

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant mitigated security concerns over his criminal conduct and personal conduct as he had no intent to falsify and has reformed his conduct. He mistakenly relied on advice of his lawyer that under state statute he was not required to report his 2000 arrest and misdemeanor conviction for drug abuse. On his 2002 security form, he disclosed two of his arrests and convictions and failed to remember and disclose two other misdemeanor convictions. While he had a string of criminal misdemeanor convictions from 1980 to 2000, he established clear evidence of successful rehabilitation as he has a fine employment record and a stable home life. Clearance is granted.

CASENO: 03-22563.h1

DATE: 06/08/2005

DATE: June 8, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22563

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Braden Murphy, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant mitigated security concerns over his criminal conduct and personal conduct as he had no intent to falsify and has reformed his conduct. He mistakenly relied on advice of his lawyer that under state statute he was not required to report his 2000 arrest and misdemeanor conviction for drug abuse. On his 2002 security form, he disclosed two of his arrests and convictions and failed to remember and disclose two other misdemeanor convictions. While he had a string of criminal misdemeanor convictions from 1980 to 2000, he established clear evidence of successful rehabilitation as he has a fine employment record and a stable home life. 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 May 7, 2004. 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 June 7, 2004, where he initially requested an administrative determination. Later on October 13, 2004, he requested a hearing.

Department Counsel on December 30, 2004, attested it was ready to proceed. The case was assigned to another administrative judge. On January 6, 2005, the case was re-assigned to me. Subsequently, a mutually convenient date for hearing was agreed to; and a Notice of Hearing issued on January 10, 2005, set the matter for January 25, 2005, at a location near where Applicant works and lives. At the hearing the Government offered Exhibits 1-9; Exhibits 1-6 and 8B were admitted into evidence without objection. Applicant objected to Exhibits 7, 8A, and 9 which were admitted into evidence over his objections. (TR 10-22, 47-48, 56-58) Applicant offered one exhibit and two documents for Administrative Notice (AN) which were admitted into evidence. (Exhibits A, I & II) Applicant testified as an adverse

witness and called one witness. The transcript (TR) was received on February 2, 2005.

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 field engineer who has worked for Defense Contractor #1 in State #1 since July 2002. He was granted a Department of Defense (DoD) Secret security clearance⁽²⁾ in 1979; he was in the military from 1979 to 1981 and discharged under Other than Honorable Conditions. (Exhibits 1, TR 25-26, 29-32) Applicant needs a security clearance to do his job, he completed a SF-816 security clearance application in July 2002. (Exhibit 1; TR 25-26; 71)

Applicant graduated from high school and earned 56 college credits in 1985. (Exhibit 1; TR 25) He married first in 1986 and divorced in 1988; he married a second time in 1989 and divorced in 1994; he re-married his second wife in August 2001. He has two children and three stepchildren; two of them still live with Applicant and his wife. (Exhibit 1; TR 27-28)

Criminal Conduct and Personal Conduct

While Applicant was in the military we has subject to Special Court Martial for Wrongful Possession, Use, and Sale of Cocaine/Wrongful Possession and Use of Marijuana. He was sentenced in 1980 for Wrongful Possession and use of Marijuana and was reduced to E1, forfeited \$299 per month, and confined at hard labor for six months. (SOR 1.e.) (Exhibit 4) Applicant admits he made mistakes as a young man; he requested an administrative discharge after his court martial. He no longer drinks and drives. (TR 65-66)

Applicant received inpatient care for cocaine and alcohol⁽³⁾ addictions in July 1989. (SOR 2.d.) (Exhibits 2, 8A; TR 48-

50; 68; 72-75)

Applicant admitted he was arrested in April 1990 after he slapped his step-daughter, and his wife called the police. A referral was made to the child protective service regarding allegations of physical abuse and neglect of his spouse and stepchildren; both charges were dismissed. However, the social worker concluded that the children have been abused physically and emotionally by the Applicant and the mother did not stop him. Subsequently, Applicant's wife moved in with her mother. (SOR 1.d.; 2.c.) (Exhibits 5, 7, 8A; TR 47; 67-68)

