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Applicant for security clearance

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May 15, 1997

ISCR OSD Case No. 96-0611

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR THE GOVERNMENT FOR THE APPLICANT

Melvin A. Howry, Esq. *Pro se*

Department Counsel

STATEMENT OF THE CASE

On October 10, 1996, 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 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 a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on November 8, 1996, and requested to have his case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) to the Applicant on December 4, 1996. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. The Applicant received the Government's written case on January 13, 1997, and elected not to submit any additional information. The case was received by the undersigned for resolution on February 18, 1997.

FINDINGS OF FACT

The Applicant is 44 and divorced, having custody of at least four of his six children. (See, Government Exhibit 4 at question 12.) He is employed by a defense contractor, and he seeks to retain a 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 attached Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and criterion in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Criterion G - Excessive alcohol consumption). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he consumes intoxicants to excess.

The evidence shows that the Applicant had an alcohol problem, at least partially due to serious domestic problems, between 1989 and 1993.

The Applicant's first alcohol-related arrest took place in 1984. He was a passenger in a car with two co-workers. One of his co-workers, who was intoxicated, got in a fight with the driver and the car crashed. The Applicant was not seriously injured, but was arrested by police because he was inebriated. No charges were filed against the Applicant for this incident.

In February 1989, the Applicant was arrested for Driving Under the Influence of Alcohol. He admits this offense, stating that he had just completed a major contract at work and drank too much. He fulfilled his sentence, and stopped drinking altogether until 1991.

In July 1991, the Applicant was informed by his then wife (they were divorced in April 1994) that she had been having a long-term affair with the Applicant's co-worker/supervisor. As a result of this admission, the marriage began to deteriorate and the Applicant and his wife engaged in frequent quarrels. In October 1991, the Applicant, after drinking an unknown amount of alcohol, left the house with the intent of visiting his wife's paramour. She attempted to stop him and a physical altercation ensued. The police were contacted by the Applicant's wife and he was placed under arrest. The District Attorney refused to issue a complaint based on a lack of evidence (Government Exhibit 9 at page 6).

In March 1993, the Applicant was again arrested for Spousal Battery. This time a complaint was issued by the District Attorney charging the Applicant with this misdemeanor offense. The official records (Government Exhibits 10 and 11) are somewhat sketchy, but the Applicant admits to drinking alcohol that night and pushing his wife during an argument (Government Exhibit 5 at page 2). The Applicant plead nolo contendere to the offense, and was sentenced to attend a Domestic Violence Program. He failed to attend the program, because he felt that he was not the one at fault. He eventually returned to court, was ordered to spend some time in jail and attend an anger management class.

On October 22, 1993, the Applicant was served with divorce papers by his wife. Two days later, after drinking at his mother's house in another city, he was picked up for Driving Under the Influence on his way home. He was subsequently convicted and sentenced to three years probation (due to end in February 1997), jail time, a fine and attend a multiple offenders class for 18 months. On page 3 of his Answer (Government Exhibit 3) the Applicant states that, in November 1996, he was three meetings away from completing the course.

There is no evidence of any alcohol-related incidents since October 1993. As stated earlier, the Applicant and his wife were divorced in April 1994. In August 1995, the Applicant described his drinking as follows, "Routinely, I use alcohol once or twice per week, generally consuming four or five beers, at the most. In any event, consuming enough that driving a vehicle would be illegal. Generally, this involves drinking during the evening, that is, three or four hours, before bedtime. The last time I was drunk was probably last Saturday, the 12th of Aug, 1995. I would describe myself as a having a history of alcohol abuse." (Government Exhibit 5 at page 2.) Subsequently, in his November 9, 1996, Answer to the SOR, the Applicant described his drinking as follows, "My drinking has ceased to be a problem, I drink mainly to relax sometimes in the evenings after dinner. My social life is non existent, I keep to myself, my family, and my work acquaintances. I do not drink in excess or get drunk. I have my life much more in control." (Government Exhibit 3 at page 3.)

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 and Section F.3. 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 criterion. 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 are:

Criterion G (Alcohol consumption)

Condition that could raise a security concern:

(1) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol abuse;

Conditions that could mitigate security concerns:

(1) the alcohol related incidents do not indicate a pattern;

(2) the problem occurred a number of years ago and there is no indication of a recent problem;

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 factors (General Factors):

- a. The nature, extent and seriousness of the conduct
- 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 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 alcohol related incidents that demonstrate 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 *prima facie* 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 *prima facie* 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 *prima facie* evidence that the Applicant has abused alcohol and been involved in alcohol related incidents (Criterion G).

The Applicant, on the other hand, has successfully mitigated the Government's case. The Applicant has not been involved in any alcohol related incidents since October 1993, a period of three and a half years when the record closed. Under the particular facts of this case, I find that the problem occurred a number of years ago and there is no indication of a current problem. In addition, the evidence is clear that much of the Applicant's alcohol abuse occurred during the time, and as a result of, his marriage was falling apart. He is now divorced from his ex-wife, and that irritant is no longer present. Under the current circumstances I do not find that the prior alcohol related incidents show a current pattern.

In addition, application of the General Factors is appropriate and supports a decision in the Applicant's favor. The Applicant is motivated to continue his sobriety (factor g.), he shows considerable evidence of rehabilitation (factor f.), and, under the circumstances of this case, the likelihood that the Applicant will return to his drinking ways are virtually nil (factor I.).

On balance, it is concluded that the Applicant has successfully overcome the Government's *prima facie* 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 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.

Subparagraphs 1.a. through g.: 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

