

KEYWORD: Personal Conduct; Criminal Conduct; Financial

DIGEST: Applicant's minor criminal offenses in June and October 1978, October 1981, and September 2000 were mitigated by the passage of time without recurrence of similar conduct. His bankruptcy discharges in February 1987 and July 2002 were similarly mitigated by the absence of additional financial difficulties after the July 2002 discharge. Clearance granted.

CASENO: 04-04625.h1

DATE: 03/31/2006

DATE: March 31, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-04625

DECISION OF ADMINISTRATIVE JUDGE

JOHN GRATTAN METZ, JR

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's minor criminal offenses in June and October 1978, October 1981, and September 2000 were mitigated by the passage of time without recurrence of similar conduct. His bankruptcy discharges in February 1987 and July 2002 were similarly mitigated by the absence of additional financial difficulties after the July 2002 discharge. Clearance granted.

STATEMENT OF THE CASE

Applicant challenges the 16 June 2005 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of personal conduct, criminal conduct, and financial considerations. ⁽¹⁾ He answered the SOR 19 July 2005, and requested a decision without hearing. He responded to DOHA's 8 September 2005 File of Relevant Material (FORM). The record closed 14 November 2005, when Department Counsel indicated no objection to the response. DOHA assigned the case to me 19 December 2005.

PROCEDURAL ISSUES

In the FORM, Department Counsel moved to amend the SOR to add subparagraph 1.d., by adding a falsification allegation based on Applicant's September 2003 sworn statement in which he stated, "I have not been involved in any other shoplifting incidents" except the August 2000 incident he was discussing with the agent. Department Counsel alleges that Applicant deliberately withheld the fact that he had a shoplifting incident in October 1978--an arrest he had previously disclosed to the government on clearance applications in January 1980 and November 1989, and had discussed with government agents in a September 1980 sworn statement. Applicant denies falsifying his September 2003 sworn statement, asserting that the agent's question addressed "new" shoplifting incidents since the August 2000

arrest. ⁽²⁾ The government has offered no other evidence in support of its motion to amend. However, Department Counsel concedes that Applicant previously disclosed this arrest in previous statements and clearance applications.

Department Counsel argues that "no matter the motive, it is clear that the Applicant intentionally lied to the Special Agent." However, it is only clear that the Applicant intentionally lied if one accepts the conclusion that he lied. Mere allegation and conclusory statements are insufficient evidence of an intentional falsification. Department Counsel has offered no evidence of the context in which the statement was made, and indeed can offer none as he was not there. He has not produced any evidence from the agent who took the statement, and Applicant asserts that the question asked referred only to incidents after the August 2000 arrest, an entirely reasonable claim in view of Applicant's established history of reporting derogatory information required by his clearance applications. Further, Department Counsel invites me to speculate on Applicant's motives for his deliberate falsification, suggesting that Applicant may have thought the information was no longer available, because the arrest was more than 25 years old, and the respective statements and questionnaires 14 and 23 years old. It is just as easy to speculate that Applicant was aware he had previously disclosed this information to the government and it would thus be available to the government forever. In any event, I will not speculate on issues not supported in the record. In addition, the October 1978 shoplifting arrest was officially irrelevant to Applicant's May 2002 clearance re-application, as none of the questions required him to disclose misdemeanor arrests more than seven years old, and this arrest was almost 24-years-old. ⁽³⁾ Department Counsel has produced insufficient evidence to support its motion to amend the SOR, and accordingly, that motion is denied.

FINDINGS OF FACT

Applicant admitted the allegations of the SOR; accordingly, I incorporate the admissions as findings of fact.

Applicant is a 51-year-old electronic engineer employed by the same defense contractor since November 1979. He seeks to retain the industrial clearance he has held since then. He previously held a clearance while serving with the U.S. Navy from February 1973 to November 1978.

