DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
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SSN: -------------------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro Se*

May 07, 2009

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Decision

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MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant showed poor judgment in abusing his prescription for Ritalin in 2004, including at work in July 2004. He is on probation until June 2011 following his guilty plea in February 2008 to negligent homicide, reckless endangerment, assault, and interfering with police in October 2004, and to a September 2004 operating under the influence (OUI) offense. Future drug abuse is unlikely, but he has not fully mitigated the criminal conduct concerns. Clearance is denied.

Statement of the Case

Applicant submitted a Security Clearance Application (SF 86) on August 19, 2003. On October 31, 2008, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline J and Guideline H that provided the basis for its action to deny him a security clearance and refer the matter to an administrative judge. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry*

(February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense as of September 1, 2006.

Applicant answered the SOR in writing on November 21, 2008, and requested a hearing before a DOHA administrative judge. The case was assigned to me on January 6, 2009. On January 29, 2009, I scheduled a hearing for February 19, 2009.

I convened the hearing as scheduled. The government submitted six exhibits (Ex. 1-6). Exhibits 1-4, and Exhibit 6 were admitted in full without any objections. Exhibit 5 was admitted in part, as I sustained Applicant's objection to inclusion of a newspaper article appended to an adverse information report. Department Counsel had included the page to explain the processing of the case and he indicated he was not relying on any of the statements in the article to support the SOR allegations. Two Applicant exhibits (Ex. A-B) were admitted in full. Department Counsel objected only to the last page of Exhibit B, consisting of fatal crash statistics for the years 1997 through 2005 as reported by the National Highway Traffic Safety Administration. Applicant offered it for the purposes of showing that the fatal accident he caused was an unfortunate but not unusual circumstance. I admitted the document for that limited purpose while advising Applicant of its limited relevance to his particular case. Applicant and three professional colleagues (two supervisors and his technical lead) testified on his behalf, as reflected in a transcript (Tr.) received on March 3, 2009.

Procedural and Evidentiary Rulings

By facsimile on February 27, 2009, Applicant forwarded for inclusion in the record a post-hearing memorandum with a case status report concerning his completion of an Employee Assistance Program (EAP) in 2004 (Enclosure 1) and information represented to be from a university health center's website about reactions to, and means of coping with, traumatic events (Enclosure 2). The document was marked collectively for identification as Exhibit C. On March 2, 2009, I ordered the government to respond on or before March 13, 2009. On March 12, 2009, Department Counsel objected to the admission of Enclosure 2 on the basis it was an incomplete Internet article that even if printed from a health center's website, lacked authorship, any identification of the medical credentials of the author, or a date, and was irrelevant to Applicant's case. Information about possible reactions to, and ways of coping with, traumatic events could aid in explaining Applicant's response to the negligent homicide at issue in SOR ¶ 1.c, so I find little merit in the government's claim that it is irrelevant. However, the document in its present form is not self-authenticating and fails to satisfy the official or business record requirement for admission under ¶ E.3.1.20 of the

Directive. I sustain the government's objection to Enclosure 2, and admit Exhibit C in part.[1]

Findings of Fact

DOHA alleged under Guideline J (criminal conduct) that Applicant's operator's license was suspended after he was charged with evading responsibility and reckless driving in about 1996 (SOR ¶ 1.a); that he was convicted of a September 2004 driving while intoxicated offense (SOR ¶ 1.b); that he was arrested for, and pleaded guilty to October 2004 charges of negligent homicide with a motor vehicle, reckless endangerment in the first degree, assault in the third degree, and interfering with an officer/resisting arrest (SOR ¶ 1.c); and that he was found guilty of a January 2006 possession of marijuana charge (SOR ¶ 1.d). Applicant was alleged under Guideline H to have abused Ritalin at work in July 2004 (SOR ¶ 2.a). Also, the marijuana possession charge was cross-alleged under Guideline H (SOR ¶ 2.b).

