

DATE: November 30, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-07131

**DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Jeff A. Nagel, Esquire, Department Counsel

**FOR APPLICANT**

-----, Personal Representative

**SYNOPSIS**

The Applicant's three arrests - one which was dismissed, one which was for traffic offenses and one for possession of counterfeit food stamps - have been mitigated by his otherwise exemplary personal and professional life. The evidence supports a finding that the Applicant did not intentionally falsify his security clearance questionnaire. Adverse clearance is overcome. Clearance is granted.

**STATEMENT OF THE CASE**

On April 15, 2005, 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 10, 2005, and requested a hearing. The case was received by the undersigned on June 16, 2005, and a Notice of Hearing was issued on July 5, 2005.

A hearing was held on July 19, 2005, at which the Government presented six documentary exhibits (Government Exhibits 1 through 6). Testimony was taken from the Applicant, who also submitted six exhibits (Applicant's Exhibits A through F) and called one additional witness. The Applicant also supplied one post-hearing exhibit (Applicant's Exhibit G), consisting of some of his school records. The transcript was received on August 1, 2005.

**RULINGS ON PROCEDURE**

The Government submitted a "Motion to Amend the Statement of Reasons" on June 8, 2005. The Motion proposed to add two allegations under Guideline E (Falsification). The Applicant did not object to the amendment, but did submit a

written "Addendum to Response to Statement of Reasons." (Applicant's Exhibit B.) The Motion was granted and the allegations became Paragraph 2 of the SOR and two subparagraphs (2.a. and 2.b.).

### **FINDINGS OF FACT**

The Applicant is 42, married and has a high school education. He is employed by a defense contractor as a custodian, and he seeks to retain a 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 (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 J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

1.a. The Applicant was arrested in March 1988 for Assault With Firearm on a Person. According to the Applicant and his Personal Representative, who is his wife, the Applicant was falsely accused of this offense. (Transcript at 51-53.) The court records were not provided, but the FBI identification record shows that the charges were dismissed. (Government Exhibit 2.)

1.b. The Applicant was subsequently arrested in June 1990 for various driving offenses. He plead guilty to a charge of Unlicensed Driver and was sentenced to jail and a fine. It appears that the Applicant was confused about whether his time in jail had tolled the fine. Eventually a bench warrant was issued for his arrest for failure to pay the fine. (Government Exhibit 5 at 2-4, Transcript at 53-55.) In conjunction with the arrest on June 2, 2003, discussed in 1.c., below, the Applicant paid the fine and the warrant was recalled. (Government Exhibit 3.)

1.c. The Applicant's final arrest occurred in June 2003. This was in connection with his using forged food stamps. According to the Applicant, he did not know that the food stamps were forged. Rather, he was manipulated by an acquaintance into passing the food stamps at a grocery store. In any case, the Applicant plead Nolo Contendere to the charge of Possession of a Forged Item on August 21, 2003. He was sentenced to serve five days in jail, or to do work for the State Transportation Department. (Government Exhibit 4.) In addition, he had to pay a fine and was put on 36 months probation. (Government Exhibit 5 at 3-4, Transcript at 39-40, 55-57.)

Paragraph 2 (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 August 18, 2003, the Applicant completed an official DoD questionnaire in which he stated that he had never been charged with a firearms offense. (Government Exhibit 1, question 22.) This statement was a false answer to a relevant question concerning the Applicant's criminal history.

The questionnaire also asked the Applicant whether, at that point in time, he had any charges pending against him. (Government Exhibit 1, question 27.) The Applicant answered, "No." This was a false answer since, on June 2, 2003, he had been arrested for Possession of a Forged Instrument, as set forth above.

The same questionnaire asked the Applicant whether, within the last seven years, he had been arrested or charged with any other offenses not otherwise revealed. The Applicant answered, "Yes." This was a true answer. He further reported the fact that the arrest on June 2, 2003, involved the bench warrant from his 1990 arrest.

The Applicant's employer was notified by the Applicant of his arrest on June 2, 2003, in a timely manner. (Government Exhibit 6.) The Report of Adverse Information submitted by his company on August 31, 2003, indicates that the Applicant was confused as to whether in fact he would be charged with an offense regarding the counterfeit food stamps when he reported the arrest to the company in June 2003.

