

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant's April 15, 1995, arrest for grand theft has been mitigated based on the fact that it was not recent and it was an isolated incident. He has had no subsequent arrests. His failure to list this charge on his December 2000 security clearance application is mitigated by Applicant's belief, based on the advice of his defense attorney, that the offense he pled to was so minor that it did not need to be reported. He did not intend to provide false information on an October 24, 2004, interrogatory response. The criminal conduct and personal conduct concerns have been mitigated. Clearance is granted.

CASENO: 03-11150.h1

DATE: 05/17/2006

DATE: May 17, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-11150

DECISION OF ADMINISTRATIVE JUDGE

ERIN C. HOGAN

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's April 15, 1995, arrest for grand theft has been mitigated based on the fact that it was not recent and it was an isolated incident. He has had no subsequent arrests. His failure to list this charge on his December 2000 security clearance application is mitigated by Applicant's belief, based on the advice of his defense attorney, that the offense he pled to was so minor that it did not need to be reported. He did not intend to provide false information on an October 24, 2004, interrogatory response. The criminal conduct and personal conduct concerns have been mitigated. Clearance is granted.

STATEMENT OF THE CASE

On December 10, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. This action was taken under Executive Order 10865, dated February 20, 1960, as amended and DoD Directive 5220.6, dated January 2, 1992, as amended and modified. The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline E, Personal Conduct, and Guideline J, Criminal Conduct.

In a sworn statement dated January 4, 2005, Applicant responded to the SOR allegations and requested a hearing. The case was assigned to another administrative judge on August 15, 2005. The case was transferred to me on November 29, 2005. A notice of hearing was issued on March 28, 2006, scheduling the video tele-conference hearing for April 6, 2006. The hearing was conducted on that date. Applicant agreed to waive the 15 day notice requirement. The government submitted seven exhibits that were marked as Government Exhibits (Gov. Ex.) 1-7. The exhibits were admitted into the record without objection. Applicant testified on his own behalf, and submitted no exhibits. After the hearing, Applicant submitted one exhibit that was marked as Applicant's Exhibit (AE) A and admitted without objection. DOHA received the hearing transcript (Tr.) on April 19, 2006.

FINDINGS OF FACT

In his SOR response, Applicant admits the allegations in subparagraphs 1.a and 2.a but denies the allegation in 1.b. Applicant's admissions are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is employed as an electronics technician and site supervisor with a Department of Defense contractor. He works on an overseas military base in the Pacific. He has worked for the same Department of Defense contractor since 1985.⁽¹⁾ He has been assigned to different locations throughout his career.

He currently holds a SECRET clearance.⁽²⁾ He is 52 years old.⁽³⁾ He is currently separated from his wife and has a 24-year-old daughter and a 22-year-old son.⁽⁴⁾ He has an associates degree in electronics.⁽⁵⁾

From January 1, 1975, to June 1, 1980, he served on active duty in the United States Navy achieving the rank of Petty Officer Third Class (E-4). He separated from the service with a discharge characterized as Honorable.⁽⁶⁾ He held a TOP SECRET clearance while in the Navy.⁽⁷⁾

In April 1995, Applicant was working as a contractor at a naval shipyard. His duties consisted of pulling cable through the manhole system at the shipyard in order to set up various land and telephone systems for base communications. They were pulling copper and fiber cable through these systems.⁽⁸⁾ Applicant states that he and his co-workers pull vast amounts of cable. They end up with a lot of cable that cannot be used and is going to be thrown away, i.e. scrap cable. It is a common practice for the crew to sell the scrap cable to a recycling center. The money received from the sale is split amongst the crew.⁽⁹⁾

Sometime during the week preceding April 15, 1995, Applicant observed a dumpster full of scrap cable in the shipyard. He admits the scrap cable did not belong to him or his company. He thought the cable in the dumpster was trash.⁽¹⁰⁾ Sometime during the morning of Saturday April 15th, he drove a truck to the shipyard and loaded approximately two tons of the scrap cable onto his truck. He intended to sell it to a recycling center for cash. He began to drive off base. Naval shipyard police saw Applicant drive his truck out of the loading area. Eventually, Applicant noticed the officers and pulled into a parking lot. He told the first responder that he "saw us officers and just got out of the truck to see what was happening."⁽¹¹⁾ At around 11:15 am, he was apprehended by the shipyard police. He told them he intended to sell the scrap cable to a recycling center for cash.⁽¹²⁾

