

DATE: December 17, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24264

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esquire, Department Counsel

FOR APPLICANT

James J. Ransom, III, Esquire

SYNOPSIS

Applicant has mitigated security concerns over his past criminal conduct and personal conduct. Given his record of excellence at work and in the community, he has mitigated this criminal conduct as he has not had any adverse incidents for over seven years. Thus, he has demonstrated clear evidence of successful rehabilitation. The omissions on his security form were not intentional as he disclosed substantial adverse information in response to other questions. Applicant has a general reputation for truthfulness in his workplace both with company officials and his co-workers. He also has a consistently good work record. 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 September 30, 2002. 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 November 4, 2002, where he admitted all of the allegations under paragraph 1 and denied all of the allegations under paragraph 2. He requested a decision be made without a hearing. Subsequently, on April 16, 2003, Applicant requested a hearing; and on May 16, 2003, the case was assigned to another Administrative Judge, and then re-assigned to another judge on May 19, 2003, who set it for hearing on June 19, 2003, but granted a continuance on June 15, 2003, at the request of Applicant's counsel.

The case was re-assigned to me on June 30, 2003. Subsequently, a mutually convenient date for hearing was agreed to; a Notice of Hearing issued on July 17, 2003, set the matter for August 13, 2003, at a location near where Applicant works and lives. Applicant's counsel formally entered his appearance on July 22, 2003, and requested a continuance as he was to be in the hospital on the date of the scheduled hearing. Initially, I denied the continuance; but after a conference call on July 24, 2003, I granted the continuance. On August 1, 2003, rescheduled the hearing for September 3, 2003.

At the hearing the Government offered eight Government exhibits which were admitted into evidence. (Exhibits 1-8) The Applicant's counsel offered two exhibits which were admitted into evidence. (Exhibits A-B) Applicant testified and called three witnesses. The transcript (TR) was received on September 15, 2003.

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, 44 years old, is a trucker who has worked for a defense contractor (Company #1) in State #1 since 1995. As Applicant needed a security clearance to perform his job, he completed a National Agency Questionnaire (DD Form 398-2) in April 1995. He remained with Company #1 and completed a Security Clearance Application (SF 86) in August 1999. (Exhibits 1, 8; TR 72-74)

Applicant married in 1978 and divorced in 1981; he has a son born in 1979. He married Wife #2 in 1987 or 1988 and was married for 18 months. He married wife #3 in 1990 and was married for a year. In 2000 he stated he had a common-law marriage with Wife #4 since 1991; she is also a co-owner of a truck and a partner in their work for Company #1. (TR 76-77; 105-110)

Criminal Conduct and Personal Conduct

Applicant admitted a series of misdemeanor arrests in the 1980's (SOR 1.a through 1.g.); he denied a probation violation arrest in 1990 in State #1 as he was living in another state (1.h.), and admitted a series of misdemeanors from 1990 to 1996 (SOR 1.i. through 1.m.) (Answer; Exhibits 1-8; TR 32-57; 66-67)

In his 1995 and 1999 security forms, Applicant disclosed a December 1994 offense for resisting arrest in State #2 in response to questions about his past criminal conduct. (SOR1.k.) He did not have any intent to mislead the Government. He has only a high school education and the questions were confusing to him. Applicant believed he did not have to list other offenses because he had not been convicted in the other incidents. Also, he had forgotten some of the arrests, and other arrests were dismissed. In 1995 he had to fill out the form quickly, and he stated he is not a "fast person." Although he gave a variety of reasons for his failure to fully disclose his past criminal history, I note that he did disclose in both security forms the most recent incident and one where he pleaded no contest and was fined in 1994. He disclosed this incident even though it did not put him in the best light and he had hired attorneys in an futile attempt to contest his arrest as there were unfair elements in the way he was treated. Therefore, I conclude he was credible in his denial of these personal conduct allegations as he had no willful intent to deceive the Government. Further, he cooperated with Defense Security Service (DSS) in several interviews in providing additional adverse details. He provided further additional details in a lengthy Answer. (Answer; Exhibits 1, 8; TR 59-68; 79-89; 93-95; 125-129)

After a March 2000 Federal Bureau of Investigations (FBI) record revealed several other arrests, Applicant was interviewed by the DSS in April 2000. Applicant stated to DSS that he had only listed this 1994 arrest as he could only remember it. When asked about other arrests in the April 2000 interview, Applicant admitted a series of arrests including one in 1986 in State #1 where he was not convicted. He also was arrested in 1987 in State #1 for an alcohol-related incident where he paid a fine and received one year's probation. In 1992 he had an arrest in State #3 which was later dismissed. In 1993 he had an arrest in State #4 where his employer paid the fines. In 1993 he was arrested in State #5 where the charges were dismissed. He also explained the circumstances of his December 1994 arrest in State #2. In June 2000 he was re-interviewed about his past drug use based on the 1986 arrest, but he stated he has not used drugs and since 1981 has worked for companies that require drug tests which he has always passed. While he used alcohol, he only had one alcohol-related arrest in 1987. (Exhibit 2, 3; TR 63-64)

In February 2002 DSS re-interviewed him. (TR 63-64) At that point Applicant attributed a number of his past arrests to his abuse of alcohol, but he stopped drinking when he started driving a truck. He denied any drug involvement. He further explained the August 1994 arrest for Aggravated Assault which was resolved when he pleaded no contest and paid a fine. He persuasively explained the outstanding warrant in 1999 was because the state had failed to give him credit for the payment. While in November 1996 he was arrested for battery while he was sitting in his truck with his spouse, he and she both persuasively explained he was not abusing her, but was upset over the recent death of his father.

