

KEYWORD: Personal Conduct; Financial; Criminal Conduct

DIGEST: Applicant was charged with criminal conduct four times, and convicted three times between 1983 and 2000. He also accrued about \$6,200 in delinquent debts between 1996 and 2000. Applicant deliberately omitted from his December 2000 security clearance application (SF 86) relevant information about his arrest record and his finances. He has failed to mitigate the resulting security concerns about his criminal conduct, personal conduct, and finances. Clearance is denied.

CASENO: 04-03041.h1

DATE: 01/30/2006

DATE: January 30, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-03041

**DECISION OF ADMINISTRATIVE JUDGE**

**MATTHEW E. MALONE**

**APPEARANCES**

**FOR GOVERNMENT**

Ray T. Blank, Esquire, Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant was charged with criminal conduct four times, and convicted three times between 1983 and 2000. He also accrued about \$6,200 in delinquent debts between 1996 and 2000. Applicant deliberately omitted from his December 2000 security clearance application (SF 86) relevant information about his arrest record and his finances. He has failed to mitigate the resulting security concerns about his criminal conduct, personal conduct, and finances. Clearance is denied.

### **STATEMENT OF THE CASE**

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>(1)</sup> it is clearly consistent with the national interest to give Applicant a security clearance. On April 26, 2004, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline E (personal conduct), Guideline F (financial considerations), and Guideline J (criminal conduct). Applicant timely answered the SOR, denied three of the allegations<sup>(2)</sup> therein, and requested a hearing.

Assignment and completion of this case was delayed due to a moratorium imposed on all cases involving potential application, discussed below, of 10 U.S.C. §986. The case was assigned to me on August 25, 2005, just after the moratorium was lifted, and I convened a hearing on October 18, 2005. The parties appeared as scheduled and Department Counsel presented 12 exhibits (GE 1 through 12), which were admitted without objection. Applicant testified in his own behalf, but submitted no documents. DOHA received the transcript (Tr) on November 3, 2005.

### **PROCEDURAL ISSUE**

SOR ¶ 1.b alleged application of 10 U.S.C. § 986 because of his conviction and sentence greater than one year. In relevant part, that statute bars, absent meritorious waiver, award or continuance of a clearance to an applicant who has been convicted of a crime and sentenced to serve more than one year in jail, even if no time was actually served. As

originally enacted in 2000, this statute (commonly known as the Smith Amendment, after its chief congressional sponsor) was applicable to the facts of this case when the SOR was issued in April 2004. However, as amended in late 2004, the statutory prohibition on granting security clearances to applicants who have been convicted in U.S. courts is now limited to those who are sentenced to and actually incarcerated for at least one year as a result of that conviction. 10 U.S.C. § 986(c)(1). Because the record evidence shows Applicant was not incarcerated for this conviction, I have not applied the Smith Amendment in this case, and I conclude SOR ¶ 1.b for the Applicant.

### **FINDINGS OF FACT**

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is a 41-year-old associate designer employed by a defense contractor to perform computer-aided design work at a U.S. Navy shipyard, where he has worked since August 2002. Between 1995 and 2002, he worked in various manual labor positions unrelated to defense contracting. Applicant also has two years of college studies to his credit.

Applicant is currently separated from his wife. However, their separation started in 1996 after three years of marriage, and no divorce has been finalized. Applicant's estranged wife still has access to his finances. When the couple separated, Applicant moved to a different state, where he still lives. Applicant initially lived with his sister after his move. After a few months, he moved in with his girlfriend, continued to receive mail at his sister's address. Applicant has lived at his current address since about 1999 or 2000.

In early 1983, when he was 18 years old, Applicant got into a fight and was arrested for assault with a dangerous weapon and destruction of property. He eventually pleaded guilty to possession of a prohibited weapon and was sent to a juvenile detention facility for 18 months. [\(3\)](#)

Around August 1992, Applicant was involved in another altercation. After being arrested and charged with assault with intent to maim, the charge was placed on a stet docket, thus holding prosecution in abeyance for at least one year on condition of Applicant's good conduct.

After Applicant and his wife separated in 1996, he kept a car they had owned. Sometime thereafter, he let his estranged wife borrow the car but she did not return it. He repeatedly called his wife and her mother trying to get the car back. His mother-in-law complained to the police and Applicant was charged with telephone misuse. In November 1996,

Applicant pled guilty to this charge and was sentenced to 18 months in jail, which was suspended. He was also fined and placed on probation for 18 months. The following month, Applicant moved looking for a fresh start.

In November 2000, Applicant was stopped for speeding on a military installation near his home. He was cited for excessive speed and for driving on a suspended license. When he was pulled over, knowing his license had been suspended, Applicant gave the officer an old learner's permit instead of his regular driver's license. He was later convicted of the suspended license charge and assessed a fine and court costs.

