

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant mitigated the criminal conduct and personal conduct concerns raised by information in his background investigation. Applicant's difficulties adjusting to civilian life after he left the military lead to four arrests for petty larceny and passing bad checks between 1994 and 1996. He has since resolved several personal issues and presented clear evidence of rehabilitation. Omissions and inaccuracies in his security clearance application (SF 86) did not constitute deliberate attempts to deceive or mislead the government about his background. Clearance is granted.

CASENO: 03-19831.h1

DATE: 03/28/2006

DATE: March 28, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-19831

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant mitigated the criminal conduct and personal conduct concerns raised by information in his background investigation. Applicant's difficulties adjusting to civilian life after he left the military lead to four arrests for petty larceny and passing bad checks between 1994 and 1996. He has since resolved several personal issues and presented clear evidence of rehabilitation. Omissions and inaccuracies in his security clearance application (SF 86) did not constitute deliberate attempts to deceive or mislead the government about his background. Clearance is granted.

STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to give Applicant a security clearance. On April 26, 2004, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline E (personal conduct) and Guideline J (criminal conduct). Applicant timely submitted a responsive pleading, and requested a hearing.

The case was assigned to me on September 19, 2005, and I convened a hearing on November 14, 2005. The parties appeared as scheduled and the government presented 14 exhibits (GE 1 through 14), which were admitted without objection. Applicant presented four exhibits (AE A through D), which were admitted without objection, and testified in his own behalf. DOHA received the transcript (Tr) on December 1, 2005.

PROCEDURAL ISSUE

SOR ¶ 1.e alleged Applicant was precluded from holding a security clearance through application of 10 U.S.C. § 986. At the time the SOR was issued, this statute barred award or renewal of a clearance for anyone who had been convicted of a crime and sentenced to more than one year in jail. As alleged in SOR ¶ 1.c, available information indicated

Applicant had been sentenced to three years in jail on conviction of a felony in 1995, but served only six months of that sentence. The statute has since been amended and is now applicable only in cases where the applicant has actually served more than one year in jail. Based on the foregoing, Department Counsel moved to amend the SOR by withdrawing ¶ 1.e. Without objection, I granted the motion. ⁽²⁾

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is 37 years old and employed by a defense contractor as a machinist on a contract at a U.S. Navy shipyard. He has held his current job since June 2001. Applicant and his wife have been married since October 1992 and have two children under 10 years old. His supervisor for the past three years and a co-worker, whom he has known for more than 20 years, recommend Applicant for a position of trust based on his good character and reliability.

Applicant enlisted in the U.S. Army in 1988 and was honorably discharged as a corporal (paygrade E-4) in 1992. While in the Army, he specialized as a mechanic working on various armored combat vehicles and tanks. He served with the 3rd Armored Division as it advanced on Baghdad during the first Gulf War. Among his decorations from the Army are an Army Achievement Medal and a Certificate of Commendation. After the war, the Army conducted a comprehensive reduction in its active duty forces, and Applicant was told he would not be retained in the service past his end of obligated service. He had hoped to make the Army a career as had his grandfather.

After leaving the service, Applicant had trouble finding employment commensurate with his skills. He did not receive much help from the Army, and he spent much of the first year after his discharge either unemployed or doing odd jobs. Fortunately, his wife was working and they were able to make ends meet. However, Applicant had trouble adjusting to civilian life and became depressed over the fact he could not support his family.

In June 1994, he was arrested and charged with felony fraud for having written some bad checks. The total amount of the checks was less than \$200, but Applicant had not been attentive in balancing his checkbook, sometimes assuming money had been deposited when it had not. He and his wife had the money to make good on these checks, but notice of the delinquencies were sent to his father's house in another county. After he did not respond to the notices, warrants were sought for his arrest. Applicant was eventually found guilty of a lesser charge of passing worthless checks. He was sentenced to 12 months in jail, which was suspended on condition of two years of good behavior.

In January 1995, Applicant was arrested and charged with shoplifting. He had stolen a leather jacket and leather vest greater than \$200 in value. He was convicted and sentenced to three years in jail, of which all but six months was suspended. After serving his six months on a state work farm, Applicant was again arrested in December 1995, and charged with petit larceny after he was caught shoplifting from a clothing store. Applicant was found guilty and sentenced to 12 months in jail, of which all but one month was suspended.

In September 1996, Applicant was arrested and charged with petit larceny after he was caught stealing razor blades and other small merchandise valued at less than \$200 from a local drug store. He was eventually convicted of misdemeanor larceny and sentenced to six months in jail.

In May 1997, Applicant and a co-worker at the fast food restaurant where he worked went out after work. Applicant's co-worker drove, but during the evening he became too drunk to drive. Applicant drove him home, then went home in his co-worker's car. Applicant returned the car to his co-worker two days later. Unbeknownst to Applicant, the co-worker swore out a warrant charging that Applicant had stolen his car. It was not until February 2001 that Applicant was arrested for grand larceny based on this warrant. The charge was dismissed when the co-worker failed to appear in court.

