

DATE: April 16, 1998

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In Re:

SSN:

Applicant for Security Clearance

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ISCR Case No. 96-0785

**DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin Howry, Esq., Department Counsel

**FOR APPLICANT**

James M. Moore, Esq.

Kathleen M. Stewart, Esq.

Karen Tassone, Esq.

**STATEMENT OF THE CASE**

On January 2, 1997, 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 April 8, 1997, and requested a hearing. Notices of Hearing were issued on November 20 and December 23, 1997, by the Administrative Judge originally assigned to this case. The case was transferred to the undersigned on January 26, 1998.

A hearing was held on January 27, 28 and 29, 1998, at which the Government presented 30 documentary exhibits, and called seven witnesses. Testimony was taken from the Applicant, who called three additional witnesses, and also submitted 19 exhibits. The last official transcript was received on February 27, 1998.

**FINDINGS OF FACT**

The Applicant is 55, single, and has an Associate of Arts degree. She is employed by a defense contractor as a security police officer, and she seeks to retain a Secret-level DoD security clearance previously granted in connection with her 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 E - Personal Conduct). It is alleged in this paragraph that the Applicant is ineligible for clearance because she has engaged in conduct involving questionable judgement, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations.

The Applicant began working for her defense contractor employer (Employer) in August 1993. Her Employer provides, under contract, security police services to military Base 1 and its sub-post, Base 2. The security police officers are designated as peace officers by the State where the two bases are located. That means the security police officers carry firearms and have the same power of arrest as any other police officer in the State while on the military installations. The Applicant was originally assigned to Base 2, and worked there from August 1993 until May 1994. From May 1994 until April 1995, she worked at Base 1. The Applicant returned to Base 2 in April 1995, and worked there until June 1995. At that point she returned to Base 1 and worked there from June 1995 until approximately January 1997. She has been on a paid leave of absence from her Employer since that time.

Subparagraph 1.a. It is alleged in this subparagraph that the Applicant has engaged in a pattern of repeated violations of company rules from the time she was hired. These violations are alleged to include noncompliance with the attendance and tardiness policies, unacceptable performance of her duty assignments, misuse of the base radio network, and faulty weapons handling procedures.

Turning first to the Applicant's absences and tardiness from work. The evidence concerning this particular allegation is found in Government Exhibits 25, 28, 31, 38 and 41, and Applicant's Exhibit K. These exhibits indicate that her employer was concerned about her absences and tardiness. They also show that the Applicant was informed of this concern. However, on only one occasion was the Applicant suspended for such conduct. This occurred when she missed a scheduled training meeting in December 1996. The Applicant is currently grieving this suspension through her union. (*See*, Applicant's Exhibit K.)

There has been conflict between the Applicant and the management of her Employer, including several of her superior officers. These officers include Lieutenant (Witness A), Lieutenant (Witness B) and Lieutenant (Witness C), all three of whom testified. Part of this conflict concerns her performance of duty assignments. The management concerns with her execution of duties are set forth in the testimony of those three witnesses, as well as Government Exhibits 5, 8, 14, 15, 16, 22, 23, 24, 26, 27, 29, 30, 35, 36 and 37, and Applicant's Exhibits H, I and L. The Applicant alleges that the majority of these disciplinary "write-ups" were punitive and/or vindictive in nature. Specifically, she believes that they were part and parcel of a hostile work environment which was allowed to exist by her Employer, and which is the subject of a current lawsuit between the Applicant and her Employer. (*See*, Applicant's Exhibit E.)<sup>(1)</sup> After a thorough review of the evidence, I find that the vast majority of the conduct alleged in the Government Exhibits referred to above did occur, that the Applicant was the actor, and that it was proper for the Applicant's superiors to enquire into the conduct. There are two exceptions. Government Exhibits 22 and 24 allege that the Applicant failed to perform her duties based on the conclusions of Witness A. His conclusions are not based on any direct evidence of the Applicant's conduct, and she absolutely denies his interpretation of the known facts. Given the state of the record, I am unable to conclude that she did act as alleged by Witness A on those two occasions.