On his July 2002 Security Clearance Application Applicant disclosed only his 1993 DUI (which he dated 1991) (SOR 1.b.) and his 1980 military court martial. (SOR 1.e.) Applicant explained his reasons for failing to disclose information in response to various other questions. (Exhibit 1; TR 43)

Applicant admitted he failed to answer Question 21, his police record -- felony offenses as he failed to disclose his 1992 arrest for Endangering Children, a felony, on the SF86. He was charged after his stepson's leg was broken in February 1992 even though he insisted that he had not broken it. An August 1992 report from child protective services substantiated physical and emotional abuse of the step-son who was three years old and was transferred to his grandmother's care. Ultimately, Applicant was not convicted of a felony; instead, he entered a guilty plea to a misdemeanor, Endangering Children. He was sentenced to 90 days in jail, suspended, and given one year of probation. He had to leave his family, so that his wife would not lose custody of her children. Applicant discussed his failure to disclose this arrest on the SF 86 with the DSS agent in January 2003. Applicant credibly maintained that this omission was not intentional as he did not remember the original charge was a felony: the incident had happened ten years prior to him completing the SF 86 and no longer had the records after he was released from probation. (SOR 1.c, 2.e) (Answer; Exhibits 1, 2, 3, 6, 8B; TR 43-44; 51-60; 61- 63; 65-66; 68-70)

Applicant credibly established he did not falsify by his answer to Question 24. He neither admitted nor denied he falsified his answer to Question 24, his police record - alcohol/drug offenses as he relied on a state statute⁽⁴⁾ which his lawyer had advised him did not require him to disclose this first time misdemeanor conviction for drug possession where he paid a \$75 fine. (SOR 1.a.; 2.f.) (Answer; Exhibits 1, 2, 3, 8B, 9; TR 43-44; 51-60; 61- 63; 65-66; 68-70)

Applicant admitted he failed to answer Question 26, his police record - other offenses which covered arrests within the previous seven years as he failed to cite his arrest in August 2000 as a Fugitive from Justice which related to an earlier DUI arrest. He credibly established he forgot this arrest as he was never convicted of the charge. This arrest was linked to his October 1993 DUI, which he did list; he had pled guilty and was sentenced to ten days in jail and fined; he was released from jail after serving only three days and shortly thereafter moved to State #2. He later got a letter asking him to return and serve the other seven days which explained that if he did not, he would be served with a bench warrant for contempt of court. He could not afford to return. When he returned to State #1 in 1999, he was tried to resolve the matter, but was unable to do so when in August 2000 he was stopped on another matter and then taken to jail on a fugitive warrant. He explained the circumstances to the court and was released from the warrant. (SOR 1.a.; 2.g.). (Answer; Exhibits 1, 2, 3, 8B; TR 43-44; 51-60; 61- 63; 65-66; 68-70)

When Applicant was interviewed in August 2002, he stated he had not used any illegal drugs since he left the military; however, he conceded at the hearing that the statement was false as he had used both marijuana and cocaine before his treatment in 1989. He made this statement "in anger" at the agent who was pressing him to concede a marijuana possession charge from August 2000 and an August 2002 conviction. He relied on advice of his lawyer that under state statute he was not required to report his 2000 arrest and misdemeanor conviction for drug abuse. Applicant believed under State #1 law he had no need to disclose this conviction for a minor misdemeanor drug possession conviction where he paid a \$100 fine. (AN I; Exhibits 2, 9; TR 75-79) The State #2 statute provides:

Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness.

