

DATE: October 6, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-02039

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

While Applicant's criminal conduct and his personal conduct in omitting material information from his security form raised serious security concerns, Applicant has rebutted these concerns. He established that there were medical reasons for his failure to reveal all of his criminal arrests and convictions on his security form and that he had no intent to falsify. Further, there is no evidence that he was involved with any criminal activity since 1990. This subsequent clean record establishes his rehabilitation and mitigates the 1970, 1974, 1980, 1981, and 1990 incidents. While after the 1974 charge and conviction, he was sentenced to serve four years, there is no evidence in the record that in fact he actually served more than one year. Thus, the 1974 criminal conviction and incarceration do not fall within 10 U.S.C. Section 986, as amended. 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 October 27, 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.⁽¹⁾ The SOR alleges security concerns both over criminal conduct (Guideline J), including an allegation that his 1973 conviction, four year sentence, and over one year incarceration is criminal conduct that disqualifies Applicant from having a security clearance because of 10 U.S.C. Section 986, unless in a meritorious case the Secretary of Defense authorizes an exception, and also, over personal conduct (Guideline E). Applicant responded to these SOR allegations in an Answer notarized on November 5, 2005, where he admitted subparagraph 1.a., failed to answer 1.b. through 1.i., and denied 2. and 2.a. He requested a decision without a hearing.

The case was assigned to Department Counsel who on February 7, 2006, prepared a File of Relevant Material (FORM) for the Applicant's review and advised Applicant that he had 30 days to submit objections and/or information before the FORM was submitted to an administrative judge and that he had the right to be represented by counsel. A paralegal sent the FORM to Applicant on February 9, 2006, and again notified the Applicant that he had 30 days from receipt of the letter to submit objections and/or information before the FORM was submitted to an administrative judge. Applicant

received the FORM on February 14, 2006, with a response due on March 16, 2006. The Applicant submitted no response. The DOHA Director assigned the case to me for a decision on the record on April 7, 2006.

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, 55 years old, has worked as a network administrator with Defense Contractor #1 in State #1 since June 2002; previously he was self-employed from September 2002 to May 2003. He previously worked as a network administrator for Defense Contractor #2 in State #1 in 2002 and as a system administrator for Defense Contractor #3 from 2001 to 2002. He completed a Security Clearance Application (SF 86) in June 2003 where he certified that his statements on the form were "true, complete, and correct to the best" of his knowledge and belief. (Items 4, 5) Applicant was married in April 1976 (Item 4)

Criminal Conduct and Personal Conduct

When Applicant completed his security form in 2003, he did disclose a 1984 "bad personal check" offense, but failed to reveal several other past criminal charges and convictions in response to question 21 on the SF 86 form. When interviewed by the Defense Security Service (DSS) in April 2005, Applicant was questioned about his former criminal activities as records documented his criminal conduct between 1974 to 1990, included felony arrests. He stated that he had not listed all of these matters on his SF 86 as he had "a problem" with his memory and could not remember anything that occurred between 1979 and 1991; however, he declared that his memory issues did not interfere with his everyday activities. He established he had no intent to falsify as during the middle and late 1980's, he had three strokes that left him with left-side paralysis, speech impairment and memory loss. He stated that his family members tried to help him complete the SF 86 as he often go things "turned around" or confused real facts with television programs. He states he has forgotten much about his life and is still undergoing physical and speech therapy from his last stroke. (Items 2, 5)

When the DSS agent went over the arrest record, he stated he could "vaguely recall bits and pieces." He did confirm that the files [\(2\)](#) were accurate. However, Applicant maintained that he is no longer that person who committed those earlier acts and is proud of his work with Defense Contractor #1. (Item 5) He has made improvements in his life. (Item 2)

Various records document a series of arrests and convictions from 1970 to 1990:

- When he was 19 years old and serving in the military, Applicant stole an unsecured vehicle from a parking lot in State #2 in March 1970 and was detained in a city jail. He was to be charged with Grand Larceny. At the time he had been absent without leave (AWOL) from his unit since February 1970. Subsequently, he was released to military control in April 1970. No disposition is noted in the records, but Applicant admits this incident. (Items 2, 7) (SOR 1.a.)
the actual time served. No other record was submitted that documents the length of time he was actually incarcerated. Applicant neither admitted nor denied this allegation. (Item 2) (SOR 1.b.) 6) Applicant neither admitted nor denied this allegation. (Item 2) (SOR 1.c.) payable. The case was nolle prossed in October 1981. In February 1982 he was judged guilty and sentenced to thirty months probation with six months work release and order to pay restitution of \$926. In November 1983 a petition was filed to revoke his probation and an arrest warrant issued. In August 1985 he was discharged from probation as he completed the terms satisfactorily. (Item 8) Applicant neither admitted nor denied this allegation. (Item 2) (SOR 1.d.) 9) Applicant neither admitted nor denied this allegation. (Item 2) (SOR 1.e.) knives, 50 rounds of hollow point pullets. He was arrested for Unlawful Possession of Weapons by Felons. A psychiatric institute found him fit to stand trial but recommended that he be order to continue psychiatric treatment. In July 1991 the matter was nolle prossed. (Items 10, 11, 12) Applicant neither admitted nor denied this allegation. (Item 2) (SOR 1.f., SOR 1.g.)

