

DATE: June 29, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-15852

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esquire, Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's criminal conduct in 1995 and personal conduct concerns over the resulting fine can be mitigated because of the passage of time and because he has completed probation and now resolved the fine in full. Also, he credibly established he had no intent to falsify when he failed to disclose his termination from a part-time job in 1996 after an administrative tribunal found he was dismissed unfairly; he believed he had no need to disclose a part-time job. However, he failed to mitigate personal conduct concerns over his failure to disclose a 1999 unpaid judgment when he failed to pay his fine in full and over his failure to disclose his travel to Mexico. Also, personal concerns persist as he failed to provide truthful information about his 1995 arrest in his security interview in October 2000. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on August 27, 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 the Applicant. ⁽¹⁾ The SOR alleges specific concerns over criminal conduct (Guideline J) in paragraph 1 and over personal conduct (Guideline E) in paragraph 2. Applicant responded to these SOR allegations in an Answer notarized on September 24, 2003, and requested a decision without a hearing.

On November 24, 2003, Department Counsel prepared a File of Relevant Material (FORM) which was forwarded to Applicant on December 1, 2003, where he was advised he had an opportunity to review the form, but needed to respond within 30 days of receipt of the letter. He received the FORM on January 13, 2004; so his response was due on February 12, 2004. On February 3, 2004, he submitted his response with an attachment. (Exhibit A) On February 9, 2004 Department Council indicated that she did not object to his submission. On February 11, 2004, the matter was assigned to me, and I admitted Exhibit A into evidence.

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, 32 years old, has been employed by Company #1, a defense contractor in State #1, since March 2000. Prior to April 1999 he lived in State #2. He completed a Security Clearance Application in April 2000. (Items 4,5)

Applicant has attended three different colleges, but has no degree. He married in 1993 and was divorced in July 1995. He lived with another woman and has one child born in February 1998. (Items 4, 5, 6 at page 3)

Criminal Conduct

Applicant disclosed in answer to Question 25 that he had been arrested in December 1995 for possession of a controlled substance and was given three years of probation in State #2. (Item 5) A Federal Bureau of Investigation (FBI) records check and other records documented that in December 1995 Applicant was arrested for possession of marijuana for sale and unlawful transportation of 235 pounds of marijuana. He was originally charged with a felony as the marijuana had an estimated value of \$188,000. He subsequently pled guilty to a misdemeanor marijuana possession charge, and the transportation charge was dismissed. He was fined \$3,180 and sentenced to three years probation which began October 1996. He was also to complete 100 hours of community service and participate in any treatment or training programs directed by the probation officer. In April 1998, Appellant's probation was modified to unsupervised probation and his offense was designated a misdemeanor. In November 1999 he completed his probation, but had a balance due on his fine of \$2,800. (Items 5, 7, 8, 9) In December 2003 he paid the fine in full. (Exhibit A)

Personal Conduct

In April 2000 when Applicant was asked by the security officer to fill out a security clearance application during work hours, he completed the application from memory. He claims that he had no intent to falsify. (Exhibit A) Applicant did disclose in answer to Question 25 that he had been arrested in December 1995 for possession of a controlled substance and was given three years of probation in State #2. (Item 5)

However, the government alleges he willfully falsified in failing and to provide truthful answers to several questions:

Question 37 required Applicant to disclose whether his financial record include any unpaid judgments. In response he failed to disclose an unpaid judgment from the fine which resulted from his 1995 arrest; his explanation for omitting this unpaid judgment is suspect as he signed an official court document in February 2000 just two months before completed his security application. Clearly, Applicant knew of this civil judgment and deliberately failed to provide this adverse information to the government or to pay the fine in full. (Items 3, 6, 9 at page 16) (SOR 2.a., 2.b.) He subsequently paid the fine in full in December 2003. (Exhibit A)

Question 16 required him to disclose any personal travel outside the United States within seven years prior to filling out his SF 86. He failed to disclose his travels to Mexico. While he claimed he misunderstood this question with respect to foreign countries he had visited, the question clearly ask applicants to list foreign travel outside the United States on other than official US government orders. The Applicant's failure to list his travel to Mexico is of security significance as he was born in Mexico, has family residing in Mexico, and attempted to transport marijuana for a friend to reside in Mexico. (Items 3, 6, 7) (SOR 2.c.)