When they separated in 1996, Applicant and his wife defaulted on a car loan and executed a voluntary repossession. Applicant's estranged wife soon filed bankruptcy and the car finance company looked to Applicant to repay a \$4,970 remainder after re-sale. A subsequent judgment against Applicant is being enforced through garnishment of Applicant's pay, an action started in 2004.

While working as a mover before hiring on with his current employer, Applicant injured his hand and required emergency room and follow-up medical care. He has not paid the balance of costs not covered by his insurance. Likewise, a foot injury and an emergency room visit for headaches resulted in similar debts for unpaid medical bills. Applicant owes a total of about \$1,275 in delinquent medical debts in place since at least 1997. One debt for \$569 was the subject of a judgment entered against Applicant in January 2000. Applicant testified he has a plan to pay his creditors about \$10 to \$15 each month. He started this plan the same month as his hearing.

Applicant submitted a SF 86 in December 2002. In response to question 26, which seeks information about arrests, charges, or convictions in the preceding seven years, Applicant omitted his 1996 conviction for telephone misuse. When interviewed on October 6, 2003, by a Defense Security Service (DSS) agent about his arrest record and his finances, Applicant stated he did not disclose the arrest as he should have because he was concerned about possibly losing his clearance and his job. In response to question 37, which seeks information about any unpaid judgments, Applicant did not disclose the aforementioned unpaid judgments for a delinquent medical bill and for the defaulted car loan. He claims he never received notice of the two lawsuits despite receiving his other mail at his sisters house after he moved away from his wife.

In a February 2003 DSS interview, Applicant submitted a personal financial statement (PFS) which reflected he had \$185 left over each month after deductions and expenses. Calculations that produced this figure did not include any payments to the creditors discussed herein. Nor did they include Applicant's monthly child support payments for three children he fathered with women other than his estranged wife. In his February 2003 statement, Applicant stated he would either file bankruptcy or start to pay off his debts no later than July 2003. He did neither.

## POLICIES AND BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>(4)</sup> for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for an applicant to have access to classified information. The applicant must then present sufficient evidence to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, applicants bear a heavy burden of persuasion to comply with the government's compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own.<sup>(5)</sup> 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.<sup>(6)</sup>

The Directive sets forth adjudicative guidelines<sup>(7)</sup> for consideration when evaluating an applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of disqualifying and mitigating conditions listed under each adjudicative guideline as may be applicable to the facts and circumstances of each case. 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 of a conclusion for or against an applicant. However, specific applicable 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. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (personal conduct), Guideline F (financial considerations), and Guideline J (criminal conduct).

## CONCLUSIONS

The SOR alleges Applicant owes approximately \$6,200 in delinquent debts since 1996. They consist of two unpaid medical bills referred to collection agencies (SOR ¶¶ 2.a and 2.b), a third unpaid medical bill for which the creditor has obtained a judgment against the Applicant (SOR ¶ 2.c), and the deficiency after re-sale from a car loan on which Applicant defaulted in 1996 and for which the creditor has obtained a judgment against Applicant (SOR ¶ 2.d). The security concern under Guideline F is that someone who is financially overextended through delinquent debt and poor personal financial management may be at risk of engaging in illegal acts to generate funds to resolve his fiscal difficulties.<sup>(8)</sup> Additionally, how one manages his personal finances also may be indicative of one's overall judgment and reliability. Despite the relatively modest sums he owes, Applicant has failed to pay or otherwise resolve these debts since 1996, a circumstance that constitutes a history of failing to meet his financial obligations and an unwillingness or inability to pay his debts. Here, the information on which the government based these allegations supports Guideline F disqualifying condition (DC) 1<sup>(9)</sup> and DC 3.<sup>(10)</sup>

I have also reviewed the Guideline F mitigating conditions (MC), the facts require consideration of MC 3. [\(11\)](#) Applicant's debts can be partially attributed to his divorce and to unexpected injuries. However, the value of MC 3 is attenuated because of his inaction since incurring the debts. Applicant has done nothing of his own volition to resolve his indebtedness. Despite telling a DSS agent over two years ago he would take corrective action, Applicant has done nothing of import to address his debts. The car loan debt is being satisfied through involuntary garnishment of his pay, and his monthly \$10 payments to his other creditors is, at best, a weak attempt to mollify the government at the 11<sup>th</sup> hour. Given all the available information in this regard, there is no basis for application of any of the Guideline F mitigating conditions. I conclude Guideline F against the Applicant.

