

DATE: July 30, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-00303

ECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted of Burglary in 1981 and sentenced to one year and four months confinement. 10 United States Code 986 applies. In addition, the Applicant falsified a questionnaire concerning four alcohol related arrests, which resulted in three convictions. Insufficient mitigation is shown. Adverse inference is not overcome. Clearance is denied.

STATEMENT OF THE CASE

On March 17, 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 April 14, 2004, and requested that the Decision be made without a hearing. The Department Counsel submitted the File of Relevant Material (FORM) to the Applicant on June 18, 2004. The Applicant was given 30 days after receipt of the FORM to submit any additional information to the Administrative Judge. The Applicant acknowledged receipt of the FORM on June 23, 2004, and elected not to submit any additional information. The case was received by the undersigned for Decision on July 27, 2004.

FINDINGS OF FACT

The Applicant is 41, married and has a Bachelor's degree in Applied Mathematics. He is employed by a defense contractor as a Software Engineer, and he seeks 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, the exhibits and the live testimony.

Paragraph 3 (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 all of the allegations under this paragraph. Those admissions are hereby deemed findings of fact.

In September 1981, at the age of 18, the Applicant broke into a house and stole some small items. He was surprised by the occupants during the burglary. He was subsequently arrested for felony Burglary. He plead guilty to the charge and was sentenced to one year and four months confinement. He served ten months confinement. (Government Exhibit 5 at 2 and Government Exhibit 7.) His conviction and sentence to more than a year imprisonment bring this case under the requirements of 10 United States Code (U.S.C.) 986.

The Applicant was arrested four times for alcohol related offenses between 1983 and 1990. Two of the arrests, in 1985 and 1990, were for Public Intoxication. The 1990 arrest resulted in a conviction and fine. In 1983 the Applicant was charged with, and convicted of, Driving Under the Influence of Alcohol. The Applicant was also arrested in 1988 and charged with (1) Driving Under the Influence of Alcohol and (2) Driving With .10 % or Higher Blood Alcohol. He plead guilty to charge (2) and was fined, spent two days in custody, three years on probation and attended a second offender's program. (Government Exhibit 5 at 2 and Government Exhibit 6.) Regarding his current drinking, the Applicant states in his Answer to the SOR, "For the past ten years, I drink on the average of 6 beers/month. I have had my bad experiences with alcohol, two driving under the influence and two public intoxications and learned my lesson. Again, these offenses happened 15 years ago without any further history."

The Government alleges that the conduct set forth in Paragraph 2 of the SOR, below, is also cognizable as criminal conduct under 18 U.S.C. 1001. Accordingly, the facts set forth below will also be considered under this subparagraph.

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 9, 2002, the Applicant completed an official DoD questionnaire in which he stated that he had never been charged or convicted of any offenses related to alcohol. (Government Exhibit 4, question 24.) This statement was a false answer to a material question pertaining to the Applicant's alcohol abuse history.

In his Answer to the SOR at page 1 the Applicant states, "I also had some alcohol related offense that I did not report. My focus was on my burglary and I have no explanation why I did not report these offenses."

Mitigation. Concerning his criminal history, the Applicant states at page 1 of his Answer, "Subparagraph 1.a. states that I committed burglary, in which I admit to, however this did in fact occur over 22 years ago with no criminal history to follow. I made a very bad decision at a very young age that I paid for by being imprisoned. While imprisoned, I made a decision to complete my GED, after released(*sic*) complete college and work in the [Defense] industry." On page 2 he concludes, "I do not consider myself to be a criminal, an alcoholic, nor a threat to the U.S.A. security. I am a proud married man with a wonderful son, own my own house, have a clean credit history, and clean driving record. [My employer] sees me for who I am, a responsible hard working team player, and has given me a chance to prove myself."

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:

- (1) the criminal behavior was not recent;
- (6) there is clear evidence of successful rehabilitation.

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 criminal conduct and 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 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 several criminal convictions, including one which resulted in a sentence of more than a year imprisonment (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, except in part. Under Paragraph 1, subparagraphs 1.b., 1.c., 1.d., and 1.e. are found for the Applicant because these alcohol-related criminal incidents occurred between 13 and 20 years in the past with no evidence of any more recent offenses. Accordingly, Mitigating Conditions 1 (*the criminal behavior was not recent*) and 6 (*there is clear evidence of successful rehabilitation*) apply.

The Applicant's conviction in 1980 for Burglary and sentence to one year and four months confinement is an allegation which cannot be mitigated. Subparagraphs 1.b. and 1.f are 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 failed to submit any reasons for his failure to disclose his four arrests and three convictions for alcohol-related offenses. Paragraph 2 (Guideline J) and subparagraph 1.g. under Paragraph 1 (Guideline E) are found against the Applicant.

The Applicant's efforts at reform are noted. Under the particular circumstances of this case, this evidence does not overcome the adverse information that has been presented by the Government. This decision does not deny the Applicant a clearance *solely* as a result of the application of 10 U.S.C. 986. Accordingly, pursuant to DOHA Operating Instruction 64, no recommendation either for or against the granting of a waiver is made.

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.

Subparagraph 1.a.: Against the Applicant.

Subparagraph 1.b.: For the Applicant.

Subparagraph 1.c.: For the Applicant.

Subparagraph 1.d.: For the Applicant.

Subparagraph 1.e.: For the Applicant.

Subparagraph 1.f.: Against the Applicant.

Subparagraph 1.g.: 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.