

DATE: July 19, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-01009

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

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FOR APPLICANT

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SYNOPSIS

Applicant's personal conduct in the faxing of proprietary information knowing that it would be communicated to an Israeli military company, and his subsequent inconsistent statements concerning this conduct, shows poor judgment and unreliability. Clearance is denied.

STATEMENT OF THE CASE

On a date uncertain, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, (as amended) 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 clearance should be denied or revoked.

The Applicant responded to the SOR in writing on October 24, 2003, and requested a hearing before a DOHA Administrative Judge. He submitted a redacted answer to the Statement of Reasons dated May 5, 2004. This case was transferred to the undersigned on January 27, 2004. A notice of hearing was issued on February 12, 2004, scheduling the hearing for March 15, 2004. On March 4, 2004, Department Counsel requested a continuance based upon good cause.

On April 13, 2004, Department Counsel filed a Motion in Limine to exclude certain evidence. On April 20, 2004, the Motion in Limine was denied.

A notice of hearing was issued on April 6, 2004, scheduling the hearing for May 5, 2004.

At the hearing the Government presented nine exhibits. The Applicant presented six exhibits and called four witnesses to testify. The Applicant also testified on his own behalf. The record was left open to allow the Applicant an opportunity to submit additional evidence. The Applicant submitted one Post-Hearing Exhibit consisting of 8 pages. The official transcript (Tr.) was received on May 21, 2004.

FINDINGS OF FACT

The Applicant is 42 years old and has a Bachelor of Science degree in Mechanical Engineering. He is employed as a Program Manager by a defense contractor. He is applying for a security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, on the basis of 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:

Paragraph 1 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because his conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or an unwillingness to comply with rules and regulations.

1.a. The SOR alleges, "You were reprimanded by your employer's security officer for faxing information concerning the development of a weapon to the Israeli Military Industries (IMI)". The Applicant denies this allegation. (*See Applicant's Answer to the SOR*).

In November 1991, the Applicant was employed by an Engineering Firm working on a particular weapon system. His duties at that time, among other things, included assisting his supervisor with engineering responsibilities. On November 15, 1991, the Applicant and his supervisor faxed some unclassified engineering information relating to data and diagrams that the Applicant helped to prepare for the marketing of a weapon system proposal to a person, (Mr. X) at an American company. (*See Government Exhibit 2 and Applicant's Redacted Answer to SOR*). The person at the American company may have been Israeli. (*See the fax to Mr. X, Applicant's Exhibit E*). On December 18, 1991, a response to the November 15, 1991 fax was sent to the attention of the Applicant and his supervisor from IMI. The response indicated that IMI was interested in working with the engineering firm the Applicant worked for. (*See Government Exhibit 6*). This fax was also received by the facility security officer. As a result, the Applicant and his supervisor were warned by the facility security officer that they were in violation of the provisions of the Industrial Security Manual, which prohibited the disclosure to the public of classified and unclassified information pertaining to a classified contract, except in certain circumstances. This was not a circumstance that allowed an exception. The security officer also referenced them to the Export Control Act and International Traffic and Arms Regulation, both of which contained sections that restricted release of selected defense data and technology without a license agreement. The Security Officer also requested a copy of the November 15, 1991 fax that was sent to the company. (*See, Security Officer's memorandum, Government Exhibit 5*).

On December 31, 1991, in response to their facility security officer's reprimand, the Applicant and his supervisor in a letter stated, in part, "We can offer no explanation as to why the [IMI] fax dated December 18, 1991 was transmitted to the authors. We have not made any contact with [IMI] in any manner." (*See Government Exhibit 4*). The Applicant explained in his sworn statement to the Defense Security Service (DSS) that the information in the fax was unclassified. (*See Government Exhibit 2*). He indicates that he and his supervisor had no idea how the foreign company became involved in the matter, and that they had not been in contact with the foreign company. (*See Government Exhibits 2 and 4*). No further action was taken concerning this incident. The Applicant was not cited for a security violation.

The Applicant applied for employment with the Federal Bureau of Investigation (FBI) in 1996. During the interview process, he provided a signed sworn statement dated May 7, 1997. (*See Government Exhibit 7*). In that statement the Applicant describes the situation discussed above much differently. The Applicant stated, "While working at the [Engineering Firm], I presented a briefing for [IMI] as a result in a combined interest in possibly doing business with them. Several representatives visited our plant. They claimed to be able to offer assistance with our propulsion system. Based upon their request, I faxed data to them regarding our systems propulsion system (one pressure time curve)." The

Applicant and his supervisor were then contacted by their facility security officer for wrongfully faxing the information.

