

DATE: April 29, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-19312

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Jonathan Beyer, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant was arrested and convicted in State court in 1988 for one count of Possession of Controlled Dangerous Substance and one count of Conspiracy to Distribute Controlled Dangerous Substance. She was sentenced to three years incarceration. The sentence was suspended and she was awarded three years formal probation. The Applicant subsequently falsified a questionnaire regarding this conviction. Title 10 U.S.C. §986 applies. Adverse inference is not overcome. Clearance is denied.

STATEMENT OF THE CASE

On June 25, 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 August 28, 2002, and requested that the case be decided without a hearing. The Government submitted its File of Relevant Material (FORM) to the Applicant on October 28, 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 November 15, 2002, and elected not to submit any additional information. The case was received by the undersigned on January 3, 2003.

FINDINGS OF FACT

The Applicant is 46 and single. She is employed by a defense contractor as a secretary, and she seeks to obtain a DoD security clearance in connection with her 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 J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because she has engaged in criminal acts.

In February 1988 the Applicant allowed her house to be used as a place to buy drugs, specifically cocaine. During one such transaction the police raided the house and found a quantity of cocaine. The Applicant faced four charges in connection the offense. She plead guilty to one count of Possession of Controlled Dangerous Substance and one count of Conspiracy to Distribute Controlled Dangerous Substance. She was sentenced to three years incarceration. The sentence was suspended and she was awarded three years formal probation.

Due to the Applicant's conviction in State court and sentence of more than one year, the provisions of Title 10 U.S.C. §986 apply. The Department of Defense has determined that it is the sentence which is important, as opposed to the actual time served. Accordingly, the statute requires that the Applicant be denied a security clearance because she was sentenced to three years incarceration.

The Government also alleges that the Applicant is ineligible for clearance because she engaged in acts of falsification discussed under Paragraph 2, below, which are a violation of Title 18 U.S.C. §1001, a felony.

Paragraph 2 (Guideline E - Personal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because she intentionally falsified material aspects of his personal background during the clearance screening process.

On June 27, 2000, the Applicant completed an official DoD questionnaire in which she stated that she had never been convicted of any felony offenses and that she had never been convicted of any offenses related to alcohol or drugs. (Government Exhibit 5, questions 21. and 24.) These statements were false answers to material questions pertaining to the Applicant's criminal and drug history.

The Applicant was subsequently interviewed by a Special Agent of the Defense Security Service (DSS) in April 2001. The Applicant stated, "The reason I did not include this [prior criminal and drug information] on my security paperwork completed in July 2000 was because I thought because this incident happened so long ago a police record would not exist because of the length of time that has passed. . . . I didn't want to have to live through this again by having to bring it up again." (Government Exhibit 3 at 3-4.)

Mitigation.

In her Answer to the SOR, the Applicant asks that consideration be given to granting a waiver under Title 10 U.S.C. §986. She states, "I hope that careful consideration will be given to the strong commitment I have made to turn my life around, the dedication I have given to my family, and the pride that I put into doing my very best at work."

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 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.
- (3) Conviction in a Federal or State court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year; [\(1\)](#)

Conditions that could mitigate security concerns:

(None of the stated conditions have application 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 status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

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 criminal activity

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 been convicted in a State court and sentenced to a term in excess of one year (Guideline J); and that she 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 her.

The Applicant's felony conviction in State court and her sentence to three years incarceration brings her under the requirements of Title 10 U.S.C. §986.

In addition, 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. In this case the Applicant's falsification is in the recent past and referred directly to her felony conviction and sentence. Guidelines E and J are found against the Applicant

On balance, it is concluded that the Applicant has failed to overcome the Government's information opposing her request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

In this case, my decision is not solely based on the applicability of Title 10 U.S.C. §986. Accordingly, pursuant to DOHA Operating Instruction No. 64, I am not making any recommendation regarding the granting of a waiver in this case.

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.

Subparagraph 1.c.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subparagraph 2.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

1. Under the provisions of 10 U.S.C. 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waive of this prohibition.