(AN I at page 5) Applicant credibly established he relied on his statute in completing his SF 86 and in his security interviews. Applicant volunteered he was last "in possession" of marijuana in 2003 as his 13-year-old daughter had it and he confiscated it from her and destroyed it. (TR 81-82)

Applicant's mother-in-law has had custody of her daughter's three children for over ten years. She testified about his relationship with Wife #2. Since they were remarried, she has seen positive changes in Applicant; he and his wife have "worked really hard to pull" the marriage together. She stated the step-children who reside with her accept Applicant as their father and visit their mother and him intermittently. She has seen changes in Applicant for the better as he is more responsible and more loving towards the children. (TR 88-100)

Job Performance

Applicant's Performance Evaluations in June 2003 and in June 2004 document that he exceeded requirements for his job. (Exhibit A)

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

E2.A10.1.1. The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Guideline E - Personal Conduct

E2.A5.1.1. The Concern: 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.

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

The Government established security concerns⁽⁵⁾ over Applicant's criminal conduct from 1980 to August 2000 which includes a 1980 drug-related Court Martial, 1990 and 1992 domestic violence and child endangering charges leading to a misdemeanor conviction in 1992, an alcohol-related arrest in 1993, and finally in August 2000 an arrest as a Fugitive from Justice and for Drug Abuse which led to a conviction for Drug Abuse.

To his credit, Applicant meets MC 6 (E2.A10.1.3.6): there is clear evidence of successful rehabilitation. Applicant has a successful work record and has reformed his conduct at work and at home according to his testimony and the testimony of his mother-in-law. He has not had any arrests for domestic and child endangerment since 1992, no repeated alcohol-related arrests since 1993, and no additional drug-abuse related incidents for five years. Thus, Applicant has successfully mitigated⁽⁶⁾ these dated incidents under Mitigating Condition (MC) 1 (E2.A10.1.3.1.): the criminal behavior was not recent. After his last conviction for domestic issues in 1992, he and his wife divorced and her children were cared for by her mother. They subsequently remarried in 2001. Applicant's mother-in-law testified credibly about the positive changes in his behavior and relationship with his step-children; thus, under MC 4 (E2.A10.1.3. 4.), I conclude that the factors leading to the earlier violations are not likely to recur. Thus, his criminal conduct has been successfully mitigated under MC 1, 4 and 6.

Hence, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 1.a. through 1.e. incorporated under SOR Paragraph 1.

Personal Conduct

The Government established security concerns over Applicant's Personal Conduct both over his abuse of his children in 1990 and 1992 and his 1989 drug treatment and over his omissions and failure to disclose answers to three questions on his SF 86. While he did reveal his 1980 court martial and his 1994 DUI arrest on his SF 86 form, he failed to disclose other adverse information which led the Government to raise security concerns over personal conduct issues under

Disqualifying Conditions⁽⁷⁾ (DC) (1) and (2). 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 signed and certified his security clearance application as "true, completed, and correct" when it was not.

On the other hand Applicant offered several explanations that meet the mitigation⁽⁸⁾ guidelines. With respect to his reprehensible conduct with respect to his children, the charges were made in 1990 and in 1992 (SOR 2.b. and 2.c.): Applicant himself and his mother-in-law established that he has substantially reformed during the intervening 12 to 14 years. He no longer treats his children in an abusive or neglectful manner. Thus he falls with MC 5, (E2.A5.1.3.5.): The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress. To his credit Applicant did seek drug and alcohol treatment in 1989 (SOR 2.d.); indeed, the SOR raises no drug

involvement security concerns. There is no evidence that he returned to use drugs subsequently. Thus MC 5 again applies.

