

DATE: July 10, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-02871

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant is on probation for a 1999 Driving Under the Influence of Alcohol arrest. He also falsified a 1994 questionnaire concerning a 1993 detention by police during a domestic dispute. Adverse inference is not overcome. Clearance is denied.

STATEMENT OF THE CASE

On November 9, 2001, 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 November 28, 2001, and requested a hearing. The case was received by the undersigned on January 30, 2002, and a Notice of Hearing was issued on February 12, 2002. An Amended Notice of Hearing was issued on February 27, 2002.

A hearing was held on March 29, 2002, at which the Government presented five documentary exhibits, and called one witness. Testimony was taken from the Applicant, who also submitted six exhibits. The transcript was received on April 8, 2002.

FINDINGS OF FACT

The Applicant is 59, married and has a Bachelor of Science degree in Mechanical Engineering. He is employed by a defense contractor as a manager, 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 a series of criminal acts.

In 1993 the Applicant became involved in a physical altercation with his step-daughter. At that time she was approximately 21 years old. His step-daughter called the police, and they responded. The Applicant was eventually taken into custody by the police and jailed overnight. A friend of the Applicant's eventually came and posted bail. Subsequently, the Applicant had a hearing with the City Attorney's office and agreed to attend Family Abuse classes. The Applicant attended the Family Abuse classes as required. The Applicant has adamantly maintained that he was never charged for this incident. (*See*, Government Exhibit 3 at 1, Transcript at 29-30.)

The Applicant was arrested for Driving Under the Influence on December 18, 1999. He testified that he had two drinks before being picked up. The Applicant stated that he drove home even though he could feel the impact of his drinking. (Transcript at 36-40.) His blood alcohol level was .20%. The legal limit is .08%. In March 2000, the Applicant plead guilty to driving with a blood alcohol level above .08%. He was fined, had his driving privileges suspended, and was placed on summary probation for 36 months. As of the date of the hearing his probation was due to expire in March 2003.

Paragraph 2 (Guideline E - Personal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

On May 13, 1994, the Applicant completed an official DoD questionnaire in which he stated that he had never ". . . been arrested, charged, cited, held, or detained by Federal, State, or other law enforcement or juvenile authorities regardless of whether the charge was dropped or dismissed or you were found not guilty." (Government Exhibit 1, question 21.) This was a false answer to a relevant question concerning the Applicant's involvement with the police. The Applicant has consistently claimed that he was never arrested or charged, and therefore did not have to answer "Yes" to this question. The Applicant testified at length with different reasons about why he answered the question the way he did. (Transcript at 43-50.) He maintained that he might have been depending on his lawyer's statements after the hearing at the City Attorney's office. (Transcript at 43.) The Applicant stated that he may have answered "No" due to his haste in completing the form. (Transcript at 49.) He also stated that he enquired of his attorney about a year later concerning how he answered the questionnaire, and the attorney told him that he did not have to admit the arrest. (Transcript at 49-50.)

On the same questionnaire the Applicant answered "No" to question 22.f. which asked, "Have you ever consulted or been counseled by any mental health professional?" The Government alleges this is a false answer because of the Family Abuse classes the Applicant took as a result of the 1993 incident. The Government submitted little or no evidence concerning what this Family Abuse counseling consisted of. The Applicant states that the classes were not mental health counseling. (Transcript at 54-55.) I agree. Based on the record before me, I do not believe that the Applicant's qualified admission in his answer is sufficient to show that he was required to answer "Yes" to this question. Subparagraph 2.b. is found for the Applicant.

The Applicant filled out a Security Clearance Application on December 15, 1999. (Government Exhibit 2.) Three days later the Applicant was arrested for Driving Under the Influence, as discussed above. The Applicant did not attempt to amend his Application. The Applicant testified that he talked to his company security people in January or February 2000 and they told him to report the incident once he knew of his sentence. (Transcript at 72.) The Applicant plead guilty and was sentenced on March 1, 2000. (Government Exhibit 5.) On March 2, 2000, the Applicant submitted a written statement to his company security office in fulfillment of his self-reporting requirement. (Applicant's Exhibit F.)

