

DATE: June 29, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04909

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's two incidents of spousal abuse occurred over three years before the record closed with no evidence of recurrence. The traffic citations were all minor and also over three years in the past. That span of time with no further incidents shows sufficient mitigation. Adverse inference is overcome. Clearance is granted.

STATEMENT OF THE CASE

On November 24, 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 December 19, 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 March 19, 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 March 29, 2004. He submitted additional information on April 29, 2004. The case was received by the undersigned for Decision on June 18, 2004.

FINDINGS OF FACT

The Applicant is 33 and married. He is employed by a defense contractor as a Network Controller, and he seeks to retain a Top 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 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.

In January and August 2000 the Applicant was involved in incidents of spousal abuse (SOR subparagraphs 1.a. and 1.c.). He and his wife were having marital problems at that time. The Applicant plead guilty to the January offense and was sentenced to six months probation and required to attend anger management classes. The Applicant successfully completed the anger management classes. The August 2000 case was dismissed. He and his wife have left the state where the incidents occurred, have worked out their problems, and are still together. (Government Exhibits 1, 4 and 5.)

When the Appellant was arrested for the January 2000 spousal abuse incident, it was found that he had outstanding traffic warrants as well. He was charged with two counts of Criminal Contempt because of the traffic warrants. The charges were subsequently dismissed. (SOR subparagraph 1.b.)

In subparagraph 1.d., it is alleged that the Applicant was issued a Bench Warrant for an uncleared traffic offense. The Applicant denied this allegation, but it appears to be supported by the documentary evidence (Government Exhibit 6 at 2). ⁽¹⁾ In his Answer, the Applicant states that he has been unable to contact the court in order to resolve this issue.

Paragraph 2 (Guideline E - Personal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because his conduct showed questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations.

Subparagraph 2.a. alleges that the conduct set forth under Paragraph 1, above, is cognizable under this Guideline as well.

Subparagraphs 2.b. through 2.f. concern traffic citations received by the Applicant between March 1999 and September 2000. The Applicant admits that the citations are unresolved and that he is in contact with the municipal Traffic Violations Bureau to resolve all issues.

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.

Guideline E (Personal conduct)

Condition that could raise a security concern:

(5) a pattern of dishonesty or rule violations, including the violation of any written or recorded agreement made between the individual and the agency.

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 spousal abuse and other 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 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 two incidents of criminal spousal abuse, as well as received several traffic citations in 1999 and 2000 (Guidelines E and J).

The Applicant, on the other hand, has successfully mitigated the Government's case. There is no evidence that the Applicant has engaged in any type of criminal conduct since September 2000, a period of over three years. He successfully completed the requirement to undertake anger management courses. It appears that the problems with his wife were situational in nature and have been resolved. With regard to Guideline J, his conduct comes within Disqualifying Condition 2 (*a single serious crime or multiple lesser offenses*). However, based on the record in this case, Mitigating Conditions 1 (*the criminal behavior was not recent*) and 6 (*there is clear evidence of successful rehabilitation*) also apply and are determinative.

Turning to Paragraph 2 (Guideline E). The series of traffic citations referred to in the SOR are somewhat troubling, and have been examined in connection with the incidents of spouse abuse. Disqualifying Condition 6 applies (*a pattern of dishonesty or rule violations, including the violation of any written or recorded agreement made between the individual and the agency*). However, once again, the span of time since the last incident and the lack of any more recent incidents provide evidence that the Applicant has changed his behavior for the better and is no longer engaging in such conduct. While none of the Mitigating Conditions directly apply to this allegation, the General Factors are applicable and support a finding for the Applicant. The conduct was not recent (factor c), there is the presence of rehabilitation (factor f), there is no potential for pressure (factor h), and there is little likelihood that the conduct will continue or recur (factor i).

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 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: For the Applicant.

Subparagraphs 1.a. through 1.d.: For the Applicant.

Paragraph 2: For the Applicant.

Subparagraphs 2.a. through 2.f.: 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

1. The first sentence of the allegation is amended by replacing the figure "1d." with the figure "2.d." to comport with the evidence.