

DATE: April 18, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03695

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Eric C. Hogan, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

While Applicant's past financial conduct, criminal conduct, and personal conduct all raised security concerns, he has mitigated these concerns. He has finally worked out an agreement with the IRS to pay his back taxes which is the only fault noted in his financial conduct. To his credit Applicant is highly regarded at work and is rehabilitated from his earlier minor criminal misconduct. In evaluating his failure to disclose all required information on two security forms, it is important to note that Applicant did reveal other significant adverse information, such as his difficulties with the IRS concerning his taxes and most of his arrests, including a more recent one in 1998. Based on these other disclosures and his testimony, I am persuaded that it was not his intent to omit any substantial information. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on October 15, 2001. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. ⁽¹⁾ The SOR alleges specific concerns over financial concerns (Guideline F) in paragraph 1, criminal conduct (Guideline J) in paragraph 2, and personal conduct ⁽²⁾ (Guideline E). Applicant responded to these SOR allegations in an Answer notarized on November 6, 2001, where he denied all paragraphs and subparagraphs and requested a hearing.

The case was assigned to Department Counsel who on January 28, 2002, attested it was ready to proceed. On January 28, 2002, the case was assigned to another judge and on January 30, 2002 it was re-assigned to me for caseload consolidation. Subsequently, a mutually convenient date for hearing was agreed to and a Notice of Hearing was issued on February 1, 2002, which set the matter for February 26, 2002, at a location near where Applicant works and lives. At the hearing the Government introduced eleven exhibits which were all admitted into evidence (Exhibits 1-11). The Applicant testified, but offered no exhibits. He was allowed an additional seven days, until March 5, 2002, to submit additional evidence. (TR 84-85, 105) On March 5, 2002, Applicant submitted his exhibits; on March 6, 2002, Department Counsel submitted the documents to me with her comments on their admissibility:

- Exhibit A, a cover letter, to which Department Counsel did not object was admitted;
- Exhibit B, the Hearing Notice, to which Department Counsel objected as cumulative, was not admitted as it was already part of the record;
- Exhibit C, his performance review, to which Department Counsel did not object was admitted;
- Exhibit D, a record of his unemployment compensation, to which Department Counsel did not object, but questioned its relevance, was admitted;
- Exhibit E, his earnings slip, to which Department Counsel did not object was admitted.

In sum, Applicant's Exhibits A, C, D, and E were admitted into evidence. The transcript (TR) was received on March 6, 2002.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 45 years old, has worked as a technician with Employer #1 in State #1 since September 1998; previously he was unemployed from April to September 1998. He worked as a technician for Employer #2 in State #1 from 1992 to April 1998. (Exhibits 1, 2)

Applicant served in the military June 1977 to May 1985. He was granted a Secret security clearance by the Defense Department in 1978 and again in 1984. (Exhibits 1, 2)

Applicant grew up as an acolyte in the church and was a boy scout. (TR 47) Applicant was married in December 1990 and widowed in November 1994; he has custody of his two children, born in 1992 and 1993. (Exhibits 1, 2, 3)

Financial Issues

Applicant has an exemplary credit history except for a tax lien, the amount of which he is disputing with the Internal Revenue Service (IRS). His current salary is \$32,000. While he filed his 1990 income tax return, the IRS never received it. His original tax lien for 1990 taxes was \$6,000 as there was a dispute over a \$100,000 loss he took when he made \$45,000. He cannot produce paperwork from that era because when his wife was living she was an alcoholic and at one point threw out his briefcase with a lot of important papers. Applicant still owes approximately that amount even though he has made payments⁽³⁾ on the tax lien from 1995-98. The amount he owes overall also includes liability for 1993 of \$582 and for 1994 of \$212. The total amount he owes keeps changing. However, Applicant has been consistently attempting to resolve the matter with the IRS but has been unable to do so before his hearing. An offer in compromise was made by IRS but withdrawn. He believes that most of the amount owed is penalties. He was not able to resolve this issue with the IRS until arch 2002. (Exhibits 3, 5, 6; Exhibits A, E; TR 33-36, 49-56, 77-82, 83-84, 86) His expenses include approximately \$500 for his house, but he did not provide a budget or identify his other expenses. (TR 56-58)

In March 2002 Applicant reached an agreement with the IRS to pay them immediately \$602 for 1993 and \$220 for 1994 tax liabilities and to pay \$200 per month for the remaining obligation. He will pay the monthly amount by an automatic withdrawal he will institute with Employer #1. (Exhibit A)

Criminal Conduct

Applicant has had a series of arrests in State #1 and #2 from 1989 to 1998.