Question 6 required him to disclose his employment history. While Applicant had a duty to disclose all his employment and failed to document his part-time job in State #2 with Company #2 from January 1996 to June 1996, and in response to Question 20 failed to list that he was involuntarily dismissed by Company #2 in June 1996, I accept as credible his reasons that he had no intent to falsify: he did not list this job as it was part-time and he was later cleared of misconduct by an official proceeding of an Appeals Tribunal in State #2 where an Administrative Law Judge (ALJ) found he was "discharged for the violation of a rule which he did not know and which was not reasonably enforced against him." The ALJ concluded that he was not discharged for misconduct. (Item 3, Attachment D) (SOR 2.d., 2.e.)

Further, Applicant deliberately falsified his answers when he was initially questioned about his 1995 drug-related arrest by the Defense Security Service (DSS) in October 2000 when he claimed that a friend had borrowed his car and that the marijuana found by the border patrol must belong to his friend. (Item 6) (SOR 2.f) Records and a transcript of a taped interview by the U.S. border patrol in December 1995 documented that Applicant's car contained 78 individually wrapped packages of marijuana with an estimated value of \$188,000. At the time of his arrest Applicant admitted to the border patrol that he was to be paid \$2,000 to transport a load of marijuana to the U.S. for a friend whom he met when he was visiting his mother in Mexico. (Item 7)

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 in evaluating this case, I weighed relevant Adjudication Guidelines as set forth below:

Guideline J - Criminal Conduct

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

2. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

1. The criminal behavior was not recent;
2. The crime was an isolated incident;

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;
3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trust-worthiness determination;

Conditions that could mitigate security concerns include:

None

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. Then 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 was convicted of a misdemeanor criminal incidents in 1995 in State #1 that raised security concerns over this criminal conduct: he pled guilty to a charge of misdemeanor marijuana possession and was fined over \$3,000 and sentenced to three years probation. However, he has mitigated⁽²⁾ these concerns because of the passage of time as the incident took place nine years ago when he was 23 and in November 1999 he completed his probation. While he was slow to reduce the balance due on his fine, in December 2003 he paid the fine in full. Thus, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraph 1.a. under SOR Paragraph 1.

Personal Conduct

Although Applicant did reveal his 1995 arrest on his SF 86 form, he failed to disclose substantial other adverse information which led the Government to raise security concerns over personal conduct issues under Disqualifying Conditions (DC) (2) and (3). Applicant's omission of relevant and material information could reflect questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations and could indicate that he may not properly safeguard classified information. Applicant had a duty to reveal the adverse information requested in Questions 37 about his 1999 unpaid judgment and in Question 16 about his travel to Mexico. Also, Applicant misled the DSS agent when he was questioned about his 1995 arrest and failed to provide correct information voluntarily in the DSS statement. He failed to establish any basis to mitigate these concerns. After considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant under SOR Paragraph 2 under subparagraphs 2.b, 2.c., and 2.f.

On the other hand Applicant rebutted and overcame some of the other security concerns. He documented that he paid in full the fine that was subject to a 1999 State #2 judgment. Further, with respect to his part-time employment with Company #2, the government failed to provide any evidence. Further, Applicant provided a credible and rational basis for his failure to list his part-time job in State #2 and to reveal his subsequent termination. He listed all other jobs and established that his termination for misconduct with Company #2 was not supported in a 1997 decisions of a State #2 Appeal Tribunal which held he was "discharged for the violation of a rule which he did not know and which was not reasonably enforced against him."

After considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant under SOR Paragraph 2 under subparagraphs 2.a., 2.d. and 2.e.

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

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: For Applicant

Subparagraph 2.e.: For Applicant

Subparagraph 2.f.: Against Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

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. **Conditions that could mitigate security concerns include:**
 - a. The criminal behavior was not recent;
 - f. There is clear evidence of successful rehabilitation.