

DATE: July 30, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-13375

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Nygina T. Mills, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

While Applicant admits he failed to reveal a 1990 arrest for rape and a 1994 criminal charge of battery in completing an October 2001 security clearance application, his defense that he did not intend to falsify by these omissions is believable in light of his subsequent disclosures and the flaws in the government's claims and in the record. The government provided no support for the 1990 rape charge where he maintained he was wrongfully arrested and the charges were ultimately dismissed. The Federal Bureau of Investigation (FBI) report lists a 1994 battery charge, but contains no record of conviction. His criminal conduct can be mitigated as these 1990 and 1994 incident were dated and isolated as there is no evidence that he has subsequently been implicated in any other criminal activity. His work record demonstrates he is clearly rehabilitated. 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 January 23, 2003. 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 Applicant. ⁽¹⁾ The SOR alleges specific concerns over criminal conduct (Guideline J) and personal conduct (Guideline E). Applicant responded to these SOR allegations in an Answer notarized on February 23, 2003; he requested a decision on a written record and did not request a hearing.

The case was assigned to Department Counsel who on March 21, 2003, prepared a File of Relevant Material (FORM) for the Applicant's review and advised Applicant that he had 30 days to submit objections and/or information before the FORM was submitted to an administrative judge and that he had the right to be represented by counsel. A Personnel Security Specialist (PSS) sent the FORM to Applicant on March 21, 2003, and again notified the Applicant that he had 30 days from receipt of the letter to submit objections and/or information before the FORM was submitted to an administrative judge. Applicant received the FORM on April 8, 2003, with a response due on May 8, 2003. The Applicant submitted no response. Subsequently, on May 23, 2003, the DOHA Director assigned ⁽²⁾ the case to me for a

decision on the record.

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, 48 years old, has worked for Defense Contractor #1 in State #1 since September 2000. Previously he worked in other positions for other employers. He served in the military from 1980 to 1986. He was married in 1996. (Answer; Item 4)

Applicant attended a college in State #2 from 1975 to 1979. (Item 4)

Criminal Conduct and Personal Conduct

Applicant completed a Security Clearance Application (Standard Form 86) (SF 86), the EPSQ version in October 2001. The SOR alleges a 1990 arrest for rape and a 1994 arrest and conviction for battery that he failed to disclose in response to two questions:

- The SOR at 2.a. alleges he failed to list a 1990 arrest for "Rape, 1st Degree," on a security Clearance Application that he signed in May 2001⁽³⁾ in response to "**Question 21. Your police Record - Felony Offenses:** Have you ever been charged with or convicted of any felony offense? For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607."

Applicant explained to the Office of Personnel Management (OPM) security investigator why he failed to list this 1990 arrest and provided substantial mitigating information for not doing so. In his supplement to his Answer to the SOR and in his February 2002 Statement to the OPM investigator on the wrongful nature of the arrest, he provided a long explanation about this arrest for rape which he viewed as unjust and racially biased; he explained his being held in jail for several months since he could not post bond, and that the charge was finally dismissed. Further, he explained he "didn't know that this was on file. . . ." While Applicant admitted this arrest in response to SOR 1.a., he explained in mitigation that he was never told who instigated the arrest and even considered filing a suit for false arrest, but could not afford to do so. The Government provided no evidence in the FORM of this 1990 arrest other than his voluntary Statement to the security investigator, so with no documentation on the 1990 arrest, I cannot conclude that the 1990 arrest in State #2 was a felony and that he had a duty to report it in answer to Question 21. (Answer; Items 4, 5) I conclude that Applicant did not omit it intentionally.

- The SOR charges in 2.b. that he falsified material facts on a "Standard Form 85-P" signed in "October 31, 2000" when he answered "No" to Question "**20. Your Police Record - In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s)?** (Leave out traffic fines of less than \$150." (Answer; Item 4)

However, the SF 86 Applicant signed does not contain that wording for Question 20. On the SF 86 form Applicant signed in October 2001 (not a SF 85-P⁽⁴⁾ form as alleged), Question 20 involves adverse information in employment, not arrests. (Item 4) The FORM did include a partially supportive FBI report of a January 1994 charge of battery in State #3 which Applicant admitted in response to SOR 1.b., but the FORM contained no evidence of the disposition of the 1994 charge. (Item 6) In mitigation Applicant claimed that he pleaded guilty to the incident which occurred during a heated argument with his girlfriend. While he admitted in response to SOR 2.b. that he did not include information on the 1994 arrest in his security form, he provided substantial mitigating information for not doing so which supports a conclusion that he did not omit it intentionally. I note that the Criterion E SOR 2.b. allegation cites the wrong form (Standard Form 85-P), cites the wrong date (October 2000), and cites the wrong questions (20).

