

DATE: February 11, 1997

In Re:

SSN: -----

Applicant for security clearance

ISCR OSD CASE No. 96-0060

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Claude R. Heiny, III, Esq.

Department Counsel

FOR THE APPLICANT

David B. Craig, Esq.

STATEMENT OF CASE

On February 12, 1996, 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's answer is stamped by a notary but undated.

The case was received by the undersigned on August 1, 1996. A notice of hearing was issued on September 27, 1996, and the case was heard on October 15, 1996. The Government and Applicant submitted documentary evidence. Testimony was taken from Applicant and three witnesses. The transcript was received on October 23, 1996.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony.⁽¹⁾ The SOR alleges Criterion J (criminal conduct) and Criterion D (sexual behavior). Applicant admitted all allegations. In response to subparagraph 1a, Applicant drank an unusual amount of alcohol and found himself in the wrong house. Applicant essentially admitted subparagraph 1b but denied he made a false statement.⁽²⁾ He admitted his conduct demonstrates poor judgment but he denied he ever suffered from an emotional disorder.

Applicant is 33 years old and employed as an ----- by a defense contractor. He seeks a secret level clearance.

Court records reflect Applicant received a Summary Court-Martial on September 23, 1991 for (1) unlawful entry with intent to commit a criminal offense, and (2) indecent assault; both counts are violations of the Uniform Code of Military Justice (UCMJ).⁽³⁾ He was found not guilty of the charges but found guilty of a lesser included offense of unlawful entry and fined \$100. Applicant testified that before the incident he had been drinking for about twelve hours and was intoxicated. (Tr. 32).

Applicant received a General Court-Martial in April 1994 under the UCMJ. He was charged with (1) two counts of maltreatment of a subordinate, (2) making a false statement with intent to deceive, (3) oral sodomy by force without the other's consent, (4) indecent assault upon another, and, (5) knowingly fraternizing with a subordinate. He was found not guilty of count 1 (Maltreatment of a subordinate) and count 5 (knowingly fraternizing with a subordinate). He was found guilty of count 2 (making a false statement). He was found not guilty of count 3 (sodomy by force) but guilty of sodomy by consent. He was found not guilty of count 4 (indecent assault) but guilty of indecent acts.

In GE #2, Applicant indicated he had been having an affair with one of his subordinates for about three months. The affair ended in approximately September 1993, and thereafter the prosecutrix had difficulty following his orders or he had a hard time disciplining her. The General Court-Martial was in April 1994 and he was sentenced on April 29, 1994. He was reduced in rank by five levels and given a bad conduct discharge. (GE #10).⁽⁴⁾ When he told his wife about the affair, she became upset. They attended marriage counseling from late 1993 to the spring of 1994, and learned positive steps to strengthen their relationship. (Tr. 27; Exhibit B).

I find Applicant a credible witness who is genuinely remorseful for his criminal conduct and/or sexual behavior.

The project supervisor and two project managers know of no reason why Applicant should not receive a security clearance. See also, Exhibit B. Two coworkers wrote letters to Applicant's command in 1994 pleading for his retention in the service or a discharge without legal action under the UCMJ. In addition to an excellent performance evaluation for the period ending in February 1995, Applicant has received numerous awards, certificates, commendations, and good performance evaluations in the military since 1985.

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 (Criterion J)

Factors Against Clearance:

1. any criminal conduct, regardless of whether the person is arrested.

Factors for Clearance:

1. the criminal conduct was not recent.
2. the crime was an isolated incident.
4. the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.
5. there is clear evidence of successful rehabilitation.

Sexual Behavior (Criterion E)

Factors Against Clearance:

1. sexual behavior of a criminal nature, whether or not the individual was arrested.
2. sexual behavior that causes an individual to be vulnerable to undue influence or coercion.

Factors for Clearance:

1. the behavior was not recent and there is no evidence of subsequent conduct of a similar nature.
4. the behavior no longer serves as a basis for undue influence or coercion.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 2-1 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) The presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; and, the likelihood of continuation or recurrence.

Burden of Proof

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 J (criminal conduct) and Criterion D (sexual behavior) 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

The Government has established a case under Criterion J. The unlawful entry in September 1991 casts doubt on Applicant's judgment, reliability and trustworthiness. Although Applicant had no legal reason for being in the neighbor's house, the case is sufficiently extenuated by his serious intoxication and the passage of almost 6 years without recurrence of similar conduct. [\(5\)](#)

Applicant's criminal conduct in 1994 was much more serious because the charges included making false statements, mistreating a subordinate, and physical misconduct. Even though Applicant was found guilty of making a false statement with intent to deceive, Applicant has sufficiently extenuated the guilty finding with his explanation of confusion over the course of the investigation. Although he used poor judgment by having an affair with a subordinate,

he did not mistreat her nor did he force will upon her. In addition, after Applicant informed his wife of the extra-marital affair, and approximately four months of counseling has helped preserve their marriage.⁽⁶⁾

Applicant's criminal conduct in 1991 involved conduct of a sexual nature and raises the possibility he could become a target for pressure. Applicant's criminal conduct in 1993 also raises the risk Applicant could also be exploited because of those actions against his subordinate. However, Applicant's full disclosure of both incidents in GE #2 and at the hearing, establishes convincing support for the conclusion neither Applicant's 1991 nor his 1994 conduct will serve as a basis for coercion or pressure.

Applicant's favorable credibility and the absence of any similar conduct in approximately 3 years; as well as the absence of negative information from his three supervisors concerning his work performance, satisfies Applicant's ultimate burden of demonstrating his suitability for access to classified information.

FORMAL FINDINGS

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

Paragraph 1: FOR THE APPLICANT.

a. For the Applicant.

b. For the Applicant.

Paragraph 2: FOR THE APPLICANT.

a. For the Applicant.

Factual support and reasons for the foregoing findings are 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. The transcript shall be cited as (Tr.). The Government's exhibits shall be cited as (GE #). Applicant's exhibits shall be cited by alphabetic letter.
2. First, Applicant admits the false statement in his answer to the SOR but explains he was trying to save his marriage. Yet, at the hearing he denied he made a false statement and explained the investigation began covering the original sexual harassment charge (which he denied), and, the investigators changed the focus of the investigation to charges of the General Court-Martial. (Tr. 38-39). Even though he may have been confused in the investigation about what he was actually charged with, the presiding judge chose not to believe him and I have no authority to second-guess the judge's decision.
3. The essential facts are that Applicant tore out the kitchen screen window and entered the victim's apartment. Applicant assaulted the victim by kissing her legs while she was sleep. When she woke, he left and returned to his house. (GE #3).
4. He was placed on voluntary extended leave during the pendency of the bad conduct discharge appeal, and he was actually discharged from the service in September 1995. (Tr. 33).

5. Criminal Conduct, Mitigating Factors #1, 2 and 4.

6. Criminal Conduct Mitigating Factor #5.