

KEYWORD: Personal Conduct; Financial; Criminal Conduct

DIGEST: Applicant mitigated security concerns over his failure to list a 1986 felony arrest on his security clearance and company applications as he had no intent to falsify. He had plead guilty to a misdemeanor and believed the court promised a clean record after probation. He also mitigated financial concerns as special circumstances led to his 1996 bankruptcy; he is resolving his education debt by regular payments as he has a stable job. Clearance is granted.

CASENO: 04-00789.h1

DATE: 10/31/2005

DATE: October 31, 2005

---

In Re:

-----  
SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 04-00789

**DECISION OF ADMINISTRATIVE JUDGE**

**KATHRYN MOEN BRAEMAN**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

Alan D. Putnam, Esquire

**SYNOPSIS**

Applicant mitigated security concerns over his failure to list a 1986 felony arrest on his security clearance and company applications as he had no intent to falsify. He had plead guilty to a misdemeanor and believed the court promised a clean record after probation. He also mitigated financial concerns as special circumstances led to his 1996 bankruptcy; he is resolving his education debt by regular payments as he has a stable job. 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 March 31, 2005. 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. <sup>(1)</sup> The SOR alleges specific concerns over personal conduct (Guideline E), finances (Guideline F), and criminal conduct (Guideline J). Applicant responded to these SOR allegations in an undated, notarized Answer and requested a hearing.

After Department Counsel stated the case was ready to proceed on May 20, 2005, the case was assigned to another judge on May 25, 2005. After the case was set for hearing on June 3, 2005, Applicant's counsel on June 8, 2005, entered his appearance and asked for a continuance because of a schedule conflict. The judge granted the continuance and the June 22, 2005, hearing was cancelled. Because of regional rotation, the case was transferred to me on July 5, 2005. On July 21, 2005, DOHA issued a Notice of Hearing and set this case to be heard on August 17, 2005, in a city near where Applicant lives and works.

At the hearing the government presented four exhibits (Exhibits 1-4) which were admitted into evidence without objection. Applicant testified and called one witness. His counsel offered one exhibit which was admitted into evidence. (Exhibit A) The transcript (TR) was received on August 29, 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, 38 years old, completed a Security Clearance Application (SF 86) on September 18, 2003, before he became employed by a defense contractor #1 in State #1. He worked there from May 2004 to October 2005<sup>(2)</sup>; previously, he worked for employer #2 from April 1999 to June 2004. (Exhibit 1; TR 14-15; 39-42) He was granted an interim clearance in November 2003. (TR 41)

Applicant received a M.S. degree from a university in State #2 in 1998 and a certificate in 2001 from a university in State #1. (Exhibit 1) Applicant has never married. He has custody of two children ages 15 and 20. (Exhibit 1; TR 15)

#### **Personal Conduct, Criminal Conduct**

On his SF 86 Applicant failed to disclose adverse information regarding his felony arrest in response to Question 21. Your Police Record - Felony Offenses. He had plead guilty to a misdemeanor in 1986 and did not know the felony arrest remained on his record. (Exhibit 1; TR 44) Applicant denied the criminal conduct and personal conduct SOR allegations in his Answer. Applicant was arrested in State #2 when he was 19 for a felony in December 1986 after he got into an altercation with an individual who had threatened his girlfriend, and Applicant injured him. Applicant plead guilty to a misdemeanor to avoid going to prison, but understood that after he completed two years probation his record would reflect a misdemeanor arrest. He has never been in any trouble since this incident. He also denied that he deliberately failed to list this incident on his Employer #1 application. While he had never checked his record, he had previously had gun permits issued from State #2 and had a responsible position in the private sector where a felony record would have presented a barrier. (Answer; TR 16-18, 23; 38-39; 42-43)

When investigated by the Defense Security Service (DSS), Applicant learned that this 1986 incident was still listed as a felony on the state arrest report. He had never previously obtained a print-out of his state arrest record as he had believed the court's promise that the charge would be lowered to a misdemeanor after he completed probation. (TR 37-38) Applicant disclosed details of this arrest and the subsequent guilty plea. He acknowledged at the hearing that in the DSS Statement he made a damaging admission that he did not list it on his security form or job application because he "was afraid this might hurt my chances of getting the job and the clearance." He also stated that he realized that "being

honest is the right thing to do in the security clearance process." Applicant signed the statement and did not amend the words of the DSS agent as he wanted to cooperate with the security process. Immediately after the DSS interview, Applicant also advised his future employer, defense contractor #1, of the felony arrest record; however they did not withdraw their offer of employment. Applicant credibly maintained that he did not know the felony arrest was still on his record and thought that his record "had been wiped clean." (Exhibit 2; TR 24-28; 42) Weighing all of the evidence, I conclude Applicant had no intent to falsify his criminal record on his security form or on his application form.

