

DATE: June 3, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-13962

**DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The Applicant committed two security violations in January and March 1999. The first incident was inadvertent, since the Applicant had not been notified of the classified nature of the briefing. The second incident was isolated, partially due to inadequate training, and he has demonstrated a positive attitude towards the discharge of his security responsibilities in the subsequent three years. Adverse inference is overcome. Clearance is granted.

**STATEMENT OF THE CASE**

On December 11, 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 January 16, 2002, and requested a hearing. The case was received by the undersigned on February 22, 2002, and a Notice of Hearing was issued on March 5, 2002.

A hearing was held on March 27, 2002, at which the Government presented four documentary exhibits. Testimony was taken from the Applicant, who called one additional witness and also submitted five exhibits. The transcript was received on April 5, 2002.

**FINDINGS OF FACT**

The Applicant is 69, married and has a Bachelor of Science degree in Electrical Engineering. He is employed by a defense contractor as a business unit manager, 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 K - Security Violations). The Government alleges in this paragraph that the Applicant is ineligible for clearance because of noncompliance with security regulations which raises doubts about the individual's trustworthiness, willingness, and ability to safeguard classified information.

The Applicant's job is to operate as the information technology liaison between the computer department for his employer and other departments. In January 1999, the Applicant was asked by another department to provide a computer for a presentation to be made by an outside consultant to a corporate vice president. The Applicant provided a computer which was not accredited to process classified information. The presentation was classified and a computer which was accredited to process classified information should have been used. The Applicant testified that he was not told at the time of this first briefing that the presentation was classified. (Transcript at 44.)

Subsequently, in February 1999, another manager scheduled a classified briefing for March 10, 1999, for the same corporate vice president by the same consultant. <sup>(1)</sup> This briefing was to be held before a larger audience at a conference room. A computer which was accredited to process classified information was necessary at the briefing. The Applicant was informed that this briefing was classified and asked to obtain the proper computer.

The Applicant attempted to obtain a computer that could process classified information but was unable to do so. (Transcript at 49-53.) The Applicant stated:

About a half hour prior to the presentation I informed [the other manager] that we did not have an approved machine. We talked about our options and canceling the presentation was not discussed. I then selected a laptop (NOT APPROVED) to use for the presentation and prepared it for the presentation. After the presentation, the PC was secured in a classified container. I knew that I was committing a security violation when I set the PC up. I felt that due to the fact that a Vice President was involved, 20 employees and that the presenter was coming from [out of state], that the "show must go on."

(Government Exhibit 2 at 1-2.) (Emphasis in original.)

After this presentation was made, the Applicant took the computer and secured it in his classified container. The Applicant also testified that it was only after the second presentation was made that he was informed the one in January was also classified. Within a day he had secured this computer as well. (Transcript at 45-47.)

The Applicant received a written reprimand from his company for his conduct. (Government Exhibit 1.)

### Mitigation.

The Applicant submitted letters of recommendation from various executives within his organization. The vice president to whom the two briefings were given submitted Applicant's Exhibit C. He states, "I am familiar with the incident in question and can assure you that this was a one-time occurrence. I strongly request that a favorable decision be made, and [the Applicant] be granted a continuance of his security clearance."

Another executive with daily contact with the Applicant submitted a letter in which he states that the Applicant, "has always exhibited a positive attitude concerning security. [The Applicant's] knowledge of security requirements and concern for the protection of classified data has been excellent. His personal integrity and sense of responsibility identify [the Applicant] as one who can be entrusted with our nation's security." (Applicant's Exhibit D.)

The vice president for information technology of the defense contractor testified for the Applicant. The Applicant reports directly to this person. The witness was also the person who gave the Applicant the written reprimand, Government Exhibit 1. In his testimony he stated that senior management of the defense contractor viewed this as being an isolated incident in the Applicant's 26 year career with the company. (Transcript at 24-25, 31.) The witness also

submitted a letter in which he states, "Without reservation, I stand firmly behind [the Applicant] in his ability, determination and trustworthiness to protect classified information and follow prescribed procedures." (Applicant's Exhibit E.)

The Applicant testified that he had never received data security instructions at his place of employment. (Transcript at 57.) The Applicant acknowledges his bad judgment in March in allowing the briefing to proceed without using an accredited computer. He states, "Certainly, it will never happen again on my watch." (Transcript at 59.)

The Applicant testified that in a 26 year career in the defense industry these two incidents were his only security violations. (Transcript at 57.) The Applicant believes the first incident to be inadvertent since he was not told the briefing was classified and had no way of knowing that fact. He further testified that he is very supportive of security issues and acts as an information technology resource to several programs that have security-related issues. (Transcript at 59.)

### 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 K (Security Violations)

##### Condition that could raise a security concern:

(2) Violations that are deliberate or multiple or due to negligence.

##### Conditions that could mitigate security concerns include actions that:

- (1) Were inadvertent;
- (2) Were isolated or infrequent;
- (3) Were due to improper or inadequate training;
- (4) Demonstrate a positive attitude towards the discharge of security responsibilities.

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 security violations 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 two security violations in 1999 (Guideline K).

The Applicant, on the other hand, has successfully mitigated the Government's case. The first incident in January 1999 was inadvertent. The Applicant was not told that the presentation to be made was classified. As an information technology person, he was not in a position to know that fact independently.

The second incident occurred because of a combination of factors. The Applicant believed, up to the day of the briefing, that he could find an accredited machine. When he could not find one, either he or the other manager should have cancelled the briefing. They did not in an attempt to please the boss. The Applicant also believed, wrongly, that securing the machine after the presentation would vitiate any possible security violations.

The two incidents occurred within three months in his otherwise spotless 26 year career. They appear to have occurred, at least in part, because of improper or inadequate security training. The Applicant has forthrightly admitted his responsibility. Senior management supports the Applicant's retention of a clearance in very strong terms. Finally, the Applicant has otherwise shown a positive attitude towards the discharge of his security responsibilities. In this respect, the three years that have passed since the incident happened without another security violation is a positive sign.

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 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: For the Applicant.

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: 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

1. The other manager is the Applicant in ISCR Case No. 01-03397.