The Applicant's superiors and supervisors were also concerned about her radio operation procedures. They felt that she would occasionally lose her temper and display an unprofessional attitude on the radio. (*See*, Government Exhibits 19 and 22, and testimony of Officer (Witness D), Transcript at 283-286.) The Applicant, in her testimony and in Applicant's Exhibit U, stated that she was the subject of unprofessional radio conduct by other members of the security police. This allegation of the Applicant's was supported by the testimony of (Witness E), formerly a lieutenant for the Employer and occasionally the Applicant's supervisor (Transcript at 480-483.) While there is evidence that the Applicant did not always use proper radio procedures, there is also evidence that proper radio procedure was not used by other members of the security police force on Bases 1 and 2 at all times. Based on the record before me, I cannot say that the Applicant's radio procedures were any worse than those Employer evidently allowed.

In addition to the allegation in Subparagraph 1.b., below, the Applicant has had one major weapons-handling violation. On June 4, 1994, the Applicant, at the end of her shift, began feeling ill and went to the restroom. Once there, she took her weapon out of its holster, wrapped it up, and placed it on the floor. This was to prevent damage to her weapon while

she was ill. She subsequently went to the security police building, a short distance away. When she went to check her weapon into the armory, she discovered it was not in its holster. The Applicant knew where the weapon was and immediately retrieved it. The weapon was out of her control for only a brief period of time. The Applicant admitted that this act occurred and accepted the counseling statement she received for it. (See, Government Exhibit 17, Transcript at 657.)

Subparagraph 1.b. This subparagraph concerns an allegation made by Witness B concerning the Applicant. He states that in the Fall of 1994 he entered the clearing barrel room of the armory asking for an unknown officer.<sup>(2)</sup> The Applicant was at the clearing barrel, having finished uploading her pistol. Witness B asserts that the Applicant turned from the clearing barrel and pointed her loaded pistol directly at the witness before holstering it. (See, Government Exhibit 29, Transcript at 318-321, 338-350.) The witness states that he filed a report on the incident and reported it to his superiors. No contemporaneous reports were presented to me. Government Exhibit 29 mentioned the weapon incident, but was written months later and primarily concerned another incident that Witness B had with the Applicant. Witness D testified that he was in the clearing barrel room at the time of the incident and, while he heard some discussion concerning the Applicant's weapon, he did not see the incident in question (Transcript at 281-283.)

The Applicant totally denied the allegation. She remembers only one incident which could have been misconstrued by Witness B. According to the Applicant, she was approaching the clearing barrel with her weapon, preparing to load, when Witness B entered the room unexpectedly and called out the Applicant's name. Startled, she began to move her unloaded weapon outside of the clearing barrel when the clearing barrel supervisor caught her attention, and she resumed loading her weapon properly. She states that she did not point her pistol, loaded or unloaded, at Witness B. (Transcript at 657-662.) Witness E was a lieutenant for Employer at the time, and was in the area when this incident took place. While she did not witness it, she confirmed that Witness B did complain about the incident to his superiors, who were upset because Witness B did not take the proper procedures at the time to allow any disciplinary action to be taken against the Applicant. (Transcript at 483-487.)

After analyzing the statements and testimony of the witnesses, I find that it is more likely than not that the Applicant pointed a weapon in the direction of Witness B while in the process of loading her weapon. I also find that it is more likely than not that the Applicant's actions were unintentional. In other words, I do not believe she intentionally pointed her weapon at Witness B. What I cannot determine, based on the state of the record, is whether the weapon was loaded at the time she pointed it at him.

Subparagraph 1.c. The Government alleges in this subparagraph that the Applicant sexually harassed a male co-worker (Witness F)<sup>(3)</sup> by deliberately touching his buttocks, after he had requested that she not do so. In addition, the Applicant was alleged to have gone up to this co-worker later and offered him money if he would drop his complaint. She is also alleged to have gone to Witness F later and offered to admit to the allegations if he would sue the Employer and split any litigation proceeds with her.

