

DATE: November 18, 1996

In Re:

SSN: -----

Applicant for security clearance

ISCR OSD Case. No. 95-0622

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Carla Conover, Esq.

William S. Fields, Esq.

Department Counsel

FOR THE APPLICANT

William S. Buchanan, Esq.

STATEMENT OF CASE

On December 15, 1995, 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 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 Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The SOR is attached.

Applicant filed his Answer to the SOR on January 7, 1996.

The case was transferred to the undersigned on February 15, 1996. A notice of hearing was issued on March 11, 1996, and the case was heard on April 23, 1996. The Government and Applicant submitted documentary evidence. Testimony was taken from Applicant. The transcript was received on May 8, 1996.

RULINGS ON PROCEDURE

At the hearing, Applicant was granted 7 calendar days to submit additional information from law enforcement officials. On May 3, 1996, Applicant advised he could not obtain the information but he requested the record be left open for an additional week to obtain information from another branch of the Department of Defense. On June 4, 1996, Applicant advised he would not seek the additional information identified in his letter of May 3, 1996. The record is closed.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The SOR alleges criminal conduct, disregard of laws or regulations, and poor judgment. Applicant admitted the criminal conduct allegation under paragraph 1a of the SOR. Applicant indicated he had insufficient knowledge to admit or deny the allegations under paragraph 2 because, "Unlike Reason 1.a., these Reasons cite only a date of occurrence and not the specific event. Therefore, I am unable to admit or deny these reasons with any degree of certainty."⁽¹⁾ After a full review of the transcript (Tr.) and assessment of the Applicant's credibility, I issue the following Findings of Fact:

Applicant is 60 years old and employed as an ----- with a defense contractor. He seeks a secret level clearance.

On August 22, 1991, during a nationwide fraud investigation, Applicant pled guilty to a two count criminal information charging him with conspiracy to commit fraud, bribery and conversion (June 1988, date offense concluded), and bribery of a government official (May 1988, date offense concluded), all felony violations of the United States Code.⁽²⁾ On December 6, 1991, he was sentenced to 33 months on each of the four criminal counts, the sentences to run concurrent with one another; 2 years probation (supervised release) upon release from incarceration, and a \$10,100 fine.⁽³⁾ The original prison term was reduced to 20 months because of Applicant's cooperation in the nationwide fraud investigation.⁽⁴⁾ Applicant admitted his guilt.⁽⁵⁾

Under paragraph 2a, Applicant gained access to sensitive procurement source selection information on or about August 31, 1987, and improperly disclosed that information to a private consultant from September 1, 1987 through September 8, 1987. (Tr. 113; Exhibit 3, p.35; Exhibit 12, pp. 19-23).

On or about September 14, 1987, Applicant, at the request of a prospective contractor, gained access to internal agency communications relating to procurement, and disclosed the information to the prospective contractor. (Exhibit 12, pp. 24, 25).

Under paragraph 2c, on or about September 25, 1987, Applicant, as an employee of the United States, gained access to information regarding processes and operations relating to procurement. Between September 25 and September 28, 1987, Applicant improperly disclosed this information to a private consultant who Applicant knew would disclose the information to a prospective contractor. (Exhibit 3, p. 11).

On or about October 5, 1987, Applicant, through his position as an employee of the United States, gained access to internal agency communications relating to procurement and improperly disclosed this information on or about October 6, 1987 to a private consultant and also personally disclosed this information to a prospective contractor in violation of the identified federal statutes under 2d. (Tr. 118; Exhibit 12, p. 27).

I find no evidence that between October 5, 1987 and November 4, 1987, Applicant gained access to internal communications relating to procurement and other proprietary information and disclosed the information on November 4, 1987 to a private consultant, knowing the private consultant would relay the information to a prospective contractor.

On or about December 16, 1987 to March 14, 1987, Applicant, as an employee of the United States, gained access to source sensitive information relating to procurement. On December 18, 1987 through March 14, 1988, Applicant improperly disclosed the information to a private consultant Applicant knew would disclose to a prospective contractor. Applicant also personally disclosed this information in violation of the cited federal statutes in allegation 2f. (Exhibit 12, pp. 36, 37, 40).