- In September 1989 Applicant went to visit a friend in jail in State #2. He had guns in his car; as he saw no sign prohibiting guns, he left his car in the parking lot . After the person in jail notified the police of the guns in his car, Applicant agreed to a search of his car; and he was arrested and charged with Bringing a Weapon to Jail, a felony. He was found guilty and sentenced to twenty days in jail; he spent ten days in jail and was never on probation. (Answer; TR 39-40; 58-59; 71-73)
- Applicant had known his wife for many years as she was married to a friend of his while he was in military

service. After she was divorced, he agreed to marry her in December 1990 in State #1. His wife had an extreme alcohol problem which led to domestic disputes for which he was arrested in June 1992 and August 1994 which were nolle prosequi as his wife did not want to testify against him in 1992 and, despite his attempts to help her, her alcohol abuse eventually led to her death in November 1994. (Answer; Exhibits 9, 10; TR 41-44; 59-67)

- In June 1998 his son was caught shoplifting. Because the store detective said if it happened again they would be not allowed to shop at the store again, Applicant decided to switch price tags on a piece of merchandise in the amount of \$3 as he thought he would thus restrict his expenses at the store; he was charged with Retail Theft. Later the charge was reduced to Petit Theft; and he pled nolo contendere, was placed on probation for four months, ordered to perform community service, and to pay \$170 in court costs. He still shops at that store and pays for all his purchases. I accept his depiction that this incident was out of character. (Answer; Exhibit 3; TR 44-46, 69-71)

Personal Conduct

Applicant completed security forms in September 1999, after he went to work for Employer #1 in September 1998. He had a limited amount of time to fill them out as they were backlogged at work. He did reveal his difficulties with the IRS concerning his 1990 taxes and his arrests in 1989-1990 and in 1998. It was not his intent to omit any information and he documented all arrests except for a 1992⁽⁴⁾ and 1994 charge that involved his wife which was eventually nolle prosequi. Although he was terminated by Employer #2 in April 1998 for "Inability to perform work/unsatisfactory work performance" (not willful misconduct). Since he was awarded unemployment compensation, Applicant believed he had prevailed and did not believe he needed to indicate that he was fired from a job on his security application. He believed his was terminated because the company was on the verge of bankruptcy. Thus, he did not attempt to falsify the form or fail to fill it out completely as alleged. (Answer; Exhibits 1, 2, 3, Exhibit D; TR 31-33, 36-38; 67-69; 73-76)

When he was interviewed in April 2000, Applicant declared that he simply forgot to list on his security form the two arrests for domestic violence/battery on his wife from 1992 and 1994 which were both dismissed. He never caused any injuries to his wife; she was an alcoholic and would fall and injure herself. There is no information that the agent confronted him in order to elicit this admission. (Exhibit 3)

Evaluation

Applicant is rated overall with a highly effective performance for 2000-01. He is described as "very reliable, hard working and effective." His individual elements showed highly effective performance in initiative, innovation, job knowledge, judgment, organization support, planning & organization, problem solving and outstanding in quality and use of technology. He was rated as successful in teamwork and written communication and "needing improvement" in verbal communication. (Exhibit C)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole, I weighed relevant Adjudication Guidelines as set forth below :

Guideline F - Financial Considerations

An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

Conditions that could raise a security concern and may be disqualifying include:

1. A history of not meeting financial obligations;
3. Inability or unwillingness to satisfy debts;

Conditions that could mitigate security concerns include:

1. The behavior was not recent;
4. . . .there are clear indications that the problem is being resolved or is under control;
6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Guideline J - Criminal Conduct

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

- a. Allegations or admissions of criminal conduct
- b. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent
- d. . . .the factors leading to the violation are not likely to recur;
- f. There is clear evidence of successful rehabilitation

Guideline E - Personal Conduct

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying also include:

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;

Conditions that could mitigate security concerns include:

2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;
3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. The Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Criterion F - Financial Considerations

Applicant rebutted security concerns over his financial problems initially raised by his (1) history of financial problems and (3) inability or unwillingness to satisfy debts with the Internal Revenue Service stemming from his 1990, 1993 and 1994 tax years. (SOR 1.a-l.c) While his delay in reaching an agreement with the IRS until March 2002 is troublesome, Applicant otherwise has exemplary credit and also has an outstanding record of performance with his current employer who highly regards him.

Thus, I conclude he has sufficiently met several of the mitigating conditions (MC⁽⁵⁾) to extenuate these security concerns. While Applicant does not assert that conditions largely beyond his control caused his financial problems, he did have a period of various family pressures with his wife's alcoholism and death in 1994 as well as a period of unemployment which contributed to his financial situation with IRS. He now has custody of his two children.

