

DATE: May 25, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-09805

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Jr., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Security concerns remain over Applicant's criminal conduct in 1998 and 2001 and over his personal conduct in failing to disclose his 1998 arrest for Simple Battery on his 2000 security clearance application. While he completed anger management in 2001, that alone is insufficient to establish clear evidence of successful rehabilitation. 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 October 21, 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 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 December 5, 2004, and requested a decision without a hearing.

On March 14, 2004, Department Counsel prepared a File of Relevant Material (FORM) which was forwarded to Applicant on March 16, 2004, where he was advised he had an opportunity to review the form, but needed to respond within 30 days of receipt of the letter. Department Counsel made a Motion to Amend the SOR to conform to the evidence by substituting "transmitted by you on July 15, 2000" for "executed by you on June 2, 2000" in allegation 2.a. concerning his security clearance application. As Applicant submitted no objection, this motion to amend the SOR is granted.

Applicant received the FORM on March 21, 2005; so his response was due on April 20, 2005. He submitted no response. On May 18, 2005, the matter was assigned to me.

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 June 1998. He completed and signed a Security Clearance Application (SF 86) on June 2, 2000, which was transmitted on July 15, 2000. (Items 4, 5)

Applicant received a BA in 1997 from a college in State #2. He married in February 2000; they have a child born in February 1998. He has a stepchild born in April 1993. (Items 4, 5) He has a third daughter reported to the Defense Security Service (DSS) in a March 6, 2002, Statement. (Item 6)

Criminal Conduct and Personal Conduct

Applicant's SF 86 documents that he disclosed in answer to Question 21 that he had a felony arrest in February 1997 for Lewd or Lascivious act; however the charges were dropped and the file expunged in State #1. In response to Question 26, Your Police Record - Other Offenses, he disclosed two earlier arrests-- a ay 1995 arrest for Trespassing where he pled nolo contendere and paid \$130 in fines and a November 1994 arrest for "Disorderly/Resist.Nonviolent" with a deferred prosecution agreement where he paid a \$150 fine and was ordered to have no violent contact with the victim. (Items 2, 5, 6)

During the security clearance investigation a Federal Bureau of Investigation (FBI) records check obtained in May 2001 also documented the 1997 felony arrest Applicant had reported. (Item 7) However, also documented in the FBI report was another arrest in November 1998 for Battery, a first degree misdemeanor, that Applicant failed to disclose in response to Question 26. (Items 5, 7, 8) The FBI report also documented a second arrest for Battery, a first degree misdemeanor, in April 2001, which occurred after he submitted his SF 86. The arrest record reports that in 2001 Applicant hit his wife in the stomach in front of their three-year-old daughter. His wife reported that at a ball game Applicant got angry and took a hot dog and smashed it in her face and when they got home he pinned her in a corner in the kitchen and hit her twice in the stomach. Applicant only admitted that he earlier got into an argument with his wife and threw a hot dog at her and shoved her. (Items 7, 9) The eldest daughter called 911. He was arrested and issued a no contact order which his wife later had lifted after he completed Anger Management/Power and Control classes in May 2001. (Items 1, 2, 6) In January 2002 adjudication was withheld, he was sentenced to two days in jail, and awarded one year of probation with early termination after six months. (Items 1, 2) Applicant asserts that he "successfully embraced the concepts and ideas of the classes"; however, he submitted no additional evidence, such as letters of reference, to support this assertion. (Item 2)

Applicant admits he failed to list the 1998 arrest on his SF 86. (Item 2) However, his assertion that the omission was not deliberate because he voluntarily revealed a 1997 felony arrest that was sealed is not credible as he has a duty to disclose all arrests. Further his claim that he subsequently provided correct information voluntarily is not credible as he provided no evidence to support this claim. Indeed his March 2002 Statement to DSS disclosed no details about the 1998 arrest. In June 2000 Applicant signed a copy of the SF 86 and certified that his statements were "true, complete, and correct" and that a "knowing and willful false statement on this form can be punished by fine or imprisonment of both. (See section 1001 of title 18, United States Code)." (Item 4)

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

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

trustworthiness.

Guideline E - Personal Conduct

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. 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's multiple misdemeanor criminal incidents in 1994, 1995, 1998, and 2001 in State #1 and his 1997 felony arrest which was sealed and expunged all raise security concerns over this criminal conduct. Conditions that could raise a security concern and may be disqualifying include: E2.A10.1.2.2.: A single serious crime or multiple lesser offenses. In the most recent incident in 2001 Applicant showed his anger at a ball game by taking a hot dog and smashing it in his wife's face. When they got home he pinned her in a corner in the kitchen and hit her twice in the stomach. One of the children call 911 which led to his arrest for Battery-Domestic Violence. In January 2002 adjudication was withheld; he was sentenced to two days in jail, awarded one year of probation with early termination after six months.

While the 1994 and 1995 charges may be mitigated⁽²⁾ because of the passage of time, the 1998 and 2001 battery charges are recent and remain a security concern because of his demonstrated poor judgment. While he did complete an anger management course in 2001, he provided no additional evidence of his rehabilitation. Thus, he fell short of meeting the high standard that "There is clear evidence of successful rehabilitation."

Thus, after considering the E2.2. Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 1.a., 1.b., and 1.c., but against him on subparagraphs 1.d. and 1.e. under SOR Paragraph 1.

Personal Conduct

Although Applicant did reveal his 1995 arrest on his SF 86 form, he failed to disclose other adverse information, his 1998 arrest for Simple Battery, which led the Government to raise security concerns over personal conduct issues under Disqualifying Conditions⁽³⁾ (DC) (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 had a duty to reveal the adverse information requested in Questions 26 about his 1998 arrest for Simple Battery. His failure to do so demonstrates that he put his personal interests ahead of the government's interests. He signed and certified his security clearance application was "true, completed, and correct" when it was not.

Further, Applicant fails to meet the mitigation⁽⁴⁾ guidelines. While Applicant claimed as a defense that he voluntarily disclosed this arrest to the DSS agent in his interview, the DSS statement included no such voluntary disclosure. So he was failed to establish this mitigation condition. Also, he failed to offer any other evidence, beside his claim that he did not omit deliberately, 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.a.

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 AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: 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. **E2.A10.1.3. Conditions that could mitigate security concerns include:** E2.A10.1.3.1 The criminal behavior was not recent; E2.A10.1.3.6. There is clear evidence of successful rehabilitation.
3. **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.
 4. **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.