

DATE: March 13, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17894

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Thomas E. Proost, Esquire

STATEMENT OF THE CASE

On September 20, 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 October 26, 2001, and requested a hearing. The case was received by the undersigned on December 19, 2001, and a Notice of Hearing was issued on January 7, 2002.

A hearing was held on January 30, 2002, at which the Government presented six documentary exhibits, and called three witnesses. Testimony was taken from the Applicant, who also submitted eight exhibits. The transcript was received on February 8, 2002.

FINDINGS OF FACT

The Applicant is 45 and married. He is employed by a defense contractor as an executive, and he seeks to retain a 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 criterion in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

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.

The SOR alleges that the Applicant falsified a Security Clearance Application dated February 22, 2000, when he answered "No" to questions 21 and 24. However, the Application that has been submitted as evidence is not the original application. Rather, Government Exhibit 1 is a November 3, 2000, computer generated reprint of the first Application (Government Exhibit 1 at 1). The original application was lost by the Government. (Transcript at 22-23.) The Applicant backdated this Application to the original date of February 22, 2000, at the request of his Facility Security Officer. (Transcript at 28, 65.)

The Applicant hand wrote an addendum on page 8 of Government Exhibit 1. This addendum states, "Not sure about #'s 21 & 24. Don't remember - too long ago." The Applicant testified that he was almost certain that he had put this annotation on the original application that was signed in February 2000. (Transcript at 65-66.)

When the Applicant was a young man, between the ages of 18 to 24, he used drugs. This was between the years 1974 and 1980. During that time he was arrested on several occasions for substance abuse and other offenses. (Government Exhibit 2 at 1.) Due to his drug use at that time, the Applicant's memory of these events is very unclear. When he was presented a list of arrests by a DSS agent, he accepted her word for it. The Applicant stated, "[D]o I have some vague recollection of being in trouble in [a city] twenty years ago? Sure. But do I have any specific recollection of what it was about? Who did it? What date it was? You know, whether it was a felony or not? No. I have no recollection whatsoever." (Transcript at 55.) The DSS agent testified that the Applicant told her this as well, at the time of the interview. She further testified, "[The Applicant] admitted having been arrested for nuisance type things. But he never spent the night in jail, and he never thought anything were felonies." (Transcript at 41-42.) (*See also*, Transcript at 46-47.)

When he was presented with the original Application in February 2000, the Applicant testified that he understood that questions 21 and 24 concerned his entire life. This was in spite of his Facility Security Officer's instructions, which were incorrect, that the Applicant only needed to go back seven years. (Transcript at 34, 61; Applicant's Exhibit A.) The Applicant decided to fill in "Yes," even though he wasn't sure it was true or not. He stated, "I decided that was the most conservative - that was the most conservative answer. I didn't feel like, if I was wrong on yes, how could they get, you know, get mad at me." (Transcript at 70.)

The Applicant was required to fill out an electronic version of the Security Clearance Application. This application is completed on the computer, then printed and signed. In order to understand how and why the Applicant filled this form in the way he did, extensive excerpts from the transcript will be used.

Q. [By Applicant's counsel.] When you filed your first PSQ [Personnel Security Questionnaire], and you came to questions twenty-one and twenty-four, how did you initially handle those?

A. [The Applicant.] They were originally entered in - let's talk about twenty-one first. I did first put in yes. I checked yes first. And the way that the form works, you know, again, it's not a written form, where you can write in the margins. It's an electronic form. It's very black-and-white.

You put in yes, and then you go to the next screen. And then, it asks you, first, the next questions are the dates of the infractions, okay? And it wants to know the, you know, the details of the arrest record. And on the screen is comments. But it won't let you go into the comments unless you fill out the dates, and the jurisdictions, and all that stuff.

Now, as I have previously testified to, this question, I didn't have anything in February, at all, in front of me. I had actually called a background check company, you know, that we deal with. And they, you know, said they would not go back more than seven years.

So I was - I just didn't know. I answered it yes. The software would not allow me to put in a yes, with an explanation, without dates, and jurisdictions.

Q. So, why did you switch to no?

A. Because that was the only way that I would have been able to validate the form, you know? Because it did allow me

to go to the next question. I put yes. And then, I went to I guess twenty-two, or whatever. And then, you know, finished the form. Finished the rest of the form.

Then when you go the validation part, you are dead in the water at that juncture, you know? Because -

Q. What's - ?

A. The validation is where the computer software kind of tests your - it doesn't test your answers. It tests and validates that you filled out the form properly. And if you have a yes checked, at least in these two questions, without corresponding, you know, documentation, or dates, or whatever, then you cannot validate it.