Applicant submitted a lengthy response to the allegations, which included 21 enclosures. The enclosures were formally admitted into evidence at the hearing as Exhibit A. In his Answer, Applicant indicated that the 1996 charge (SOR ¶ 1.a) was resolved by a guilty plea to a single misdemeanor motor vehicle count of evading responsibility. He admitted pleading guilty to the September 2004 drunk driving charge in February 2008 (SOR ¶ 1.b). Applicant also acknowledged that he had been involved in a fatal automobile accident in October 2004. However, while he was charged criminally in July 2005 with, in part, manslaughter II with a motor vehicle and misconduct with a motor vehicle, he averred he pleaded guilty in February 2008 to misdemeanor motor vehicle charges of negligent homicide with a motor vehicle, reckless endangerment I, assault III, and interfering with an officer (SOR ¶ 1.c), and that he was not under the influence of drugs or alcohol at the time of the "very freak and tragic accident for which [he has] struggled with [sic] ever since the day it has occurred." As for the marijuana possession offense (SOR ¶¶ 1.d, 2.b), Applicant denied he was convicted because the charge was dismissed after he completed a pretrial drug program. Applicant expressed his belief that the drug involvement guideline did not apply to the marijuana possession since he did not plead guilty. While he made no excuse for abusing the Ritalin at work (SOR ¶ 2.a), the drug was legally prescribed for him and he had not taken it since that day. After considering the evidence of record, I make the following findings of fact.

Applicant is a 31-year-old electrical engineer, who has worked for a defense contractor since August 2003 (Ex. 1), with the exception of a few months in 2008. He

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[1] Applicant's post-hearing memorandum and Department Counsel's response consisted largely of argument. For example, Applicant indicated Department Counsel was "way out of line in his closing argument" when he stated Applicant showed no remorse for the October 2004 fatal accident. Department Counsel contended the facts of the October 2004 negligent homicide established criminal negligence with a motor vehicle, a class D felony under state law, even though Applicant was charged with negligent homicide, a misdemeanor. Such arguments were not considered as evidence. However, it is appropriate for Counsel to argue lack of remorse, or that conduct meets the elements for a felony.

seeks to retain a secret-level security clearance that was granted to him in December 2003 (Ex. 5).

In about 1996, when Applicant was 17, he sideswiped another vehicle and drove off. He was driving his father's vehicle and was scared (Tr. 54). He turned himself in to the police after speaking to his parents, and was charged with evading responsibility and reckless driving. He pleaded guilty to the misdemeanor evading responsibility charge, and his driver's license was suspended for four months. The reckless driving charge was dismissed. Applicant was also sued civilly for the damage and his insurance settled (Exs. 1, 2).

Applicant earned his bachelor of science degree in electrical engineering in August 2003 and started working for his current employer. On August 19, 2003, he executed a security clearance application (SF 86) for a secret-level security clearance. Uncertain how he should respond to question 26 concerning any police record (other offenses) in the last seven years, Applicant consulted with his attorney, who advised him to indicate "Motor Vehicle Violations."(Ex. B). Applicant disclosed on his SF 86 that he had been charged with a "MOVING VIOLATION" in December 1997, but also that it had been "DROPPED IN COURT." He reported the insurance settlement in response to question 40, concerning any civil court actions in the last seven years (Ex. 1). Applicant was granted his secret clearance in December 2003 (Ex. 5). Applicant claimed that he did not know until 2004 that he had been convicted of evading responsibility ("I thought everything was dropped." Tr. 57).

Suffering from severe insomnia and depression in 2004, Applicant began treatment under the care of a medical professional who prescribed psychotropic medications, including Ritalin, and counseling (Ex. 2). Applicant began taking Ritalin that spring in capsule form. He abused the drug on occasion by taking the capsules apart and snorting the drug, initially only at home. During the second week of July 2004, he began snorting Ritalin in a lavatory at work (Ex. 6). Inhalation gave him "a rush" that lasted for about three hours, and allowed him to work at a time when he wasn't sleeping (Tr. 82).

On July 14, 2004, Applicant's manager happened to be in the lavatory before noon when he saw and heard evidence that led him to suspect illegal drug abuse. He watched as Applicant exited the lavatory, and reported him to their employer. During an interview by a company investigator on July 15, 2004, Applicant admitted he had snorted Ritalin on the property the day before, and on three or four occasions before that, in the same bathroom. He also admitted that he had taken three capsules with him on the morning of the interview and had saved the third so that he could snort the drug at work, but he was approached by security before he could use it. He turned the capsule over to security, and the code on the pill was consistent with his admission of Ritalin abuse. Applicant took a drug test, which was negative for substances tested (amphetamines, barbiturates, benzodiazepines, cocaine and marijuana metabolites, methadone, opiates, and PCP, Ex. B), and he was suspended from work pending the outcome of the investigation. He turned over a prescription vial showing his Ritalin

medication had been filled on July 8, 2004, for a quantity of 60 20-mg. capsules to be taken at two each morning. Based on the number of capsules remaining (20), 24 pills were missing (Ex. 6). Applicant believes he took more than the prescribed amount of Ritalin (Tr. 81). He was suspended from work without pay for one week, given a written warning, and required to take counseling classes through his company's EAP (Tr. 82). He completed the sessions on September 15, 2004 (Ex. C). Applicant indicates that he stopped abusing Ritalin after he was caught (Answer, Ex. 2), and there is no evidence proving otherwise.

