ No other persons were involved in the fight or witnessed it, and no weapon was used. Applicant broke the student's jaw.⁶ He was arrested on October 14, 1999, and charged with aggravated assault with a deadly weapon. Applicant credibly testified that he did not use a weapon and only used his fist.⁷ At court he received deferred adjudication and was sentenced to five years probation, 240 hours of community service, a \$20,000 fine, and was required to pay restitution for medical costs of \$7,536.⁸ Applicant had been serving probation from his previous arrest in June 1998. That charge was dismissed as part of the plea bargain on the assault charge.⁹ Applicant completed paying the \$20,000 and restitution in February 2005.¹⁰ He worked to pay the fines.¹¹ He was expelled from school for the offense and attended an alternative high school. He completed high school and graduated.

While on probation for the assault charge, Applicant was charged with being in possession of alcohol as a minor on July 29, 2000. On July 7, 2001, Applicant was charged with three minor traffic offenses and having "alcohol detectable," again while on probation.¹² He was ordered into custody at an Intermediate Sanction Facility, where he stayed for two months. Because there was a

²Tr. 43-46.

³Tr. 49-50.

⁴Tr. 55

⁵Tr. 56-59.

⁶Tr. 63.

⁷Tr. 66.

⁸Tr. 64.

⁹Tr. 47-48, 63.

¹⁰Tr. 72.

¹¹Tr. 65.

¹²Tr. 75.

waiting list he did not go into custody until February 2003, and remained there until April 2003.¹³ Applicant had been working at a motorcycle shop from September 2001 to January 2003. He had to leave his job to be confined.¹⁴

From approximately November 2000 to March 2005, Applicant was charged or cited nine times for traffic violations, including speeding, failure to yield right of way, failing to wear a seat belt, and failure to maintain financial responsibility (i.e. no insurance). He received fines, some over \$150, and paid them. He presently maintains insurance on his car.

When filling out his security clearance application (SCA), Applicant failed to list his traffic violations that had fines over \$150, as was required.¹⁵ He did list his aggravated assault charge, but also failed to list the possession of marijuana and being in possession of alcohol as a minor, as was also required.¹⁶ Applicant credibly testified that he forgot about the other charges and with regard to the tickets, he did not remember how much the fines were for, so did not include them. He explained he did not know what to put down and was unaware that he could list the tickets and explain he did not know how much the fines were.¹⁷ I find Applicant's testimony to be truthful and that he did not intentionally attempt to hide adverse information about his past. He credibly testified about his past and was candid and forthcoming with information. It was obvious from his testimony that he is unfamiliar with filling out forms and had trouble understanding the questions. I believe Applicant made an unintentional error when he failed to provide the correct information and was not trying to be deceptive.

Applicant no longer is part of a gang and no longer associates with its members. Like him, many of the members now have wives and families and have moved on in their lives. Applicant is sorry for his past, but accepts the fact that he can not change it, but must move forward to make a life for his wife and son. The Facilities Security Officer (FSO), a retired Marine, and a former special agent with the Naval Criminal Investigative Service as a criminal investigator, before assuming his current duties, testified on Applicant's behalf. Not one easily swayed, he truly believes Applicant has turned his life around and is now a productive member of society and an outstanding worker and asset to the company. He knows Applicant is a sought after employee because of his work ethic, enthusiasm, and dedication. He also believes he has great potential. Applicant willingly volunteers to take on new duties and is trusted by the FSO and his supervisors. The FSO is aware of Applicant's background and difficulties, but believes he has learned his lesson and has demonstrated a willingness to step up and take responsibility for his actions. He believes most of Applicant's problems were due to his difficult youth and he has now moved on. I find Applicant was extremely credible in acknowledging his mistakes, not blaming others and taking responsibility. He never

¹³Tr. 80.

¹⁴Tr. 75.

¹⁵Question 26 asks the Applicant if there are any other offenses, in the last seven years, that he has not already listed and he is to include traffic offenses, if the fine is over \$150.

¹⁶Question 24 asks the Applicant if he has ever been charged with or convicted of any offenses related to drugs or alcohol.

¹⁷Tr. 85-88.

attempted to minimize his actions. He acknowledged his past and worked hard to overcome it. His FSO believes Applicant to be trustworthy and possesses the integrity to hold a security clearance.

Applicant has three younger brothers and he has tried to set an example and steer them from making the same mistakes that he did in the past.¹⁸ Applicant has goals for the future and hopes to improve and move up in the company. He understands that he must abide by and follow all the laws and regulations, including traffic rules. He acknowledges he has wasted a great deal of money on tickets, that could be better spent on his son. He is committed to leading a conscientious law abiding lifestyle.

POLICIES

“[N]o one has a ‘right’ to a security clearance.”¹⁹ As Commander in Chief, the President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information.”²⁰ The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”²¹ An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”²² “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²³ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.²⁴ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.²⁵ 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.²⁶

The revised Adjudicative Guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3

¹⁸Tr. 91-92.

¹⁹*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

²⁰*Id.* at 527.

²¹Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960).

²²ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

²³*Id.*

²⁴*Id.*; Directive, Enclosure 2, ¶ E2.2.2.

²⁵Executive Order 10865 § 7.

²⁶*See* Exec. Or. 10865 § 7.

of the Directive to be considered in evaluating a person's eligibility to hold a security clearance. Additionally, each security clearance decision must be a fair and impartial commonsense decision 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 and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the revised adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guidelines are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Based upon consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

Guideline E-Personal Conduct is a concern because conduct involving questionable judgment, lack of candor, dishonest, 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.

Guideline J-Criminal Conduct is a security concern because 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.

