

KEYWORD: Criminal Conduct

DIGEST: The Applicant was involved in two criminal incidents in 2001 and 2004. The Applicant remains on probation for the second incident. In addition, the Applicant remains personally involved with the other participant in both criminal incidents. Insufficient mitigation is shown to overcome the evidence of poor judgment, unreliability and untrustworthiness. Clearance is denied.

CASENO: 06-19376.h1

DATE: 07/25/2007

DATE: July 25, 2007

In Re:	)	
	)	
-----	)	
SSN: -----	)	ISCR Case No. 06-19376
	)	
Applicant for Security Clearance	)	
	)	

**DECISION OF ADMINISTRATIVE JUDGE  
WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Jeff Nagel, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The Applicant was involved in two criminal incidents in 2001 and 2004. The Applicant remains on probation for the second incident. In addition, the Applicant remains personally involved

with the other participant in both criminal incidents. Insufficient mitigation is shown to overcome the evidence of poor judgment, unreliability and untrustworthiness. Clearance is denied.

### **STATEMENT OF THE CASE**

On November 28, 2006, 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 January 18, 2007, and requested a hearing. The case was originally assigned to another Administrative Judge on February 13, 2007. The case was reassigned to me on February 21, 2007, and a Notice of Hearing was issued on February 27, 2007.

A hearing was held on March 21, 2007, at which the Government presented three documentary exhibits. Testimony was taken from the Applicant, who also submitted one exhibit. The transcript was received on March 30, 2007.

### **FINDINGS OF FACT**

The Applicant is 47, single, and has a high school diploma. He is employed by a defense contractor as a technician, and he seeks to obtain a DoD security clearance 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.

In May 2001 the Applicant was driving the car of a friend (Mr. X). During a traffic stop by police, Mr. X's car was searched and drugs were found in the possession of Mr. X and also in the possession of the Applicant. The Applicant was arrested and charged with felony counts of Possession and Transportation of Narcotics or Controlled Substances and a misdemeanor count of Possession of Over 1 Ounce of Marijuana. The Applicant pled Nolo Contendere to the third count and the felony counts were dismissed. He was sentenced to, and completed, an 18 month diversion

program. The case against the Applicant was dismissed as a result of his successful completion of the diversion program. (Transcript at 19-22, 32-34; Government Exhibit 3; Applicant's Exhibit C.)

The Applicant remained friends with Mr. X even after the 2001 incident. Some time later Mr. X was not able to purchase an automobile because of his bad credit. The Applicant obtained an automobile loan and purchased a car for Mr. X's use. In 2004 Mr. X informed the Applicant that the car had been stolen. Since the car was licensed in the Applicant's name, he was required to file a police report concerning the stolen automobile. In reality, the automobile had not been stolen by strangers, but by Mr. X himself.

The police and the insurance company discovered Mr. X's fraud and he was arrested for Grand Theft - Auto. Because the Applicant had filed a false police report, albeit unknowingly, he was arrested for Falsely Reporting A Crime and being a Principal Party to a Crime. The first count was dismissed and the Applicant plead guilty to Count 2. He was sentenced to three years probation and to pay a fine. As of the date of the hearing, the Applicant continued to be on probation. (Transcript at 22-29, 34-38.)

The Applicant has known Mr. X since 1987. Except when he is in jail, Mr. X has lived with the Applicant and the Applicant's sister since 2000. The Applicant testified that, without the generosity of the Applicant, Mr. X would be homeless. (Transcript at 46-48.) At one point in his testimony, the Applicant stated that Mr. X has changed as a person. (Transcript at 41-42.) Later, however, the Applicant stated:

No, I don't trust him [Mr. X]. And we do have new locks on the bedroom door - - my sister's bedroom door and her bathroom so nothing disappears. There is nothing in my room to take; so, he is not taking anything from there. Basically, it's just so he is not homeless. (Transcript at 44.)

### **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 criminal acts 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 a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has been involved in two criminal offenses (Guideline J).

The Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him. The Applicant showed extremely poor judgment in being involved in two incidents of criminal activity, both involving Mr. X. This poor judgment continues to be shown by the Applicant in that he has allowed Mr. X, a known criminal who the Applicant does not trust, to live with him for several years.

The following Disqualifying Conditions apply to the facts in this case: 31.(a) *A single serious crime or multiple lesser offenses*; and 31.(d) *Individual is currently on parole or probation*. None of the Mitigating Conditions apply, specifically because there is evidence, set forth above, that casts doubt on the Applicant's reliability, trustworthiness and good judgment. In addition, under the particular facts of this case, there is insufficient evidence of successful rehabilitation.

I have also considered this case under the Whole Person concept. Using the General Factors, I am also unable to find that the Applicant possesses the requisite good judgment, reliability and trustworthiness required of security clearance holders. I have particular concerns with Factors (6) *The presence or absence of rehabilitation and other permanent behavioral changes*, (8) *The potential for pressure, coercion, exploitation, or duress*, and (9) *The likelihood of continuation or recurrence*.

On balance, it is concluded that the Applicant has failed to overcome the Government's information opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the 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: Against the Applicant.

Subparagraphs 1.a. and 1.b.: Against the Applicant.

**DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Wilford H. Ross  
Administrative Judge