Around that same time, Applicant changed his treating physician because he did not agree with the clinician's diagnosis of bipolar disorder. His new psychiatrist placed him on Zoloft for depression. Applicant was also prescribed a sleeping aid for his chronic insomnia, and he was taking one as of October 2004 (Ex. 2, Tr. 103-04).

In September 2004, Applicant was pulled over shortly after leaving a bar where he had been drinking with friends. The officer detected an odor of alcohol. Applicant submitted a motor vehicle registration that had expired in February 2004 and he was unable to perform field sobriety tests correctly. He was arrested for operating while under the influence (OUI) and taken to the station, where an initial breathalyzer showed a .185% blood alcohol content. He was charged with OUI, failure to drive in established lane, and failure to carry insurance card (Ex. 3). Applicant pleaded not guilty to OUI, contending that he was pulled over for no reason and had passed the field sobriety test (Ex. 2).

While the OUI charge was pending against him, Applicant was involved in a fatal traffic accident in mid-October 2004. En route home from work at around 1830 hours, Applicant veered off the highway onto the right shoulder and struck a 28-year-old woman who was changing a tire on the passenger side of her vehicle. The victim succumbed to her injuries. Applicant was taken by the state police to the hospital for observation, where a toxicology report was negative for alcohol (Ex. A). Applicant denies he was impaired by his prescription medications at the time (Tr. 77) or that he fell asleep. He still has no explanation for what led him to drive off the road (Tr. 72-73). Four days later, Applicant's employer filed an adverse information report with the Defense Industrial Security Clearance Office (Ex. 5). In July 2005, Applicant was charged with manslaughter III, a class C felony, misconduct with a motor vehicle, a class D felony, and two violations of motor vehicle laws: failing to drive in proper lane, and reckless driving (Ex. A). Sometime before May 2007, his OUI case was transferred to be handled with the October 2004 charges (Ex. 2).

Applicant's vehicle was impounded as a result of the October 2004 incident, and marijuana was found, apparently behind the car stereo. Applicant denies knowing possession of the drug, but he was charged criminally with illegal possession of

marijuana in late December 2005 or early January 2006 (Ex. 2).[2] On January 9, 2007, Applicant's case was continued for one year to allow him to complete a pretrial drug education program. Applicant satisfactorily completed a 12-hour drug program on March 20, 2007, and 30 hours of community service (Exs. 2, A).[3] The marijuana possession charge was dismissed on January 9, 2008 (Answer, Ex. A).

On June 1, 2007, Applicant was interviewed by an Office of Personnel Management (OPM) investigator about his treatment for depression and insomnia, his arrest record, and the status of pending charges. Applicant explained that he took prescribed Zoloft for depression from 2004 to fall 2006, but his depression had resolved. He was currently on Seroquel nightly and a generic tranquilizer because he was sleeping only two to three hours a night (Ex. 2). Concerning his use of Ritalin at work in July 2004, Applicant admitted he had been caught abusing prescribed Ritalin in the lavatory. He attributed his abuse of his prescription to being "not in the right state of mind." While he admitted he had abused Ritalin in the same manner once or twice before, he denied snorting it at work before that occasion. Concerning the September 2004 OUI charge, Applicant claimed he passed the filed sobriety tests as proved by a video in his attorneys' possession. He denied any excessive consumption or adverse impacts from his alcohol use. With respect to the October 2004 accident, Applicant indicated that the victim's family had been paid $500,000 in an insurance settlement but that the family "pressured the state police to charge [him]." He indicated he would be offering a plea in return for no felony convictions. Applicant denied any knowing possession of the marijuana found in his vehicle while it was impounded. He expected the charge to be dismissed since he had completed a pretrial drug program. As for the 1996 evading responsibility charge, Applicant told the OPM investigator that he had "unknowingly sideswiped another car." (Ex. 2).

