

DATE: January 30, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-08843

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's history of criminal conduct has been mitigated by sufficient evidence of reform and rehabilitation. 10 U.S.C. 986, as amended, otherwise known as the Smith Act does not apply. Clearance is granted.

STATEMENT OF THE CASE

On January 26, 2004, 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, 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 March 26, 2004, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on September 7, 2005. A notice of hearing was issued on September 28, 2005, scheduling the hearing for November 2, 2005. At the hearing the Government presented five exhibits. The Applicant presented three exhibits and testified on his own behalf. The record was left open until November 12, 2005 to allow the Applicant an opportunity to submit additional supporting documentation. The Applicant submitted one-Post Hearing Exhibit consisting of 27 pages. The official transcript (Tr.) was received on November 17, 2005.

FINDINGS OF FACT

The Applicant is 39 years old. He has a high school diploma and twenty hours of college credits. He is employed by a defense contractor as a Network Administrator Senior User Service Technician, and 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 J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The Applicant admitted to each of the allegations set forth in the SOR under this guideline.

He was first arrested as a juvenile, at the age of thirteen or fourteen, in 1980, and charged with Attempted Breaking and Entering. The Applicant was out with friends and wanted to get into a building. He pleaded guilty and was sentenced to six months of supervised probation and was fined \$45.00.

The Applicant was arrested four years later, in December 1984, and charged with Driving While Under the Influence of Alcohol. Prior to his arrest the Applicant had been consuming between six and ten beers. He pleaded guilty and was sentenced to a 30 day driver's license suspension, a six month driving restriction and was fined \$72.00.

In October 1986, while the Applicant was in the active duty Marine Corps he was arrested and charged with (1) Driving While Intoxicated, a felony, and (2) inor Consuming. At the time of the arrest, the Applicant and two of his fellow Marines were out drinking and driving on the back roads when they were pulled over. He pleaded guilty and was sentenced to a 90 day driver's license suspension, a one year driving restriction and was fined about \$150.00.

The Applicant got out of the Marine Corps in 1989, and went to work for a construction company and a jewelry store. In January 1990, he was arrested and charged with Embezzlement when the owner of the jewelry store accused him of stealing a watch and a necklace. The Applicant contends that the owner agreed to allow the Applicant to pick out a watch and then later a necklace and payments for the items would be automatically deducted out of his paycheck. When the Applicant was taken to court he learned that the owner was also accusing him of stealing \$50,000 in diamonds.

The Applicant pled guilty to the charge of Embezzlement on the recommendation of the appointed court attorney because he was told that he would get off in six months. The Applicant was sentenced to eight years in the penitentiary, with six years suspended, two years probation, was ordered to pay \$500.00 in restitution and was required to attend alcohol classes because of his prior alcohol related arrests. The Applicant actually served between six and eight months in prison. He was released in 1991. (Tr. p. 23). The Government alleged that 10 U.S.C. 986, as amended, disqualifies the Applicant from having a security clearance. I find that the provisions of the statute do not apply as the Applicant did not serve more than one year in prison.

Since 1991, the Applicant has not been arrested for any reason whatsoever. The Applicant states that for the past fourteen years he has strived to be a role model for his children and others. He has worked hard to gain the trust of others. He is teaching his children to respect the law and accept responsibility for their actions so that they do not have to learn the hard way like he did. (*See Applicant's Answer to SOR*).

Mitigation.

Letters of recommendation from a retired Program Manager, Chief of the Geo-Integration Office and his father-in-law all indicate that the Applicant is a person of the highest integrity, ethics, honesty and character. They strongly recommend him for clearance. (*See Applicant's Exhibit A*).

Various performance appraisals of the Applicant from the years 2000 through January 2005 reflect ratings of either "superior," "exceptional" or "outstanding" in every category. (*See Applicant's Post-Hearing Exhibit*).

POLICIES

Enclosure 2 and Section E.2.2. 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 J (Criminal Conduct)

Conditions that could raise a security concern:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns:

1. The criminal conduct was not recent;
5. 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 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 criminal conduct that 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 a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in criminal conduct (Guideline J). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. 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 introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guideline J of the SOR.

The Applicant's criminal history involves four arrests, the most recent which occurred in 1990, over sixteen years ago. Since then, the Applicant has cleaned up his lifestyle. He has matured, become responsible, regained the trust of his associates, started a family and had children and essentially turned his life around. The criminal conduct of the past has not been repeated. This evidence of criminal conduct when he was younger establishes that the exercise of poor judgment was an aberration, and not a basic part of Applicant's character. He has demonstrated that he is now a responsible adult that is reliable and trustworthy. Under Guideline H, Disqualifying Conditions (1) *any criminal conduct, regardless of whether the person was formally charged*; and (2) *a single serious crime or multiple lesser offenses* are clearly applicable. However, Mitigating Conditions (1) *The criminal conduct was not recent* and (5) *There is clear evidence of successful rehabilitation* also apply. Under the circumstances of this case, 10 U.S.C. 986 as amended, does not apply.

There is substantive indication of a fundamental change in the Applicant's thinking process or character. On this basis, I conclude that the criminal conduct is a thing of the past and is unlikely to ever be repeated. There is a strong indication of the Applicant's rehabilitation. Accordingly Guideline J is found for the Applicant.

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

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.

Subpara. 1.a.: For the Applicant.

Subpara. 1.b.: For the Applicant.

Subpara. 1.c.: For the Applicant.

Subpara. 1.d.: For the Applicant.

Subpara. 1.e.: 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.

Darlene Lokey Anderson

Administrative Judge