

KEYWORD: Personal Conduct; Financial; Criminal Conduct

DIGEST: Applicant is a 42-year-old employee of a defense contractor. Applicant was in an automobile collision in 2000, which resulted in the death of the driver of another car. He was convicted of negligent manslaughter, and served more than a year in jail. When Applicant went to jail, he was unable to pay his debts. Applicant has not mitigated the financial considerations and criminal conduct security concerns. Additionally, under 10 U.S.C. § 986(c)(1), the Department of Defense may not grant or continue a security clearance to one who was convicted of a crime, sentenced to more than one year in jail, and actually served at least one year of incarceration. Clearance is denied.

CASENO: 06-23180.h1

DATE: 05/03/2007

DATE: May 3, 2007

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In re:)	
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-----)	ISCR Case No. 06-23180
SSN: -----)	
)	
Applicant for Security Clearance)	
_____)	

**DECISION OF ADMINISTRATIVE JUDGE
EDWARD W. LOUGHRAN**

APPEARANCES

FOR GOVERNMENT
Francisco Mendez, Esq., Department Counsel

FOR APPLICANT
Pro Se

SYNOPSIS

Applicant is a 42-year-old employee of a defense contractor. Applicant was in an automobile collision in 2000, which resulted in the death of the driver of another car. He was convicted of negligent manslaughter, and served more than a year in jail. When Applicant went to jail, he was unable to pay his debts. Applicant has not mitigated the financial considerations and criminal conduct security concerns. Additionally, under 10 U.S.C. § 986(c)(1), the Department of Defense may not grant or continue a security clearance to one who was convicted of a crime, sentenced to more than one year in jail, and actually served at least one year of incarceration. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On December 29, 2006, DOHA issued a Statement of Reasons¹ (SOR) detailing the basis for its decision—security concerns raised under Guideline E (Personal Conduct), Guideline F (Financial Considerations), and Guideline J (Criminal Conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense for SORs issued after September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR in writing on February 1, 2007, and elected to have a hearing before an administrative judge. The case was assigned to me on March 2, 2007. A notice of hearing was issued on March 12, 2007, scheduling the hearing for April 5, 2007. The hearing was conducted as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on April 13, 2007.

RULINGS ON EVIDENCE

The Government offered three exhibits that were marked as Government Exhibits (GE) 1 through 3. The list of exhibits was marked Hearing Exhibit (HE) I. There was no objection to GE 1, and it was admitted. GE 2 and 3 are reports of investigation (ROI), conducted for Applicant's background investigation. Applicant was advised of his right under ¶ E3.1.20 of the Directive to object to their admission. Applicant did not object to their admission. Absent an objection, GE 2 and 3 were admitted. Applicant testified and called a witness, but did not submit any documentary evidence. The record was left open to allow Applicant an opportunity to submit additional material. He did so in a timely manner. Applicant submitted documents via fax to both Department Counsel and me. The fax cover sheets were different, but the attached documents were identical. A check to Palisades Collections and attached statement is marked Applicant Exhibit (AE) A. The check to GMAC is AE B. The check to Campen & Walsworth is AE C. The fax cover sheet to me is AE D. The fax to Department Counsel with attached documents is AE E. The memo from Department Counsel forwarding the documents without objection is marked HE II. AE A through E are admitted.

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.

¹Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (Directive).

Applicant is a 42-year-old employee of a defense contractor. He has a diploma from a technical school as an electronics technician. Applicant has never been married and has no children.²

Applicant smoked marijuana approximately 120 times from about 1984 to 1998. He has not used any illegal drugs since then.³

In November 2000, Applicant was driving on a two-lane highway. He attempted to pass a car, but could not pull in between that car and the car in front of it. He then passed both cars at a high rate of speed. After he was back in his lane, a car from the oncoming traffic attempted to pass, and entered Applicant's lane. Applicant swerved to avoid hitting the oncoming car. Applicant was still speeding from his pass, approximately 90 miles per hour (MPH), in a 50-MPH zone. Because of his excessive speed, Applicant lost control of his car, and hit a different oncoming car. The driver of the oncoming car was killed in the collision. Drugs and alcohol were not a factor in the collision.⁴

Applicant was charged in state court with Count (1) negligent manslaughter; Count (2) reckless driving; Count (3) driving vehicle in excess of reasonable speed; Count (4) passing in a no passing zone; Count (5) failure to drive on right hand roadway; and Count (6) negligent driving. Applicant pled not guilty. After a jury trial, Applicant was found guilty of Counts (1), (2), (3), and (6). Counts (4) and (5) were dismissed. Counts (2), (3), and (6) were merged into Count (1) negligent manslaughter, for the purpose of sentencing. Applicant was sentenced on February 26, 2003, to five years in jail, with three years and six months suspended, 250 hours community service, and \$168 court costs.⁵

