

March 19, 1997

In Re:

SSN: -----

Applicant for Security Clearance

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ISCR OSD Case No. 96-0572

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

Appearances

FOR THE GOVERNMENT FOR THE APPLICANT

Melvin A. Howry, Esquire -----

Department Counsel Personal Representative

STATEMENT OF THE CASE

On August 13, 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 the attached 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 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 September 4, 1996. This case was assigned to the undersigned on February 7, 1997, and a Notice of Hearing was issued on December 18, 1996.

A hearing was held on February 28, 1997, at which the Government presented five documentary exhibits. The Applicant submitted one documentary exhibit and testified on his own behalf.

The official transcript was received on March 10, 1997.

FINDINGS OF FACT

The Applicant is 28 years old and unmarried, and he has a high school diploma. He is employed by a defense contractor as a Electronics Technician, and he seeks to obtain 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 attached Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and criterion in the SOR:

Paragraph 1 (Criterion J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he has engaged in criminal conduct.

In January 1994, the Applicant, who was in the military at the time, and living on base, met a young lady who became his girlfriend. By July or August 1994, the Applicant had started living off-base, part time with his girlfriend and her two children. The Applicant became the principal provider of the family. In August 1995, the Applicant left the military and in November 1995, the Applicant, his girlfriend, and her children, all moved from North Carolina to California.

On February 13, 1996, the Applicant became upset with the eleven year old son of his girlfriend. Apparently, the child was having problems with children picking on him at school. The Applicant was unhappy with the child because he was not standing up for himself against the bullies at school who were picking on him. Instead, the child told the Applicant that, "I am a lover, not a fighter". This outraged the Applicant. The Applicant took a leather belt, made the child get into push up position across his bed while he whipped him on his buttocks and thighs approximately 10 to 20 times with his pants down. After this beating, the Applicant told the boy to go to his room. A short while later, the Applicant called the boy back for a second whipping. Again, the Applicant struck the boy with the leather belt another 10 to 20 times. The Applicant testified that while he was whipping the child, he lost himself and did not realize the number of times he whipped the child.

The child's mother took the child to the hospital for medical assistance. The child's buttocks were severely bruised, and the skin was torn and broken. Medical authorities immediately contacted the police and reported the incident.

The Applicant was arrested on February 14, 1996, and charged with Corporal Injury To A Child, a misdemeanor. The Applicant was in jail from February 14, 1996, until his hearing date on February 22, 1996. The Applicant pled no contest and on March 21, 1996, was sentenced to serve sixty days in jail, three years probation, \$100.00 restitution and ordered to complete an Anger Management Program. (See, Government Exhibit 3).

Immediately after the incident, the Applicant began monthly counseling sessions to determine why he did what he did. Although he stated that he did not realize the severity of the beating at the time, he now realizes the it was excessive, unnecessary and wrong. He also realizes that the child did nothing to warrant the whipping. The Applicant testified that he has come to realize that it was other stresses in his life, including his stressful relationship with his girlfriend, and not the child's behavior that brought about the whipping. The Applicant was "beaten" as a child and until he started counseling believed it was a proper method of discipline. In counseling, the Applicant has learned other types of effective ways to discipline children without hitting them. The Applicant testified that he has apologized to the child and is willing to pay for counseling if his mother chooses to pursue it. The Applicant is no longer involved in a relationship with his girlfriend who has since moved out of the state. The Applicant's girlfriend is still very distressed about the incident and continues to call the Applicant from time to time to discuss it.

The Applicant regrets this incident ever occurred, and realizes that he must control his anger in the future. The Applicant is currently receiving counseling and intends to continue his counseling in the future.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the

1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the conditions are neither 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 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 are:

Criterion J (Criminal Conduct)

Conditions that could raise a security concern:

- (1) any 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 crime was an isolated incident;
- (5) there is clear evidence of successful rehabilitation.

In addition, as set forth in Enclosure 2 of the Directive at page 2-1, "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.

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 repeated instances of off-duty alcohol abuse which demonstrates poor judgment, untrustworthiness or unreliability on the Applicant's part.

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. All 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 DOHA cases the Government has the initial burden to go forward with *prima facie* evidence in support of the factual and conclusionary allegations in the SOR. If the Government meets this initial obligation, 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 *prima facie* case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the interests of national security to grant him or her a security clearance.

Criminal Conduct reflects questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an Applicant has demonstrated a lack of respect for the law in his private affairs, then there exists the possibility that he or she may demonstrate the same attitude towards security rules and regulations.

In this case, the Government has met its initial burden of proving by *prima facie* evidence that the Applicant has engaged in criminal conduct (Criterion J). Where an Applicant engages in criminal conduct, it can be presumed that he will not take a serious attitude toward the important matter of protecting classified information. The Applicant, on the other hand, has introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's *prima facie* case against him. Accordingly, he has met his ultimate burden of persuasion under Criterion J.

The record evidence establishes that the Applicant was arrested and convicted of Corporal Injury To A Child, a misdemeanor, on February 14, 1996, over a year ago. Except for this one arrest, the Applicant has been arrested at no other time in his past. Furthermore, there is clear evidence of successful rehabilitation. Since the incident, the Applicant has received counseling, and is currently continuing his counseling, dealing with anger control to determine the underlying causes for his criminal violation. It appears that the Applicant has gained the insight into the seriousness of this criminal conduct, and is prepared to act responsibly and is unlikely to repeat his irresponsible conduct. The Applicant now realizes that the child's punishment itself was unwarranted, and the method of punishment was improper, severe, wrong, and can never happen again. The Applicant expresses genuine remorse and empathy for the child. Although the Applicant will remain on probation for this criminal offense until 1999, I find that the Applicant's criminal conduct was isolated, in the past, and will not recur in the future. Accordingly, Criterion J (Criminal Conduct), is found for the Applicant.

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

Subpara. 1.a.: For the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the interest of national security to grant or continue a security clearance for the Applicant.

DARLENE LOKEY-ANDERSON

Administrative Judge