

DATE: February 19, 1997

In Re:

SSN: -----

Applicant for security clearance

ISCR OSD Case No. 96-0362

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Carla Conover, Esq.

Department Counsel

FOR THE APPLICANT

James N. McCune, Esq.

STATEMENT OF CASE

On June 10, 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 filed his Answer to the SOR on June 19, 1996.

The case was received by the undersigned on July 9, 1996. A notice of hearing was issued on November 21, 1996, and the case was heard on December 6, 1996. The Government and Applicant submitted documentary evidence. Testimony was taken from Applicant and two witnesses. The transcript was received on December 23, 1996.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents<sup>(1)</sup> and the live testimony. (Tr.). The SOR alleges Criterion J (criminal conduct). Applicant admitted all allegations.

Applicant is 39 years old and employed as a ----- by a defense contractor. He seeks a secret level clearance.

Applicant believed one of the causes of his criminal record was falling in with the wrong crowd. (Tr. 49). In addition, the criminal conduct was drug-related. (Tr. 51).<sup>(2)</sup> Applicant acknowledged inconsistencies between GE #2 and GE #5 but has been trying to block the entire incident out of his mind over the years. (Tr. 87-95).<sup>(3)</sup>

Applicant was arrested on February 21, 1975 for (1) delinquency, (2) disorderly conduct, (3) resisting arrest, and, (4) uncontrollable. He was found guilty of all charges and given six months probation and ordered to attend Alcoholics Anonymous (AA).<sup>(4)</sup> On May 14, 1975, Applicant was 18 years old when he was charged with (1) burglary, felony, (2) attempted theft, felony, and (3) possession of a deadly weapon during the commission of felony. He was found guilty of burglary and sentenced to 3 years in jail, but the entire sentence except for 10 days was suspended, and Applicant was placed on 3 years probation. On September 3, 1975, Applicant was charged with (1) conspiracy, and (2) burglary, both felonies. He was found guilty of burglary and sentenced to three years; the entire sentence was suspended except for 6 months. He was given probation for the balance of the term and ordered to pay court costs.

On April 18, 1976, Applicant was charged with attempted burglary and possession of marijuana. He was found guilty of attempted burglary and sentenced to one year in jail.<sup>(5)</sup>

On May 3, 1976, Applicant was charged with (1) three counts of felony theft, and, (2) three counts of burglary. He was found guilty of 3 counts of burglary and sentenced to one year in jail, sentence to run concurrent to the sentence in the preceding paragraph. Applicant burglarized the house of a drug using friend and took the friend's drugs and food and money. (GE #2).

On September 7, 1977, Applicant was charged with felony theft. He was found guilty and fined. Applicant was a shoe store stock person at the time. He was caught selling the stock at below the advertised cost and pocketing the proceeds of the sale.

On November 7, 1979, Applicant was charged with (1) first degree murder, murder first degree when engaged in the perpetration of kidnaping or robbery, (3) arson of motor vehicle, (4) kidnaping, (5) robbery, (6) assault and battery, and (7) conspire to rob. Applicant was found guilty and sentenced on November 18, 1980 to 30 years in prison and ordered to pay \$70 court costs. (GE #3). He is on parole until the year 2006. On November 11, 1978, after spending several hours with the deceased using K.W. (a drug similar to PCP, GE #5), Applicant and two accomplices attacked, robbed and killed him. The three accomplices split the victim's money and drugs and Applicant kept the credit cards and the special knife. Applicant went to work part of the next day and used the credit cards to buy clothes and a watch. (GE #5). Approximately a year later, Applicant was arrested for the murder and made a statement. (GE #5).<sup>(6)</sup>

Applicant was paroled on December 21, 1989, and is still required to make regular visits to his parole officer.

On May 24, 1992, Applicant was charged with driving while under the influence (dwi). Applicant missed a court date, and a bench warrant was issued on October 4, 1992.<sup>(7)</sup> He was fined \$130 and ordered to serve 150 hours of community service. Applicant explained he had been drinking at a graduation party and should not have been driving. He was pulled over on the same street he lives on.

After his 1989 parole, Applicant spent a little time with his parents until he moved in with a retired truck driver in 1990 and lived there for approximately four and one-half years. (Tr. 109). Applicant disclosed his criminal past within a week after he moved into the truck driver's house. (Tr. 109). The truck driver and his wife entrusted the house and his three sons to Applicant for an entire month. (Tr. 112).

Applicant courted his wife for 18 months, and has been married to her for 18 months. (Tr. 117). He has been a steady influence on his wife's two sons from a previous marriage. (Tr. 120). His strong work ethic provides a good example for them in their school work. Applicant obtains computer programs to facilitate her children's learning. (Tr.122).