In his Answer Applicant contests the validity of this alleged conviction as he was not represented by counsel at the time of the charge; although the FBI record lists the charge, it does not list the disposition of this case as alleged in SOR 1.a. Further, while he cooperated fully with the security investigator in discussing the 1990 incident, that Affidavit statement does not include any information nor any reference to a 1994 incident even though in his Answer Applicant stated the investigator brought the incident to his attention. I conclude from his statement in his Answer that he had no intent to falsify by not disclosing this incident on his October 2001 SF 86 security form. Further the January 1994 arrest was not within the seven year time limit for past criminal conduct in the SF 86 questions. (Answer, Items 4, 5, 6)

Applicant stated he has been working for his company for three years without missing a day, and he puts in many hours of overtime. He states he is very good at his work and highly respected⁽⁵⁾ by his co-workers. He states he has worked in many agency buildings without any incident and is a hard worker. He mentions he has worked for two different U.S. Attorney Generals. I conclude Applicant had no intent to falsify and cooperated fully with the security investigator. (Answer; Item 5)

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 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;

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

Criminal Conduct

Applicant mitigated security concerns over his criminal conduct in 1990 and 1994 as these incidents were dated and factors leading to these violations are unlikely to recur. The Government provided no evidence in the FORM on the 1990 arrest for rape other than his voluntary Statement to the security investigator where he persuasively asserted that the arrest was wrongful and ultimately dismissed. Thus, I cannot conclude that the 1990 arrest in State #2 was, in fact, a felony. While there was an FBI record of his 1994 arrest for battery, there was no evidence in the FORM of the disposition. Consequently, the Government has not established clearly this criminal conduct. While he admitted these arrests, he provided persuasive evidence of mitigation.

The actions that led to these incidents 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 as there is no evidence that he has subsequently been implicated in any other criminal activity since 1994. Moreover, Applicant has a successful work record. Thus, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 1.a and 1.b. under SOR Paragraph 1.

Personal Conduct

The Applicant mitigated security concerns over personal conduct issues in the October 2001 security clearance application form. While he admitted he failed to disclose 1990 and 1994 arrests on his SF 86, neither are within the seven year window on questions relating to criminal conduct. Further, both SOR 2.a. and 2.b. are filled with errors as detailed in the Findings which create prejudice to Applicant as to the actual conduct alleged. Indeed, because of the mistakes in both the reference to the form and to the question at issue, I cannot determine what question the Government thinks the Applicant falsified: the SOR at 2.b. cited the wrong form number and cited a question 20 that does not appear on his SF-86 form. In the FORM, the Department Counsel based her arguments on a falsification of SF 86, instead of SF 85-P which was mistakenly alleged in SOR 2.b. In this case I believe the Applicant was prejudiced by these mistakes and explained persuasively that he had no intent to falsify by omitting the 1994 incident from his security form. Thus, I conclude the Government failed to establish their case of willful falsification of material facts.

Even if one were to conclude that the Government properly raised a security concern over personal conduct, Applicant has successfully rebutted and overcame the Government's case as Applicant demonstrated that he has mitigated⁽⁶⁾ this conduct. Applicant nevertheless attempted to answer these questions by admitting his past arrests, but provided a lengthy Answer to establish that he had no intent to falsify. Conditions that could mitigate security concerns include: C 2, the falsification was an isolated incident, and the individual

subsequently provided correct information to the OPM investigator voluntarily. Applicant cooperated with the security investigator and provided details that explain his reason for not including the 1990 arrest on his security form. Based on all the facts, I conclude he had no intent to falsify by omitting these criminal matters from his SF 86. Further, his current good work record provides evidence in mitigation. Hence, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 2.a. and 2.b. under SOR Paragraph 2.

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 J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Paragraph 2. 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. While the assignment transmittal memorandum states that the Applicant is represented by counsel, there is no documentation in the file of any counsel's name.
3. Applicant signed the form in October 2001.
4. The Appeal Board recently explained that an SOR is "an administrative pleading that is not measured against the strict requirements of a criminal indictment." (ISCR Case No. 02-15383, July 29, 2003, at p. 2) However, in this case because of the mistakes in both the reference to the form and to the question at issue, I cannot determine what question the Government thinks the Applicant falsified: the SOR cited the wrong form number and cited a question 20 that does not appear on his SF-86 form. In the FORM, the Department Counsel bases her arguments on a falsification of SF 86, instead of SF 85-P which was mistakenly alleged in SOR 2.b. In this case I believe the Applicant was prejudiced by these mistakes and explained persuasively that he had no intent to falsify by omitting the 1994 incident from his security form.
5. While he listed names of individuals who could attest to his character, he failed to provide any independent letters of reference.
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.