

February 11, 1998

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In Re:

SSN:

Applicant for Security Clearance

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ISCR OSD Case No. 97-0184

## **DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Melvin A. Howry, Esq., Department Counsel

#### **FOR APPLICANT**

Larry H. Layton, Esquire

### **STATEMENT OF THE CASE**

On April 7, 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 (as amended), 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 23, 1997, and requested a hearing. The case was received by the undersigned on July 16, 1997, and a Notice of Hearing was issued on July 22, 1997.

A hearing was held on August 26, 1997, at which the Government presented eight documentary exhibits, and called two witnesses. Testimony was taken from the Applicant, who called two additional witnesses and submitted seven exhibits. The transcript was received on September 4, 1997.

### **FINDINGS OF FACT**

The Applicant is 44, married and has a grade school education. He is employed by a defense contractor as a truck driver, and he seeks to retain a Top 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 D - Sexual behavior). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in sexual behavior which is criminal, subjects the Applicant to undue influence or coercion, and reflects a lack of judgement or discretion.

In March 1986, the Applicant was arrested for Disorderly Conduct (Soliciting a Lewd Act). The Applicant subsequently plead *nolo contendere* to the charge. His sentence included a fine, five days in jail and 12 months probation. (See, Government Exhibits 5 and 6.) Except in an interview with a Defense Investigative Service (DIS)<sup>(1)</sup> Special Agent on December 12, 1996 (Government Exhibit 1), the Applicant has consistently denied the allegation. (See, Government Exhibit 4, Applicant's Exhibit "B" and the Transcript at 102-111.) There is no evidence other than Government Exhibit 1 as to what the alleged conduct consisted of. The Applicant states that he plead *nolo contendere* on the advice of his counsel, without understanding the full impact of the plea. (See, Transcript at 109.)

This incident began when the Applicant helped a stranger repair his car. The other person requested that the Applicant follow him home, and offered the Applicant \$10 for his trouble. On the way, the other person stopped at a public park and entered the restroom. After several minutes, the Applicant went into the restroom to find the other person. At that point, police officers identified themselves and the other person fled. The Applicant was arrested at that time for soliciting a lewd act. Admittedly, the Applicant's story on its face seems far-fetched. However, after thoroughly examining all the evidence, including the very credible testimony of the Applicant and the DIS Special Agent who took Government Exhibit 1, I am convinced that the Applicant was not involved in a criminal sexual act in 1986. Instead, I find, as the Applicant states, that he became accidentally involved in this incident while attempting to be a "Good Samaritan."

In January 1996, the Applicant was arrested and charged with Lewd Conduct. Specifically, that the Applicant had masturbated in front of a police officer while urinating in a public restroom. The Applicant denied the charge, plead not guilty, and was acquitted at the end of a jury trial. (See, Government Exhibit 9, Applicant's Exhibits "A" and "G," and the Transcript at 111-118.) As will be discussed below, the Applicant's admission in Government Exhibit 1 that he committed this alleged conduct is insufficient evidence to prove that the Applicant actually engaged in this act, especially given his acquittal in the criminal case. After a thorough review of the evidence, I am convinced that the Applicant was not involved in a criminal sexual act in 1996.

Paragraph 2 (Criterion E - Personal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

The Applicant has never denied the fact of his *nolo contendere* plea on the 1986 charge. He has admitted this conviction on at least four Government questionnaires (Government Exhibit 3, Applicant's Exhibits "B," "D," "E" and "F.") On November 11, 1986, the Applicant gave a statement to a security investigator for his employer (Applicant's Exhibit "B" at 2-6.) In this statement he gave an explanation of the March 18, 1986, arrest. Subsequently, on November 6, 1987, the Applicant gave a sworn statement to a DIS Special Agent in which he proclaims that he was innocent of the charge against him, and reiterates his explanation of what actually happened. This occurred again in December 1996 when he was interviewed by a DIS Special Agent who is also a polygraph examiner.

The evidence shows that the Applicant is not a sophisticated man, capable of creating the explanations he has consistently given concerning these two incidents. In fact, I found him to be a very credible witness as to these events. His testimony was believable, and is consistent with his prior statements. His credibility was not shaken by vigorous cross-examination by the Department Counsel. I am convinced the evidence shows that on two occasions the Applicant got caught up in situations beyond his control.

In Government Exhibit 1, the sworn statement of December 10, 1996, the Applicant admitted that he had engaged in the criminal sexual conduct alleged in the SOR. In addition, he admits that he is a bisexual, that he has engaged in homosexual acts for some time, and that his wife knows of his bisexuality. I have examined this statement, and the circumstances surrounding its preparation, closely. Based on the totality of the evidence, I do not find the statement to be a credible statement of the facts in this case.

The DIS Special Agent believed that the Applicant was not being truthful, told the Applicant as much, and forcefully interrogated him. For the Applicant, having his veracity questioned on December 10, 1996, was the last straw. He was tired, depressed, and felt intimidated and under duress. At the hearing the Applicant stated his frame of mind this way:

The best way I could put it to you is that my state of mind was I had had enough. I was kind of like I had been punched in the mouth so many times that it was time to stay down, and everything he came up with was, "Would you say that?" "Yes, I would." "Would you say this?" "Yes, I would." "Would you say that?" "Yes, I would."

