

DATE: February 24, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-15628

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant engaged in sexual behavior that was likely to make him vulnerable to coercion between 1987 and 1994. He was arrested for this behavior in 1994. In 2000 he gave a false answer about this arrest in a questionnaire, and in a subsequent interview. Insufficient mitigation is shown. Adverse inference is not overcome. Clearance is denied.

STATEMENT OF THE CASE

On May 17, 2002, 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 June 6, 2002, and requested that the case be decided without a hearing. The Government submitted its File of Relevant Material (FORM) to the Applicant on July 16, 2002. 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 September 11, 2002, and submitted a reply on October 5, 2002. This reply consisted of two letters from the Applicant (Applicant's Exhibit A), documents from his therapist (Applicant's Exhibit B), a letter from his wife (Applicant's Exhibit C), one from his brother (Applicant's Exhibit D) and one from his pastor (Applicant's Exhibit E). Department Counsel did not object to the admissibility of the Applicant's exhibits. The case was received by the undersigned on October 21, 2002.

FINDINGS OF FACT

The Applicant is 51, married and has a Master's Degree. He is employed by a defense contractor as an Engineer, and he seeks to obtain or retain a DoD security clearance in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a 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 and the exhibits.

Paragraph 1 (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 January 5, 2000, the Applicant completed an official DoD questionnaire in which he stated that he had not been arrested within the last seven years for any offenses other than minor traffic offenses. (Government Exhibits 4 and 5, questions 26.) This statement was a false answer to a relevant question concerning the Applicant's criminal history. In fact the Applicant had been arrested in March 1994 for Indecent Exposure. This was after being observed masturbating in his automobile by an undercover police officer.

The Applicant was subsequently interviewed by a Special Agent of the Defense Security Service (DSS) in July 2000. In that interview the Applicant again denied any arrest record. The Special Agent then confronted the Applicant with the fact of his 1994 arrest. In a subsequent sworn statement the Applicant said:

[The DSS Special Agent] asked me "in the last seven years had I ever been arrested, charged or convicted of any offense". I told [the DSS Special Agent] that I had never been arrested, charged or convicted of any offense. [The DSS Special Agent] then mentioned to me that she had a police report that contradicted what I had just said. I told [the DSS Special Agent] that yes I had been arrested back in 1994 for indecent exposure. [The DSS Special Agent] asked me why I had just said "no" just two minutes earlier to that question. I told [the DSS Special Agent] that I was very embarrassed about the incident and tried to put it behind me. (Government Exhibit 7 at 1-2)

The Applicant stated that he had falsified his arrest information, "(B)ecause I was fearful of loosing (*sic*) my job, my career could be ruined and the impact it would have on my family. At first, when I was filling out my security questionnaire, I had listed the arrest then after agonizing about that choice, and the reasons stated above, I deleted the arrest from the questionnaire." (Government Exhibit 7 at page 3.) (*See, also*, Applicant's Written Response to SOR at 1.)

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 which involves a criminal offense, is indicative of a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress or reflects lack of judgment or discretion.

In addition to the incident set forth under Paragraph 1, above, the Applicant admits to exposing himself to other men at least three times between 1987 and 1992. He admits occasionally engaging in mutual masturbation with these men. (Government Exhibit 7 at 2-3.)

Paragraph 3 (Guideline J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

As found above, the Applicant knowingly and willfully provided false material information to DoD during the clearance screening process. In so doing the Applicant violated the felony criminal provisions of 18 U.S.C. 1001.

Mitigation. The Applicant's evidence shows that his sexual conduct was, at least in part, a reaction to a very dysfunctional family life when he was growing up. The Applicant's Written Response to the SOR and his brother's letter, Applicant's Exhibit D, set forth this history in great depth. The Applicant's wife describes him as "a very good man . . . with a problem." (Applicant's Exhibit C.) His pastor describes as a man of integrity. (Applicant's Exhibit E.) Finally, his therapist, who treated him from 1999 through 2001 stated, "In my opinion this client has good judgement and is reliable in safeguarding classified national security information." (Applicant's Exhibit B at 3.)

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 are:

Guideline E (Personal conduct)

Conditions 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;
- (3) deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination;
- (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;

Condition that could mitigate security concerns:

- (5) the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation or duress.

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;
- (3) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;
- (4) sexual behavior of a public nature and/or that which reflects a lack of discretion or judgment.

Conditions that could mitigate security concerns:

- (2) The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;
- (4) the behavior no longer serves as a basis for undue influence or coercion.

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.)

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 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 sexual behavior, criminal conduct and acts of falsification 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 granting or 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 engaged in sexual behavior of a type to make him vulnerable to coercion or undue influence (Guideline H); and that he intentionally made false material statements to DoD, in violation of a felony criminal statute (Guidelines E and J).

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. Turning first to the sexual conduct, which last occurred nine years ago. Such a span of time might have been mitigating. However, in examining all the documentation in this case, it is obvious that the Applicant, by his own admission, continues to feel "extreme embarrassment and humiliation for me and my family brought on by my actions." (Applicant's Answer to SOR at 1.) Under the particular circumstances of this case, I cannot find that he has successfully mitigated the allegations under Guideline D. Paragraph 2 is found against the Applicant.

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. Two separate acts of falsification, within six months, less than three years ago cannot be mitigated by the evidence currently before me. Guidelines E and J are found against the Applicant.

I have carefully reviewed all of the Applicant's documentary evidence. It is obvious that he suffered severe trauma while growing up, and that trauma contributed to both his sexual conduct and his acts of falsification. That being said, based on the evidence currently before me, I am unable to find that the Applicant has overcome the Government's allegations and shown that he is no longer vulnerable to coercion, exploitation or duress.

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.

Subparagraph 1.a.: Against the Applicant.

Subparagraph 1.b.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subparagraph 2.a.: Against the Applicant.

Subparagraph 2.b.: 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