

DATE: March 16, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-15233

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Suzanne K. Biely, Esquire

Biely and Biely

SYNOPSIS

The Applicant falsified a questionnaire by not admitting that he had plead "no contest" to Assault in 2000 in connection with a child custody dispute. He mitigated the security significance of the Assault itself, but not the intentional falsification. Adverse inference is not overcome. Clearance is denied.

STATEMENT OF THE CASE

On April 24, 2003, 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 May 13, 2003, and requested a hearing. The case was received by the undersigned on September 8, 2003, and a Notice of Hearing was issued on the same date.

A hearing was held on September 25, 2003, at which the Government presented seven documentary exhibits, and called one witness. Testimony was taken from the Applicant, who called one additional witness and also submitted 20 exhibits. The transcript was received on October 6, 2003.

FINDINGS OF FACT

The Applicant is 51, divorced and has a Master's degree in Management Information Systems. He is employed by a defense contractor as an Avionics/Electrical Engineer, 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 guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

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.

In early 2000, the Applicant's wife left him and took their three children. The Applicant could not find his wife, who had left the children with her mother. On ay 3, 2000, based on the advice of his counsel, the Applicant decided to take back custody of his children from his mother-in-law.

During a previously arranged visit with his children at a park, the Applicant asked them if they would like to go home. The children agreed. The mother-in-law found out about his plan and objected strenuously. The Applicant began carrying his three year old son to his car. While he was walking, the 77 year old mother-in-law followed behind, holding his shirt, yelling and attempting to strike the Applicant. During this walk, the mother-in-law fell down and severely hurt herself. That is not in dispute. What is in dispute is how she fell. She states that the Applicant pushed her down, the Applicant vehemently disagrees and says that she fell attempting to strike him.

The police were called after the Applicant left the area and a police report was prepared. Based on that report, and the statements of the mother-in-law and her children, the Applicant was charged by the county district attorney with Elder Abuse, Battery and Child Endangerment. As part of the criminal case, the Applicant was booked and fingerprinted by the local police department. (Government Exhibits 6 and 7.)

On September 12, 2000, the Applicant, pursuant to a plea agreement, plead no contest to a charge of Assault. He received a fine and one year's court probation. The other three charges were dismissed. (Government Exhibits 3, 4 and 5; Applicant Exhibits A through L, Transcript at 47-52.)

At the same time as the criminal case was proceeding, the mother-in-law had filed a civil action to obtain a Domestic Violence Prevention Order against the Applicant. (Applicant's Exhibit N.) A hearing on this petition was held on September 1, 2000, during which the Applicant testified. (Applicant's Exhibit M.) On September 12, 2000, a stipulation was agreed to in this case whereby both parties agreed to avoid the other whenever possible. (Applicant's Exhibit Q.)

In addition to the above two actions, in 2001 the mother-in-law also filed a civil suit against the Applicant. That suit asked for money damages against the Applicant. This suit was dismissed in April 2002. (Applicant's Exhibit T.)

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.

On April 5, 2001, the Applicant completed an official DoD questionnaire in which he answered "No," to the following question:

In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607. (Government Exhibit 1, question 26.)

This statement was a false answer to a material question pertaining to the Applicant's criminal record.

The Applicant was subsequently interviewed by a Special Agent of the Defense Security Service (DSS) in October 2001. In that first interview the Applicant informed the Special Agent that he was being sued by his mother-in-law in a

civil suit. This referred to the suit filed in 2001. The Applicant did not tell the Special Agent about the criminal case or the suit for the issuance of a restraining order. The Special Agent subsequently found out about those two cases through her investigation. (Transcript at 27-29.)

The Applicant was subsequently re-interviewed on January 7, 2002. A sworn statement was taken in which the Applicant stated:

When I was previously interviewed by DSS on 12 Oct 01 and 17 Oct 01, I disclosed the information regarding this [May 3, 2000] incident but was not completely forthcoming in explaining the results of said incident.

...

I did not list these charges or discuss them in previous interviews because I didn't think that when I plea bargained to a lesser charge of "no contest" that I was plea bargaining to a criminal offense. I have never been in a court room prior to this, have never been in any trouble with the law, and I am very naive to the whole process. When I previously discussed this incident and said I never heard from the police again, that was true. I was not arrested, but I was notified by mail that charges were being filed against me. I realize now that I should have listed this incident and should have disclosed that I was charged and plea bargained to an assault charge. I discussed the incident openly at my prior interviews and know that records would be checked and did not intentionally attempt to conceal this information. (Government Exhibit 2 at 1-2, Transcript at 39-40.)

At the hearing, the Applicant testified that he answered "No" because he did not know that he was being charged with a crime, that he didn't feel he needed to report the charges because they were not true, that he did not realize that he had to admit his "no contest" plea, that he did not know his plea to Assault was a plea to a criminal offense, and that he did not think his criminal record was "significant." (Transcript at 44, 53, 60 and 74.)

Mitigation.

The Applicant submitted several character reference letters from current and former co-workers. (Applicant's Exhibit R.) They describe the Applicant as a man of high moral character, one who is honest, trustworthy and exhibits integrity.

Applicant's Exhibit S consists of a number of work-related certificates. They show that the Applicant is respected at his job, including being named Employee of the Year in 1999.

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.

Conditions that could mitigate security concerns:

(1) the criminal behavior was not recent;

(2) the crime was an isolated incident;

(3) the person was pressured or coerced into committing the act and those pressures are no longer present in that person's life;

Guideline E (Personal conduct)

Conditions that could raise a security concern:

(1) reliable, unfavorable information provided by associates, employers, coworkers, neighbors and other acquaintances;

(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;

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 conduct or 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 met its initial burden of proving by substantial evidence that the Applicant has a single serious criminal conviction on his record (Guideline J); and that he intentionally made false material statements to DoD (Guideline E).

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, except in part. The Applicant's plea of "no contest" to Assault in 2000 was connected to the emotional turmoil surrounding his deteriorating marriage. Based on the record, it is clear that this was an aberrational event that occurred three years before the record closed. There has been no repeat of this conduct. The Applicant has mitigated this allegation and Paragraph 1 is found for 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. I have examined the Applicant's explanations for his falsification on the questionnaire and find all of them wanting. The Applicant is an intelligent man, with a Master's degree. He retained counsel to represent him in a criminal case. It is simply not credible that he could believe he did not have to admit this criminal record on his questionnaire. His list of explanations and excuses, in my opinion, show him to be a man who read the question in the narrowest fashion to allow him to answer "no." The question was relevant, material and asked in a way that was understandable to any reasonable person. The Applicant, for whatever reason, attempted to deceive the Government about his record.

The Applicant's credibility on this point is affected by several factors. The Applicant's answer to question 40 on the questionnaire was also false, in that he did not admit that he had a civil action filed against him. In addition, he misled the DoD investigator by not fully disclosing information about his criminal case and the civil suit that he knew, or should have known, was relevant. Finally, his hearing testimony was contradictory and confusing. It is the Applicant's burden to show that he was truthful and/or that he has mitigated any falsification. He has failed to do so. Paragraph 2 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 Paragraph 2 of the Government's Statement of Reasons. As set forth above, Paragraph 1 is found for the Applicant.

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.

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