Under MC 1, this behavior was not recent as it occurred initially in the early 1990's. While Applicant's conduct in his delay in resolving the IRS tax liens has raised security concerns, he has now addressed them and reached an agreement. Notably, in the 1995-98 period he successfully met his obligations to pay on this tax lien through payroll withholding, but since then was unable to reach a new agreement with the IRS. Now he has successfully mitigated these concerns under MC 6 by initiating a good-faith effort to repay his tax debts. He is financially in a position to resolve completely the debt to the IRS and has committed to pay that debt. I note favorably that he lives modestly, has a stable job and income, and is highly regarded at his place of employment which suggests employment security. He is now able to be as financially responsible with the IRS as he has been consistently with his other creditors. Applicant lives within his means and has had no other financial issues. After considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 1.a. through 1.c. under SOR Paragraph 1.

Criminal Conduct

Applicant has refuted the Government maintains security concerns over Applicant's past criminal conduct: he was found guilty to criminal charges in 1989 and served ten days in jail. He was arrested in 1992 and 1994 over domestic disputes with his wife that were linked to her alcoholism, but was never convicted. He plead guilty to a 1998 charge of Petit Theft after switching a \$3 price tag in a store where he pled nolo contendere and was placed on probation. While the Government alleged that his omissions on his security questionnaire to two questions amounted to a felony falsification, Applicant refuted that claim by establishing that he did not intend to falsify by his failure to list a 1994 arrest and by his belief that he was not terminated from Employer #2 as alleged and discussed below under Personal Conduct.

Except for the dated 1989 incident, these matters are misdemeanors that seemed to grow out of his family pressures which no longer exist. Consequently, the actions that led to his 1989 conviction and 1992, 1992, and 1998 arrests may now be mitigated under condition (a) as the behavior was not recent, (d) . . . the factors leading to the violation are not likely to recur; and (f) there is clear evidence of successful rehabilitation. Today Applicant has a successful work record: Applicant's evaluation portrays him as "very reliable, hard working and effective."

Further, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 2.a., 2.b., 2.c., 2.d, and 2.e., incorporated under SOR Paragraph 2.

Personal Conduct

Applicant also refuted the Government's security concerns over personal conduct issues concerning his omission of his 1994 arrest and his failure to reveal his 1998 job termination. Applicant demonstrated that he has mitigated⁽⁶⁾ this past conduct. Significantly, Applicant did reveal other substantial adverse information on his security forms: his difficulties with the IRS concerning his 1990 taxes and his arrests in 1989-1990 and in 1998. Based on these other disclosures and his testimony, I am persuaded that it was not his intent to omit any material information and that he simply forgot to list the 1994 arrest. With the trauma over his wife's death in 1994, I find it believable that he did not remember the 1994 charge which was eventually nolle prosequi. He did remember and reveal this 1994 arrest and a 1992 arrest in his DSS

interview promptly and without any noted confrontation.

Although the Government obtained records that he was terminated by Employer #2 in April 1998 for "Inability to perform work/unsatisfactory work performance (not willful misconduct), I find it believable that he did not think he should report that he was fired from a job on his security application since he prevailed in a dispute with his employer and was awarded unemployment compensation. I find him credible when he argues that he did not attempt to falsify the form or not fill it out completely as he believed he was terminated because the company was on the verge of bankruptcy. Hence, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 2.a. through 2.b. under SOR Paragraph 2-⁽⁷⁾.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline F: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2-⁽⁸⁾ Guideline E: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For 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.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.

2. The Guideline E allegations are mistakenly labeled as paragraph 2 when they should be paragraph 3.

3. In February 1995 the IRS notified Applicant's Employer #2 in State #1 that Applicant had agreed to a payroll deduction to pay taxes owed of \$22,330 from a 1990 tax liability at the rate of \$200 per month; the amount owed for the 1992 tax liability was not included. He paid in that way from 1995-98. Applicant claims that the IRS did not properly apply the amounts he paid through Employer #2. He claimed in closing argument also to have paid the 1993 and 1994 taxes but provided no evidence to that effect. (Exhibits 3, 6; TR 98)

4. The Government did not allege any security concerns over his failure to list the 1992 arrest as it was outside the seven year time limit. (TR 92)

5. Conditions that could mitigate security concerns include: 1. The behavior was not recent; 2. It was an isolated incident; 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); 4. The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control; 5. The affluence resulted from a legal source; and 6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

6. Conditions that could mitigate security concerns include: 1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability; 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily; 3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts; 4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided; 5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress; 6. A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information; 7. Association with persons involved in criminal activities has ceased.

7. Alleged as Paragraph 2 in the SOR when it should have been numbered paragraph 3.

8. Alleged as Paragraph 2 in the SOR when it should have been numbered paragraph 3.