

DATE: February 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-05269

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Lynette Andresen, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant falsified a statement to an official Government investigator in January 2000 concerning his use of marijuana five times between 1996 and 1998. The Applicant did not falsify a statement in February 2000 or a questionnaire in October 2001. Sufficient mitigation is shown. Adverse inference is overcome. Clearance is granted.

STATEMENT OF THE CASE

On April 26, 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 May 18, 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 August 2, 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 August 5, 2004, and elected not to submit any additional information. The case was received by the undersigned for Decision on November 1, 2004.

FINDINGS OF FACT

The Applicant is 34, married and has a Bachelor of Science. He is employed by a defense contractor as an Analyst, and he seeks to obtain 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 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 January 5, 2000, the Applicant stated to a Special Agent of the Defense Security Service (DSS) that he had used marijuana from 1984 to August 1996 on an occasional basis. (Government Exhibit 6 at 1-2.) This was a false statement as the Applicant actually used marijuana until August 1998, using it five times in the intervening two years.

The Applicant was subsequently re-interviewed by a Special Agent of the DSS on February 9, 2000. The SOR at subparagraph 1.b. states that the Applicant denied using marijuana after August 1997 when he actually used it until August 1998. This is in error. The Applicant states, "I smoked marijuana about five times at the most from Aug 96 to Aug 98. The last time I smoked marijuana was in Aug 98 while attending a concert . . . I have not used marijuana or any illegal drug after Aug 98." (Government Exhibit 7 at 1.)

In the same statement, the Applicant admitted falsifying his statement of one month earlier. He stated that he did this, "because I was concerned that I could lose my job."

In an official questionnaire completed by the Applicant on October 15, 2001, he stated that he had used marijuana 10 times in the year 1995. (Government Exhibit 4, question 27.) However, he goes on to state immediately below in "Remarks," "I don't recall actual dates and [occurrences]. I signed statements during my previous investigation stating the dates and [occurrences]."

Paragraph 2 (Guideline J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

As found above, the Applicant knowingly and willfully provided false material information to DoD during the clearance screening process on January 5, 2000. In so doing the Applicant violated the felony criminal provisions of 18 USC 1001.

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. The applicable Mitigating and Disqualifying Conditions under the Personal Conduct and Criminal Conduct concerns 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 acts of falsification and criminal conduct 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 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 successfully mitigated the Government's case. First of all, it is clear that the Applicant falsified only one statement, that of January 2000. His statement in February 2000 was accurate and subparagraph 1.b. is obviously incorrect. In addition, on the questionnaire the Applicant completed in October 2001 (subparagraph 1.c.) the Applicant clearly states that he did not recall the actual dates and that the Government should look at his earlier statements. Accordingly, the Government was put on notice of the possibility that his answers on this questionnaire were incorrect. Accordingly, there was no falsification of this questionnaire.

What is left is that the Applicant five years ago concealed from the Government that he had used marijuana five times between 1996 and 1998, seven to nine years ago. Under Guideline E Disqualifying Condition E2.A5.1.2.3 applies (*deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination*). However, Mitigating Condition E2.A5.1.3.2 also applies (*the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*). It is also noted under the whole person concept that the statement where the Applicant truthfully discusses his drug use was taken only a month after the first.

Guideline J also applies to this single incident of falsification five years ago. Specifically, Disqualifying Condition E2.A10.1.2.1 (*allegations or admissions of criminal conduct; regardless of whether the person was formally charged*). The facts of this case also support the application of 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*).

The Applicant false statement to an investigator in January 2000 is not to be minimized. However, it was five years ago, concerned the use of marijuana on five occasions between 1996 and 1998, and his subsequent statements have been truthful. Under the particular circumstances of this case, 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.

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: For the Applicant.

Subparagraph 1.c.: For the Applicant.

Paragraph 2: For the Applicant.

Subparagraph 2.a.: 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