On Applicant's behalf, his attorney continued to engage in plea negotiations to resolve the September 2004 OUI and October 2004 manslaughter and other charges. Despite the request of the victim's family that Applicant be sentenced to a lengthier jail term, the state accepted his offer to plead guilty to misdemeanor offenses. In late February 2008, Applicant pleaded guilty to substituted charges of negligent homicide with a motor vehicle, reckless endangerment (first degree), assault (third degree), and interfering with an officer.[4] He was sentenced on the negligent homicide count to six

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[2]Applicant testified with no rebuttal from the government that his car was in the possession of the state police from the date of the October 2004 fatal accident until 2006 when they charged him with possession of marijuana. He continues to adamantly deny that the marijuana was his (Tr. 48). He had no explanation for how the marijuana ended up behind his car stereo ("I had about 300 CD's stolen from me. The car was totally compromised. You're talking about a stock car stereo that's bolted in. Why would they unbolt a car stereo? Then they found a vial. I never saw the vial."). (Tr. 53).

[3]Applicant served as a judge for a student invention convention in late April 2007 for a period of eight hours (Ex. A). It is unclear whether this fulfilled part of his community service requirement.

[4]Applicant explained the charge as due to the fact that his account of the accident did not agree with the investigating officers, that the state police "chose to leave a lot of information out of the police report." (Tr. 91).

months in jail, suspended after 98 days, and placed on probation for two years. On each of the three remaining charges, he was sentenced to one year in jail, execution suspended, and placed on probation for three years. Applicant entered a guilty plea as well to the September 2004 OUI. He was sentenced to six months in jail, execution suspended after two days, placed on two years probation with conditions, and ordered to pay a $500 fine (Exs. 4, A). The jail sentences were to run consecutively for a total effective sentence of four years, execution suspended after 100 days (two days of the mandatory term suspended), and three years of probation with the following conditions: alcohol evaluation and treatment as deemed necessary by the probation office; three years license suspension; a $2,500 charitable donation to a charity of the victim's family's choice; 100 hours of community service; and random urinalysis (Ex. A). Applicant spent 98 days in jail (Tr. 47) and his three-year probation term began on June 4, 2008 (Ex. B). For his community service, Applicant refurbished several public benches in his local community. He spent about 330 man-hours on the project (Ex. A, Tr. 47). Allowed to substitute a OUI program for the alcohol evaluation component of his probation (Tr. 98), Applicant completed Phase I of the court-ordered substance abuse program on August 22, 2008.[5] He attended Phase II from September 8, 2008, to November 3, 2008, and was referred to Phase III (Exs. A, B). On January 28, 2009, Applicant made a payment of $2,500 to the memorial fund set up in the victim's memory, to satisfy the charitable contribution requirement of his probation. As of February 9, 2009, Applicant was in compliance with his probation (Ex. A). He was scheduled to start the final phase (Phase III) of the OUI-related program on February 21, 2009 (Tr. 69, 85). At no time had he discussed his prior Ritalin abuse during his sessions because he considered it "irrelevant." (Tr. 87). All urinalysis testing had been negative for substances tested (Ex. A). He calls in to his probation officer once a month and sees her every other month (Tr. 78).

As of August 2008, Applicant was drinking alcohol twice a week, fewer than four drinks in an evening (Ex. A). As of February 2009, he had been taking his present prescription medications for about a month. He denied taking more than the prescribed dosages (Tr. 84).

Applicant did not allow his legal difficulties to affect his work performance for the defense contractor. Well-regarded because of his hard work and dedication, Applicant continued to respond positively to his workplace challenges of increasingly more difficult and visible assignments. In December 2007, he received an award from his employer in recognition of his outstanding efforts. He received the highest rating for his performance (excels at job requirements) as a senior engineer from March 2007 to March 2008 (Ex. A), but resigned from his job because of his legal difficulties (Ex. A, Tr. 114). Before leaving, he worked over the weekend to put together a transition package that was "so good" that his second-level supervisor showed his boss (Tr. 115-16). In about October

[5] The client evaluation lists a .13% blood alcohol content (BAC) for the OUI, apparently based on Applicant's self-report (Ex. A). The police report indicates his BAC tested at .185% and then .170% (Ex. 3). The state's attorney cited those breathalyzer results when Applicant entered his plea in February 2008 (Ex. A). Applicant could have chosen to litigate those breathalyzer results in court and chose not to.