The government has also expressed concerns about Applicant's trustworthiness through SOR allegations that he deliberately falsified his answer to SF 86 Question 26 when he failed to disclose his 1996 arrest and conviction for telephone misuse (SOR ¶ 3.a), and that he deliberately falsified his answer to SF 86 Question 37 when he failed to disclose two unpaid judgments (SOR ¶ 3.b). Under Guideline E, a security concern arises where it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information. [\(12\)](#) The record evidence shows Applicant did not list his arrest because he was afraid doing so would adversely affect his clearance and / or his employment. As to his omission of the unpaid judgments, Applicant avers he did not know of them because he did not receive notice in the mail or otherwise. I do not accept his explanation because he also testified he was receiving his mail even when he was between residences as he was able to use his sister's mailing address until he found his own place. In light of his acknowledged deliberate falsification of Question 26, it is more likely than not Applicant deliberately falsified his answer to Question 37 as well. The record as a whole in this regard supports application of Guideline E DC 2. [\(13\)](#)

Having reviewed the listed mitigating conditions under Guideline E, I find none is applicable. His falsifications were multiple and recent, and Applicant did not try to provide the correct information before his DSS interviews. His omission of his 1996 arrest alone is sufficient to disqualify him in that it demonstrates Applicant's willingness to place his own interests ahead of those of the government, conduct directly at odds with the fiduciary nature of holding a clearance. I conclude Guideline E against the Applicant.

The government also alleged Applicant was arrested, convicted, and incarcerated in 1983 for a weapons charge (SOR ¶ 1.d); that he was charged in 1992 with assault (SOR ¶ 1.e); that he was charged and convicted of telephone misuse in 1996 (SOR ¶ 1.a); and that he was cited for and convicted of driving on a suspended license in 2000 (SOR ¶ 1.c). The resulting security concern expressed through Guideline J is that a person who is willing to disregard the law and risk fines or incarceration may also be willing to disregard rules and regulations governing the protection of classified information. [\(14\)](#) The criminal activity at issue may consist of a single serious crime or multiple lesser offenses. Here, available information proves these allegations and supports application of Guideline J DC 1 [\(15\)](#) and DC 2. [\(16\)](#)

Applicant has a history of criminal conduct from the time he was a teenager until at least 2000. Without more, his conduct and change of circumstances might show his conduct was not recent and that Applicant had demonstrated sufficient rehabilitation. However, while not specifically alleged, I cannot ignore the import of Applicant's deliberate

falsifications, discussed above. This conduct violates federal law under 18 U.S.C. § 1001, which makes it a crime to knowingly and wilfully make a false statement or representation to any department or agency of the U.S. government concerning a matter within its jurisdiction. Violation of this statute is punishable by jail, a fine, or both. Applicant's signature at page 7 of his SF 86 is immediately below just such an advisement. By signing a form he knew to be false, Applicant further demonstrated a disregard for laws and regulations, adverse conduct at the heart of Guideline J. Accordingly, there is no basis in this record for application of any of the Guideline J mitigating conditions and I conclude this guideline against the Applicant.

A fair and commonsense assessment<sup>(17)</sup> of the entire record before me shows the government properly expressed reasonable doubts about Applicant's suitability to have access to classified information. The SOR was based on sufficient, reliable information about Applicant's financial history, arrest record, and deliberate falsification of his SF 86. Such issues bear directly on an applicant's ability to protect classified information, and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Absent substantial information to mitigate these doubts, which Applicant has failed to provide, I conclude he has failed to overcome the government's case.

### **FORMAL FINDINGS**

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: For the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Paragraph 2, Guideline F (Financial): AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

Subparagraph 2.b: Against the Applicant

Subparagraph 2.c: Against the Applicant

Subparagraph 2.d: Against the Applicant

Paragraph 3, Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 3.a: Against the Applicant

Subparagraph 3.b: Against the 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.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Applicant denied deliberately falsifying his SF 86 as alleged in SOR ¶¶ 3.a and 3.b.
3. Because the government did not allege application of the Smith amendment based on Applicant's juvenile incarceration, I decline to discuss whether the statute may apply in its current form.
4. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
5. *See Egan*, 484 U.S. at 528, 531.
6. *See Egan*; Directive E2.2.2.
7. Directive, Enclosure 2.
8. Directive, E2.A6.1.1.
9. Directive, E2.A6.1.2.1. A history of not meeting financial obligations;
10. Directive, E2.A6.1.2.3. Inability or unwillingness to satisfy debts;
11. Directive, E2.A6.1.3.3. The conditions that resulted in the behavior were largely beyond the person's control (e.g.,



loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation);

12. Directive, E2.A5.1.1.

13. Directive, E2.A5.1.2.2. The 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, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

14. Directive, E2.A10.1.1.

15. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;

16. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

17. Directive, E2.2.3.