

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: The Applicant was engaged in a serious criminal incident in 1991 and a minor one in 1996. He was innocent of the charges brought against him in 2000. The Applicant's incorrect answers on two Government questionnaires were not made with the intent to deceive. Considerable mitigation is shown. Adverse inference is overcome. Clearance is granted.

CASENO: 06-17080.h1

DATE: 03/27/2007

DATE: March 27, 2007

In Re:	)	
	)	
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SSN: -----	)	ISCR Case No. 06-17080
	)	
Applicant for Security Clearance	)	
	)	

**DECISION OF ADMINISTRATIVE JUDGE  
WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Goldstein, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The Applicant was engaged in a serious criminal incident in 1991 and a minor one in 1996. He was innocent of the charges brought against him in 2000. The Applicant's incorrect answers on

two Government questionnaires were not made with the intent to deceive. Considerable mitigation is shown. Adverse inference is overcome. Clearance is granted.

### **STATEMENT OF THE CASE**

On August 16, 2006, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on September 27, 2006, and requested a hearing. The case was assigned to another Administrative Judge on November 9, 2006, and a Notice of Hearing was issued on January 24, 2007. The case was assigned to me on February 13, 2007.

A hearing was held on February 15, 2007, at which the Government presented eight documentary exhibits. Testimony was taken from the Applicant, who also submitted three exhibits. The transcript was received on February 27, 2007.

### **FINDINGS OF FACT**

The Applicant is 33, single and has a Bachelor of Science degree. He is employed by a defense contractor, and he seeks to obtain a Secret-level DoD security clearance in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

The Applicant is the product of a broken home. He was physically abused by his parents when young and, at the age of 13, their parental rights were terminated and he became a ward of the state. The Applicant was then in foster care until 18 years of age. (Government Exhibit 1 at question 43, Transcript at 65-67, 93-94.)

Despite the best efforts of his social worker (Social Worker), who has known him for 20 years,<sup>1</sup> and various foster parents, the Applicant became involved with a gang in the city where he grew up. On November 9, 1991, he was involved in an incident where one of his fellow gang members shot another member. The Applicant had driven the shooter to the location where the other person was shot. He did not know that the shooter had a weapon until the incident took place.

The Applicant was subsequently charged with Attempted Murder. According to the Applicant, the authorities knew that he was not the shooter but wanted the Applicant's cooperation against the shooter. He did cooperate with the authorities. As a result of his cooperation, the Attempted Murder charge was dropped and he plead guilty to Disorderly Conduct, a misdemeanor. (Transcript at 26-33.)

In May 1992, the Applicant joined the U.S. Army. His Army recruiter knew about this incident. In fact, the Applicant had to obtain a waiver in order to enlist. (Transcript at 33-34.)

The Applicant served in the Army for four years. He was honorably discharged on April 30, 1996. On May 13, 1996, as a civilian, the Applicant received a citation from the Military Police at his former duty station. Along with several friends, the Applicant was involved in removing equipment from abandoned automobiles on the base. Although the car was abandoned, technically the act constituted theft. The report is somewhat unclear, but it appears that he was charged with Larceny of Private Property and Damage to Private Property. He completed a pre-trial diversion program, and on September 3, 1996, all charges were dismissed. (Government Exhibit 5, Transcript at 37-43.)

The Applicant subsequently enlisted in the Coast Guard in February 1997. His Coast Guard recruiter knew about this incident. (Transcript at 43, 81-82.)

The Applicant was honorably discharged from the Coast Guard in February 1999, and began working as a civilian. In August 2000 the Applicant was involved in a fight with the person he was sharing a house with. The Applicant's credible testimonial evidence is that the other person attacked him with a hammer and the Applicant, a former high school wrestler, defended himself aggressively. The end result was that the other person called the police and the Applicant was arrested as the aggressor. Specifically, the other person said that the Applicant had attacked him with a hammer. (Transcript at 43-55.)

The Applicant was subsequently charged with Assault with Intent to Kill and Assault and Battery with a Dangerous Weapon. He was acquitted of both charges after a jury trial. (Government Exhibit 3, Transcript at 56-58.)

Paragraph 2 (Guideline E - Personal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process. The allegation contained in SOR 1.d. will be evaluated under this paragraph as well.

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<sup>1</sup>Government Exhibit 1 at question 7, Government Exhibit 2 at question 12, Applicant's Exhibit A at 1.