Witness F described what happened to him in a sworn statement taken the same day as the incident. "On 05 May 95, at 1341 hours, after guard mount, while exiting the guard mount room, (the Applicant) grabbed and squeezed my butt. When I turned around to look, I saw (the Applicant). SPO (Witness G) and (Witness H) witnessed (the Applicant) touching me and advised me of that. (The Applicant's) actions were not professional and I would like this not to happen again. I was not offended by (the Applicant's) actions." (Government Exhibit 2 at 22, Transcript at 72.)

Witnesses G and H also prepared statements on May 5, 1995, concerning what they saw. In essence, the officers confirmed Witness F's statement. (Government Exhibit 2 at 17-20.) Witness H testified concerning the incident, "(R)ight after guard mount we were exiting the guard mount room. (Witness F) and (the Applicant) were both exiting the door at the same time. At that time I noticed (the Applicant) with her right hand grab (Witness F) at that time, left buttocks, more like a pat type." (Transcript at 243.)<sup>(4)</sup>

Witness F made a subsequent statement on May 30, 1995, in which he stated, "(The Applicant) continues to ask me questions about what's going on with your statement and what is the Captain going to do. (The Applicant) asked me if there is anything she can do to make it up to me. (The Applicant) wanted to give me money to keep quiet. (The Applicant) said I will give you anything." (Government Exhibit 2 at 8, Transcript at 73-74.)

Witness F made a third statement on June 5, 1995. In that statement he says that on June 3, 1995:

(The Applicant) continued to pressure me about the contents of my statement and that she was sorry, though she finds me to be handsome, she did not mean anything by it and would do anything to get herself out of the incident, by paying me money, personal favors or anything. (The Applicant) also stated that we should work together to sue the company. (The Applicant) stated that she would admit to all the allegations against her, I would sue the company and we both could split the money. (Exhibit 2 at 24, Transcript at 74-75.)

There is evidence that Witness F acted in a friendly fashion towards the Applicant, informing her that the other members of the security police force were going to keep a sharp eye on her, and would not be tolerant of any mistakes. (Transcript at 100-102.) The Applicant admits that Witness F did this and that she had no problems with him, stating that their relationship was "strictly business." (Transcript at 644-645, 653.)

The Applicant, on the other hand, totally denies that the incident took place as alleged by the three witnesses. She describes it as an innocent attempt to regain her balance while exiting the guard mount room. She testified that she placed her hand on Witness F's wallet, and not directly on his buttock, in order not to fall down after tripping. In addition, the Applicant stated that, since she did not touch Witness F in a sexual manner, she had no reason to attempt to persuade him not to write a statement, or to conspire with him to sue her Employer. Finally, she also denied touching any of her other co-workers in a sexual manner at any time during her employment. (Transcript at 673-695.)

The Applicant alleges a conspiracy against her by other members of the security police force.<sup>(5)</sup> However, there is no evidence that, at the time of the incident on May 5, 1995, and through June 5, 1995, Witness F was a part of it. The Applicant admits their relationship was professional. Witness F testified concerning the above incidents, and he was subject to vigorous cross-examination. He is a co-defendant in the lawsuit filed by the Applicant. That fact, however, is insufficient in itself to show that he is lying concerning these incidents. I found him to be a credible witness and his statement of the facts is accepted. In addition, the statements and testimony of Witnesses G and H concerning the incident on May 5, 1995, are credible and believable.<sup>(6)</sup>

In conclusion, I find that the Applicant did touch Witness F on May 5, 1995, on the buttocks. I further find that this was an intentional act on the Applicant's part, and was not the result of her tripping. Finally, I find that she did attempt to dissuade Witness F from continuing with his statement of the facts, and did attempt to conspire with him to sue their Employer and split the proceeds.

Subparagraph 1.d. The Government alleges in this subparagraph that the Applicant is ineligible for clearance because she attempted to intimidate and/or threaten Witness B, the training officer, with a knife. This was subsequent to his overhearing the Applicant offer money to another security police officer to disrupt the class.