I heard myself saying out loud, "This is all true, okay it is all true." I would never have said that. My state of mind was, "Enough." I am sorry, I just - - I realized after I left there what kind of a horrible mistake I had made, and it made my life even more miserable. (Transcript at 149-150.)

The Applicant was subsequently asked by the Administrative Judge, "Okay, now, what was upsetting you so much that you were still being questioned about these (offenses), that they had been happening?" (Transcript at 150.) The Applicant replied:

All right, let me see if I can make you understand. If I had have been guilty with that sort of thing, I know that I could have gone to Security and said, "Look, I am a bisexual man and I got myself in trouble," and I know that they couldn't have held it against me, depending on the situation, okay?

So, I mean, so here is this charge that really matters to me, inside me, and I have been carrying it around for a long time, and the 1996 incident, that brought it out and it just opened another can of worms and it was like re-living it all over again. I have got to tell you, I went through hell for that. I did.

It is hard for me to understand how this could happen in the first place, and then to have it just ground into - - you know, it is like salt in a sore. It was just - - it was more than I could take. (Transcript at 150-151.)<sup>(2)</sup>

I find that, under the particular circumstances of this case, the Applicant could reasonably perceive himself to be under duress. There is no evidence that the DIS Special Agent actually attempted to intimidate the Applicant. However, in his own testimony the DIS Special Agent confirmed that important parts of the interview were conducted in the question and answer format which the Applicant described. (See, for example, Transcript at 52.)<sup>(3)</sup>

Paragraph 3 (Criterion J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

As found above, the Applicant did not intentionally falsify his sworn statement of November 1987. In addition, he did not make false statements to a DIS Special Agent during the December 1996 interview. Accordingly, Paragraph 3 of the SOR and its single subparagraph will be found for the Applicant.

Mitigation. The Applicant's wife and his best friend also testified. They each stated that the Applicant is an honest man who they believe. His wife testified that the Applicant called her immediately after each arrest. In addition, both witnesses also confirmed circumstantial parts of the Applicant's testimony concerning his ability to repair cars and that he only has one kidney.

Applicant's Exhibit "C" consists of several character reference letters. The correspondents include co-workers, family friends, two ministers and the Applicant's employer's Security Administrator. They each state that the Applicant is an honest, dependable and and hard-working man.

## 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 D (Sexual behavior)

Conditions that could raise a security concern:

(None of the stated conditions have application in this case.)

Conditions that could mitigate security concerns:

(None of the stated conditions have application in this case.)

Criterion E (Personal conduct)

Conditions that could raise a security concern:

(None of the stated conditions have application in this case.)

Conditions that could mitigate security concerns:

(None of the stated conditions have application in this case.)

Criterion J (Criminal conduct)

Conditions that could raise a security concern:

(None of the stated conditions have application in this case.)

Conditions that could mitigate security concerns:

(None of the stated conditions have application in this case.)

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 sexual criminal conduct and acts of falsification 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 has been involved in criminal sexual misconduct (Criterion D); and that he intentionally made false material statements to DoD, in violation of a felony criminal statute (Criteria E and J).

The Applicant, on the other hand, has successfully mitigated the Government's case. There are two pillars to the Government's case; the Applicant's *nolo contendere* plea in 1986 and his 1996 sworn statement (Government Exhibit 1). Turning first to the *nolo contendere* plea, the Applicant has the burden of showing why I should not view the plea as the functional equivalent of an admission of guilt. The Applicant has met that burden. The evidence shows that his plea was based on the advice of counsel, even though the Applicant was not guilty of the charge. In addition, the Applicant has consistently maintained his innocence on every occasion since then. The decision by the Applicant to contest the second arrest also provides support to his contention that he did not understand the true import of his *nolo contendere* plea.

As discussed above, Government Exhibit 1 was primarily the product of the Applicant's depression over continuing to be questioned about something he did not do. The Applicant reasonably, if falsely, deemed himself to be under duress. The end result was a statement which had no relationship to the facts as they truly existed.

In conclusion, as discussed under Findings of Fact, above, I find that the Applicant did not engage in any sexual criminal activity in 1986 or 1996. In addition, I further find that he did not falsify material facts concerning these two arrests in a sworn statement or during an interview. Finally, I find that the Applicant did not violate any Federal law concerning the making of a false statement.

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, 2 and 3 of the Government's Statement of Reasons.<sup>(4)</sup>

## **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. and 1.b.: For the Applicant.

Paragraph 2: For the Applicant.

Subparagraphs 2.a. and 2.b.: For the Applicant.

Paragraph 3: For the Applicant.

Subparagraph 3.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

1. The Defense Investigative Service was renamed the Defense Security Service in late 1997.
2. *See also*, Transcript at 124-126.
3. *See also*, Transcript at 49, where the DIS Special Agent admits that, at the beginning of the interview with the Applicant, he already believed that the Applicant had actually committed the acts that were alleged in the records. The impact of this belief on his interview with the Applicant is unknown.
4. One other point needs to be discussed. Assuming the allegations to be true, the decision to continue to investigate this Applicant, who is alleged to have committed two misdemeanors ten years apart, could be seen as improperly using sexual orientation or preference as a basis for or a disqualifying factor in determining his eligibility for a security clearance. (*See*, Enclosure 2, page 2-10, of the Directive.)