2008, Applicant was rehired by the defense contractor. He continued to have a positive impact within his working group (Ex. A).

Applicant's second-level supervisor (Tr. 117-18) and his direct supervisor (Tr. 124-26) have some knowledge that Applicant abused Ritalin at work in 2004, although his direct supervisor believes it happened only once (Tr. 125). A third coworker, the technical leader of the working group, was unaware until "the other day" that Applicant had abused a prescription medication at work (Tr. 140-42). None of these professional colleagues has any concern about Applicant holding a security clearance (Ex. A, Tr. 116, 124, 135).

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that 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." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J—Criminal Conduct

AG ¶ 30 sets out the security concern about criminal conduct:

> 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.

Applicant has misdemeanor convictions on his record that raise security significant criminal conduct concerns under AG ¶ 31(a), "a single serious crime or multiple lesser offenses." He pleaded guilty to evading responsibility after he sideswiped a car and left the scene in about 1996. In February 2008, he pleaded guilty to OUI for driving while drunk in September 2004. Under a plea deal accepted by the state, he also pleaded guilty in February 2008 to negligent homicide, reckless endangerment in the first degree, assault in the third degree, and interfering with a police officer for causing a fatal motor vehicle accident in October 2004. Although the OUI and negligent homicide charges were punished under the pertinent state's motor vehicle statutes,[6] he

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[6]Under Connecticut's General Statutes, evading responsibility, negligent homicide, and operating under the influence of liquor are violations of the state's motor vehicle laws:

> **Sec. 14-224. Evasion of responsibility in operation of motor vehicles**. . . b) Each person operating a motor vehicle who is knowingly involved in an accident which causes physical injury, as defined in section 53a-3, to any other person or injury or damage to property shall at once stop and render such assistance as may be needed and shall give his name, address and operator's license number and registration number to the person injured or to the owner of the injured or damaged property, or to any officer or witness to the physical injury to person or injury or damage to property, and if such operator of the motor vehicle causing the physical injury of any person or injury or damage to any property is unable to give his name, address and operator's license number and registration number to the person injured or the owner of the property injured or damaged, or to any witness or officer, for any reason or cause, such operator shall immediately report such physical injury of any person or injury or damage to

was sentenced to jail terms for the offenses. Furthermore, the reckless endangerment, assault, and interference are Class A misdemeanors under the state's penal code.[7] The

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property to a police officer, a constable, a state police officer or an inspector of motor vehicles or at the nearest police precinct or station, and shall state in such report the location and circumstances of the accident causing the physical injury of any person or the injury or damage to property and his name, address, operator's license number and registration number. . . g) Any person who violates the provisions of subsection (b) or (c) of this section shall be fined not less than seventy-five dollars nor more than six hundred dollars or be imprisoned not more than one year or be both fined and imprisoned, and for any subsequent offense shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned not more than one year or be both fined and imprisoned.

Sec. 14-222a. Negligent homicide with a motor vehicle or commercial motor vehicle. (a) Except as provided in subsection (b) of this section, any person who, in consequence of the negligent operation of a motor vehicle, causes the death of another person shall be fined not more than one thousand dollars or imprisoned not more than six months or both. (b) Any person who, in consequence of the negligent operation of a commercial motor vehicle, causes the death of another person shall be fined not more than two thousand five hundred dollars or imprisoned not more than six months, or both.

Sec. 14-227a. Operation while under the influence of liquor or drug or while having an elevated blood alcohol content. (a) **Operation while under the influence or while having an elevated blood alcohol content.** No person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both. A person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both if such person operates a motor vehicle (1) while under the influence of intoxicating liquor or any drug or both, or (2) while such person has an elevated blood alcohol content. For the purposes of this section, "elevated blood alcohol content" means a ratio of alcohol in the blood of such person that is eight-hundredths of one per cent or more of alcohol, by weight, and "motor vehicle" includes a snowmobile and all-terrain vehicle, as those terms are defined in section 14-379.

At the time of his plea, Applicant was asked by the court clerk whether he pleaded guilty or not guilty to the charge of "criminally negligent homicide." (Ex. A). While Applicant responded, "Guilty," criminal negligent homicide is distinguishable under state law from the negligent homicide that he was sentenced on as part of the plea bargain. (*See* **Sec. 53a-58. Criminally negligent homicide: Class A misdemeanor.** (a) A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person, except where the defendant caused such death by a motor vehicle).