On February 11, 1997, the Applicant completed an official DoD questionnaire in which he stated that he had never been charged with a felony offense. (Government Exhibit 2, questions 23.c.) This statement was a false answer to a material question pertaining to the Applicant's criminal history.

This questionnaire was filled out by the Applicant's Coast Guard recruiter. The Applicant did state that he signed it, but he had difficulty remembering the entire transaction. He stated that he did not believe the information about his 1991 felony charge needed to be disclosed again because the Army had always known of it, and he had just revealed it again in 1995 when he first applied for, and was granted, a security clearance by the Army. (Government Exhibit 2, question 26; Transcript at 78-81.) It is noted that the Applicant listed his Social Worker on this exhibit as a person who knows him well, and as the person to contact for a statement of his actions during the time from 1989 through 1992. He also put down his Army supervisor on the same form. Both of these people knew about his felony arrest in 1991. (Government Exhibit 2 at questions 11 and 12, Transcript at 97-98.)

In the same questionnaire, he further stated that, in the previous seven years, he had not been arrested, charged with or convicted of any offense not listed elsewhere on the form. (Government Exhibit 2, question 23.f.) This statement was a false answer to a material question pertaining to the Applicant's criminal history.

Regarding his failure to mention the 1996 incident, the Applicant also had trouble remembering the reasoning for his actions ten years ago. Based on his testimony, it appears that he had a good faith belief that, since the charges had been dismissed, he "didn't believe there was a need to disclose that type of information." He emphasized the fact that his Coast Guard recruiter knew about the 1996 incident. (Transcript at 82.)

On May 17, 2005, the Applicant completed an official DoD questionnaire in which he stated that he had been charged with a felony offense in 1991 (SOR 1.a.). He did not reveal his arrest and acquittal for Attempted Murder and Assault With Intent to Kill in 2000 (SOR 1.c.). (Government Exhibit 1, question 21.) This statement was a false answer to a material question pertaining to the Applicant's criminal history.

The Applicant was, and is, tremendously incensed by the injustice of this charge. He explained his reasons for not putting revealing that incident on his questionnaire:

I was found not guilty for this - - found not guilty and that's the reason why - - that's the reason why I had put that down because I - - I'm not guilty. I didn't do these charges in the first place. That's why I didn't put those down and felt that I didn't have to disclose it. I don't know any other answer to give you, but that's my answer. I honestly didn't feel there was a need to disclose that because I was found not guilty. (Transcript at 85-86.)

#### Mitigation.

The Applicant's acquittal in 2001 acted as a wake up call to him. He moved to the state where he now lives and began going to college using his GI education benefits. He received his Associate of Science degree in 2004 and his Bachelor of Science degree in 2006. (Applicant's

Exhibit B.) His grade point average throughout his schooling was 4.0 and he was the Valedictorian of his class for both degrees. (Applicant's Exhibit C.) His college advisor stated, "To say that [the Applicant] was an exceptional student is an understatement. His school ethic and dedication were beyond reproach. It is rare to see an individual excel to his level." (Applicant's Exhibit A at 3.)

The Applicant's Social Worker, who has known him for 20 years, submitted a letter on his behalf. She describes him as a "very kind and compassionate person," and someone who is "honest and often will say nothing if he fears the truth will hurt someone's feelings." She goes on, "Through the years I have watched this troubled, frightened youth become a smart, confident adult." (Applicant's Exhibit A at 1.)

A former military colleague of the Applicant also wrote a letter of recommendation for him. This individual continues to serve as a National Guardsman, as well as a Department of Defense civilian. He firmly recommends the Applicant for a security clearance. (Applicant's Exhibit A at 4.)<sup>2</sup>

## POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case will be set forth under CONCLUSIONS, below.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- (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 voluntariness of participation

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<sup>2</sup>This person was not involved in the 1996 incident (SOR 1.b.).

- (6) The presence or absence of rehabilitation and other pertinent behavior changes
- (7) The motivation for the conduct
- (8) The potential for pressure, coercion, exploitation or duress
- (9) The likelihood of continuation or recurrence.”

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in criminal acts and falsification of Government forms that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

## CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the granting of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has a criminal history (Guideline J); and that he made false material statements to DoD, in violation of a felony criminal statute (Guidelines E and J).