Applicant served his sentence in jail from February 28, 2003 to March 25, 2004. He was released early for good behavior. Applicant completed his community service within six months of his release from jail. He remains on probation for about another two years. Applicant has complied with all the terms of his probation. Applicant has not driven a car since he was released from jail. He is in the process of attempting to obtain a driver's license.⁶

Prior to reporting to jail, Applicant had a car and an auto loan for that car. He notified the auto finance company that he would not continue making payments on the car, because of his impending imprisonment. The car was repossessed in about February 2003. A balance remained after the car was sold at auction. Applicant has been in contact with the finance company, and made payment arrangements of \$100 per month. He made a payment of \$100 on March 27, 2007. His balance is approximately \$7,500.⁷

²Tr. at 20, 32; GE 1 at 2.

³Tr. at 29-32; Applicant's response to SOR.

⁴Tr. at 23-25, 33; Applicant's response to SOR; GE 2 at 1.

⁵Tr. at 23-25; Applicant's response to SOR; GE 3.

⁶Tr. at 18, 21; Applicant's response to SOR; GE 2 at 2.

⁷Tr. at 26-27; Applicant's response to SOR; GE 2 at 3; AE B.

When Applicant went to jail, he stopped paying a credit card, which had an outstanding balance of \$11,169. Applicant began making payments of \$200 in August 2006. His most recent payments were \$200, received by the collection agency on January 31, 2007, and \$200, sent by Applicant on March 28, 2007. His balance before the most recent payment was \$9,769.⁸

After he was released from jail, Applicant retained the services of an attorney to facilitate the disposal of a handgun. The attorney billed Applicant \$700. Applicant thought the bill was too high and only paid part of the bill. Applicant paid the balance of \$323 on March 1, 2007.⁹

Applicant is well regarded by his employer. His supervisor, who is also the facility security officer (FSO), testified that Applicant is loyal, responsible, trustworthy, and a definite asset to their team.¹⁰

POLICIES

“[N]o one has a ‘right’ to a security clearance.”¹¹ 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.”¹² 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.”¹³ An applicant has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance. The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.¹⁴ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.¹⁵ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. 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.¹⁶

⁸Tr. at 27; Applicant’s response to SOR; GE 2 at 3; AE C.

⁹Tr. at 27; Applicant’s response to SOR; GE 2 at 3.

¹⁰Tr. at 35-38.

¹¹*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

¹²*Id.* at 527.

¹³Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960).

¹⁴ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

¹⁵*Id.*; Directive, ¶ E2.2.2.

¹⁶Exec. Or. 10865 § 7.

The revised Adjudicative Guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. 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 adjudicative process factors listed in the Directive and AG ¶ 2(a).

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

Guideline E, Personal Conduct

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.

There are two potential Personal Conduct Disqualifying Conditions (PC DC) in this case, PC DC 16(c) (*credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information*) and 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 . . .*).

Applicant's use of marijuana from 1984 through 1998, could also have been considered under Guideline H (Drug Involvement). The Government presumably felt it was mitigated under that Guideline and therefore not alleged. Drug abuse is against the law and can also reflect questionable judgment, untrustworthiness, and unwillingness to comply with rules and regulations.¹⁷ Applicant's drug abuse supports the application of PC DC 16(c). His marijuana use created a vulnerability to exploitation, manipulation, or duress. PC DC 16(e) is applicable based upon Applicant's drug abuse. I do not find PC DC 16(e) applicable to Applicant's failure to pay his financial obligations. Applicant's financial issues are discussed further under Guideline F. If the financial issues are sufficient for an adverse finding under Guideline F, then the financial issues would not trigger PC DC 16(c).

¹⁷ISCR Case No. 04-12556 at 2 (App. Bd. Apr. 27, 2007).

I have considered all the Personal Conduct Mitigating Conditions (PC MC), and I especially considered PC MC 17(c) (*the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*), 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*), and PC MC 17(e) (*the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*).

Applicant has not used any illegal drugs since 1998. PC MC 17(c), PC MC 17(d), and PC MC 17(e) all apply to Applicant's drug abuse. The drug abuse and financial delinquencies will be further considered in the "whole person" discussion.

Guideline F, Financial Considerations

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Based on all the evidence, Financial Considerations Disqualifying Condition (FC DC) 19(a) (*inability or unwillingness to satisfy debts*) and FC DC 19(c) (*a history of not meeting financial obligations*) apply in this case. Applicant accumulated substantial delinquent debt after he went to jail.

I have considered all the Financial Considerations Mitigating Conditions (FC MC), and especially considered FC MC 20(a) (*the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*), FC MC 20(b) (*the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances*), FC MC 20(c) (*the person received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control*), and FC MC 20(d) (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*).