[7]Connecticut's penal code provides in relevant part:

Sec. 53a-63. Reckless endangerment in the first degree: Class A misdemeanor. (a) A person is guilty of reckless endangerment in the first degree when, with extreme indifference to human life, he recklessly engages in conduct which creates a risk of serious physical injury to another person. (b) Reckless endangerment in the first degree is a class A misdemeanor.

Sec. 53a-61. Assault in the third degree: Class A misdemeanor. (a) A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or (2) he recklessly causes serious physical injury to another person; or (3) with criminal negligence, he causes physical injury to another person by means of a deadly weapon, a dangerous instrument or an electronic defense weapon. (b) Assault in the third degree is a class A misdemeanor and any person found guilty under subdivision (3) (a) of this section shall be sentenced to a term of

police found marijuana in his vehicle, apparently while it was impounded following the October 2004 accident, and it led to a charge of illegal possession of marijuana filed in late December 2005 or early January 2006. The charge was dismissed without a conviction on Applicant's completion of a pretrial drug program. The lack of a conviction does not preclude me from considering the conduct for its security implications (*see* AG ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted"). Applicant has not contested that marijuana was found. While AG ¶ 31(c) applies to that offense, credible evidence of unknowing possession could mitigate the security concern (*see* AG ¶ 32(d), "evidence that the person did not commit the offense"). AG ¶ 31(d), "individual is currently on parole or probation," is clearly implicated, given Applicant is on probation until 2011 for the 2004 offenses.

Mitigating condition AG ¶ 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," is implicated in part. He was only 17 when he evaded responsibility for sideswiping another car. Yet, while over four years have now passed since his more recent criminal conduct in 2004, judgment, reliability, and trustworthiness concerns persist because of the seriousness of the misconduct committed while he held a security clearance. He blew a .185% BAC after his arrest for OUI. Concerning the October 2004 negligent homicide and other charges stemming from the accident, I cannot conclude as a matter of law that Applicant committed the felony offenses of which he was originally charged. At the same time, Applicant cannot reasonably argue that he did not commit criminal conduct or that his conduct was minor in nature just because he has no felony convictions on his record. A prosecutor's decision to accept a plea agreement does not necessarily establish that an offense is minor (*see* ISCR 07-17559, App. Bd., Dec. 19, 2008). He was sentenced to a total of four years in jail, although he was required to serve only 98 days, and is on probation until June 2011. His present probationary status is not a per se bar to holding a security clearance, but Applicant bears a substantial burden to show he is fully rehabilitated where he has completed less than half of his probation term.

Under AG ¶ 32(d), evidence of successful rehabilitation includes, but is not limited to, "the passage of time without recurrence of criminal activity, remorse or

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imprisonment of one year which may not be suspended or reduced.

Sec. 53a-167a. Interfering with an officer: Class A misdemeanor. (a) A person is guilty of interfering with an officer when such person obstructs, resists, hinders or endangers any peace officer, special policeman appointed under section 29-18b, Department of Motor Vehicles inspector appointed under section 14-8 and certified pursuant to section 7-294d, or firefighter in the performance of such peace officer's, special policeman's or firefighter's duties.(b) Interfering with an officer is a class A misdemeanor.

restitution, job training or higher education, good employment record, or constructive community involvement." His employment references (Ex. A, Tr. 113-36) and performance evaluation for March 2007 to March 2008 (Ex. A) show his dedication to his work for the defense contractor. As of February 2009, Applicant was in compliance with the terms of his probation. He fulfilled his community service, exceeding the mandatory 100 hours. On January 28, 2009, he made the required charitable contribution with a payment of $2,500 to the accident victim's memorial fund. He completed the first two phases of an OUI program with the third phase scheduled to start on the Saturday after his security clearance hearing.

