

DATE: January 10, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-05256

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

William S. Fields, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On July 23, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 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 clearance should be denied or revoked.

The Applicant responded to the SOR in writing on August 14, 2001 in which he elected to have the case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) to the Applicant on August 21, 2001. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM on September 5, 2001, and he submitted no reply.

The case was assigned to the undersigned for resolution on December 17, 2001.

FINDINGS OF FACT

The Applicant is 47 years old. He is employed by a defense contractor as an Image Processor, and is seeking to retain his security clearance in connection with his employment.

The Government opposes the Applicant's request for a continued security clearance, on the basis of allegations set forth in the attached Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

The Applicant completed a Security Clearance Application (Standard Form 86) dated April 7, 1999. In response to question 21 which asked, "Have you ever been charged with or convicted of any felony offenses?" the Applicant answered "NO." (See, Government Exhibit 4, Question 21). This was a false answer. The Applicant was arrested on January 18, 1975, for Uttering a Forged Instrument (felony). He subsequently pled guilty to the charge, received a suspended imposition of sentence, and was placed on probation for three years. ⁽¹⁾ The Applicant stated that he did not know the charge was a felony. The Applicant further stated that he remembers that he had been in trouble during the 1970s, but did not remember everything that occurred. He informed his manager of this, and they figured that by obtaining an arrest record they would solve the problem. The Applicant went to the police department, paid for a copy of his police record, and obtained the information on the record. (See, Government Exhibit 3). He revealed only the information contained in his police record. (See, attachment to Government Exhibit 3). He states that he did not intend to mislead the Government. (See, Government Exhibit 3).

The same application asked, "Have you ever been charged with or convicted of any offenses related to alcohol or drugs?" The Applicant answered "Yes, and listed each of the arrests that were listed in his police record that he obtained, one arrest in July 1973, one in February 1977 and one in May 1988. (See, Government Exhibit 4, Question 24). The Applicant failed to list that he was charged in June 1974 with the Sale of Controlled Substance, charged in November 1974 with Narcotics, charged in December 1976 with Possession of a Controlled Substance, charged in January 1978 with Driving While Intoxicated and Possession of Marijuana, and charged in December 1979 with Possession of Marijuana.

Although the Applicant obtained a copy of his police report that revealed only three arrests, the Applicant knew or should have known that there were numerous other charges against him that were not on his police report, but that he should have revealed on his security clearance application. I find that the Applicant's responses to questions 21 and 24 on his security clearance application of April 7, 1999, were a deliberate attempt to conceal material information from the Government. The information provided by the Applicant was inaccurate, and the Applicant knew or should have known that it was inaccurate at the time he provided it on the application.

The record does not contain sufficient evidence in mitigation to overcome or outweigh the negative effects of the Applicant's false statements to DoD that were provided under a certification of truth or a sworn oath.

POLICIES

Enclosure 2 of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

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 statute, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

Conditions that could mitigate security concerns:

None.

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 general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- 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, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have 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

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 per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in instances of dishonesty and criminal conduct, which demonstrates poor judgment or unreliability.

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 a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has deliberately and intentionally falsified material facts in his security clearance application (Guideline E). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

The Applicant's past criminal conduct is extensive. He was either arrested, charged and /or convicted on at least nine separate occasions. Admittedly, all but one of the charges, arrests or convictions occurred in the 1970s, some twenty-five years ago, however, the Applicant still remains responsible for providing accurate information on his security clearance application. The Applicant revealed only three arrests, when in fact he had been charged and/or convicted on six other occasions for criminal misconduct, and in 1975, convicted of a felony. I have considered the Applicant's

excuses for failing to reveal these charges on his security clearance application. Under the particular facts of this case, I do not find his excuses credible or believable. Consequently, the evidence proves that the Applicant has not been honest with the Government regarding his felony conviction, or his extensive criminal record.

The Government relies heavily upon the integrity and honesty of clearance holders. It is a negative factor for security clearance purposes when an Applicant has deliberately provided false information about material aspects of his personal background. This Applicant cannot be considered trustworthy, and does not meet the eligibility requirements for access to classified information. Accordingly, I find against the Applicant under Guideline E, (Personal Conduct).

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

Subpara. 1.a.: Against the Applicant.

Subpara. 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.

Darlene Lokey Anderson

Administrative Judge

1. This case does not fall within the purview of the Smith Amendment, (codified as 10 United States Code Section 986), as the Applicant was not sentenced to imprisonment for a term exceeding one year.