The Applicant denies that he had any intent to falsify his answers. The evidence shows that the Applicant has great difficulty reading. He states that he is dyslexic, and that his wife must read to him in order to understand written questions. (Transcript at 37-38.) Further, he and his wife testified that she was not present when he filled out the current questionnaire, which affected his comprehension. (Transcript at 61-63, 74-75.)

The Applicant's hand written responses to the SOR show a man who is uncertain in his written use of English. (Applicant's Exhibits C and D.) Available school records confirm that the Applicant was a poor reader. (Applicant's Exhibit G.) His verbal responses at the hearing, however, were coherent and well-thought out.

### MITIGATION

The Applicant is extremely well-thought of by his employer. Applicant's Exhibit F consists of many awards given to the Applicant for doing his job in a fine fashion.

The Vice President and General Manager of his employer submitted a letter on his behalf. In addition, a Senior Program Manager and the Directors of two separate, important, defense related programs also wrote letters on the Applicant's behalf. (Applicant's Exhibit E.) The Applicant is described by these people as an "asset," "responsible, reliable and conscientious," and a person of "high personal character."

### 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 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]:

- E2.2.1.1. The nature, extent and seriousness of the conduct
- E2.2.1.2. The circumstances surrounding the conduct, to include knowledgeable participation
- E2.2.1.3. The frequency and recency of the conduct
- E2.2.1.4. The individual's age and maturity at the time of the conduct
- E2.2.1.5. The voluntariness of participation
- E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavior changes
- E2.2.1.7. The motivation for the conduct
- E2.2.1.8. The potential for pressure, coercion, exploitation or duress
- E2.2.1.9. 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 criminal conduct and 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 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 had several incidents of criminal conduct (Guideline J), and may have falsified a Government questionnaire (Guideline E).

The Applicant, on the other hand, has successfully mitigated the Government's case. His 1988 incident eventually resulted in the charges being dismissed, because he did not commit the criminal act. His 1990 arrest was for minor driving offenses. The 2003 arrest and subsequent conviction for Possession of a Forged Document is serious. However, under the circumstances of this case, it is mitigated. There have been no other incidents of that kind, and the incident resulted from him being too trusting of other people.

Disqualifying Condition E2.A10.1.2.1. (*A single serious crime or multiple lesser offenses*) applies. However, Mitigating Conditions E2.A10.1.3.2. (*The crime was an isolated incident*) and E2.A10.1.3.6. (*There is clear evidence of successful rehabilitation*), also apply. In addition, several of the General Factors also have application in this case. Two criminal incidents, one for traffic offenses, are not serious (General Factors E2.2.1.1. and E2.2.1.3); there is considerable evidence of rehabilitation and other pertinent character changes (E2.2.1.6.); he is motivated to continue his law-biding ways (E2.2.1.7); there is no potential for coercion or exploitation and virtually no likelihood of recurrence (E2.2.1.8. and E2.2.1.9). Paragraph 1 is found for the Applicant.

Turning to Paragraph 2. There is clear evidence that the Applicant's security clearance questionnaire had two wrong answers on it. What is not so clear is whether the Applicant intended to falsify the questionnaire in giving those answers. In my opinion, the evidence does not support that conclusion. I find this way for several reasons. First, the Applicant's testimony, that of his wife, school records, and his hand written documents, confirm that he is very uncertain in reading and writing. His testimony, and demeanor on the stand, showed his embarrassment at being unable to read properly and needing people to read important documents to him. Second, his questionnaire puts the Government on notice that he was arrested on June 2, 2003. (Government Exhibit 1, question 26.) Third, the Applicant properly notified his company that he had been arrested in 2003. (Government Exhibit 6.) Finally, the evidence shows that the Applicant was confused at the time he filled out the questionnaire concerning whether he had even been charged with the counterfeit food stamp offense.

Disqualifying Condition E2.A5.1.2.2. requires, "The *deliberate* omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire. . ." (Emphasis supplied.) The evidence shows that any omission of facts from the Applicant's questionnaire was not deliberate but a mistake on his part. The Government has

not proved an intent to falsify on the part of the Applicant and Paragraph 2 is found for him.

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.

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.

Subparagraph 2.b.: 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