

DATE: February 24, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-18827

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Department Counsel

FOR APPLICANT

Lynn H. Ball, Attorney At Law

SYNOPSIS

Applicant's felony conviction in 1984 for 7 counts of bribery against the Department of the Navy has not been mitigated. No waiver of 10 United States Code, Section 986 is recommended. Clearance is denied.

STATEMENT OF THE CASE

On July 29, 2002, 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, (as amended) 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 19, 2002, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on November 26, 2002. A notice of hearing was issued on December 10, 2002, scheduling the hearing for January 16, 2003. At the hearing the Government presented eight exhibits. The Applicant presented one exhibit and called one witness. He also testified on his own behalf. The official transcript (Tr.) was received on January 30, 2003.

FINDINGS OF FACT

The Applicant is 55 years old. He has two years of college in aeronautical engineering and is employed as a Data Entry Specialist by a defense contractor. He is applying for a 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 Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he has engaged in criminal conduct.

Beginning in May 1982, the Federal Bureau of Investigation (FBI) and the Naval Investigative Service (NIS) initiated a joint investigation into allegations of collusive bidding on United States Navy procurement contracts at a Naval Air Station. In furtherance of the investigation, an undercover operation business was created to engage in obtaining supply contracts from the United States Navy. During the course of the undercover operation it was discovered that a number of members of the Navy, including the Applicant, were involved in collusion bidding and kickback activities with regard to United States Navy supply contracts.

During this period, the Applicant, who was the storekeeper at the Naval Air Station, was responsible for procurement. Over an eight to ten month period, the Applicant received kickbacks, (a total of between \$5,000.00 and \$6,000.00), either in the form of cash or gift certificates for engaging in business with the undercover business. In October 1984, the Applicant was charged with one count of Conspiracy to Defraud the United States, a violation of 18 United States Code, Section 372, and 11 counts of bribery, a violation of 18 United States Code, Section 201(c). The Applicant was found guilty by a jury of 7 counts of bribery. He was sentenced to four years, 11 months in jail, which was suspended, and he was placed on five years probation. He was ordered to pay a fine of \$3,000.00 and ordered to pay restitution in the amount of \$2,685.00. The Applicant states that he has paid the fine and restitution, and served his probation. (*See*, Government Exhibits 2, 3, 4, 5 and 6).

In January 1985, as a result of his conviction, the Applicant was discharged from the United States Navy after eighteen years of service, two years short of meeting retirement eligibility.

The Applicant testified that his present employer has so much trust in him that he has given him a key to a classified area, and allowed him access to classified information, (specifically access to airplane parts that are classified), when the Applicant does not currently have a security clearance and is not authorized for such access. (*See*, Tr. pp. 24- 28 and 39-40).

Mitigation.

A friend of the Applicant who has known him since 1984 and sees him about three or four times a week testified that the Applicant is trustworthy and loyal.

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 J (Criminal Conduct)

Conditions that could raise a security concern:

1. Allegations or admissions 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.

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.

10 United States Code, Section 986 states that the Department of Defense may not may not grant or renew a security clearance for a person if the person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year.

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 financial irresponsibility 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 or her a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has been engaged in criminal conduct (Guideline J). 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 felony conviction for 7 counts of bribery in 1984 indicates that he is not sufficiently responsible or trustworthy to hold a security clearance. The Applicant committed this crime against the Department of Defense, specifically the Department of the Navy. His criminal behavior was immature and completely unacceptable. Although this crime was committed eighteen years ago, it was so egregious, that the Applicant can never regain the trust of the United States to the degree that he is eligible for access to classified information. Accordingly, Guideline J (Criminal Conduct) is found against him.

10 United States Code, Section 986 disqualifies the Applicant from having a security clearance granted or renewed by the Department of Defense. A person who has been convicted in any court of a crime and sentenced to imprisonment for a term exceeding one year is disqualified from holding a security clearance. Applicant's conviction and sentence make him subject to this statute. Pursuant to DOHA Operating Instruction 64, Paragraph 3.e., I do not recommend further consideration of this case for a waiver of 10 United States Code, Section 986.

Overall, 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