

DATE: November 19, 2007

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In Re: )  
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 ----- ) ISCR Case No. 07-00864  
 SSN: ----- )  
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 Applicant for Security Clearance )  
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**DECISION OF ADMINISTRATIVE JUDGE  
WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Candace Le'i, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The Applicant has been arrested four times (twice in 1998, 2000 and 2004). Two of the arrests (1998 and 2004) did not result in charges because the Applicant did not commit the offense. For the most serious offense, in 2000, the Applicant served 30 days in jail and was on probation for three years. He has not engaged in criminal conduct since 2000 and shows considerable evidence of rehabilitation. Applicant is now eligible for a security clearance. Clearance is granted.

**STATEMENT OF THE CASE**

On March 20, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on April 5, 2007, and requested a hearing. The case was assigned to another Administrative Judge on August 3, 2007. It was received by the undersigned on August 8, 2007, and a Notice of Hearing was issued on August 16, 2007.

A hearing was held on September 4, 2007, at which the Government presented two documentary exhibits. Testimony was taken from the Applicant, who also submitted six exhibits. The transcript was received on September 12, 2007.

### **FINDINGS OF FACT**

The Applicant is 27, married but separated, and has a high school diploma. He is employed by a defense contractor, and he seeks to obtain a DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

The Applicant has been arrested four times since 1998. Only one of these arrests resulted in a conviction.

The Applicant was first arrested in April 1998. This incident involved his accidentally hitting a teacher with his elbow when he was still in high school. The teacher submitted a statement to the District Attorney stating that the Applicant did not intend to hit her and the charges were dismissed. (Transcript at 26-27, Government Exhibit 2 at 2, Applicant's Exhibit E.)

The Applicant was next arrested in October 1998 for Driving Under the Influence of Alcohol. He was involved in a motor vehicle accident after drinking. At that time the Applicant was only 18 years old. He called the police after the accident and was arrested. The charges were subsequently dropped. His driver's license was suspended for six months by the Department of Motor Vehicles. (Transcript at 28-29.)

In March 2000 the Applicant was involved in a serious incident involving an underage woman. The young woman, who was 17 at the time, became sexually involved with the Applicant

and two of his friends. During this incident, the woman was intoxicated. The Applicant did not have intercourse with the victim, but he did engage in sexual activity with her. His two friends did have intercourse with the woman. (Transcript at 29-36, Government Exhibit 1 at 34-35.)

After the night was over, the victim filed charges against the Applicant and his two friends. The Applicant was charged with Forcible Rape, Rape of a Drugged Victim and Child Endangerment, Possible Injury/Death (felony). The Applicant pled no contest to the charge of Child Endangerment and was sentenced to 60 months probation and 100 days in jail. He actually served 30 days. (Transcript at 36-39, 68-70.) In June 2003 the charge was reduced to a misdemeanor and, in August 2003 the Applicant successfully petitioned to have the conviction set aside, a plea of not guilty entered and the complaint dismissed. (Applicant's Exhibit D.)

The Applicant's final arrest occurred in October 2004. On this occasion the Applicant's wife accused him of hitting her while she held their infant son. He was charged with Inflicting Corporal Injury on Spouse and Child Cruelty. The Applicant has consistently stated that this incident did not happen. (Transcript at 39-48.) The Applicant's wife submitted a signed statement supporting his version of the facts. (Applicant's Exhibit A.) She states:

At that time [October 6, 2004] I made a false accusation against [the Applicant] in order to see my grandmother in New York who at the time was very sick and was diagnosed with Cancer. . . . The reason I did the false accusation was because I had asked [the Applicant] if I could go with our son . . . to see my grandmother and he told me no that he didn't think it was a very good idea, because of [the son's] young age. That's when I got very upset and found out that if I press charges on him that I would be able to go to New York without needing his consent. Postpartum and the fact we had got into a disagreement the day before [our] anniversary gave me the incentive to do what I did.

The case never went to court. The Applicant's wife recanted her statement about what the Applicant had done and the case was dropped. (Transcript at 48, Government Exhibit 1 at 33-34.)

#### Mitigation.

The Applicant submitted a letter of reference from his Team Lead. (Applicant's Exhibit B.) She states that she asked the Applicant to submit his resume for a job after he was laid off by his previous employer. She states that the Applicant is "a hardworking dependable employee with a strong work ethic." That is also shown by a Surveillance Inspection from August 2007 submitted by the Applicant. (Applicant's Exhibit F.)

A Staff Sergeant in the United States Air Force submitted a statement saying he believes the Applicant to be "an intelligent, capable, dedicated, professional and personable young man." (Applicant's Exhibit C.)

## **POLICIES**

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case will be set forth under CONCLUSIONS, below.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General 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 behavior changes
- (7) The motivation for the conduct
- (8) The potential for pressure, coercion, exploitation or duress
- (9) The likelihood of continuation or recurrence."

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in repeated acts of criminal misconduct that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

### CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the granting of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has been engaged in several criminal acts between 1998 and 2004 (Guideline J).

The Applicant, on the other hand, has successfully mitigated the Government's case. The evidence shows that two of the criminal incidents involving the Applicant were resolved before trial because the Applicant did not engage in the alleged criminal conduct. These were the cases involving the battery on a teacher in 1998 and the spousal abuse charge in 2004. This last incident appears to have been the result of a serious misunderstanding between the Applicant and his spouse that she allowed to get out of hand.

As for the second 1998 arrest, the Applicant admits that he had been drinking, though he was underage. The charge was dismissed and the results were that the Applicant had his driver's license suspended, and he does not drink and drive anymore.

The 2000 arrest and conviction are the most serious. The Applicant admits to using very poor judgment on that occasion. His conduct is not condoned, but it is to his benefit that he successfully completed probation and the charges were dismissed almost four years ago. Seven years have passed since this incident, and the evidence shows that the Applicant is a much more mature man than he was at that time. He shows considerable contrition and an understanding of how this incident occurred and a credible intent not to engage in such conduct again.

The following Disqualifying Condition applies to this case: 31(a) *A single serious crime or multiple lesser offenses.*

The following Mitigating Conditions also apply to this case: 32(a) *So much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*; 32(c) *Evidence that the person did not commit the offense*; and, 32(d) *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.*

In addition, application of the General Factors is appropriate and supports a decision in the Applicant's favor. The Applicant shows considerable evidence of rehabilitation (factor 6), and, under the circumstances of this case, the probability that the Applicant will engage in any conduct like this again are virtually nil (factor 9).

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: For the Applicant.  
Subparagraphs 1.a through 1.d.:

### **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.

Wilford H. Ross  
Administrative Judge