Yet, Applicant's ongoing minimization of his misconduct raises considerable doubts about his reform. Concerning the OUI, Applicant told an OPM investigator on June 1, 2007, that his BAC was either .12% or .10% and that video showed he passed the field sobriety tests. The higher BAC reported by the police (.185%), which he did not challenge in court, cannot easily be reconciled with his testimony that he consumed only three beers (Tr. 62-63). Although this high BAC reading was brought to the attention of the judge in his presence in court in February 2008, Applicant signed off on the OUI program's evaluation report of August 22, 2008, which listed his BAC at .13%. There is no indication that the information in the evaluation report came from sources other than Applicant, and it raises concerns about whether Applicant has been completely candid with the government and the OUI program evaluator about his OUI. When asked why the court ordered him to complete an alcohol program if, as the toxicology report showed, he was not impaired by alcohol at the time of the accident, Applicant blamed a "rogue reporter" who wrote false articles about him in the newspaper (Tr. 97). He also blamed the victim's family members, who "were pushing the judge that this was a DUI case." The transcript of the sentencing proceedings indicates that the alcohol screening was court-ordered as a result of the OUI and not the accident.

As for the accident itself, Applicant correctly indicates that he was not convicted of criminal negligent homicide. Instead he was convicted of negligent homicide with a motor vehicle. He has not denied that he caused the tragic accident, and he apologized to the victim's family at his sentencing. Applicant is not without remorse for causing the death of another person ("I tell you what, it's a life-altering experience going to jail for 98 days and having that burden on myself knowing that somebody lost their life because of an accident that was my fault. And that's huge." Tr. 107), although it is noted that it was his attorney and not the prosecutor who told the judge in February 2008 that Applicant has been "extremely remorseful." On the other hand, Applicant has yet to provide credible explanations for the interference charge and what led him to swerve off the road. He remembers drifting off the road, seeing the vehicle, and trying to avoid it (Tr. 92), but claims to have no recall of his conduct that immediately preceded the accident. Concerning the interference with police charge, Applicant testified:

> It was based on the fact that my account of the accident didn't agree with the investigating officers . . . Well, the fact of the matter is, is the State Police chose to leave of lot of information out of the police report. What I thought happened was I thought I swerved on the opposite side of the car

> and apparently I went on the other side of the car, which was ultimately determine [sic] to be correct. So that was why they charged me with interfering with a police officer because my account didn't match what the ultimate State findings concluded. (Tr. 91)

By pleading guilty to interference, Applicant admitted that he obstructed, resisted, hindered, or otherwise endangered the police. A charge of interference is not made out by an account made in good faith that later proves to be inaccurate.

With respect to the evading responsibility and reckless driving charges in 1996, Applicant signed a SF 86 in August 2003 on which he indicated that a moving violation charge had been dismissed in court. His attorney told him to list the charges as "Motor Vehicle Violations" (Ex. B), but there is no evidence that he was advised to indicate the disposition as "dropped in court." Applicant now claims that he was unaware until 2004 that the evading responsibility charge had not been dismissed. But his assertion of a mistaken good faith belief is difficult to accept where he averred falsely in June 2007 that he had "unknowingly sideswiped another car" when he was 17 (Ex. 2). He admitted at his security clearance hearing that he had known he had damaged the other car and fled the scene because he was scared.

Concerning the possession of marijuana charge filed in late 2005 or early 2006 after the drug was found in his impounded car, Applicant has consistently denied knowing possession of the drug and the case was dismissed without a conviction after he completed a pretrial drug program. He told the OPM investigator in June 2007 that he had bought his car used from a dealer in 2001 (Ex. 2). The police report from the OUI of September 2004 shows Applicant was driving a 1996 sedan. He apparently was driving the same vehicle in October 2004. The government presented no evidence to counter Applicant's claim that the marijuana was in a vial located behind the stereo. It is possible that the marijuana was placed there by a previous owner, or someone else, before Applicant purchased the car. In the absence of any evidence that Applicant ever used marijuana, I accept his assertion that he did not have knowing possession of marijuana.

Drug Involvement

The security concerns raised by illegal drug involvement are set out in AG ¶ 24:

> Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness t comply with laws, rules, and regulations.
>
> (a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Applicant abused his prescription for the stimulant Ritalin in 2004, snorting the contents of capsules at home and at work to get a "rush." He snorted the drug in a lavatory at work on at least four occasions over the course of a week in July 2004 until his supervisor reported him for suspected illegal drug abuse. The day he was confronted by security, Applicant had taken three capsules (one more than the prescribed dose) with him from home, consumed two in the car while driving to work, and saved one to break apart and snort the contents at work. He was approached by security before he could do so. The vial produced at the request of the company investigator was missing 24 pills, which would tend to indicate that Applicant had abused his prescription, not only by using it in a manner not prescribed, but also by taking more than the prescribed daily dosage as he had intended on July 15, 2004, but for the fact that he was confronted. AG ¶ 25(a), "any drug abuse," is implicated. While Applicant had legal possession of the Ritalin, a Schedule II controlled substance with a high potential for abuse, the manner in which he used it deviated from approved medical direction. Although Applicant exhibited extremely poor judgment in abusing his Ritalin prescription while he held a security clearance, AG ¶ 25(g), "any illegal drug use after being granted a security clearance," does not apply. Under AG ¶ 24(b), illegal use of a drug (which would encompass those drugs with no medical purpose and/or those not prescribed) is distinguishable from use of a legal drug in a manner deviating from medical direction, and AG ¶ 25(g) refers only to illegal drug use. Since he did not know that there was marijuana in his vehicle, Applicant did not have illegal possession that would implicate AG ¶ 25(c), "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia." But AG ¶ 25(c) still applies to the extent that he used paper, paper currency, and a credit card to crush the granular Ritalin into a powder that he could then inhale. For purposes of facilitating his drug abuse, they became drug paraphernalia.

Although Applicant continues to take prescription medications, primarily now for his chronic insomnia, It has been almost five years since any evidence of drug abuse. AG ¶ 26(a), "the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment," applies in that his abuse was limited to the 2004 time frame. Applicant denies any abuse of Ritalin or any other prescribed drug since 2004 and has no intent to abuse any drug in the future. AG ¶ 26(b)(3), "a demonstrated intent not to abuse any drugs in the future, such as: (3) an appropriate period of abstinence," also applies. Concerns about his overall judgment and reliability persist (*see* the whole-person discussion, *infra*), in part because he stated

in his affidavit to the OPM investigator, “I had abused Ritalin in the same manner once or twice (exact dates and frequency not recalled) before [the July 2004] incident and never before at work.” (Ex.2). He had admitted to the company investigator that he had been snorting his Ritalin on company property on three or four occasions in the same lavatory at work before the occasion that led to the investigation (Ex. 6). But a finding of drug abuse requires some evidence of drug abuse and there is no indication that he abused Ritalin or any other prescribed medication since July 2004.

AG ¶ 26(c), “abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended,” is not squarely on point. While the Ritalin was prescribed and abused when Applicant was suffering from severe depression, which he indicates has been resolved, Applicant abused the Ritalin at least in part for the rush and to be able to work when he was sleeping only two or three hours a night. He continues to suffer from chronic insomnia. Moreover, his is not a case of physiological abuse that gradually developed because of the substance’s addictive propensity, which is at the heart of AG ¶ 26(c).

Applicant completed EAP counseling in September 2004 as mandated by his employer after he was caught abusing Ritalin at work (Ex. C). More recently, he fulfilled the pretrial drug program, which consisted of eight, ninety minute group interaction sessions, in March 2007. While both the EAP and pretrial drug program sessions may properly be considered in assessing the risk of recurrence, the record evidence does not show that either program qualifies as a prescribed drug treatment program under AG ¶ 26(d), “satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.” Applicant testified the pretrial drug program involved drug education (Tr. 89). Furthermore, there is no favorable prognosis by a duly qualified medical professional, which is required under AG ¶ 26(d).

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an Applicant’s eligibility for a security clearance by considering the totality of the Applicant’s conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual’s age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guideline J and Guideline H in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant's abuse of his Ritalin prescription, including on four or five occasions at work in July 2004, raises serious judgment concerns that are mitigated, however, by his completion of drug education programs with no recurrence. But the burden of demonstrating reform of his criminal conduct is met only in part by his compliance with the terms of his probation. The state has yet to consider him fully rehabilitated in that he is still on probation until June 2011. While his probationary status does not bar him from holding a security clearance, he shows insufficient reform by inappropriately attributing blame and motivation to others (*e.g.*, the interference charge stems from a variation in his account with the police investigation and the police omitted information from their report; a rogue reporter published slanderous newspaper articles about him) and by dismissing or even concealing record evidence that places him in a less favorable light. Undisputably, he is held in high regard by his work colleagues because of the quality of his performance. But he also showed little regard for his obligations as a cleared employee in abusing his prescribed Ritalin at work and in driving drunk outside of work. Based on all the information presented, I am unable to conclude that it is clearly consistent with the national interest to grant or continue his access to classified information.

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 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant

Conclusion

In light of the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ELIZABETH M. MATCHINSKI
Administrative Judge