A human resource specialist for Defense Contractor #1 attested that Applicant informed him of his felony arrest after the formal application process, but before he was hired by the company. Applicant's employment at the company has been satisfactory. The company application form asks for misdemeanor or felony arrests in the last seven years. (TR 46-48; 49-51)

### **Finances**

Applicant took some classes in May 2003 with his credit union and his previous employer to try to resolve his financial issues. He has a budget on computer and monitors his monthly expenses. (TR 32-33) Applicant in August 2005 had a net monthly income of approximately \$5,000 per month with a remainder after expenses of approximately \$3,000. He saves \$500 monthly. He has approximately \$20,000 in investments and \$1,200 in credit card debt. (TR 20-21; 34)

SOR 1.a.. Applicant filed for Chapter 7 bankruptcy in August 1996 to clear up the debts that arose from getting custody of his two sons; the debts were discharged in December 1996. He had to get emergency custody after the mother left his sons at their grandmother's home. He got custody in 1995-1996. (Exhibits 3, 4; TR 19, 28-30)

SOR 1.b. Applicant admits his debt to the U.S. Department of Education for \$18,900 but in June 2005 he entered into a repayment agreement of \$190 monthly and has made three payments. He incurred the debt in 1985-87. He had been making payments, but them temporarily stopped making payments when he was having problems with his sons, so it went into default in May 2003. (Answer; Exhibits 3, 4; Exhibit A; TR 21-22; 30-32, 36)

### **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 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.**

### **Guideline F - Financial Considerations**

***The Concern:* An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.**

### **Guideline J - Criminal Conduct**

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

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**

### **Personal Conduct**

Under Guideline E Applicant's answer to Question 21 on the 2003 security clearance application raised security concerns as he did not disclose a 1986 felony arrest on that form or on the company's application. Under Personal Conduct Disqualifying Condition 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 security clearance eligibility or trustworthiness . . .*), a finding of falsification requires evidence that the Applicant acted with an intent to mislead or deceive the government. The record evidence as a whole must be considered to determine whether there is direct or circumstantial evidence concerning Applicant's state of mind at the time the statement was made. Applicant credibly established that he had no intent to falsify. When Applicant was arrested in State #2 at age 19 for a felony in December 1986, Applicant pleaded guilty to a misdemeanor to avoid going to prison. He believed that after he completed two years probation his record would reflect only the misdemeanor plea. He has never been in any trouble since this incident. While he had never checked his record, he previously had gun permits issued from State #2 and had a responsible position in the private sector where a felony record would have presented a bar. Thus, he concluded that he had no felony record in State #2 and did not need to disclose it on his security form as it was a misdemeanor from 1986 which he was not required to disclose. I conclude this belief was reasonable given his understanding on his guilty plea as a teenager.

Applicant did not learn that the felony arrest remained on his state record until the DSS interview. He then fully disclosed the details. In order to demonstrate he was fully cooperating with the DSS agent he made a damaging admission in his DSS statement, as he acknowledged there that he did not list this 1986 arrest on his security form or job application because he "was afraid this might hurt my chances of getting the job and the clearance." However, looking at all of the evidence I conclude that at the time he completed his security clearance form, he had no intent to deceive.

His explanations at the hearing were credible, especially in the light of his understanding. His assumption that he has a clean record was based on his having successfully gotten a gun permit in the same state where a felony record would have been a bar. Thus, I conclude Applicant did not deliberately, with an intent to deceive, answer question 21 incorrectly. Under E2.A5.1.3.2. even if one were to conclude it was a falsification, this omission was an isolated incident, was not recent, and Applicant subsequently provided correct information voluntarily when questioned by the DSS agent.

Similarly, I conclude he did not intend to falsify the company application as that application asked only for arrests in the past seven years: his guilty plea stemmed from 1986, seventeen years previous. He fully disclosed this past arrest to the company when the DSS agent advised him to do so. The human resource specialist from the company confirmed that Applicant made this disclosure before he was formally hired by the defense contractor. Thus, he has refuted and mitigated the security concerns under Personal Conduct. After looking at him as a whole person and considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraph 1.a. and 1.b. under SOR Paragraph 1.

### **Financial Considerations**

The Government established disqualifying conditions that could raise a security concern and may be disqualifying under Financial Disqualifying Condition (E2.A6.1.2.1. history of financial problems and E2.A6.1.2.3. inability or unwillingness to satisfy all of his debts). Two issues raised concerns: a 1996 Chapter 7 bankruptcy and an unresolved education debt for approximately \$18,000. Applicant explained the special circumstances involving gaining custody of his sons that led to unusual expenses that led to his bankruptcy. The financial pressures resulting from his gain custody of his sons and the subsequent bankruptcy can be mitigated under E2.A6.1.3.3. (The conditions that resulted in the behavior were largely beyond the person's control.) Also, he recently made arrangements to pay the educational debt. At the time of the hearing he has sufficient income to handle his current financial obligations and to make regular payments on his education loan debt. Applicant is now financially responsible as he followed through with three timely payments on his plan to resolve the debt. Also, under E2.A6.1.3.4. Applicant showed that he has received or is receiving counseling for the problem. Thus, under E2.A6.1.3.6. there are now clear indications that the problem is being resolved or is under control. Thus, Applicant has mitigated<sup>(3)</sup> these financial concerns.

After considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant under SOR Paragraph 2 as he mitigated the allegations in SOR subparagraphs 2.a. and 2.b.

### **Criminal Conduct**

The government's security concerns under criminal conduct were linked to the concerns of his personal conduct. Since he had no intent to falsify, I conclude that there is insufficient evidence to support the security concerns over criminal conduct based sole on allegation 1.a.. After looking at the whole person and considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraph 3.a. under SOR Paragraph 3.

### **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 E: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Paragraph 2. Guideline F: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Paragraph 3. Guideline J: FOR APPLICANT

Subparagraph 3.a.: 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. An October 20, 2005, letter from his counsel indicated he had been laid off by Defense Contractor #1.
3. **E2.A6.1.3. Conditions that could mitigate security concerns include:** E2.A6.1.3.1. The behavior was not recent; E2.A6.1.3.2. It was an isolated incident; E2.A6.1.3.3. The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation); E2.A6.1.3.4. The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control; E2.A6.1.3.5. The affluence resulted from a legal source; and E2.A6.1.3.6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.