

DATE: January 2, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03705

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esquire, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On June 26, 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 August 2, 2001, and requested that the case be decided without a hearing. The Government submitted its File of Relevant Material (FORM) to the Applicant on September 5, 2001. The Applicant was given 30 days from receipt of the FORM to submit any documents in rebuttal, extenuation or mitigation. The Applicant received the FORM on October 17, 2001, and submitted no response. The case was received by the undersigned on November 20, 2001.

FINDINGS OF FACT

The Applicant is 55 and married. He is employed by a defense contractor as a Numeral Control Maintenance Mechanic, and he seeks to retain a 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 criterion 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.

Paragraph 2 (Guideline D - Sexual behavior). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in sexual behavior that is criminal in nature and/or which may subject the Applicant to coercion, exploitation or pressure.

The Applicant has been arrested and convicted twice in connection with soliciting prostitutes. The first arrest occurred in April 1997. The Applicant admitted that this incident happened as alleged. (Government Exhibit 6 at 2.) He plead guilty to reduced charges of Trespassing and Disturbing the Peace.

The Applicant was arrested again in March 1998 and charged with Solicitation of Prostitution. He plead no contest to this charge. He was fined, given a suspended jail sentence and had to perform 120 hours of community service. The Applicant denied that he was guilty of this charge in his Answer to the Statement of Reasons. Instead, he stated, "I had stopped to help a young lady that I thought was stranded and never solicited her in any way when the police came out from hiding and arrested me." (Government Exhibit 3.) In his sworn statement of May 1998, two months after the event, he described it this way, "I saw a woman in front of [a motel] and I thought she was a friend of my daughter. I turned around and pulled up to the curb next to her however it turned out that I did not know her. I offered her a ride anyway and she started asking me if I was interested in sexual favors. She asked me to pull into the alley, which I did and the police were there. It turned out that she was also an undercover officer and I was arrested." (Government Exhibit 6 at 2.) After reviewing all the available evidence, I find that the Applicant did solicit for the purposes of prostitution in March 1998.

The Applicant also denied in his Answer that he had solicited prostitutes in addition to the times when he was arrested. However, in his March 1998 sworn statement he stated, "I would like to advise that I have solicited a prostitute on two other occasions prior to 1997 however I was not arrested on these occasions. My spouse has no knowledge of these two occasions or my 1997 arrest." (Government Exhibit 6 at 2.) After reviewing all the available evidence, I also find that the Applicant has solicited prostitutes on at least two additional occasions.

Paragraph 3 (Guideline E - Personal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because the conduct set forth under subparagraphs 1.a. and 1.b., above, also shows questionable judgement, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Accordingly, the facts regarding those subparagraphs will be evaluated under this guideline as well.

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.

Conditions that could mitigate security concerns:

(None of the stated conditions have application in this case.)

Guideline D (Sexual behavior)

Conditions that could raise a security concern:

- (1) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (2) Compulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive or high-risk behavior or that which is symptomatic of a personality disorder;
- (3) sexual behavior that causes an individual to be vulnerable to undue influence or coercion;
- (4) sexual behavior of a public nature and/or that which reflects a lack of discretion or judgment.

Conditions that could mitigate security concerns:

(None of the stated conditions have application in this case.)

Guideline E (Personal conduct)

Conditions that could raise a security concern:

- (4) personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;
- (5) a pattern of dishonesty or rule violations, including the violation of any written or recorded agreement made between the individual and the agency.

Conditions that could mitigate security concerns:

(None of the stated conditions have application in this case.)

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 criminal and/or sexual 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 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 used engaged in criminal and sexual misconduct (Guideline D and J); and that such conduct may show poor judgment, unreliability or untrustworthiness on the Applicant's part (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.

The Applicant has shown extremely poor judgment over a prolonged period of time by soliciting for the purpose of prostitution at least four times. Two times, in 1997 and 1998, he was arrested by undercover police officers for this conduct. Each time he was convicted in relation to the solicitation.

Three and a half years have passed since the last incident, which can be a mitigating factor. However, in his Answer the Applicant downplays the latest arrest and directly contradicts an earlier statement which admitted his misconduct in other solicitations. Since I have found that he did commit the acts, this failure to admit the prior conduct goes directly to a determination of whether the Applicant has been successfully rehabilitated. In addition, there is evidence his wife does not know of his 1997 arrest or his previous solicitations. This evidence was not contradicted by the Applicant, and I cannot find that the Applicant is not now subject to blackmail or coercion concerning this conduct.

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, 2 and 3 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.

Paragraph 2: Against the Applicant.

Subparagraph 2.a.: Against the Applicant.

Paragraph 3: Against the Applicant.

Subparagraph 3.a.: 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