Applicant apparently received his entry-level industrial clearance in November 1979 as a routine administrative grant after his military service. In January 1980, he completed a clearance application to begin the investigation required to increase his level of access. That application required him to disclose any criminal record except for traffic offenses with a fine less than \$25.00. Applicant disclosed a spring 1978 marijuana possession charge (2.a.) and a summer 1978 shoplifting charge (1.a.), as well as a spring 1978 negligent driving charge, five speeding tickets from 1971 to June 1973 (for which he was unsure of the fine paid), and four speeding tickets from February 1978 to August 1978 (for which he thought he paid more than \$25.00). He discussed the marijuana and shoplifting arrests in detail in a September 1980 sworn statement. He received his upgraded clearance in June 1981 and has held it since.

In March 1982, Applicant pleaded guilty to destroying insured property (1.b.). It appears that his employer filed the required adverse information report with the industrial security program, because in January 1983 Applicant gave a sworn statement about the circumstances of his March 1982 conviction. Applicant's clearance was continued. In April 1984, Applicant was interviewed about some apparent financial difficulties, which were apparently resolved in his favor. However, in October 1986, Applicant and his wife filed a Chapter 7 bankruptcy petition and were discharged of their debts in February 1987 (3.a.).

In November 1989, Applicant completed a clearance application to begin his periodic reinvestigation. In response to pertinent questions (still worded as "ever" questions), Applicant disclosed his June 1978 marijuana possession charge, his October 1978 shoplifting charge, his March 1982 insurance fraud charge, and his February 1987 Chapter 7 bankruptcy discharge. He also disclosed his 1977-1978 use of marijuana and hashish. (5) His clearance was apparently continued without further interview by government investigators.

In May 2002, Applicant again completed a clearance application to begin another periodic reinvestigation. In response to two "ever" questions, he disclosed his June 1978 marijuana possession charge and his March 2002 insurance fraud charge. In response to two "last seven years" questions, he disclosed an August 2000 shoplifting charge (1.c.), to which he pleaded no lo contendere on his lawyer's advice, (6) and a March 2002 Chapter 7 bankruptcy filing. He truthfully answered "no" to a "last seven years" question about illegal drug use. He was not asked to disclose his October 1978 shoplifting charge.

In his September 2003 sworn statement, Applicant again discussed his June 1978 marijuana possession charge (and its associated marijuana use), his March 1982 insurance fraud charge, his August 2000 shoplifting charge, and his March 2002 Chapter 7 bankruptcy petition, since resolved by discharge of debts in July 2002. He also discussed his 1987 Chapter 7 bankruptcy discharge. He did not discuss his October 1978 shoplifting charge. He says that the agent only asked him about additional charges after the August 2000 charge.

Applicant acknowledges that his Chapter 7 bankruptcy discharges in February 1987 and July 2002 were due to letting household finances get out of control, and not because of any unforeseen circumstances. However, he and his wife have not experienced any further financial difficulties and their September 2003 personal financial statement (PFS) shows positive monthly cash flow of \$1,370.00.

POLICIES AND BURDEN OF PROOF

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative 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. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guidelines are Guideline E (Personal Conduct), Guideline J (Criminal Conduct), and Guideline F (Financial Considerations) .

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then 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.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their 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. ⁽⁷⁾

CONCLUSIONS

The government established a Guideline E case, ⁽⁸⁾ but Applicant mitigated the security concerns. Of the three allegations under Guideline E, all but the 2000 shoplifting offense have previously been adjudicated multiple times. Those prior adjudications do not prevent the government from revisiting the conduct, either with or without subsequent unadjudicated misconduct.. However, the disputed circumstances of the 2000 arrest, the minor nature of the conduct (as indicated by the disposition), the passage of more than five years without recurrence of the conduct, and the Applicant's continued successful discharge of his security obligations lead me to conclude that the additional security significance attributable to the 2000 offense does not warrant revocation of Applicant's clearance ⁽⁹⁾ Nor does the cumulative effect of three minor offenses in 22 years justify revoking his clearance. I conclude Guideline E for Applicant.