Applicant submitted a security clearance application (SF 86) on January 29, 2002. He initially filled in by hand a copy of the questionnaire and submitted it to a member of the company's security staff, who then transferred the information to an electronic version. Several months later, a hardcopy version, which is GE 1, was presented to Applicant for review and signature. (3) The version Applicant signed listed his arrests in 1995 and 1996, but mistakenly listed their dates as 1985 and 1986. I specifically find these were typographical errors. Applicant was in high school in 1985 and 1986. Applicant also omitted the February 2001 grand larceny charge because he thought he did not have to list it if it was dismissed.

Applicant's younger sister was murdered in 1997. This event and the birth of his first child in 1998 had a profound effect on Applicant. His sister had joined the Army to emulate Applicant, and had been encouraging Applicant to straighten out his life so she could be an aunt to his children. Applicant's wife has been a steadying influence on him, and he has not been involved in any adverse circumstances since he went to work at the shipyard in 2001.

POLICIES AND BURDEN OF PROOF

The Directive sets forth adjudicative guidelines (4) to be considered in evaluating an Applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating

conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive.⁽⁵⁾ The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (personal conduct) and Guideline J (criminal conduct).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽⁶⁾ for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for the Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽⁷⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁽⁸⁾

CONCLUSIONS

Under Guideline E, a security concern may arise if it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information.⁽⁹⁾ Here, the government questioned Applicant's trustworthiness by alleging he deliberately omitted from his SF 86 his February 2001 arrest for grand larceny, and that he deliberately misstated the dates of two of his arrests (SOR ¶ 2.a).

Department Counsel submitted sufficient information to show that these omissions and inaccuracies exist. Based on available information, Guideline E DC 2⁽¹⁰⁾ must be considered. However, to be disqualifying, the omissions and inaccuracies must have been made with intent to mislead or deceive the government in its investigation of Applicant's background. The record does not support a conclusion Applicant had the requisite intent to falsify his SF 86. The dates he listed for his 1995 and 1996 arrests were clearly inadvertent errors, and Applicant credibly asserted he thought he did not have to list an arrest if the charge was dismissed. Certainly, in his mind, Applicant knew no crime had been committed in the first place. In light of all of the information probative of this issue, DC 2 does not apply, and I conclude Guideline E for Applicant.

The government also alleged Applicant was charged with and convicted of passing worthless checks in July 1994 (SOR ¶ 1.d), felony shoplifting in January 1995 (SOR ¶ 1.c), felony petit larceny in December 1995 (SOR ¶ 1.b), and larceny in September 1996 (SOR ¶ 1.a). Criminal conduct is a security concern because a person who is willing to disregard the law and risk fines or incarceration may also be willing to disregard rules and regulations governing the protection of classified information.⁽¹¹⁾ The government submitted sufficient information to support these allegations, and Applicant has admitted these facts throughout his investigation and at his hearing. Based on the available information about Applicant's criminal conduct, Guideline J DC 1⁽¹²⁾ and DC 2⁽¹³⁾ apply.

By contrast, the record also supports application of Guideline J mitigating condition (MC) 1⁽¹⁴⁾ and MC 6.⁽¹⁵⁾ Applicant's last criminal offense occurred over nine years ago. Since then, he has experienced the death of his sister and the birth of his children, profound events he credibly asserts helped motivate him to overcome whatever difficulties he may have had adjusting to life after the military. Since June 2001, he has been steadily employed by a defense contractor and appears to be a responsible, mature adult who is not likely to repeat his past criminal behavior. On balance, Applicant has mitigated the security concerns about his criminal conduct, and I conclude Guideline J for the Applicant.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guideline. A fair and commonsense assessment⁽¹⁶⁾ of information about Applicant's criminal record, taken in the context of all of the information before me shows that he has overcome any reasonable doubts about his judgment and reliability. His criminal conduct is dated and not likely to recur, and any errors in his SF 86 do not constitute deliberate attempts to deceive the government. Accordingly, Applicant has overcome the government's case for disqualification.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline J (Criminal Conduct): 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

Subparagraph 1.e: Withdrawn

Paragraph 2, Guideline E (Personal Conduct): FOR THE APPLICANT

Subparagraph 2.a: 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. Clearance is granted.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

2. Tr., 11.

3. Tr., 30 - 33.

4. Directive, Enclosure 2.

5. Commonly referred to as the "whole person" concept, these factor are as follows:

1. Nature and seriousness of the conduct and surrounding circumstances.
2. Frequency and recency of the conduct.
3. Age of the applicant.
4. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
5. Absence or presence of rehabilitation.

6. Probability that the circumstances or conduct will continue or recur in the future;

6. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).

7. *See Egan*, 484 U.S. at 528, 531.

8. *See Egan*; Directive E2.2.2.

9. Directive, E2.A5.1.1.

10. Directive, E2.A5.1.2.2. 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;

11. Directive, E2.A10.1.1.

12. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;

13. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

14. Directive, E2.A10.1.3.1. The criminal behavior was not recent.

15. Directive, E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

16. Directive, E2.2.3.