Applicant did not request a waiver from the statutory requirements of 10 U.S.C. Section 986 ("The Smith Amendment") alleged in the SOR.

STATUTORY REQUIREMENTS

A provision of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 10 U.S.C. Section 986 ("The Smith Amendment"), which was subsequently amended, mandates restrictions on the granting or renewal of security clearances. This statutory limitation was implemented within the Department of Defense by a June 7, 2001, Memorandum, and within DOHA by Operating Instruction (OI) 64, issued initially on July 10, 2001, and revised on September 12, 2006. Under the provision a person convicted in any court of the United States of a crime who was sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year is disqualified from being granted a security clearance. In meritorious cases an exception to the disqualification may be granted if there are mitigating factors.

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

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

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.

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 alleged security concerns over Applicant's criminal conduct from 1970 to 1990. Most crucial was Applicant's charge for Armed Robbery in February 1974 where he was sentenced to four years according to an FBI record. Also, the government alleges that he served more than one year incarcerated and argues this time served dictates this incident fall within a statutory provision. The Smith Amendment (10 U.S.C. Section 986), as amended, and as implemented by DoD, mandates restrictions on the granting or renewal of security clearances. The statutory provision disqualifies persons with convictions in both State and Federal courts with sentences imposed of more than one year, who actually served more than one year. However, it is crucial that the government establish the length of time he was actually incarcerated. In this case, the allegation is made at SOR 1.b., that he was incarcerated in a state penitentiary from February 7, 1974, to July 11, 1975; however there is no documentation the FORM that he indeed was incarcerated for that period. The submitted FBI record only records

a four year sentence and does not include the time actually served. Thus, his 1974 conviction does not fall within the Smith provision as amended.

While Applicant provided only his own statements of his successful work record, there is no evidence he has been arrested in the last fifteen years. In the FORM the Government concedes he meets mitigating⁽³⁾ condition (MC) (1) as the behavior was not recent with respected to his dated criminal conduct and (6) as there is clear evidence of rehabilitation. While the government questions whether or not MC 3 and MC 4 apply, the record shows that he had psychiatric problems at the time of the 1990 incidents, and he was subsequently ordered to continue psychiatric treatment on a indefinite basis. Thus, he has established his case in mitigation.

Further, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., 1.f., 1.g., 1.h., and 1.i. incorporated under SOR Paragraph 1.

Personal Conduct

The Government advanced security concerns over personal conduct issues Applicant had an opportunity to disclose the totality of his criminal conduct on his SF 86, but failed to do so in answer to question 21 on the security form. Consequently, Applicant's behavior⁽⁴⁾ reflects questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations and could indicate that he may not properly safeguard classified information.

Applicant rebutted and overcame the Government's case, by demonstrating that he had medical problems that contributed to these omissions and that he had no intent to falsify. He did disclose a bad check charge from 1984, but not the other charges. He credibly established that he relied on his family members to help him remember any additional charges, and they failed to do so. Given the fact that his criminal record did not extend past 1990, it is believable that his family members and he might have forgotten incidents that occurred more than 13 years prior to the time he completed the form or concluded that they were not relevant nor material. Thus, Applicant has mitigated⁽⁵⁾ concerns over this personal conduct. He also assures that currently he is proficient at work as he has memory problems in certain, but not all areas. Hence, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 2.a. under SOR Paragraph 2.

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

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.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.

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. While Applicant in his statement confirmed that "the files" DSS showed him were "accurate as to what they say about me," there is no documentation in the Statement as to precisely which files he reviewed and what they revealed. Most troubling is the fact that the only documentation on his 1974 arrest, conviction and four year sentence is a summary FBI record. (Item 6) While the government alleges in SOR 1.b. that he was "received on February 7, 1974" at a state department of corrections and "discharged on July 11, 1975" there is no documentation in the FORM of his having served that amount of time. While in the FORM at page 5, Department Counsel argues that he served in a state penitentiary for 17 months, she does not document that allegation with a reference to any specific document other than Item 6 which does not document his time served. Applicant failed to either admit or deny allegation 1.b.

3. 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.

- 4. Conditions that could raise a security concern and may be disqualifying also include:** 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;

- 5. Conditions that could mitigate security concerns include:** 1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability; 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily; 3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts; 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; 5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress; 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; 7. Association with persons involved in criminal activities has ceased.