Based on all the evidence, Personal Conduct Disqualifying Condition (PC DC) 16(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*), PC DC 16(d) (*credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, . . .unwillingness to comply with rules and regulations. This includes but is not limited to consideration of: . . .(3) a pattern of dishonesty or rule violations*), PC DC 16(e) (*personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1)engaging in activities which, if known, may affect the person's personal ,professional ,or community standing. . .*), and 16(g) (*association with persons involved in criminal activity.*)

Based on all of the evidence, including considering Applicant's demeanor, attitude, and candor, I find he did not intentionally falsify his SCA. Applicant was clearly confused about what he could write down on his SCA. He admitted to the most serious and aggravating charge. I do not believe Applicant deliberately failed to list his traffic violations and minor offenses. He was clearly focused on the offense that was most serious. I find Applicant did not intentionally and deliberately lie on his security clearance application, and therefore I find he did not violate Title 18 U.S.C. § 1001.

I have also considered all of the evidence when analyzing Applicant's long history of traffic violations and his gang activity. He failed to follow the traffic laws starting in 2000 and his most recent violation was in 2005. Applicant admitted his gang activity lasted from approximately 1998 to 2000. I find PC DC 16(d), (d) and (g) apply because Applicant's conduct represents a pattern of rule violations. His gang activity shows his involvement with persons involved in criminal activity and his past personal conduct creates a vulnerability to exploitation, manipulation or duress.

I have considered all of the Personal Conduct Mitigating Conditions (PC MC) and especially considered PC MC 17 (d) (*the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur*), PC MC 17(e) (*the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation or duress*), and PC MC (g) (*association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with the rules and regulations.*). Applicant's conduct as a gang member happened almost seven years ago. He no longer associates with the gang or its members. His gang activity is part of his youth and he is working hard to show he has become a productive member of society. Regarding his traffic violations, Applicant is fully aware of the gravity of having so many offenses. He admitted that these violations have cost him a great deal of money in fines which could be better spent on his family. He has not had a ticket since 2005, and was credible in his testimony that he intends on complying with all the rules and regulations of the road. It has been more than two years since his last traffic violation. Applicant has awakened to the reality that he is an adult and must comply with the rules of society if he wants to succeed. He provided sufficient evidence to show he is working hard to succeed and can be trusted. I find PC MC 17 (d), (e) and (g) apply.

Based on all the evidence, Criminal Conduct Disqualifying Condition (CC DC) 31(a) (*a single serious crime or multiple lesser offenses*) and 31(b) (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*), apply. Applicant was charged with aggravated assault with a deadly weapon in 1999. He received deferred adjudication. Applicant also was arrested for being a minor in possession of alcohol (1999 and 2000) and possession of marijuana (1998). He was a member of a gang from 1998-2000, and admitted drawing graffiti.

I have considered all the mitigating conditions and especially considered Criminal Conduct Mitigating Condition (CC MC) 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 individual's reliability, trustworthiness, or good judgment*), and CC 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).

Applicant credibly testified that he belonged to a gang, drew graffiti, but that was the extent of his gang activity. He has not been part of a gang since 2000. He no longer associates with gang members, most of whom have moved on also. He committed other minor offenses of possessing marijuana and alcohol as a minor. They occurred in 1998, 1999 and 2000. The most serious criminal offense of aggravated assault with a deadly weapon occurred while Applicant was in high school. He denied using an actual weapon, but admitted he broke the victim's jaw. Applicant completed five years of probation and did a great deal of growing up during that time. He paid a \$20,000 fine and over \$7,000 in restitution. He served some time in a correctional facility because of his failure to comply with the terms of his probation. It was a true wake up call. It is apparent Applicant had a difficult youth. Except for the assault charge, most of the offenses were minor, but there were numerous offenses.

Applicant has not been in criminal trouble since 2000, excluding traffic offenses. He has a good job and is committed to abiding by the law. He has set goals at work and hopes to improve and have a long term career with his company. His reputation at the company is excellent. He understands the error of his ways and is trying hard to put his past behind him and work on his future. He gives his wife his pay check and is devoted to both her and their son. Applicant admittedly has made mistakes, acknowledges them, is remorseful, and now is working hard to be a productive member of society. He has warned his younger brothers about the mistakes he made, so they do not repeat them. He no longer associates with his old friends. He is committed to his family. Applicant's recent history reflects a changed man, a success story for putting his past behind him and working hard to achieve a better life. The offenses are not recent and enough time has passed that Applicant has proven himself that he has changed his behavior and it is unlikely that he will get in trouble again. He has proven over the past couple of years that he can be trusted and exercises good judgment. I find CC MC 32(a) and (d) apply.

Whole Person Analysis

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I considered the whole person in evaluating the case. I considered Applicant's credibility, demeanor and responsiveness when testifying. Applicant is maturing as a responsible career oriented young man. He has hopes and goals and wants to achieve them and is willing to work hard to do so. He must live with his checkered past and can not avoid it, but he has made significant progress by being a responsible and trustworthy employee. Based on my analysis above and my opportunity to judge Applicant's demeanor, credibility, sincerity and commitment to living within the rules of society, I am convinced he is a changed man and is deserving of a security clearance. Therefore,

based on the totality of the evidence, I find Applicant has successfully mitigated the security concerns under Guideline E, personal conduct, and Guideline J, criminal conduct.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline E: FOR APPLICANT

Subparagraph 1.a-1.i: For Applicant

Paragraph 2. Guideline J: FOR APPLICANT

Subparagraph 2.a-2.f: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Carol G. Ricciardello
Administrative Judge