Finally, on or about May 20, 1988, Applicant, as an employee of the United States, gained access to internal communications relating to procurement, and on May 23, 1988, disclosed this information to a private consultant Applicant knew would then relay the information to a prospective contractor. (Exhibit 3, p. 20).⁽⁶⁾

Applicant's character evidence, consisting of performance evaluations since 1985 and character statements, paints an especially positive picture of an analyst who has taken substantial steps to place the past behind him. While Applicant's

impressive evaluations between 1985 and July 1990 are obviously tarnished by his admitted criminal conduct and poor judgment in 1986, 1987, and 1988, his conduct after his guilty plea in August 1991 shows good judgment in continuing to cooperate with law enforcement during the period of his guilty plea, and during his incarceration and after the termination of his probationary period. Although the lead prosecutor, on December 6, 1991, could not agree to a shorter sentence than set forth in the guidelines, he noted Applicant's continuing cooperation with the Government and acceptance of responsibility for his conduct. (7)

Approximately 7 character statements describing various parts of Applicant's life were presented to the Judge at sentencing in December 1991. For example, a friend of 12 years praised Applicant for faithfully having the interests of the military and the taxpayer in his mind when making business decisions. Other friends commended Applicant's close relationship with his children and his positive contribution to the community, having taught ----- on a part-time basis at the regional community college. (Applicant's Exhibits D through M).

On August 23, 1995, Applicant was praised for his research and affidavit in a motion for partial summary judgment regarding unilateral mistake in the contractor bidding process. His efforts saved the military money. (Applicant's Exhibit C).

The most persuasive piece of evidence regarding Applicant's recognition of his illegal conduct and capacity for rehabilitation, in addition to Applicant's positive demeanor at the hearing, is Applicant's Exhibit A describing the extent of Applicant's ongoing cooperation in the nationwide fraud investigation. The former prosecutor, who directed the entire investigation as lead prosecutor negotiating all the plea agreements, indicated Applicant reviewed hundreds of documents and never refused to cooperate. Applicant's information led to additional convictions. The reduction in Applicant's sentence (Government's Exhibit 8) on December 30, 1992, was based on Applicant's ongoing cooperation in the investigation.

While in prison in 1992, Applicant learned the prison testing system for ----- was antiquated and he redesigned the system. (Tr. 106). While in the halfway house for two and one-half months, Applicant created a data base to assist his employer establish the value of each piece of his property for bank refinancing. (Tr. 107).

Applicant's present employer since October 1993, finds Applicant a reliable and trustworthy employee. (Applicant's Exhibit A).

POLICIES

Enclosure 2 of the Directive set forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

Criminal Conduct

Factors Against Clearance:

Felony policy.

Factors for Clearance:

Felony policy - (a).

1. Conduct occurring in the distant past, in the absence of subsequent criminal conduct.

Security Responsibility Safeguards⁽⁸⁾

Factors Against Clearance:

2. Deliberate or reckless violations of security regulations, including..., or disclosing classified information, or other information, disclosure of which is prohibited by Statute,... to persons who are not cleared or authorized to receive it.

Factors for Clearance:

None apply.

Poor judgment

There are no supplemental factors for poor judgment, however, conduct alleged under other criteria may also constitute acts of omission or commission indicative of poor judgment, unreliability and untrustworthiness.

General Policy Factors

In addition to applying the appropriate policy factors above, the facts and circumstances of every case must be evaluated under the general policy factors which are:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
- e. Absence or presence of rehabilitation.
- f. Probability that the circumstances or conduct will continue or recur in the future. (Section 3, page 7 of the Directive).

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information 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.

The Government must establish all the factual allegations under Criterion h (criminal conduct), Criterion g (disregard of statutes, or unauthorized disclosure) and Criterion i (acts of omission or commission indicative of poor judgment, unreliability and untrustworthiness) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to the sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

CONCLUSIONS

Applicant, a civilian official who served as -----, occupied a position

in which he helped develop the military's ----- technology in the evaluation process in which competition was initiated. His position enabled him to influence the award of military contracts. Clearly, he had critical fiduciary responsibilities to the military to ensure a quality purchase at a cost that would not sacrifice the quality of the purchase. In 1986, 1987 and 1988, Applicant betrayed the trust reposed in him by the military when he engaged in conspiracy to commit fraud, bribery, bribery of a Government official, and conversion, all violations of federal law. He unlawfully enriched himself by accepting certain gratuities he was not entitled to. The crimes were exceptionally grave because of the pattern of dishonest conduct over a three year period. The crimes were directed against the Federal Government or its instrumentalities or agents, and the crimes involved a breach of trust.