In that same statement to the FBI, the Applicant later states, " Having been introduced to [IMI], I now had Mr. X's phone number. . . **Several years later, I called Mr. X to ask if IMI or any other company which he might represent might be interested in inventing in(sic) developing a weapon system.**" (*Ibid*). (Emphasis supplied).

Government Exhibit 6 is the response to the fax from IMI. It is noted that this response was specifically addressed to the Applicant and his supervisor, and was not a generic request for additional information. The document presents a very detailed response discussing a joint venture between the Applicant and IMI.

As stated above, Applicant's Exhibit E is a copy of the fax that was sent by the Applicant and his supervisor on December 18, 1991. Government Exhibit 7, Applicant's statement to the FBI, shows that the Applicant knew Mr. X was connected with IMI. Based upon my analysis of the fax and the Applicant's statement to the FBI, I find that the Applicant faxed or had the information faxed knowing that the information would be communicated to IMI. (*See* Government Exhibit 7).

I further find that the Applicant was reprimanded for this conduct. (*See*, Government Exhibit 5).

The Applicant attempted to reduce or eliminate the impact of his sworn statement to the FBI. (Government Exhibit 7) He has failed. The Applicant contends that the information contained in his statement to the FBI was not accurate, although he states that he tried to be honest and truthful. He states that he was nervous, pressured and in a hurry during its preparation. He also states that he did not have access to other documents that could have helped him. (Tr. pp. 162-165, 230-233).

The Applicant's Redacted Answer to the SOR states, "First, the Statement of Reasons suggests that I faxed information to IMI. That is incorrect. I did not fax anything. The fax that was sent was by the President's secretary, at the request of MR. [B]. I did not direct anyone to fax these materials, and I do not recall whether I even knew that the fax would be sent. Nor was anything faxed to IMI; instead the fax was sent to AES [an American company]". (*See* Applicant's Redacted Answer to the SOR, p. 3).

Applicant's Exhibit E, (the fax, dated November 15, 1991); Government Exhibit 6, (the response to the fax by IMI dated December 18, 1991); and Government Exhibit 4, (the letter from the Applicant and his supervisor to their security officer dated December 31, 1991), support my finding of fact. Accordingly, Government Exhibit 7 is most consistent with the documentary evidence in the record.

1.b. The SOR alleges, "Your removed documents that you believed contained sensitive, if not classified information from your place of employment in May 1993 after the employer filed a Chapter 7 Bankruptcy. You stored the documents in your unsecured garage until February 1999". The Applicant denies and admits this allegation in part. (*See* Applicant's Answer to SOR).

In 1993, the Applicant was employed as a Program Manager for a subsidiary of a company, that had a contract with the United States Army to manufacture the weapon system. The Applicant testified that the subsidiary, for whom the Applicant worked, was not a "cleared" facility. It was never issued a facility security clearance and no classified information was ever stored at the facility. The Applicant further stated that he never had access to classified information during his employment with the subsidiary. In April 1993, the subsidiary of the company went through a Chapter 11 Bankruptcy. By May or June 1993, the subsidiary was forced to convert the Chapter 11 into a Chapter 7 bankruptcy. The subsidiary closed its doors in June 1993.

In an effort to have the Army contract novated, (assigned to another firm by the bankruptcy trustee and the Army) the bankruptcy trustee hired the Applicant to work for the estate. The bankruptcy trustee testified that she directed the Applicant to remove any files or documents which he might need for continuing work under the Army contract. (Tr. pp.137-138). The Applicant removed a lap top computer and six boxes of documents. The boxes were stored in the Applicant's garage until February 1999. (*See* Government Exhibit 2, at pp. 9-10). Ultimately, the contract with the Army was not novated. In fact, the Applicant indicated the Army paid the bankruptcy trustee not to novate the contract. After learning this, the Applicant did not return the computer or the boxes of documents to either the estate or the Army, as he

believed that they had no further interest in them.

It was later determined that the boxes in question contained no classified information.

1.c. The SOR alleges, "You contacted a reputed foreign arms dealer in 1995-1996, in an attempt to obtain funding for the weapon which you were trying to develop and sell." The Applicant denies this allegation. (*See Applicant's Answer to the SOR*).

The Applicant stated that after having worked on the weapon system for many years, he was not pleased about termination of the contract. (*See Government Exhibit 8*). He was still convinced that a shoulder fired munition systems would be of great value to the United States military. He then attempted to seek private interest in developing a similar weapon system. In order to explain his proposed weapon system he developed a "white paper" and program proposal. (*See Government Exhibit 3*). It contained general, non-classified information about his proposed weapon and the target acquisition device which was used to aim the weapon.