Mitigation. The Applicant submitted many documents from his employer showing that he is a talented and well-liked member of senior management. His most recent Performance Appraisal shows that he exceeds his performance

objectives. He has recently been promoted to a higher level position. (Applicant's Exhibit A.)

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 criterion. 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 are:

Guideline J (Criminal conduct)

Conditions that could raise a security concern:

- (1) Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
- (2) A single serious crime or multiple lesser offenses.

Condition that could mitigate security concerns:

- (1) The criminal behavior was not recent.

Guideline E (Personal conduct)

Condition that could raise a security concern:

- (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.

Condition that could mitigate security concerns:

- (1) the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress

i. The likelihood of continuation or recurrence."

The eligibility criteria 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 acts of falsification and criminal conduct 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 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 two criminal incidents in his background (Guideline J); and that he intentionally made false material statements to DoD (Guideline E).

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, except in part. Regarding Paragraph 2 (Guideline E): Subparagraph 2.b. is found for the Applicant as I have determined that the Applicant did not falsify his answer to that question. Subparagraph 2.c. is also found for the Applicant. The Applicant did self report to his company his arrest for Driving Under the Influence in March 2000. (Applicant's Exhibit F.) The Government cited no regulatory authority requiring the Applicant to "correct" his Application, Government Exhibit 2, which was accurate the day he signed it.

Turning to Paragraph 1 of the SOR. The Applicant has argued that he was not detained and that he did not have any legal action taken against him in 1993. I disagree. When a person is handcuffed by police and taken into custody until bailed out by a friend, he has been detained or held. The Applicant also argues that he was not charged in connection with this offense. The evidence is mixed on this point. The Government has not introduced any documentation showing that the Applicant was charged in criminal court. However, as he has admitted, the Applicant did have to appear at a hearing with the City Attorney's office and did have to attend Family Counseling as a condition to having this "situation dismissed." (Government Exhibit 3 at 2.) It is certainly arguable that the incident was handled in an informal manner. Given the length of time that has passed since this incident, and the fact that it has not been repeated, I find that the security significance of the conduct has been vitiated. Subparagraph 1.a. is found for the Applicant.

The Applicant is currently on probation for his Driving Under the Influence conviction. The conviction is recent and is for a serious offense. Until the Applicant has successfully completed his probation, it cannot be said that he is completely rehabilitated. After a thorough review of the evidence, I cannot find that the Applicant has mitigated the

security significance of this conviction and probation. Subparagraph 1.b. and Paragraph 1 of the SOR are found against the Applicant.

Concerning Paragraph 2, I have closely considered the Applicant's arguments as to why he answered "No" on his 1994 questionnaire concerning his arrest. They are not compelling. In reviewing the evidence, the Applicant contradicts himself several times. While the Applicant may not have been "arrested" or "charged," he certainly was "detained" or "held." He says he talked to his lawyer, but it may have been before his DSS interview in 1994 and not before he filled out the questionnaire in 1993. The Applicant supplied little or no evidence from anyone supporting his version of events, or submitting that the Applicant is a trustworthy and believable person. The situation was one the Applicant had to admit on his questionnaire. He did not. It is the Applicant's responsibility to submit a valid, coherent, believable and credible reason for his lack of a correct answer, he has not done so. Under the circumstances of this case, the Applicant's falsification of his 1994 questionnaire still has security significance.

The Government relies heavily upon the integrity and honesty of clearance holders, and it is a negative factor for security clearance purposes where an Applicant has deliberately provided false information about material aspects of his or her personal background. Subparagraph 2.a. and Paragraph 2 of the SOR are found against the Applicant.

This is a close case. The Applicant is an able, respected, hard working member of his company. He has done good work in the past. The two incidents are separated by several years and are not overly serious in isolation. However, in combination, they indicate a pattern of conduct and have current security significance. It is the Applicant's burden to show that he is eligible for access to classified information. He has not done so. The Applicant may well be eligible for a security clearance in the future. He is not now.

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 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: Against the Applicant.

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subparagraph 2.a.: Against the Applicant.

Subparagraph 2.b.: For the Applicant.

Subparagraph 2.c.: For 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