Applicant was charged with grand theft/property over \$400 and causing loud noise.⁽¹³⁾ He hired an attorney to represent him. He pled nolo contendere to the causing loud noise offense and was fined \$250 and other fees. The total amount of fines and fees was \$985.⁽¹⁴⁾ The grand theft charge was dismissed. His lawyer told him that he was essentially pleading to a charge of disturbing the peace. Applicant states his lawyer told him that "it's like it never really

happened ... all you'll ever have on your record is disturbing the peace." [\(15\)](#)

At the time of his arrest, Applicant's employer was aware of the incident. His employer took no administrative action against Applicant but transferred him to another location. [\(16\)](#) His security clearance was not suspended or revoked as a result of this incident. [\(17\)](#)

On December 6, 2000, Applicant submitted a security clearance application as part of his periodic reinvestigation. [\(18\)](#) On his security clearance application Applicant responded "No" to question 26. Your Police Record - Other Offenses which asks:

In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24 or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607. [\(19\)](#)

He admits that he did not list his April 15, 1995, arrest on his security clearance application. He did not list the arrest because he thought it was a non-issue based on what his lawyer told him. He believed that since he pled to a minor offense, he did not have to list it on his security clearance application. [\(20\)](#)

In October 2004, the Department of Defense sent Applicant a set of interrogatories pertaining to his arrest for grand theft on April 15, 1995, and his reasons for not listing the arrest on his security clearance application. He answered the interrogatories on October 25, 2004. [\(21\)](#) Question 2.b of the interrogatory asked him to explain the circumstances surrounding his arrest on April 15, 1995. In response to question 2.b, Applicant indicated "On the date in question, I was working @ the _____ naval shipyard." The government alleges Applicant falsified his answer to his interrogatories by stating he was working on the day of his arrest.

Applicant admits he was not working on the date of his arrest. In response to question 2.b of the interrogatory, he was describing his employment status at the time of his arrest. He intended to say that he was working as a contractor on the naval shipyard during the time of the incident. [\(22\)](#) He states that his poor word choice resulted in the government misinterpreting his answer. He did not intend to mislead the government into believing he was working that day. [\(23\)](#) He points out that he told the police officer on the day of his arrest that he was not working. [\(24\)](#)

Applicant has not been arrested since April 15, 1995. At the time of his arrest, he had to spend the weekend in jail and describes it as a harrowing experience.⁽²⁵⁾ Based on his past experience, he no longer takes part in recycling scrap cable that belongs to his company even though his company has no policy against the practice.⁽²⁶⁾

For the past ten years, Applicant has been assigned overseas.⁽²⁷⁾ He recognizes the seriousness of his actions on April 15, 1995, and notes it was a stupid thing to do. He hopes to retain his security clearance.⁽²⁸⁾

POLICIES

The President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information."⁽²⁹⁾ In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline J, Criminal Conduct: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.⁽³⁰⁾

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.⁽³¹⁾

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance."⁽³²⁾ An administrative judge must apply the "whole person concept,"

and consider and carefully weigh the available, reliable information about the person.⁽³³⁾ An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.⁽³⁴⁾

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information.⁽³⁵⁾ Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts admitted by the applicant or proven by Department Counsel. The applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision.⁽³⁶⁾ "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."⁽³⁷⁾

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant.⁽³⁸⁾ It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline E, Personal Conduct, SOR ¶ 1.a, and Guideline J, Criminal Conduct, SOR ¶ 2.a.

Criminal Conduct

Applicant admits to being arrested on April 15, 1995, for grand theft. He admits that he loaded two tons worth of scrap cable from a dumpster on the naval shipyard into his truck. He admits that he intended to sell the scrap cable to a recycling center in order to make some extra cash. He admits he was not authorized to take the scrap cable. He admits the scrap cable was neither his or his company's property. As such, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1: (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and CC DC E2.A10.1.2.2: (*A single serious crime or multiple lesser offenses*) apply.

The criminal conduct concern can be mitigated. I find several Criminal Conduct Mitigating Conditions (CC MC) apply to Applicant's case. CC MC E2.A10.1.3.1: (*The criminal behavior was not recent*) applies since the crime occurred over 11 years ago. It was also the first and only time he had been arrested. As such, CC MC E2.A10.1.3.2: (*The crime was an isolated incident*) applies. Applicant has not been arrested since the April 1995 arrest. He has learned a lesson. He

understands the seriousness of the offense committed and does not intend to commit any additional criminal conduct in the future. He has worked for the same company both before, during, and after the arrest without incident. Based on these reasons, CC MC E2.10.1.3.6: (*There is clear evidence of successful rehabilitation*) applies.