The credit card debt and the debt resulting from the repossession of Applicant's car were directly related to his serving time in jail. Applicant remains on probation for his crime. Most of the money owed on those two debts has not been paid. The debt to the attorney occurred after Applicant was released from jail. It has now been paid in full. Applicant did not prove that the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on his current reliability, trustworthiness, or good judgment. FC MC 20(a) does not apply. Applicant's incarceration for negligent manslaughter does not constitute a condition that was largely beyond Applicant's control. FC MC 20(b) does not apply.

Applicant paid the attorney's fees. He started making \$200 payments on the credit card debt. He stated he was paying \$200 per month since August 2006. His documents reveal a \$200 payment received on January 31, 2007, and another \$200 payment sent on March 28, 2007. Applicant did not submit documentation of other payments. I see no evidence of a February 2007 payment. While it appears that previous payments were made on this debt since the amount owed in the March 2007 statement is \$1,400 less than the amount in the SOR, I cannot tell from the evidence with what regularity the payments were made. Applicant made one payment of \$100 for the deficiency on his repossessed car. Applicant is currently employed and there is no evidence of new delinquent debts. Applicant has started paying his delinquent debts, but he has not established a sufficient history of financial responsibility for me to find a clear indication that the problem is being resolved, under control, or that he has made a good-faith effort to repay overdue creditors or otherwise resolve debts. FC MC 20(c) and FC MC 20(d) do not apply.

Guideline J, Criminal Conduct

Criminal activity creates doubt about an applicant'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.

Applicant's conviction for negligent manslaughter establishes Criminal Conduct Disqualifying Condition (CC DC) 31(a) (*a single serious crime or multiple lesser offenses*) and CC DC 31(c) (*allegation or admissions of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*). Applicant is still on probation as a result of that conviction. CC DC 31(d) (*individual is currently on parole or probation*) also applies.

I have considered all the mitigating conditions as they relate to CC DC 31(a) and CC DC 31(c), 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*).

The criminal activity that resulted in Applicant's conviction occurred in November 2000, more than six years ago. There is no record of any criminal activity since that time. Applicant was released from jail on good behavior. He has complied with all the requirements of his probation, and has a good employment record since his release. However, the crime was very serious, and resulted in the loss of an innocent person's life. Applicant remains on probation for his crime. I am unable to totally apply either CC DC 31(a) or CC DC 31(c).

This case also falls under CC DC 31(f) (*conviction in a Federal or State court, including a court-martial, of a crime, sentenced to imprisonment for a term exceeding one year and incarceration as a result of that sentence for not less than a year*), which implements 10 U.S.C. § 986. Under 10 U.S.C. § 986(c)(1), the Department of Defense is prohibited from granting a security clearance to any applicant who was convicted of an offense in a U.S. court, was sentenced to more than one year in jail, and was incarcerated as a result of that conviction for at least one year.

Applicant was convicted and sentenced to five years in jail, with three years and six months suspended. He served his sentence in jail from February 28, 2003 to March 25, 2004. Applicant was therefore sentenced to more than one year in jail, and incarcerated as a result of that conviction for more than one year. CC DC 31(f) and 10 U.S.C. § 986 are both applicable.

The statute also provides that an exception to the prohibition may be authorized in a meritorious case if there are mitigating factors. The waiver provision of the statute is implemented in CC MC 32(e) (*potentially disqualifying conditions (b) and (f) above, may not be mitigated unless, where meritorious circumstances exist, the Secretaries of the Military Departments or designee, or the Directors of Washington Headquarters Services (WHS), Defense Intelligence Agency (DIA), National Security Agency (NSA), and Defense Office of Hearings and Appeals (DOHA) or designee, has granted a waiver*). Applicant cannot be granted a clearance under the provisions of 10 U.S.C. § 986(c)(1), unless he is granted a waiver.

Whole Person Analysis

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating Applicant's case, I have considered the adjudicative process factors listed in the Directive and AG ¶ 2(a). I have also considered every finding of fact and conclusion discussed above.

Applicant used illegal drugs from 1984 to 1998. He committed negligent homicide in November 2000, resulting in his incarceration for more than a year. Because of his incarceration, he was unable to pay a credit card debt and his car was repossessed, which resulted in a deficiency owed on the loan. He was released from jail in March 2004, but only recently began paying his delinquent debts. He is still on probation for his crime. He has complied with all the terms of his probation, and there has been no subsequent criminal conduct. I also considered Applicant's favorable character evidence.

After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the personal conduct security concerns. He has not mitigated the security concerns based on the financial considerations and his criminal conduct. Additionally, Applicant is precluded from being granted access to classified information under CC DC 31(f) and 10 U.S.C. § 986(c)(1).

FORMAL FINDINGS

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

Paragraph 1. Guideline E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant

Paragraph 2. Guideline F: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: For Applicant

Paragraph 3. Guideline J: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: 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 or continue a security clearance for Applicant. Clearance is denied.

Edward W. Loughran
Administrative Judge