

DATE: February 20, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-21086

**DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The Applicant plead guilty to misdemeanor criminal conduct in 1990. He plead nolo contendere to misdemeanor criminal conduct involving damaging a door in his ex-wife's house in 2002. He has engaged in therapy to avoid recurrence, expresses remorse, and shows considerable evidence of rehabilitation. Sufficient mitigation is shown. Adverse inference is overcome. Clearance is granted.

**STATEMENT OF THE CASE**

On June 13, 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 July 14, 2003, and requested a hearing. The case was received by the undersigned on August 28, 2003, and a Notice of Hearing was issued on September 8, 2003.

A hearing was held on September 23, 2003, at which the Government presented seven documentary exhibits (Government Exhibits 1 through 7). Testimony was taken from the Applicant, who also submitted five hearing exhibits (Applicant's Exhibits A through E). He also submitted one post-hearing exhibit. Applicant's Exhibit F consists of Performance and Development Summary, a Letter of Appreciation and a Certificate of Appreciation. The transcript was received on October 3, 2003.

**FINDINGS OF FACT**

The Applicant is 44, divorced and has a Associate's Degree in Electrical Engineering. He is employed by a defense

contractor as a Senior Field 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 1990, the Applicant was arrested and convicted for being Intoxicated in Public under State Penal Code section 647(f), a misdemeanor. As a result of his guilty plea he was sentenced to two years court probation and ordered to pay a fine. (Applicant's Exhibit A, Transcript at 29.)

The Applicant and his ex-wife separated in 2000 and divorced in 2001. It was a very contentious time for them both. In September 2001, the Applicant went over to his wife's house to talk to her about a possible reconciliation. She refused to answer the door and the Applicant obtained entry to the house. In her bedroom, the Applicant argued with his wife and pounded his arm against her bathroom door, damaging it. At that time, her boyfriend was in the bathroom. The Applicant then left the house at his wife's request and went to his church, where he and the pastor discussed and prayed over the incident. No one was hurt during the incident. (Government Exhibit 2 at 1-2, Government Exhibit 3 at 3, Transcript at 19-26.)

Two months later, in November 2001, the police interviewed the Applicant about the incident. (Government Exhibit 3 at 4-5.) In February 2002, the Applicant was arrested for Vandalism (State Penal Code section 594(B)(4)(A)) and Unauthorized Entry into a Dwelling (State Penal Code section 602.5), both misdemeanors. The Applicant pleaded nolo contendere to the charge of Unauthorized Entry into a Dwelling in March 2002. He was sentenced to three years informal probation, a fine and time served in jail. (Government Exhibit 4, Applicant's Exhibit C.)

The Applicant was deeply disturbed by his conduct with his wife, and has received continuing therapy to resolve the issues related to his divorce. The Applicant's therapist provided a detailed statement which goes into great depth in discussing the Applicant's problems, his course of treatment, his response to treatment and his positive prognosis. In particular, the therapist states, "It is also noteworthy that [the Applicant] has experienced the most recent event (09-16-01) in an ego-dystonic (alien, foreign and with discomfort) manner, motivated to learn from this transgression, continuing to utilized treatment to augment and build upon proactive and direct communication skills to reduce his symptoms. This has had the positive consequence of building his ego-strengths rendering him unlikely to repeat anything resembling this isolated event in the future. (Applicant's Exhibit E at 2.) The Applicant continues to attend group meetings with this provider.

The Applicant's ex-wife also submitted a statement. She has since remarried and moved to another city. She states, "Since that single incident, we have both done better in handling our divorce and now focus on doing what is best for our children." (Applicant's Exhibit B at 1.)

### Mitigation.

The Applicant submitted a statement from his facility security officer, who has known the Applicant since 1994. She states, "I do not feel that [the Applicant] is a risk to national security. He is a trained professional and a dedicated worker and father. He has been very honest with me concerning this case and has also sought out professional assistance to help him deal with his personal problems." (Applicant's Exhibit D.)

The Applicant's evaluations show that he is a very able, intelligent, well-thought of employee. Comments include, "Over the years he's worked at [the base, the Applicant] has built a very credible working relationship with the . . . customer, based on a deep respect for his abilities and integrity." (Applicant's Exhibit F at 4.) His most recent report states, "[The Applicant] is a self-starter who recognizes what needs to be done and executes accordingly. He operates effectively and efficiently with minimal direction. He is extremely well thought of by personnel at the . . . Project Office, who praise him regularly." (Applicant's Exhibit F at 5.)

## 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;

(4) the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;

(6) there is clear evidence of successful rehabilitation.

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 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 been involved in two criminal acts, in 1990 and 2001.

The Applicant, on the other hand, has successfully mitigated the Government's case. The evidence shows that these two incidents were aberrations. The conduct which led to his first arrest, in 1990 for being drunk in public, has never been repeated. That criminal conduct was not recent (Mitigating Factor 1) and also isolated in nature (Mitigating Factor 2.)

His most recent criminal act involved his conduct in entering his ex-wife's home without her permission and damaging her bathroom door. While not to be condoned, it is worth noting that his conduct did not involve any violence towards his ex-wife or her boyfriend. Immediately after the incident, the Applicant expressed remorse and went to his pastor. He took responsibility for his conduct and has continued to receive therapy to avoid such conduct happening in the future. Now that his ex-wife is remarried and moved, the pressures or factors which helped lead to this event have been removed (Mitigating Factors 3 and 4). While he is on informal probation, there is clear evidence of successful rehabilitation that mitigates that fact (Mitigating Factor 6).

The Applicant's mitigating evidence show that he is a very able, well-thought of and intelligent employee. His conduct after this last incident confirms it. The likelihood for continuation or recurrence is virtually nil.

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.

Subparagraph 1.b.: 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