Under the felony policy, when it is determined the applicant has violated the federal law,⁽⁹⁾ his clearance shall be denied or revoked unless it is determined that there are compelling reasons to grant or continue the clearance. While Applicant's conduct was exceptionally grave and was not an isolated occurrence, Applicant has demonstrated trustworthiness and respect for the law over an extended period of time since the offense occurred. First, the record reflects the criminal conduct ended in June 1988. Second, when Applicant pled guilty in August 1991, the prosecutor emphasized Applicant's cooperation as being the primary reason for a recommendation to sentence Applicant at the low end of the sentencing guidelines. Second, Applicant's substantial and continuing cooperation after his sentencing in December 1991 while he was in prison motivated the prosecutor to move on December 4, 1992 to reduce the original sentence. That motion was granted on December 30, 1992. An example of Applicant's continuing cooperation is reflected in Applicant's Exhibit C which thanked Applicant in August 1995 for his research and participation in litigation saving the military money.

Applicant's character evidence, both before and after his sentencing in December 1991, particularly the persuasive evidence of cooperation, and Applicant's affirmative conduct in prison and the halfway house, together with the passage of almost eight years since June 1988, and Applicant's favorable credibility at the hearing, provide ample justification to conclude Applicant has demonstrated trustworthiness and respect for the law over an extended period of time.

Applicant gained and/or unlawfully disclosed proprietary information in violation of Criterion g and Titles 48 or 18 of the United States Code.⁽¹⁰⁾ Even though he did not violate any security regulations or disclose classified information, he unlawfully disclosed proprietary information. His misplaced belief that his major concern was the military and the taxpayer is belied by his acceptance of gratuities on an occasional basis.

The serious pattern of intentional criminal or dishonest conduct and the conclusive evidence of culpability under paragraphs one and two do not constitute an immutable bar to Applicant's present application for a security clearance. His most positive evidence in reform is his activity after his guilty plea and before his sentencing and also while he was in prison. If he had resisted all or some efforts by law enforcement to divulge information leading to the conviction of others, then his inaction would have little or no value in establishing his case in rehabilitation. However, he responded to all prosecutorial efforts to assist in obtaining convictions against those involved in the nationwide fraud operation. Instead of isolating himself in prison, Applicant put his expertise to work by upgrading the ----- testing system. During his stay at the halfway house, he created the data base to facilitate bank refinancing for the building contractor. Applicant successfully completed his supervised release in June 1995 and has no subsequent criminal conduct since December 1991. At the hearing, Applicant's demeanor and conduct provides a positive picture of a contrite person whose past conduct is sufficiently explained and assuaged by his affirmative action since August 1991 to allow another opportunity for access to classified information.

Having weighed (1) the former prosecutor's positive remarks concerning Applicant's degree of cooperation, (2) the positive, anecdotal character evidence from Applicant's colleagues and his present employer, and (3) his favorable credibility at the hearing, Applicant has persuasively demonstrated he can be trusted, and, the serious pattern of past criminal conduct will not recur.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 f the Directive are:

Paragraph 1: FOR THE APPLICANT.

a. For the Applicant.

Paragraph 2: FOR THE APPLICANT.

a. For the Applicant.

b. For the Applicant.

c. For the Applicant.

d. For the Applicant.

e. For the Applicant.

f. For the Applicant.

g. For the Applicant.

Paragraph 3: FOR THE APPLICANT.

Factual support for the foregoing findings is set forth in FINDINGS OF FACT and CONCLUSIONS above.

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 Applicant.

Paul J. Mason

Administrative Judge

1. At the hearing, Applicant generally admitted all allegations under paragraph 2 but had difficulty correlating the dates alleged with kinds of information unlawfully disclosed. (Tr. 101).
2. See Government Exhibits 3, 4, 5, and 7. The items illegally received and corresponding values are identified in Applicant's Exhibit CC.
3. See Government Exhibit 7.
4. See Government Exhibit 8; Applicant's Exhibit A.
5. Applicant also acknowledged his conduct represented poor judgment and he identified the gratuities he accepted from the other culpable parties. (Exhibit 6; Tr. 84, 100). He agreed the consultants and contractors benefited from the information he provided. (Tr. 83).
6. Government's Exhibit 2.
7. Exhibit 6, p. 4-5.
8. Because the mitigating factors under Criterion g are tailored to security violations rather than unauthorized disclosure of proprietary information, Applicant's misconduct and mitigating conduct shall be adjudged under the general policy factors at page 7 of the Directive.
9. Application of the felony policy is based on Applicant's conviction as set forth in 1a. Applicant's misconduct under allegation 2c constitutes a misdemeanor as the punishment under Title 18 USC 1905 is a maximum year incarceration and up to a \$1000 fine.

10. Criterion g, Disqualifying Factor No. 2, disclosing information, disclosure of which is prohibited by statute.