And when you can't validate it, you cannot send it anywhere. I could not give it to [the Facility Security Officer] un-validated. Because you have to be able to, as a feature, when you're all done, to send it to your security officer. Okay? When you do that is when you - and it won't send it to your security officer unless you validate it.

So, I felt kind of stuck in the water at that juncture.

Q. Were you certain that the answer was yes when you checked it yes?

A. I was not certain at all that the answer was yes, you know? Because again, I recalled, as I have admitted, you know, many times, that I had recollections of arrests. I did not have any specific recollections of charges. I did not have any specific recollections of convictions.

I couldn't tell you in a million years whether they were felonies, or misdemeanors. I mean, I know a felony is a very serious matter, okay? No one has to tell me that. But it just didn't seem to be felonies. I didn't recall them to be felonies.

(Transcript at 67-69.)

Question 21 of Government Exhibit 1 asks, "Have you ever been charged with or convicted of any felony offenses?" Question 24 asks, "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"

The Applicant denied all of the factual subparagraphs of the SOR, based on a lack of knowledge and belief. Furthermore, in his sworn statement, Government Exhibit 2, he admitted only to the various arrests in the record. He later testified that he had no specific recollection of the arrests, but had no reason to believe the DSS agent would lie to him about such things. Finally, concerning what a charge is, the Applicant testified, "An arrest is absolutely not a charge or conviction. A charge is something that, as far as I know, not being an attorney. But the prosecuting attorney for a county, I believe, is the only one who can make a charge." (Transcript at 69.) We now turn to the Government's evidence to see what the admissible evidence shows concerning the factual allegations.

SOR subparagraph 1.a.(1) alleged that the Applicant was arrested on October 13, 1974, and charged with Unlawful Possession of a Controlled Substance. There is no evidence in the record that he was charged as a result of this arrest.

SOR subparagraph 1.a.(2) alleged that the Applicant was arrested on October 27, 1974, and charged with Tampering With a Motor Vehicle, a felony, as well as other offenses. None of the charges was drug or alcohol-related. Government Exhibit 3 consists of County Prosecuting Attorney index cards, which show that the Tampering With a Motor Vehicle charge was reduced to a misdemeanor. There is no docket or other charging document in the file, so we do not know whether the Applicant was actually charged with a felony, or merely arrested for a felony that was reduced to a misdemeanor by the Prosecuting Attorney at the time of filing. Under the terms of the questionnaire, misdemeanor arrests and/or convictions more than seven years old need not be admitted, unless they concern firearms or alcohol/drugs.

SOR subparagraph 1.a.(3) alleged that the Applicant was arrested on October 28, 1974, and charged with Driving Under the Influence of Narcotics, as well as other offenses. There is no evidence in the record that he was charged as a result of this arrest.

SOR subparagraph 1.a.(4) alleged that the Applicant was arrested on October 17, 1978, and charged with Driving While Intoxicated and Careless/Imprudent Driving. It further alleged that the Applicant was found guilty of Charge 2. Government Exhibit 6 is alleged to be police report regarding this incident. It does not show a guilty plea, and it also infers that the Applicant was recharged with Driving While Under the Influence. While there is no docket or court document, the police record is sufficient to show that there was a drug related charge made in this case.

SOR subparagraph 1.a.(5) alleged that the Applicant was arrested on November 10, 1978, and charged with Driving Under the Influence - Narcotics and Violation of the State Substance Law - Possession. Both are alleged to be felony offenses. Government Exhibit 5 is the police report of this incident. However, there is no evidence in the file to show that the Applicant was subsequently charged as a result of this arrest.

SOR subparagraph 1.a.(6) alleged that the Applicant was arrested on December 25, 1978, and charged with Driving Under the Influence of Drugs (Quaaludes), and Violation of the State Substance Law - Possession of a Controlled Substance (Methaqualone - Quaaludes). Government Exhibit 4 shows that a warrant was issued on the Possession of a Controlled Substance Charge. There is no evidence which shows that he received a suspended imposition of sentence and probation of two years.

SOR subparagraph 1.a.(7) alleged that the Applicant was arrested on February 10, 1980, for a Violation of the State Substance Law - Possession of Marijuana. There is no evidence in the record to show that this arrest resulted in any charges being filed against the Applicant.

SOR subparagraph 1.a.(8) alleged that the Applicant was arrested on June 23, 1980, for the offense of Driving Under the Influence - Narcotics, a felony. There is no evidence in the record to show that this arrest resulted in any charges being filed against the Applicant.