From January 1995 until January 1998, the Applicant made various attempts to contact different influential people through his friend, a well known violinist, in an attempt to obtain funding for his weapon project. The Applicant is a violinist himself. The Government alleges that the Applicant contacted a reputed arms dealer in an attempt to obtain funding for his proposed weapon system.

The Applicant testified that on one occasion, in 1993 or 1994, he was performing as part of the orchestra, at a party given at the home of this reputed arms dealer. The Applicant asked if he could talk with the reputed arms dealer in an attempt to obtain funding for the weapon program he was trying to develop and sell. (Tr. p. 228). Ultimately, the reputed arms dealer declined to speak to the Applicant and the Applicant never had the opportunity to speak with him. The Applicant was never able to convince anyone to participate in his project.

Mitigation.

Several individuals testified on the Applicant's behalf. His direct supervisor testified that he is an outstanding employee. He has integrity, enthusiasm and takes responsibility for his actions. He is considered trustworthy and reliable. He is well respected in his field. He recently received a bonus for his work performance.

A friend and business owner, who has known the Applicant for fourteen years testified that the Applicant is active in the church, has integrity, honesty and concern for his family and friends. He is dedicated to his faith, his family, and his work.

Another friend, a Special Agent with the FBI, testified that he was the person who encouraged the Applicant to apply to work for the Bureau. He has great respect for the Applicant and told him to be absolutely honest when answering any of the questions asked by the Government during his application process.

A professional colleague who used to be the Applicant's manager and knows him socially as well testified that he trusts the Applicant with his life.

Applicant's performance appraisals for the periods from 1997 to the present all indicate that he either "meets" or "exceeds expectations", with additional comments such as "exceptional performance" or "excellent performance". The Applicant has consistently received outstanding performance evaluations. (*See Applicant's Exhibit D*).

POLICIES

Enclosure 2 of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are

found to be applicable in this case:

Guideline E (Personal Conduct)

Condition that could raise a security concern:

4. Personal Conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail.

Conditions that could mitigate security concerns:

None.

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 general

factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- 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 criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk.

Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past

and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have 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

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 per

day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or blackmail. This personal conduct demonstrates poor judgment or unreliability.

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 that the Applicant has engaged in personal conduct that increases his vulnerability to coercion, exploitation or duress. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

With respect to the Applicant's removal of a laptop and six boxes of documents from his previous employer, he was acting under the direction of the bankruptcy trustee. He reasonably believed, and she testified, that as the trustee she had the legal authority to have him complete this act. Furthermore, none of the documents contained classified information. I do not find that the Applicant used poor judgment in this instance. Accordingly, allegation 1(b) is found for the Applicant.

In addition, the Applicant's alleged contact with a reputed arms dealer in 1995-1996 in an attempt to obtain funding for his weapon project is unsupported by the evidence. What can be made of this situation is that the Applicant attempted to contact a reputed arms dealer to obtain funding for his proposed project. It appears that the Applicant never actually made contact with this individual other than to perform at his home. The Applicant's efforts to market his weapon proposal to friends of friends and influential people, even if those individuals may be scandalous or carry a bad reputation, has not been shown to be illegal and in itself is not indicative of poor judgment. Accordingly, allegation 1(c) is found for the Applicant.

Most important in this case is the fact that the Applicant has not been truthful, honest and candid with the Government about his contact with IMI. There are conflicting stories from the Applicant as to whether he took part in the faxing of proprietary information knowing that it would be communicated to an Israeli military company. This raises doubt about his credibility. I assume that his most serious admissions are the most truthful since the contemporary documentary evidence supports that finding. The evidence shows that thirteen years ago, the Applicant and his supervisor faxed information to an individual at a stateside company who was obviously the front man for an Israeli military company. The Applicant knew, or should have known at the time, that the information was going to be communicated to an Israeli company. Why he lied about this is unexplained and places the Applicant's credibility in question. There are other inconsistencies between his sworn statement to the FBI dated May 7, 1997, and the information he provided in his sworn statement to the DSS on June 30, 1999. (See Government Exhibits 7 and 2). These contradictions indicate that the Applicant has not been completely candid with the Government and that he cannot be trusted. The Applicant cannot

mitigate conduct that he does not admit. Allegation 1.(a). is found against the Applicant. Accordingly, Guideline E (Personal Conduct) is found against the Applicant.

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1, except in part, 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.

Subpara. 1.a.: Against the Applicant.

Subpara. 1.b.: For the Applicant.

Subpara. 1.c.: For 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.

DARLENE LOKEY ANDERSON

Administrative Judge