

DATE: July 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23351

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant was involved in a domestic dispute in 1989 that turned violent and resulted in his arrest and conviction for felony counts of Assault and alicious Mischief. The Applicant subsequently falsified a security clearance application regarding these acts. Adverse inference is not overcome. Clearance is denied.

STATEMENT OF THE CASE

On December 10, 2004, 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 5, 2005, and requested that the Decision be made without a hearing. The Department Counsel submitted the File of Relevant Material (FORM) to the Applicant on April 11, 2005. The Applicant was given 30 days after receipt of the FORM to submit any additional information to the Administrative Judge. The Applicant acknowledged receipt the FORM on April 25, 2005, and elected not to submit any additional information. The case was received by the undersigned for Decision on June 22, 2005.

FINDINGS OF FACT

The Applicant is 42 and married. He is employed by a defense contractor as a Warehouseman, 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 was involved in a serious domestic dispute with his then girlfriend in June 1989. During this argument the Applicant took out a knife and "punctured the tires on her truck and another individual's vehicle." (Government Exhibit 6 at 2.) He then threw the knife away and it hit his girlfriend on the arm, cutting her. The Applicant was charged with felony charges of Assault and Malicious Mischief, as well as a misdemeanor charge of Malicious Mischief. (Government Exhibit 7.)

The Applicant was found guilty of the charges. His sentence included restitution and jail time, which was converted into community service. The Applicant did not complete the community service in a timely manner, therefore violating his sentence in 1992. (Government Exhibit 3 at 1-2, and Government Exhibit 7.)

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 December 12, 2000, the Applicant completed an official DoD questionnaire in which he was asked, "Have you ever been charged with or convicted of any felony offense? . . . For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record." (Government Exhibit 4, question 21.) The Applicant answered, "NO." This statement was a false answer to a material question pertaining to the Applicant's criminal record.

The Applicant stated that he had falsified his arrest history because, "It was my understanding that two years after I completed my sentence, all records of the arrest would be destroyed and I could act as if I had never been arrested." (Government Exhibit 6 at 1.) In his Answer to the SOR the Applicant states, "At the time I filled out the security clearance application I was unaware that the charges against me had been felony charges. Do to my ignorance of the law and the way the charges were presented to me by my court appointed public attorney I believe that I was misled to believe that the charges against me were less severe than they really were." (Government Exhibit 3 at 2.)

The Applicant's conduct in falsifying his questionnaire is a violation of Federal law, Title 18, United States Code, Section 1001. That section makes it a Federal criminal act to knowingly and willfully make any false statement to any instrumentality of the Federal government. This conduct is also cognizable under Paragraph 1, above.

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 will be set forth under "Conclusions," below.

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 falsification of a security clearance application 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 engaged in felony criminal conduct (Guideline E); 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, except in part. The violent domestic dispute for which the Applicant was convicted occurred in 1989, 16 years ago. He violated the terms of his sentence in 1992, 13 years ago, by not completing his community service. With regards to those two incidents, I believe that mitigating Conditions E2.A10.1.3.1. *The criminal behavior was not recent* and E2.A10.1.3.2. *The crime was an isolated incident* apply. Subparagraphs 1.a. and 1.b. are 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 considered the Applicant's different explanations, in effect that he was ignorant of the status of the criminal offenses, and find them wanting. I have also considered the time, five years, since the falsification. However, under the circumstances of this case, he has not mitigated the conduct. Under Guideline J, Disqualifying Condition E2.A10.1.2.1. applies *Allegations or admission of criminal conduct, regardless of whether the person was formally charged.* Disqualifying Condition E2.A5.1.2.2. applies under Guideline E *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.* None of the Mitigating Conditions apply. 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 his request for a security clearance. It is the Applicant's burden to show that he has mitigated the allegations. He has not done so. 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.

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: For 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