Witness B stated that, on October 22, 1995:

I overheard (the Applicant), state to SPO , (Witness J), "I'll give you \$5.00. If you get him excited today!" While she made this remark, she was pointing directly at me. (The Applicant) turned to face the front of the class, then turned back to (Witness J) once again. She then animatedly reiterated her previous statement by saying and pointing at me "\$5.00 to get him excited. This is a good time to get him because (Witness K) is back in class." As (the Applicant) turned to the front of the class, she observed me looking at her. (Prior to this, she was unaware I had heard her comments). She reached down under the table and brought out a knife. While continuing to stare at me, brought the knife up chest high, and whipped the knife open. (The Applicant) then turned away from me, toward (Witness J), and stated "Remember, \$5.00." (Exhibit 33, Transcript at 322-326.)<sup>(7)</sup>

Witness B went on to state that the Applicant's actions were attempts to intimidate him, and that he feels intimidated by her. The Applicant denies that she engaged in any such incident. She further alleged that Witness B has fabricated all the incidents concerning the Applicant as part of the conspiracy against her. (Transcript at 699-670.) I do not believe that to be so. Witness B testified and was subject to intensive cross-examination. I found him to be a credible and believable witness.

In conclusion, I find that it is more likely than not that the Applicant did indeed attempt to engage another officer to intimidate or upset Witness B. This action may very well have been a joke that got out of hand. I also find that the Applicant probably took a knife out and displayed it. Given that the Applicant was 20 feet away from Witness B when she took out the knife, however, it was not reasonable for him to feel intimidated by this action of the Applicant's. I am unable to find, therefore, that she attempted to intimidate Witness B with a knife on that occasion.

Mitigation. The Applicant has received Letters of Appreciation for her job performance while with Employer (Government Exhibit 6 and Applicant's Exhibit C). Applicant's Exhibit M shows that the Applicant successfully completed courses for her certification as a peace officer in 1969 and 1973. The Applicant has also received written recognition from her Employer (Government Exhibit 7 and Applicant's Exhibit N). The performance evaluations provided to me rate the Applicant as Average in October 1993 (Government Exhibit 5) and Above Average in October 1994 (Government Exhibit 8). The records also show that the Applicant has submitted a plan to be used in community policing efforts with children at Base 2 (Applicant's Exhibit P).

In addition to being a security police officer, the Applicant acts as the supervisory security guard at an apartment building. The manager of the building testified at the hearing. This person (Witness L) trusts the Applicant and finds her very dependable. Witness L states that there has been no problem with the Applicant's attendance and that she also handles her weapon responsibly.

## 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 E (Personal conduct)

#### Conditions that could raise a security concern:

- reliable, unfavorable information provided by associates, employers, coworkers, neighbors and other acquaintances;

(5) a pattern of dishonesty or rule violations<sup>(8)</sup>.

#### Conditions that could mitigate security concerns:

- the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;

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 conduct showing questionable judgement, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations 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. The Government has met its burden in this case.

In looking at the evidence, I have kept in mind the relationship between the Applicant on the one hand; and her Employer, supervisors and co-workers on the other. The credibility of both sides is in issue. The Applicant is affected because of her interest in retaining her security clearance, as well as the impact of this case on her lawsuit against Employer and many of her co-workers. As stated earlier, each of the Government's witnesses are defendants in Applicant's lawsuits. Accordingly, each has the motivation to lie to assist in his or her own defense.

Turning first to Subparagraph 1.a., that allegation is found for the Applicant. From all indications in the record, the Applicant is an average to above average security police officer. Her Employer was appropriately concerned with various aspects of how the Applicant performed her duties. The rules violations by the Applicant referred to Subparagraph 1.a. were generally minor in nature, and appear to have been handled by the Employer with appropriate management tools such as counseling and letters of reprimand. In particular, it is noted that the Employer chose to issue the Applicant only a written reprimand when she misplaced her weapon in June 1994. In my opinion, the Government failed to show that these work-related problems indicated a pattern of rule violations, or an inability to comply with rules or regulations, sufficient to justify denial of a security clearance.

As described under Findings of Fact, above at page 4, the Applicant did point a weapon in the direction of Witness B sometime in the Fall of 1994. While Witness B perceived the action to be a threat with a loaded weapon, I am unable to reach the same conclusions. Without any contemporaneous records, the most I can say is that the Applicant behaved in a negligent manner with her weapon on this occasion. What happened here was entirely different from the incident when she accidentally left her weapon in the rest room, and there is no indication of a pattern of serious rule violations involving weapons. In my opinion, her conduct on this occasion does not involve judgment questionable enough to justify her losing her clearance. Subparagraph 1.b. is found for the Applicant.

