

Date : August 29, 1997

In RE:

SSN:

Applicant for security clearance

ISCR OSD Case No. 96-0903

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR THE GOVERNMENT

Melvin A. Howry, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

On February 18, 1997, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (as amended by Change 3) (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 March 3, 1997, and requested a hearing. The case was received by the undersigned on April 7, 1997, and a Notice of Hearing was issued on April 21, 1997.

A hearing was held on May 13, 1997, at which the Government presented four documentary exhibits, and called one witness. Testimony was taken from the Applicant, who also submitted four

exhibits. The transcript was received on May 23, 1997.

FINDINGS OF FACT

The Applicant is 39, divorced with two children, and has a high school diploma with two years of technical school training. He is employed by a defense contractor as a radar technician, and he seeks to retain a Secret-level 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 J - Criminal activity). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

Paragraph 2 (Criterion H - Drug involvement). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has been involved with the sale of illegal drugs.

In early 1994 the Applicant provided a place to live for his ex-wife. She was on probation at the time for a prior felony conviction concerning illegal drugs. The Applicant and his ex-wife had been divorced in 1984. She abandoned their two children, and the Applicant subsequently gained custody of them.

At some time after she began residing in the Applicant's house, the ex-wife began dealing illegal drugs. At the hearing, the Applicant testified that he believed his ex-wife was doing this, but she denied it to him and he did not know what else to do about it. He considered reporting her to her probation officer, but was afraid of the impact on his then 12 year old son. (See, Transcript at 34 through 36.)

On April 8, 1994, a friend of the ex-wife, who was also a police informant, came to the Applicant's house. According to the Applicant's testimony, the ex-wife and her friend went into the bedroom for approximately 15 minutes. The informant subsequently came out of the bedroom and handed the Applicant \$40, saying that the ex-wife had instructed the informant to do that. It appears that at some time either before or after that event the ex-wife gave the informant an amount of marijuana and the \$40 was payment. (See, Government Exhibit 1 at 7.) The Applicant's ex-wife was subsequently arrested for violating her probation and is currently incarcerated.

The Applicant was arrested on December 20, 1994, and charged with Sale of a Controlled Substance, a felony in the jurisdiction in which it occurred. Subsequently, on September 26, 1996, the Applicant pleaded no contest to a charge of Conspiracy to Possess a Controlled Substance, a gross misdemeanor in the jurisdiction in which it occurred. He was subsequently found guilty and sentenced to three years formal probation, 30 days in jail to be served on consecutive weekends, and pay various fees and fines. The Applicant is currently on formal probation and is fulfilling all the requirements of his probation. (See, Government Exhibit 1, Applicant's Exhibits A and C.)

The Applicant credibly testified that he was not in an active conspiracy with his ex-wife to sell drugs. However, the Applicant did admit that he suspected his wife was dealing drugs and also suspected that the money he was given by the informant was for drugs. (See, Transcript at 26, 36 through 39.)

In addition, the Government does not allege, and there is no evidence to show, that the Applicant has been involved in any other drug related offenses, or that he used drugs at the time of the incident or subsequently. Finally, there is no evidence to show that the Applicant has engaged in any other illegal acts since April 1994.

Mitigation. The Applicant presented his last three evaluations from work. They show that he has been an excellent employee. In addition, the Applicant presented five letters of reference from various supervisors and co-workers at his place of employment. All of them recommended the Applicant quite highly, stating that he is a "valuable asset," who is "trustworthy and honorable." (Applicant's Post Hearing Exhibit.)

The Applicant currently has custody of his 15 year old son. He is deeply involved with his son's activities, which take up most of his leisure time.

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 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 criminal behavior was not recent;
- (2) the crime was an isolated incident;
- (3) the person was pressured or coerced into committing the act and those pressures are no longer present in that person's life;
- (5) there is clear evidence of successful rehabilitation.

Criterion H (Drug involvement)

Conditions that could raise a security concern:

- (2) illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution.

Conditions that could mitigate security concerns:

- (1) the drug involvement was not recent;
- (2) the drug involvement was an isolated or infrequent event;
- (3) a demonstrated intent not to abuse any drugs in the future.

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 drug activity that demonstrates 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 was involved in drug related criminal activity (Criteria H and J). The Applicant, however, has mitigated the Government case and shows that he is eligible for a continued security clearance.

The Applicant was peripherally involved in a single drug transaction involving his ex-wife. While the Applicant did not have any criminal intent, he admits that he suspected the money he received was for illegal drugs. The Applicant's conduct on this one occasion showed extremely poor judgment. However, the record also shows that, since April of 1994, the Applicant has not been involved in any other criminal or drug activity of any kind.

The single incident the Applicant was involved in occurred over three years before the hearing. It was isolated, not recent, there is clear evidence of successful rehabilitation and a demonstrated intent not to be involved with illegal drugs in the future. There is also some evidence that the Applicant felt pressure from his son to not ask too many questions about his ex-wife's conduct. The Applicant no longer feels any pressure from this source. The circumstances under which this conduct occurred were unique and should not recur.

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 and 2 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.

Subparagraph 1.a.: For the Applicant.

Paragraph 2: For the Applicant.

Subparagraph 2.a.: 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