

DATE: February 24, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27001

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a long criminal history, stretching from 1969 to 1996. He also falsified a questionnaire in 2000 by not admitting any of this conduct. Insufficient mitigation is shown. Adverse inference is not overcome. Clearance is denied.

STATEMENT OF THE CASE

On December 19, 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 January 8, 2003, and requested that the case be decided without a hearing. The Government submitted its File of Relevant Material (FORM) to the Applicant on May 26, 2003. 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 June 12, 2003, and submitted no additional information. The case was received by the undersigned on September 2, 2003.

FINDINGS OF FACT

The Applicant is 57 and single. He is employed by a defense contractor as a Technician, and he seeks to obtain 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 J - Criminal Conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

The Applicant admitted to all of the factual allegations under this paragraph. Those admissions are hereby deemed findings of fact.

Between 1969 and 1976 the Applicant was arrested ten times, occasionally for multiple offenses. These included arrests for Public Lewdness, Endangering the Welfare of a Child, Contributing to the Delinquency of a Minor, Possession of Marijuana and Trespassing.

In September 1991, the Applicant was arrested for (1) Aiding and Abetting the Sale of Marijuana and (2) Possession of Marijuana for Sale, both felonies. The Applicant plead Guilty to charge (1) and was sentenced to time served in jail (19 days), three years probation and a fine. In his sworn statement the Applicant states that he was an unwitting accomplice to the marijuana sale. (Applicant's Exhibit 6 at 2-3.) The court records show that the Applicant knowingly and willingly plead guilty to the charge. (Government Exhibit 7 at 8-46.)

The Applicant was last arrested in October 1996 for (1) Indecent Exposure, (2) Lewd Conduct in Public and (3) Public Nudity. He plead guilty to count (2) and was sentenced to three years probation and to pay a fine. (Government Exhibit 7 at 1-7.)

The Government alleges that the Applicant's conduct set forth below constitutes a violation of Title 18, United States Code, §1001, a felony.

Paragraph 2 (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 Applicant admitted to all of the factual allegations under this paragraph. Those admissions are hereby deemed findings of fact.

On March 6, 2000, the Applicant completed an official DoD questionnaire in which he stated that he had never been charged with a felony offense. (Government Exhibit 4 at question 21.) In fact, the Applicant had been charged with two felony drug offenses in 1991. His response constituted a false answer to a relevant question about his felony criminal history.

The Applicant was asked on the same questionnaire whether he had been charged with, or convicted of, any offenses relating to alcohol or drugs. (Government Exhibit 4 at question 24.) He answered "No" to this question as well. In fact, the Applicant had been charged or convicted of drug related offenses five times between 1970 and 1991. His response was a false answer to a relevant question about his drug use history.

The March 6, 2000, questionnaire also asked the Applicant if, in the last seven years, he had been arrested for, charged with or convicted of any offenses not specifically listed elsewhere on the form. (Government Exhibit 4 at question 26.) He answered "No" to this question. As discussed above, the Applicant had been convicted in 1996 for Lewd Conduct in Public. This response was also a false answer to a relevant question about his criminal history.

The Applicant stated, "I did not list my arrest record on my questionnaire because I could not recall it all I was told to back seven years and to list only felonies and not misdemeanors. I was under the belief that I had completed the form as requested. I did not understand nor did I think that the question have you ever been 'charged or convicted' applied to events prior to the seven year cut off." (Applicant's Exhibit 6 at 4.)

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)

Condition that could raise a security concern:

(2) A single serious crime or multiple lesser offenses.

Condition that could mitigate security concerns:

(1) The criminal behavior was not recent.

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 acts of falsification and criminal conduct 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 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 a long criminal history (Guideline J); 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.

The Applicant has a long criminal history for offenses relating to drugs, lewd conduct and contributing to the delinquency of minors. Disqualifying Factor 2 applies. The Applicant's last arrest was in 1996. Normally, that span of time since the last offense would bring Mitigating Condition 1 into effect. However, given the extent of his criminal history, and his intentional falsification of his questionnaire in 2000, I find that the Applicant has not mitigated the security concerns of this paragraph. Guideline J 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. The Applicant has no good reason for not disclosing his criminal history to the Government. Disqualifying Factor 2 applies to his conduct. Guideline E is found against the Applicant.

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 and 2 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.

Subparagraphs 1.a. through 1.m.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subparagraphs 2.a. through 2.c.: 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