

DATE: June 25, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-01324

**DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco J. Mendez, Jr., Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The Applicant was involved in three fights between 1997 and 1999, while he was in the Navy. There have been no incidents in over four years. Sufficient mitigation is shown. Adverse inference is overcome. Clearance is granted.

**STATEMENT OF THE CASE**

On April 16, 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 21, 2003, and requested that the Decision be made without a hearing. The Department Counsel submitted the File of Relevant Material (FORM) to the Applicant on November 12, 2003. 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 December 2, 2003, and elected not to submit any additional information. The case was received by the undersigned for Decision on April 26, 2004.

**RULING ON PRELIMINARY MATTERS**

In the FORM, Department Counsel made a motion to amend subparagraph 1.b. of the SOR. In my opinion, subparagraph 1.b. as currently stated is legally sufficient. The motion is therefor DENIED.

**FINDINGS OF FACT**

The Applicant is 31 and married. He is employed by a defense contractor as an Aircraft Worker, 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 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 admitted in his Answer to being in three fights between 1997 and 1999 (SOR subparagraphs 1.a. through 1.c.). Those admissions are hereby deemed findings of fact. He denied subparagraph 1.d.

The first incident happened in 1997 when the Applicant was in the United States Navy. He engaged in a mutual fight with another sailor after that sailor had called the Applicant's wife and told her about an alleged extra-marital affair of the Applicant. He received non-judicial punishment for this incident. (Government Exhibits 7 at 1-2, and Government Exhibit 8.)

In January 1999 the Applicant and another sailor were involved in a fight with two other sailors. There is some evidence that the Applicant was the aggressor in this fight. However, each participant provided a different version of events. (Government Exhibit 7 at 2, and Government Exhibit 9.) The Applicant was discharged from the Navy shortly after this incident and the local authorities declined to prosecute.

The Applicant was involved in a fight with his wife in December 1999. As a result of the incident, he was placed on two years unsupervised probation, fined \$50.00 and required to attend a Community Corrections Program. (Government Exhibit 7 at 3, and Government Exhibit 10.)

The Applicant denied subparagraph 1.d. In the FORM at page 7 Department Counsel states, "(T)he Government does not oppose a finding in favor of Applicant as to this allegation." Accordingly, this subparagraph is found for the Applicant.

In his Answer to the SOR the Applicant states, "I admit that in my past I have had several incidents where I have made poor judgment calls. I have paid for those mistakes. I have grown a lot over the years and I am more mature. I have 3 kids and wife to support and provide for. I do not think that I am a security risk." (Government Exhibit 2 at 2.)

### **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;

(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 activity 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 several criminal acts between 1997 and 1999 (Guideline J).

The Applicant, on the other hand, has successfully mitigated the Government's case. The Applicant's last incident took place in December 1999, over four years ago. There is no indication that there have been any further incidents.

Disqualifying Condition 2 (*a single serious crime or multiple lesser offenses*) applies. However, given the span of time since the last incident, and the lack of any further incidents, Mitigating Conditions 1 (*the criminal behavior was not recent*) and 6 (*there is clear evidence of successful rehabilitation*) also apply. Under the particular circumstances of this case, this evidence is sufficient to overcome the adverse inferences of the Applicant's prior misconduct.

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 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.

Subparagraph 1.c.: For the Applicant.

Subparagraph 1.d.: 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