Although he accepts full responsibility for his actions, I do note that Applicant believed the scrap cable in the dumpster was trash at the time he took it. He loaded up the company truck with the scrap cable in broad daylight. He was apprehended at 11:15 am. Although the police report claims he intended to avoid the police, he pulled into a parking lot rather than driving off the shipyard. When the police officer approached him, he told the police officer that he pulled over because he "saw us officers and just got out of the truck to see what was happening." (39) He also readily admitted that he loaded up his truck with the scrap cable because he intended to sell it at the recycling center. He admitted he had no authorization to do this. He used extremely poor judgment on April 15, 1995, but his actions do not appear the actions of a seasoned criminal. Applicant has mitigated the Guideline J security concern. I find for him with respect to Guideline J.

Personal Conduct

Applicant did not list his April 15, 1995, criminal charge on his security clearance application in response to question 26. Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.1: (*Reliable unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*) applies since the investigator who conducted his background investigation discovered his 1995 arrest during the investigation. The information discovered was reliable and unfavorable.

PC DC 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*) applies with respect to Applicant deliberately omitting his 1995 criminal charge.

The personal conduct concern can be mitigated. I find that following Personal Conduct Mitigating Concerns (PC MC) apply:

PC MC 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*) applies. When he pled nolo contendere to the making loud noise charge, his attorney advised him it was the equivalent of a charge of disturbing the peace and that it was such a minor offense, it would be as if he did not have a record. Applicant believed that the offense he pled to was so minor that he did not have to list the offense on his security clearance questionnaire. I find his explanation credible. He now recognizes that he should have listed the arrest on his security clearance application. Although he omitted this arrest, he did not intend to deceive the government. He thought the offense that he pled to was so minor that he did not need to list it. When the government sent him interrogatories about the April 15, 1995, arrest, he cooperated fully and provided detailed information about the arrest.

PC MC E2.A5.1.3.1: *(The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability)* applies based on Applicant's understanding of what his attorney told him. His employer has known about the arrest since the date it occurred. Despite this arrest, they continued to keep him as an employee. He has demonstrated during the 11 years since this incident that he is a trustworthy and reliable employee. The information was substantiated, but I conclude that his failure to list the arrest on his security clearance application was not pertinent to a determination of his judgment, trustworthiness or reliability since he was under the mistaken belief that he did not have to list it based on the advice of his defense attorney. There was no intent to deceive.

With respect to SOR ¶ 2.b, I find that Applicant did not falsify material facts when he responded to interrogatories sent to him by the Defense Office of Hearings and Appeals in October 2004. He had no intent to deceive the government by stating that he was working at the naval shipyard on the date of his arrest. His intention was merely to state that this was where he was employed at the time of his arrest. It was a matter of poor word choice rather than an intent to deceive. Furthermore, whether or not he was working that day is irrelevant to the underlying conduct which resulted in his arrest. He provided accurate details as to the underlying conduct in response to the interrogatory.

Applicant has mitigated the security concerns under Guideline E. I find for him with respect to Guideline E.

I carefully considered all of the circumstances in light of the "whole person" concept. I concluded Applicant is eligible for access to classified information.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline E: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Paragraph 2. Guideline J: FOR APPLICANT

Subparagraph 2.a: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Erin C. Hogan

Administrative Judge

1. Tr. at 40.

2. Tr. at 7.

3. Tr. at 6.

4. Tr. at 42.

5. Tr. at 6.

6. Tr. at 43; Gov. Ex. 1.

7. Tr. at 51.

8. Tr. at 22.

9. Tr. at 23-24.

10. Tr. at 33.

11. Gov. Ex. 2 at 5.

12. Gov. Ex. 2 at 1.

13. Gov. Ex. 5 and 6.
14. Gov. Ex. 6.
15. Tr. at 19.
16. Tr. at 40.
17. Tr. at 41, 44.
18. Gov. Ex. 1.
19. Gov. Ex. 1.
20. Tr. at 19-20.
21. Gov. Ex. 3.
22. Tr. at 22.
23. Tr. at 34-35.
24. Gov. Ex. 2 at 6; AE A.
25. Tr. at 26.
26. Tr. at 52.
27. Tr. at 40.
28. Tr. at 51; AE A.
29. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).
30. Directive, ¶ E2.A10.1.1.
31. Directive, ¶ E2.A5.1.1.
32. Directive, ¶ E2.2.1.
33. *Id.*
34. *Id.*
35. Directive, ¶ E3.1.14.
36. Directive, ¶ E3.1.15.
37. Directive, ¶ E.2.2.2.
38. Exec. Ord. 10865, § 7.
39. Gov. Ex. 2 at 5.