The government established a Guideline J case, but Applicant mitigated the security concerns. The government proved four minor criminal offenses in June and October 1978, October 1981, and September 2000, adding a June 1978 marijuana possession charge to the three allegations under Guideline E. ⁽¹⁰⁾ None of the offenses standing alone warrant revocation of Applicant's clearance. Even viewed as a pattern, the four offenses do not justify revoking his clearance.

Three of the offenses are more than 24 years old. The most recent offense is more than five years old. While this conduct is not isolated,⁽¹¹⁾ it is also not recent,⁽¹²⁾ and there has been no recurrence of the conduct--evidence of successful rehabilitation.⁽¹³⁾ Accordingly, I conclude Guideline J for Applicant.

The government established a Guideline F case, but Applicant mitigated the security concerns. Applicant had Chapter 7 bankruptcy discharges in February 1987 and July 2002.⁽¹⁴⁾ He acknowledges that there were no particularly extenuating circumstance leading to his financial difficulties.⁽¹⁵⁾ However, the financial problems were confined to two distinct periods in Applicant's life, separated by 15 years.⁽¹⁶⁾ The most recent bankruptcy was more than three years ago,⁽¹⁷⁾ and his monthly finances now show a substantial positive cash flow.⁽¹⁸⁾ Finally, bankruptcy is a legitimate means of resolving indebtedness that gets out of control, as it did for Applicant, and there is no evidence that Applicant has resorted to bankruptcy abusively or frivolously.⁽¹⁹⁾ I conclude Guideline F for Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline E: FOR APPLICANT

Subparagraph a: For Applicant

Subparagraph b: For Applicant

Subparagraph c: For Applicant

Paragraph 2. Guideline J: FOR APPLICANT

Subparagraph a: For Applicant

Subparagraph b: For Applicant

Paragraph 3. Guideline F: FOR APPLICANT

Subparagraph a: For Applicant

Subparagraph b: For Applicant

Subparagraph c: 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 Applicant. Clearance granted.

John Grattan Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865 and Department of Defense Directive 5220.6, as amended (Directive).
2. The September 2003 sworn statement was typed, apparently by the agent. Applicant made corrections to the statement regarding his 2002 bankruptcy, because the agent recorded the dates of discharge on the individual debts as March 2002 (the date of filing) instead of July 2002 (the date of discharge).
3. And Applicant truthfully disclosed a 20-year-old felony arrest and a 24-year-old drug possession arrest, both in response to questions asking "ever," and truthfully disclosed the August 2000 shoplifting arrest occurring within the last seven years.
4. In December 1980, Applicant became involved in a scheme to have his car "stolen" and destroyed so he could collect the insurance money. Eventually the scheme unraveled, Applicant admitted his criminal involvement in September 1981, and surrendered to the police in October 1981. He was originally charged with both destroying insured property and filing a false insurance claim. He was given four months in jail (served on work furlough), two years probation, fined, and ordered to make restitution. He satisfactorily completed the terms of his sentence.
5. Information not required on his January 1980 clearance application, which only asked if applicants were addicted to any illegal drugs.
6. The Applicant asserts that he did not intend to steal any merchandise, but got the headphones he was trying out mixed up when putting them back in their boxes. He was fined \$270 for this misdemeanor offense.

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

8. E2.A5.1.2.1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances;

9. E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;

10. 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.

11. E2.A10.1.3.2. The crime was an isolated incident.

12. E2.A10.1.3.1. The criminal behavior was not recent.

13. E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

14. E2.A6.1.2.1 A history of not meeting financial obligations; E2.A6.1.2.3 Inability or unwillingness to satisfy debts;

15. E2.A6.1.3.3 The conditions that resulted in the behavior were largely beyond the person's control. . . ;

16. E2.A6.1.3.2 It was an isolated incident;

17. E2.A6.1.3.1 The behavior was not recent;

18. 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;

19. E2.A6.1.3.6 The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.