The Applicant, on the other hand, has successfully mitigated the Government's case. The Applicant has had to travel a hard road for a good part of his life. He does not go out of his way to discuss it, nor does he use it as a shield. The fact remains that he has successfully turned his life around. This case must be viewed with an acknowledgment of, and an appreciation for, his background.

Turning first to the Applicant's criminal conduct. He does not contest the incidents in 1991 and 1996. His credible testimonial evidence shows a remorse for them, a knowledge of how these incidents occurred, and a determination not to have such events occur in the future. There is little to no security significance in his 2000 felony arrest and acquittal. This is especially so where the acquittal was not the result of a plea bargain, but rather a jury's conclusion based on a trial where all the evidence, both for and against the Applicant, was seen and evaluated. As further discussed below, I find that he did not intend to deceive the Government when he filled out the two questionnaires at issue. Accordingly, it has been over ten years since the Applicant has been involved in any criminal acts which were his fault.

Under Guideline J, the following Disqualifying Conditions apply: 31.(a) *A single serious crime or multiple lesser offenses*; and 31.(c) *Allegations or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*. However, the following Mitigating Conditions also apply and, in this case, mandate a finding for the Applicant. 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*; 32.(c) *Evidence that the person did not commit the offense*; and 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*.

Allegations of falsification are serious. The Applicant has a heavy burden of persuasion in such cases. Turning to the allegations of falsification of two Government questionnaires, I find that these can also be mitigated. The Applicant was unsure of the exact course of events in 1997 when he enlisted in the Coast Guard. What the Applicant was sure of is that he did not intend to deceive the Government by his actions and, based on the particular circumstances of this case, I find this to be true for the following reasons. First, this was not the first application for a security clearance the Applicant had filled out. The evidence is that he had applied in 1995 for a security clearance in the Army, which was granted. (Government Exhibit 2 at question 26.) Second, his credible testimonial evidence is that his Army recruiter knew about the 1991 felony arrest, and that he had to receive a waiver to enter the Army. Third, he further testified credibly that his Coast Guard recruiter knew about the 1996 incident, which resulted in pre-trial diversion. Fourth, he listed his Social Worker and former Army supervisor on the 1997 questionnaire as persons who had knowledge of his actions. They certainly would have informed any investigators of the Applicant's criminal history. The end result is that the Government had multiple sources of knowledge about the Applicant's recent and distant past in 1997. As such, the Applicant did not have an *intent* to deceive the Government when this questionnaire was filled out incorrectly.

The Applicant admits that, in hindsight, he should have listed the 2000 incident, which resulted in his acquittal, on the 2005 questionnaire. The Applicant clearly resents this false charge that he had to fight in court. The fact that he was acquitted of the charge is important to him. His

motivation for not listing that incident, while wrong, was not unreasonable under the circumstances. Once again, I specifically find that the Applicant did not have an *intent* to deceive the Government when this form was filled out incorrectly.

It is arguable that Disqualifying Condition 16.(a) applies to the facts of this case: *Deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.* While none of the Mitigating Conditions apply on their face, as discussed in detail above, I do not find that the Applicant intended to deceive the Government and find for him under this Guideline.

The Applicant was remarkably candid and open at the hearing concerning his past life, warts and all. His is a remarkable success story, in that he is a young man who has overcome long odds, stopped himself from the downhill slide, and is well on the way to achieving success in his life. Using the Whole Person Concept, application of the General Factors is appropriate and supports a decision in the Applicant's favor. The Applicant's poor conduct was in the distant past (factor (3)); he was young and immature at the time of the events (factor (4)); he shows considerable evidence of rehabilitation (factor (6)); there is virtually no potential for pressure, coercion or duress (factor (8)); and, under the circumstances of this case, the probability that the Applicant will return to the past he has worked so hard to leave is virtually nil (factor (9)).

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

- Paragraph 1: For the Applicant.
  - Subparagraph 1.a.: For the Applicant.
  - Subparagraph 1.b.: For the Applicant.
  - Subparagraph 1.c.: For the Applicant.
  - Subparagraph 1.d.: For the Applicant.
  
- Paragraph 2: For the Applicant.
  - Subparagraph 2.a.: For the Applicant.
  - Subparagraph 2.b.: For the Applicant.
  - Subparagraph 2.c.: For the Applicant.



**DECISION**

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

Wilford H. Ross  
Administrative Judge