

KEYWORD: Criminal Conduct

DIGEST: Applicant's criminal conduct is not recent. Clearance is granted.

CASENO: 07-02275.h1

DATE: 09/17/2007

DATE: September 17, 2007

In Re:)	
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SSN:-----)	
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Applicant for Security Clearance)	

**DECISION OF ADMINISTRATIVE JUDGE
JOSEPH TESTAN**

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's criminal conduct is not recent. Clearance is granted.

STATEMENT OF THE CASE

On May 25, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on June 15, 2007, and elected to have his case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's written case (FORM) on or about July 25, 2007. Applicant responded to the FORM on or about August 29, 2007. The case was assigned to me on September 10, 2007.

FINDINGS OF FACT

Applicant is a 37 year old employee of a defense contractor.

In or about August 1990, applicant was arrested and charged with selling cocaine. He was placed on First Offender probation for five years and was fined \$2,500.00. Applicant successfully completed his probation and paid the fine.

In June 1991, applicant was charged with Aggravated Assault. During the same month, he was charged with Simple Battery. It's possible both charges arose from the same incident. Both charges were dropped.

In August 1992, applicant was charged with Battery. During the same month, he was charged with Aggravated Assault. It's possible both charges arose from the same incident. Both charges were dropped.

In 1993, applicant was arrested and charged with Possession of a Drug Related Object. He was convicted of the charge and fined \$300.00.

In 1993, applicant was arrested and charged with Criminal Trespass and Simple Battery. He was convicted of both charges, fined approximately \$300.00, and placed on probation for 12 months.

In 1993, applicant was arrested and charged with Possession of a Firearm by a Convicted Felon and Permitting Violator to Violate State Law. The charges were dismissed.

In August 1994, applicant was arrested and charged with Simple Battery. The charge was dismissed.

In December 1994, applicant was arrested and charged with Criminal Trespass, and on a separate date was arrested and charged with Aggravated Assault. The charges in both cases were dismissed.

In March 1998, applicant was arrested and charged with DUI. He was convicted of DUI or a lesser charge, was sentenced to two days in jail, fined \$655.00, and placed on probation for 12 months.

In December 1998, applicant was arrested and charged with Battery. He was convicted of the charge, fined \$745.00, and placed on probation for 12 months.

In September 1999, applicant was arrested and charged with Terroristic Threats and Acts, and Obstruction of Officers, both felonies. The Terroristic Threats and Acts charge was dismissed, and the Obstruction of Officers charge was reduced to a misdemeanor. He was convicted of Obstruction of Officers and Stalking and fined \$1,000.00. The SOR alleges that applicant received 12 months probation. In his response to the SOR, applicant volunteered the fact he was convicted of two counts of Obstruction of Officers and one count of Stalking, and was sentenced to 12 months of probation for each count, which ran consecutively, for a total of 36 months. This helps explain how he was charged with a probation violation in 2002.

In October 1999, applicant was charged with Contempt of Court. The charge was dismissed.

In November 2002, applicant was arrested and charged with Battery. The charge was dismissed. Applicant admits that during the same month he was charged with a probation violation.

In March 2006, applicant was arrested and charged with Simple Battery. The charge was dismissed.

In response to the FORM, applicant submitted two character reference letters. The first was from a former coworker who was also applicant's manager for five and one-half years. She states that applicant "proved to be a reliable, dedicated, hardworking and honest individual," and she would recommend applicant "for any position that requires secured access to sensitive or classified information." She concluded her letter by stating, "Working together for 5 ½ years has given me quite a bit of insight to [applicant's] professional and personal life and the opportunity to see firsthand how he handles adversity, deals with challenge and manages different levels of stress. Nothing I have seen would cause me to think that [applicant] would be unable [to] safeguard information or that he would misuse such information in a harmful or unlawful way."

The second letter is from the President and CEO of the defense contractor that has employed applicant since May 2005. He states that applicant has proven to be honest, reliable, and hardworking, and recommends applicant for a security clearance.

CONCLUSIONS

The evidence establishes that applicant was arrested and convicted of various crimes on six occasions beginning in 1990 and ending in 1999. Applicant's criminal conduct reflects adversely on his judgment, reliability and trustworthiness, and suggests he cannot be relied upon to safeguard classified information. Disqualifying Conditions 31a. (*a single serious crime or multiple lesser offenses*) and 31d. (*violation of parole or probation*) are applicable.

Although a quick glance at the SOR would create the impression that applicant is completely unworthy of a security clearance, when the facts are reviewed, it is clear there is significant mitigation present. First, more than half of charges alleged in the SOR were dismissed. This strongly suggests that applicant had a problem with local law enforcement. But even if he didn't have such a problem, the mere fact the charges were dismissed on so many occasions strongly suggests that applicant did not engage in the conduct for which he was charged. Accordingly, Mitigating Condition 32c. (*evidence that the person did not commit the offense*) is applicable.

Second, except for perhaps a probation violation in 2002 (about five years ago),¹ there is no credible evidence that applicant has committed any criminal act since 1999 (about eight years ago). Since 1999, he has been employed with two companies that think very highly of him. Whether it is simply applicant getting older and maturing, or his gainful employment, or a combination of the two, it appears that applicant has put his criminal ways behind him. He qualifies for Mitigating Conditions 32a. (*so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment*), and 32d. (*there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*).

Based on the foregoing, and after consideration of the general factors set forth in Enclosure 2, Paragraph 2 of the Directive,² Guideline J is found for applicant.

FORMAL FINDINGS

GUIDELINE J: FOR THE 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.

Joseph Testan
Administrative Judge

¹ Because there is no evidence in the record regarding the probation violation, I cannot determine if the conduct causing the probation violation was criminal. And, it is not clear if a probation violation, by itself, is a crime.

²Pages 18 and 19.