With respect to his omissions to questions on the SF 86, he offered different, yet each credible, reasons for his omissions. With respect to SOR 2.e., he explained credibly that he did not recall that the original charge for his 1992 was a felony. He had plead guilty to a misdemeanor and had completed his probation, so he no longer kept the paperwork related to the original charge. Thus he established that he had no willful intent to falsify. With respect to SOR 2.f, his most recent arrest, he established that he did not omit it deliberately from the SF 86 as he relied on his lawyer's interpretation of a state statute⁽⁹⁾ that this "minor misdemeanor violation. . .does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries. . . ." While this interpretation was pre-empted by the federal government's legal right to obtain this conviction information (AN II). The issue is whether or not he had an intent to falsify with regard to his omission of this 2000 drug abuse conviction on his SF 86 (as alleged in the SOR) and his failure to discuss it the DSS agent (which was not alleged in the SOR). Indeed there is a specific MC that covers his belief: E2.A5.1.3.6. when a refusal to cooperate is based on advice from legal counsel. . . . While he did not have legal counsel during his security proceedings, he had relied on legal counsel when he earlier had pled guilty to the charge and had a reasonable basis for his reliance on the state statute. Arguably, Applicant might again sought legal counsel with respect to the interplay of the state and federal statutes, so that he could have been advised of the importance of cooperating with the DSS agency which he failed to do as he relied on his lawyer's earlier advice. He regretted that he even misled the DSS agent by one of his statements which is a serious security concern. However, looking at Applicant as a whole person⁽¹⁰⁾ and considering the circumstances surrounding his conduct (E2.2.1.2) and Applicant's current record of rehabilitation and pertinent behavioral changes, I conclude that even this conduct (which was not alleged) can be mitigated given (E.2.2.1.7.), the motivation for the conduct was to rely on state statute to shield his drug possession conviction.

With respect to SOR 2.g., he credibly established that he forgot this charge as he was never convicted of being a Fugitive from Justice; further, it was linked to a 1993 DUI which he did disclose and involved his having not completed his jail time for that offense. He had earlier made unsuccessful attempts to comply with the court's request for additional jail time.

Overall, looking at him as a whole person, I conclude that he has reformed his previous questionable and immature conduct, and now is effective both on his job and in his personal life. Consequently, I conclude he falls within MC E.2.2.1.9., there is little likelihood of continuation or recurrence of these varying personal conduct issues and concerns. Thus, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant under SOR Paragraph 2 under subparagraphs 2.a. through 2.g.

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

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For Applicant

Subparagraph 2.e.: For Applicant

Subparagraph 2.f.: For Applicant

Subparagraph 2.g.: 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. Clearance is granted.

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. His security clearance was suspended in the military due to his arrest and court martial on drug charges. (TR 30-31)
3. Applicant insisted he was not treated for alcohol addiction; however the records do not support his view as he admitted aftercare at NA and AA after his 1989 treatment. (Exhibit 8A; TR 50)
4. Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness. (ANI at 5)

5. E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1 Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.;
E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

6. E2.A10.1.3. Conditions that could mitigate security concerns include: E2.A10.1.3.1. The criminal behavior was not recent; E2.A10.1.3. 2. The crime was an isolated incident; E2.A10.1.3.3. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life; E2.A10.1.3. 4. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur; E2.A10.1.3. 5. Acquittal; E2.A10.1.3.6 There is clear evidence of successful rehabilitation.

7. E2.A5.1.2 Conditions that could raise a security concern and may be disqualifying also include: 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.

8. E2.A5.1.3. Conditions that could mitigate security concerns include: E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability; E2.A5.1.3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily; E2.A5.1.3.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts; E2.A5.1.3.4. 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; E2.A5.1.3.5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress; E2.A5.1.3.6. 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; E2.A5.1.3.7. Association with persons involved in criminal activities has ceased.

9. Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness. (ANI at 5)

10. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:

E.2.21.1. The nature, extent, and seriousness of the conduct; E.2.2.1.2. The circumstances surrounding the conduct, to include knowledgeable participation; E.2.2.1.3. The frequency and recency of the conduct; E.2.2.1.4. The individual's age and maturity at the time of the conduct; E.2.2.1.5. The voluntariness of the participation; E.2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes; E.2.2.1.7. The motivation for the conduct; E.2.2.1.8. The potential for pressure, coercion, exploitation, or duress; and E.2.2.1.9. The likelihood of continuation or recurrence.

(E.2.2. Adjudication Process)