The project manager hired Applicant in June 1995. The senior systems engineer finds Applicant an excellent performer who is extremely motivated. A colleague has known Applicant for 6 years and considers him a good instructor who exhibits patience with students.

On May 24, 1987, Applicant received his associate's degree while in prison. (Exhibit C).<sup>(8)</sup> He received 3 additional citations or commendations (including his college degree) in 1993. He is currently taking courses toward his master's degree. (Tr. 73-74).

## 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:

2. a single serious crime or multiple lesser offenses.

#### Factors for Clearance:

1. the crime was not recent.
2. the crime was an isolated event.
5. there is clear evidence of rehabilitation.

### **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) 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

A case under Criterion J has been established as Applicant exhibited a pattern of criminal conduct between 1975 and 1979 that clearly raises doubt about his judgment, reliability and trustworthiness. Although Applicant was a juvenile in February 1975, he clearly exercised poor judgment in disrespecting his parents in their own house. In May 1975, Applicant had reached the age of 18 and promptly burglarized a drug store. In September 1975, Applicant committed a second burglary and was given a second chance at probation (he was first given probation in May 1975) which he violated in less than a year for the second time. Applicant received only a one year sentence for the attempted burglary set forth in subparagraph 1d. Applicant was convicted of a subsequent burglary in May 1976 (subparagraph 1e) but received another break because the sentence was ordered to run concurrent with the sentence in subparagraph 1d. In September 1977, Applicant was apprehended again for a retail theft when he decided to sell the merchandise at his arbitrary price rather than the store price.

Even before the murder in November 1978, Applicant's criminal conduct was serious because of the pattern and his lack of respect for the law. The dominance of drugs in Applicant's lifestyle is exemplified by the burglary in May 1976 where Applicant burglarized an associate's dwelling to secure repayment of a loan. He took money, drugs and even food.

Applicant's repeated theft offenses are compounded by his involvement in the kidnaping and murder in November 1978. His first mistake was being involved in the crime. The second mistake was not telling law enforcement about the crime until he was arrested more than a year later. Applicant's attempt to water down his involvement definitely undercuts his overall credibility.

On the other hand, the evidence persuades me to conclude Applicant was genuinely remorseful for his role in the murder and recognized the gravity of the misconduct. Against the heinous nature of the crime are the positive steps Applicant has taken over the years in making himself a productive member of society and in rehabilitating his credibility. First, instead of laying fallow in prison, he accomplished two objectives by obtaining his high school diploma and his associates's degree. After his discharge from prison in December 1989, Applicant continued his education and received his college degree in 1993. He is currently working toward a post-graduate degree.

Applicant has been gainfully employed since August 1990. He worked for the university for almost five years. After working at another job for about three months he has been employed in his current job for 18 months. He enjoys the support of his project manager and senior systems engineer. Applicant demonstrated good judgment and responsibility when he lived with the truck driver. His present wife has known Applicant for 3 years and has been his wife for 18 months. She is enthused by Applicant's beneficial impact on her two sons. In addition to his job performance and the positive influence on his stepchildren, Applicant has complied with all the terms of his parole term. Even though there remains an added motivation to stay on the right side of the law until 2006, I strongly believe nine years of incarceration and the evidence of rehabilitation, particularly Applicant's efforts to continue his education both in and out of prison, reinforces the ultimate conclusion Applicant's criminal past, which ended almost 19 years ago, will not recur in the future.<sup>(9)</sup>

### **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.
- c. For the Applicant.
- d. For the Applicant.
- e. For the Applicant.

f. For the Applicant.

g. For the Applicant.

h. 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 government exhibits shall be identified as (GE #) and Applicant's exhibits shall be identified by the letter of the exhibit.
2. The equivocal testimony concerning the role of drugs in his criminal conduct undercuts Applicant's credibility to some degree. (Tr. 73; 103). He continued to use drugs in prison until 1983. (GE #2).
3. There are distinct inconsistencies between GE #5 (statement taken in September 1979) and GE #2 (taken in March 1996). GE #5 shows Applicant was a much more active party in the commission of all crimes he was charged with.
  4. Applicant was 17 years old at the time. (Tr. 46).
5. Applicant explained he tried to break into a liquor store. He began hammering on a glass window but the stick he was using was too small. (GE #2).
6. The murder occurred in September 1978. The police did not arrest Applicant until a year later because of information he had provided to a friend some time after the murder. (Tr. 103). He was remorseful for the crime and relieved as he provided the details. (Tr. 58).
  7. Applicant was actually served the bench warrant on October 4, 1992 during the course of an arrest for another unalleged traffic incident. (Tr. 96).
  8. He also received his high school equivalency degree. (GE #2).
9. The alcohol-related incident is isolated as there is no evidence of recent conduct of a similar nature. The last time Applicant engaged in similar conduct before May 1992 was in 1983 when Applicant was in prison.