The evidence is mixed over what exactly the Applicant did to Witness F on May 5, 1995. After thoroughly reviewing all the evidence on pages 4 through 6, above, I found that the Applicant did deliberately touch Witness F on the buttocks, and that this was not an accident. I also found that she did attempt to get Witness F to drop the complaint or sue the Employer and split the proceeds. It is important to note that Witness F did not initiate the investigation of this incident, and did not initially want to give a statement. While the Applicant does have a personality conflict with Witness G, there is no evidence of a conflict with Witnesses F and H. All three witnesses testified and were subject to intensive cross-examination. I have taken seriously, and considered, the Applicant's allegations of a conspiracy against her among the male security police officers on Base 2. There is evidence of a strained relationship between the Applicant and her co-workers. However, the evidence does not show that any alleged conspiracy included Witness F on May 5, 1995, or after. Since the Applicant continues to deny this incident, it is impossible for me to say that she has mitigated the security concerns of it. Accordingly, Subparagraph 1.c. is found against the Applicant.

We now turn to Subparagraph 1.d. As described on pages 6 and 7, above, I believe that it is more likely than not that the Applicant did, possibly jokingly, offer money to another security police officer to disrupt a training session. I also believe she took out a knife and opened it up. I am unable to find that it was reasonable for Witness B to have been intimidated by her conduct, given the nature of her conduct and the distance she was away from him. Her conduct was immature and unprofessional. However, I am unable to find that it was of such a nature as to require that she lose her security clearance over it. Subparagraph 1.d. will be found for the Applicant.

The Applicant's conduct towards Witness F, and her inability to admit it or sufficiently explain it, goes directly to her trustworthiness, reliability and judgment. Even looked at in a way most favorable to the Applicant, there is considerable doubt as to the veracity of her story. Such doubt must be found against the Applicant, since she has the ultimate burden of persuasion in showing that it is clearly consistent with the national interests to grant her a security clearance. She has not met that burden and I must find against her on the ultimate question.

The General Factors also support my conclusion. The conduct was serious, and could reasonably be viewed as sexual harassment (Factor a.); I have found that the Applicant was a knowledgeable participant (Factor b.); the Applicant is a mature individual who should know better (Factor d.); she was a voluntary participant (Factor e); and there is, under the circumstances, an absence of rehabilitation (Factor f.).

## **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: Against the Applicant.

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: For the Applicant.

Subparagraph 1.c.: Against the Applicant.

Subparagraph 1.d.: For the Applicant.

**DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Wilford H. Ross

Administrative Judge

1. All of the Government's witnesses in this case are co-defendant's in the Applicant's lawsuit.
2. The clearing barrel is used by the officers to upload and unload their weapons. It is a barrel of water with a hole in the top where the officer inserts the barrel of the pistol, loads a clip of ammunition, releases the slide of the pistol, then holsters the weapon. Another officer acts as the clearing barrel supervisor, making sure that proper safety procedures are followed at the clearing barrel. (*See*, Transcript at 318-319.)
3. At the time of the incident, Witness F was a security police officer with Employer. He is no longer employed by Employer and does not work in the security police field.
4. *See, also*, testimony of Witness G, Transcript 214-215.
5. *See*, for example, testimony of Applicant at 628, testimony of the Applicant's union local president (Witness I) at 753-758, and Applicant's Exhibit B.
6. Witness G made a subsequent statement, and testified at the hearing, that the Applicant had also touched him in a sexual manner at least once. I do not believe this statement has much credibility, given the obvious animosity between the Applicant and Witness G. (*See*, Transcript at 696-697.) However, it is well within my prerogative as the trier of fact to believe one part of a witness' testimony without believing all of it.
7. Witnesses J and K, though mentioned in records, did not testify at the hearing.
8. To include violation of any written or recorded agreement made between the individual and the agency.