Mitigation. The Applicant's partner, who is also the company Facility Security Officer, testified that the Applicant had "a fabulous reputation." He further stated that the Applicant had been open with him for several years about the problems he had in the 1970s. (Transcript at 31.) The Applicant submitted a statement from his ex-wife, which states the Applicant's character has always displayed "honesty, loyalty and integrity." (Applicant's Exhibit B.) Various business associates also submitted statements in which they discussed in detail how, in his interactions with them, the Applicant conducted himself in an honest, upright and truthful fashion. (Applicant's Exhibits C through H.)

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 E (Personal conduct)

Conditions that could raise a security concern:

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

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 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 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 not met its initial burden of proving by substantial evidence that the Applicant has falsified a Security Clearance Application dated February 22, 2000.

The allegation in the SOR states, "You falsified facts on a Security Clearance Application (SF-86), executed by you on February 22, 2000." The evidence shows that the Application executed by the Applicant on February 22, 2000, is not the Application admitted into evidence (Government Exhibit 1). That Application has been lost by the Government. Rather, Government Exhibit 1 is a reprint of the Application, printed on November 3, 2000, and backdated. The Applicant denied this allegation and, accordingly, I cannot find that the Applicant falsified a document which is not in evidence.

The above may be seen by some as an overly technical, or judicial, interpretation of the facts. However, the Government's case also fails to show that the Applicant falsified this Application in several other ways.

On the Application, Government Exhibit 1, that is in evidence, the Applicant modified his answers in writing in a way which is sufficient to vitiate any intent to falsify. The Applicant wrote on the Application, "Not sure about #'s 21 & 24. Don't remember - too long ago." This statement, on a form which was sent to the Government, gave the Government notice that the Applicant had concerns about his answers. In other words, that the answer "No" to questions 21 and 24 may not be correct. As will be discussed below, the nature of the electronic PSQ (EPSQ) forced the Applicant to make this statement. The upshot of it is that there is evidence that the Applicant actively attempted NOT to deceive the Government.

In addition, the Applicant had no intent to deceive when he answered "No" in order to complete the EPSQ. The Applicant openly admitted that he used drugs during the 1970s through 1980, when these incidents occurred. He further has testified, credibly and believably, that he knew he had been arrested on occasion, but had no recollection of when, where, the charges (if any) and any fines or sentences. Given that all the incidents happened over 19 years before he completed the questionnaire, that fact is not surprising. The Applicant testified that he at first answered "Yes" to question 21 on the EPSQ. The computer software then brought up a new screen which required the Applicant to say where, when, the charges (if any) and the sentence. Not knowing any of the facts, he answered "Yes" and proceeded to the end of the form and attempted to electronically validate it. The software would not validate the form because the subfields under 21 and 24 were not filled in. This type of situation is described as a "software trap." (Transcript at 29.) The Applicant lacked the specific knowledge to fill them in. This is not an unknown problem with this system. The Applicant had to answer "No" in order to validate the form. As stated above, the Applicant was concerned enough about his answers to clarify it them writing at the end of the Questionnaire.

Finally, the record evidence concerning the Applicant's offenses is very sketchy. This leads to a question as to what offenses the Applicant was even required to discuss in the first place. As set forth above, only with regard to SOR subparagraphs 1.a.(4) and 1.a.(6) is the Government information barely sufficient to show that drug related charges may have been made against the Applicant in 1978. The record evidence utterly failed to prove that the Applicant, while he may have been arrested for various other felonies or drug/alcohol offenses, was ever formally charged with them. The Questionnaire, of course, states that arrests only have to be admitted if they occur within seven years from the date of filling out the form. (See, Transcript at 43-48 for a discussion of what the DSS Special Agent felt the Applicant needed to admit.)

In summary, I find that the Applicant did not falsify his Security Clearance Application. I specifically find that the Applicant assumed that he should answer "Yes" to questions 21 and 24 of his Security Clearance Application; that he attempted to answer "Yes," but did not have the requisite specific knowledge that would allow him to validate those answers on the EPSQ; that the form would not validate because the Applicant did not possess the requisite specific information; that for this reason, and no other, he answered these questions "No"; that his annotation on the last page of the Security Clearance Application put the Government on notice concerning the Applicant's unease with these answers; that there was no intent by the Applicant to deceive the Government; that the Government failed to show the Applicant was required to respond affirmatively to Question 21; and that the Government failed to produce the Security Clearance Application referred to in the SOR, that is the one executed by the Applicant on February 22, 2000.

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.

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