

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: The Applicant has a history of minor criminal and dishonest conduct, primarily related to driving offenses. The majority of this conduct occurred between 2002 and 2004. The Applicant has taken responsibility for his conduct, changed his attitude about the law, and has presented persuasive evidence that he is now eligible for a security clearance. Clearance is granted.

CASENO: 06-21516.h1

DATE: 08/10/2007

DATE: August 10, 2007

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| SSN: ----- |) | ISCR Case No. 06-21516 |
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| Applicant for Security Clearance |) | |
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**DECISION OF ADMINISTRATIVE JUDGE
WILFORD H. ROSS**

APPEARANCES

FOR GOVERNMENT

Jeff A. Nagel, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant has a history of minor criminal and dishonest conduct, primarily related to driving offenses. The majority of this conduct occurred between 2002 and 2004. The Applicant has taken responsibility for his conduct, changed his attitude about the law, and has presented persuasive evidence that he is now eligible for a security clearance. Clearance is granted.

STATEMENT OF THE CASE

On November 27, 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 December 15, 2006, and requested a hearing. The case was received by the undersigned on February 7, 2007, and a Notice of Hearing was issued on February 16, 2007.

A hearing was held on March 15, 2007, at which the Government presented three documentary exhibits. Testimony was taken from the Applicant, who called one additional witness, and also submitted three exhibits. The transcript was received on April 5, 2007.

FINDINGS OF FACT

The Applicant is 27, married and has a Bachelor's degree in Technical Management. He is employed by a defense contractor as a Test Engineer, and he seeks to retain a Top Secret-level DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued 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.

1.a. The Applicant has consistently denied being arrested on November 26, 1999, for a Public Peace Offense. He submitted his DD-214, which shows that he was on an overseas tour with the Army on that particular date. (Applicant's Exhibit C; Transcript at 16-17.)

1.b. The Applicant admitted receiving Non-Judicial punishment in the Army in 2002 for having a fight with a fellow soldier. He was sentenced to perform extra duty. According to the Applicant, this was one of three fights he has had in his life. (Transcript at 17-18, 30-32.)

1.c. In 2002, the Applicant missed a court date for a traffic citation and a warrant for Failure to Appear was issued. In November 2002 he was arrested on this charge. He subsequently paid a fine and the charge was dismissed. The Applicant admitted he was at fault for missing the court date and avers that such an occurrence will never happen again. (Transcript at 19-20, 34-36.)

1.d. The Applicant's next involvement with the police happened in October 2003 when, after a traffic stop, he was arrested for Driving on a Suspended License. The Applicant avers that he did not know his license was suspended for having too many driving infractions. However, the Applicant testified, "I went to Court and pled guilty to driving with a suspended license and I was given five days in jail, in which I served three and I did pay my fine." (Transcript at 20-21, 36-37.)

1.e. On November 2, 2004, the Applicant was arrested and charged with Reckless Driving and Evading a Police Officer. He pled Guilty to the Reckless Driving Charge, for which he received a \$761 fine and 36 months informal probation. The probation will expire in April 2008. The available evidence indicates that this incident was not as serious as the charges indicate. (Transcript at 21-25, 38-42.) It is also clear that the Applicant made a point of notifying his employer of the incident so they could properly notify the Government. (Government Exhibit 2.)

Paragraph 2 (Guideline E - Personal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because his conduct showed questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations.

2.a. The Applicant was working as a bagger at a grocery store in 1998. He freely admits that he used extremely poor judgment when he stole some grocery items from his employer. He was terminated for this incident. (Government Exhibit 1 at question 20; Transcript at 25-27, 43-44.)

2.b. The Applicant used marijuana twice, in 1997 and August 2002. The August incident happened after the Applicant had been discharged from the Army, but his security clearance was still active. The Applicant did not know that his security clearance was still active at that time. (Applicant's Exhibit A; Transcript at 27-28, 46-48.)

2.c. The Applicant's conduct, set forth under Paragraph 1, above, will be viewed under this Guideline as well.

Mitigation.

The Applicant received an Honorable Discharge from the Army in 2002. During his service he was awarded the Army Achievement Medal twice and also the Good Conduct Medal. He is very proud of his service to the nation. (Applicant's Exhibit A; Transcript at 45-46.)

The Applicant submitted evidence showing that he is successful at work. He has recently been granted a promotion and is viewed as an "important part of the operation." (Applicant's Exhibits B and 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 criminal acts, or other incidents, that demonstrate 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 continued holding 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 involved in several criminal incidents over several years (Guideline J); and that this conduct, along with other acts not criminal, indicates poor judgment, untrustworthiness and unreliability by the Applicant (Guideline E).

Under Guideline J the following Disqualifying Conditions apply: 31.(a) *a single serious crime or multiple lesser offenses*; and 31.(d) *individual is currently on parole or probation*. The following Disqualifying Conditions are also applicable concerning the Guideline E allegations: 16.(c) *credible adverse information in several adjudicative areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information*; and 16.(d) *credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations*.

The Applicant, on the other hand, has successfully mitigated the Government's case. The Applicant has, by his own admission, acted in an irresponsible manner on occasion when he was a young person. Three of the incidents occurred in 2002 and 2003. The Applicant has only had a minor traffic offense since November 2004, the date of his last arrest. He remains on informal probation until April 2008, but from his testimony and other evidence, it is clear that he has matured and will engage in such acts in the future. It is particularly worthwhile to note that the Applicant made a point of keeping his employer notified of the judicial process of the 2004 case. Based on the evidence, the following Mitigating Conditions apply: 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*; 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*. Paragraph 1 is found for the Applicant.

Turning to Guideline E, the Applicant admits that he used poor judgment in using marijuana twice and in stealing groceries from his employer when a teenager. It is obvious from the available evidence that his involvement in such minor offenses is an aberration on the part of the Applicant and will not be repeated. Mitigating Condition 17.(c) applies: *the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness or good judgment*. Paragraph 2 is found for the Applicant.

In addition, application of the General Factors is appropriate and supports a decision in the Applicant's favor. Several of the acts occurred because the Applicant was young and immature. He is older and his testimony shows that he has matured in knowing his responsibilities as a security clearance holder (factor (4)). The Applicant shows considerable evidence of rehabilitation (factor (6)), he is motivated to not engage in such conduct in the future (factor (7)), and, under the circumstances of this case, there is little to no likelihood of continuation or recurrence of the conduct (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 Paragraphs 1 and 2 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.e.: For the Applicant.

- Paragraph 2: For the Applicant.
 - Subparagraphs 2.a. through 2.c.: 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 the Applicant.

Wilford H. Ross
Administrative Judge