

DATE: May 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-06805

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant as a young man had a three year span, 1999 through 2001, where drinking got him into trouble with the police on several occasions. He also was arrested several times for driving offenses during the same period. He has matured, has gone three years without any criminal conduct, and no longer drinks. The Applicant did not falsify a Government questionnaire as alleged in the Statement of Reasons. Adverse inference is overcome. Clearance is granted.

STATEMENT OF THE CASE

On April 14, 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 3, 2004, and June 10, 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 12, 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 the FORM on August 24, 2004, and elected to submit additional information on September 14, 2004. Department Counsel indicated on October 4, 2004, that he had no objection to the additional information. The case was received by the undersigned for Decision on October 12, 2004.

FINDINGS OF FACT

The Applicant is 25, single and has a high school diploma. He is employed by a defense contractor as a Technician, 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 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 1 (Guideline - Alcohol consumption). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he abuses intoxicants.

The Applicant admits that he used poor judgment concerning alcohol from 1998 until May 2002. The result was that in 1998, twice in 1999 and January 2001, the Applicant was arrested for alcohol related offenses. The last three arrests were for domestic violence offenses committed against his live-in girlfriend. While the first three offenses resulted in guilty pleas, the charge in the last case was dismissed on the State's motion in October 2001. (Government Exhibit 9.) The Applicant also admits that alcohol caused he and his girlfriend to have other arguments which resulted with the police being called out on several other occasions.

The Appellant states that he reduced his drinking after May 2002. This was because he had matured and realized the difficulty that alcohol was causing in his life. He stopped drinking altogether after January 1, 2004. (Appellant's Additional Exhibit at 2.)

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.

In connection with a domestic violence arrest in 1999 (SOR 1.c.), the Applicant was also arrested for Possession of a Controlled Substance (Marijuana). The police found some seeds and stems in an ashtray while the Applicant was getting dressed in connection with his arrest.

During 2000 and 2001 the Applicant was arrested three times for Driving Without a License. The Applicant states that he has learned his lesson and does not drive, but uses public transportation.

The allegations set forth under Paragraph 1, above, will also be considered under this Paragraph.

The Government alleges that the Applicant has an outstanding arrest warrant for a Domestic Battery offense in January 2001 (SOR 1.e.). The Applicant has consistently denied the allegation. The case was dismissed in October 2001. Since the underlying case was dismissed, in my opinion there is no longer an active warrant. Subparagraph 1.d. is found for the Applicant.

Paragraph 3 (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 February 28, 2002, the Applicant completed an official DoD questionnaire in which he stated that he did not have a pending charge against him. (Government Exhibit 6, question 23.) This statement was a true answer since, as discussed above, the Applicant did not have an active warrant for his arrest on a dismissed case. Subparagraph 3.a. is found for the Applicant.

The same questionnaire asks the Applicant whether he has been charged with any offense connected to alcohol or drugs? (Government Exhibit 6, question 24.) The Applicant answered, "Yes," and discussed a 1998 arrest for Public Intoxication. He did not mention his being charged in 1999 with Possession of Controlled Substance (Marijuana). The Applicant submits that this act was unintentional on his part.

Finally, the same questionnaire asks the Applicant whether, within the previous seven years, he had any other charges pending against him other than the ones asked elsewhere on the form. (Government Exhibit 6, question 26.) The Applicant answered, "Yes," and listed five different offenses from 1998 to 2001, involving driving offenses and domestic violence. The Applicant did not mention one arrest in January 2001 for Domestic Battery (SOR 1.e.). The Applicant submits that this act was unintentional on his part.

Mitigation.

Two of the Applicant's supervisors provided letters of recommendation. The Applicant is described as an excellent employee who is very reliable. One of his supervisor's, retired from the Army, states that since starting work in 2001, the Applicant "has matured and has a very different outlook on life." The supervisor goes on to say, "[The Applicant] has proven himself to be a very reliable, trustworthy employee who is a tremendous asset to the Pentagon Renovation Program." (Applicant's Additional Exhibit at 5-6.)

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 Disqualifying and Mitigating Conditions which must be given "binding" consideration in making security clearance determinations. These conditions should be followed in every case according to the pertinent guideline. However, the conditions 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 conditions exhaust the realm of human experience, or apply equally in every case. The particular conditions applicable to this case will be discussed 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 alcohol and criminal incidents, as well as acts of 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 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 used alcohol to excess (Guideline G); that he has engaged in several acts of misdemeanor criminal conduct (Guideline J); and that he made false material statements to DoD (Guideline E).

The Applicant, on the other hand, has successfully mitigated the Government's case. Turning first to Guideline G. The Applicant's history of alcohol-related incidents from 1998 to 2001 requires application of Disqualifying Condition E2.A7.1.2.1 (*Alcohol-related incidents away from work, such as driving under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use.*) The evidence shows that he reduced drinking in 2002 and stopped entirely in 2004. As of the date the record closed, three years had passed since there had been any alcohol-related incidents. Mitigating Conditions E2.A7.1.3.2. (*The problem occurred a number of years ago and there is no indication of a recent problem*) and E2.A7.1.3.3 (*Positive changes in behavior supportive of sobriety*) also apply and, under the facts of this case, support a finding for the Applicant. Paragraph 1 is found for the Applicant.

With regards to Guideline J. By his own admission, when he was a young man, the Applicant was involved in a series of minor criminal acts, some connected with alcohol. Disqualifying Conditions E2.A10.1.2.1. (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) and E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*) apply. To his credit, his written statements indicate a degree of self-knowledge and a growing maturity. The statements from his work supervisors support a finding that, in the past three years, the Applicant has outgrown the bad habits of his younger days. Therefore, the evidence supports the application of Mitigating Conditions E2.A10.1.3.1 (*The criminal behavior was not recent*) and E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*). Paragraph 2 is found for the Applicant.

Finally, the discussion moves to Guideline E. As stated above, subparagraph 3.a. is found for the Applicant as I find that he did not have an active warrant or charge against him when he answered that question.

Concerning the other two questions, it is obvious that the Applicant spent a great deal of time on the Questionnaire. He admitted many offenses, including traffic, alcohol and spousal abuse. The Government was put on notice that the Applicant had a criminal record worth investigating. I have considered the Government's argument, but do not find it compelling under the particular facts of this case. The Applicant did not have an intent to deceive the Government concerning his criminal record. I find that the omissions were inadvertent and, accordingly, Paragraph 3 is found for the Applicant.

In addition, application of the General factors is appropriate and supports a decision in the Applicant's favor. The Applicant is motivated to continue his law abiding and non-drinking ways (factor g.), he shows considerable evidence of rehabilitation (factor f.), and, under the circumstances of this case, there is little or no probability of recurrence (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, 2 and 3 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.f.: For the Applicant.

Paragraph 2: For the Applicant.

Subparagraphs 2.a. through 2.f.: For the Applicant.

Paragraph 3: For the Applicant.

Subparagraphs 3.a. through 3.c.: 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