The charges were dismissed. (Exhibit 4) Wife #4 testified that Applicant has never assaulted her, and that in the incident in 1996 she confirmed he was upset over his father's death. (TR 110-113)

Applicant's spouse also confirmed two other incidents with Appellant where charges were dismissed and also provided details on the 1994 incident where he was charged, ultimately pleaded no contest, and paid a fine. (TR 118-127)

For the past seven years, Applicant has had no adverse incidents at his company nor any criminal arrests. He no longer drinks, takes no illegal drugs, and has not tested positive on any of Company #1's random drug tests. (TR 69-72; 90-92; 129-130)

References and Job Performance

The president of Company #1 testified that he has known Applicant since 1995 when he joined the company. Applicant is one of over 200 drivers for the company and is one of the company's top producers. This official reported that Applicant also has been willing to fully discuss and disclose any issues that might create a problem. He confirmed that Applicant has "always done what's been asked of him. . . ." The company has never had any disciplinary problems with Applicant. Applicant has always behaved in a professional manner. Applicant and his spouse have even appeared in a company advertisement. He explained that 80 per cent of the company's work now requires a security clearance; previously Applicant has had a security clearance with the company; and he always handled his responsibilities correctly. This manager has always found Applicant to be truthful and forthcoming. (TR 133-140; 141-146)

A vice-president of Company #1 testified that he has been with the company for five years and known Applicant for that period of time. During that period Applicant has never had any safety violations. Company #1 does random drug tests, and Applicant has never failed a test. When Applicant was hired in 1995, his employment checks were all clean. On the company form, their policy is only to ask about convictions, not arrests. He reported that Applicant and his partner are "a hard working team" with no problems with customer relations. (TR 148-157)

Applicant provided 21 letters of reference from individuals who are his co-workers, former co-workers, and neighbors, as well as one letter from his banker: all furnished strong positive statements about his character and trustworthiness. (TR 95-104; Exhibits A & B)

Applicant's spouse testified that he loves his work; she recommended him for a security clearance because of his excellent character and concern for other people. Since 1991, she has seen him mature. (TR 113-117; 130)

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. [T]he 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 the Government's security concerns over his criminal conduct from 1980 to 1996 when he had misdemeanor arrests and convictions. He persuasively explained the outstanding warrant in 1999 as resolved by his having paid the fine but the state having failed to give him credit for the payment. Since then Applicant has reformed his conduct. He has a very successful work record and favorable work references from managers and co-workers which indicate his successful change in his lifestyle and his general reputation for honesty and trustworthiness. He has had no criminal nor any other questionable incidents in the past seven years. Although the Government alleges a felony under Title 18 United States Code Section 1001 for his failure to fully disclose his criminal record on his two security forms, I conclude they have not established that he willfully falsified as discussed below under Personal Conduct.

Consequently, the actions that led to his convictions may now be mitigated under MC a, as the criminal behavior was not recent, under MC d., as the factors leading to the violation are not likely to recur, and under MC f., as there is clear evidence of successful rehabilitation. Significantly, the President of Company #1 who known Applicant since 1995 substantiated that Applicant is one of the company's top producers: Applicant has "always done what's been asked of him. . . ." The company has never had any disciplinary problems with Applicant who has always behaved in a professional manner. Another company official and Applicant's co-workers had similar positive views. Hence, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 1.a. through 1.m. incorporated under SOR Paragraph 1.

Personal Conduct

While the Government raised security concerns over Applicant's personal conduct in failing to disclose fully all adverse information in answering questions on the security forms in 1995 and 1999, I am persuaded that he had no intent to falsify as he disclosed other adverse information on his security forms with regard to the most recent conviction in 1994 even though there were mitigating circumstances surrounding this arrests. He failed to disclose other arrests which were dated, some over twenty years ago, and the majority were incidents where the matter was ultimately dismissed or he paid a small fine. All were misdemeanors. The arrest in 1996 though more recent was subsequently dismissed. Even if one were to conclude these omissions were deliberate, they would be mitigated under MC 2, as Applicant subsequently provided correct information voluntarily to DSS in the interviews. There was no evidence that he had to be confronted before he cooperated. Further, a company official explained their policy that only convictions are required to be reported on the company employment records; therefore, I conclude it was credible for the Applicant who has only a high school education to conclude he need only reveal the matter that led to the recent conviction in 1994 which he did fully disclose. Thus, I conclude that the omissions of details of his other arrests were not intentional. Applicant has a general reputation for truthfulness in his workplace both with company officials and his co-workers. He also has a consistently good work record. His favorable reference establish that he is generally viewed as an honest and trustworthy person. Hence, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraph 2.a.. through 2.d. under SOR Paragraph 2

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines 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

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Subparagraph 1.j.: For Applicant

Subparagraph 1.k.: For Applicant

Subparagraph 1.l.: For Applicant

Subparagraph 1.m.: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.a.(1): For Applicant

Subparagraph 2.a.(2): For Applicant

Subparagraph 2.a.(3): For Applicant

Subparagraph 2.a.(4): For Applicant

Subparagraph 2.a.(5): For Applicant

Subparagraph 2.a.(6): For Applicant

Subparagraph 2.a.(7): For Applicant

Subparagraph 2.a.(8): For Applicant

Subparagraph 2.a.(9): For Applicant

Subparagraph 2.a.(10): For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.b.(1): For Applicant

Subparagraph 2.b.(2): For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.c.(1): For Applicant

Subparagraph 2.c.(2): For Applicant

Subparagraph 2.d.: For Applicant

Subparagraph 2.d.(1): For Applicant

Subparagraph 2.d.(2): For Applicant

Subparagraph 2.d.(3): 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.