

December 31, 1997

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In Re:

SSN:

Applicant for Security Clearance

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ISCR Case No. 97-0225

**DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**STATEMENT OF THE CASE**

On March 20, 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 31, 1997, 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 July 9, 1997. 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 July 22, 1997, and submitted no additional information. The case was received by the undersigned for resolution on August 25, 1997.

**FINDINGS OF FACT**

The Applicant is 45, married, and has a high school diploma and two and a half years of college. He is employed by a defense contractor as a Reproduction Operator, 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 and the exhibits.

**Paragraph 1 (Criterion J - Criminal conduct).**

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

At the time of the alleged offense in December 1994, the Applicant and his wife ran a high school booster club (Booster Club). The Applicant's stepson was employed by the same high school (High School) in its bookstore and had the responsibility for depositing scholarship checks in special accounts. The Government alleges that the stepson stole a check for \$25,000.00 and deposited it into the Booster Club account, which was controlled by his mother and step-father (the Applicant). The evidence indicates that, after the stepson was arrested and held on \$19,000.00 bail, the Applicant used the proceeds of the stolen check to provide bail for his stepson. (Government Exhibit 6 at 9-10.)

In August 1995, the Applicant plead nolo contendere to a single count of Grand Theft of Property Over \$400.00, a felony in the jurisdiction in which it occurred. He was subsequently sentenced to one year in jail or 350 hours community service, required to seek psychological counseling, pay restitution of \$25,000.00, and awarded formal probation for five years. (Government Exhibit 6 at 1.)

In his sworn statement the Applicant denied he had used the proceeds of the stolen check for bail. Instead he stated that he had obtained the money from a friend he would not identify. He stated, "I did not take any monies belonging to (High School), I have no knowledge of how the check for \$25,000.00 got into the Booster Club Account, it is not unusual for the Booster Club Account to have large amounts of monies." (Government Exhibit 5 at 1.)

The County Probation Officer's Report on this offense states, in part:

Available information indicates that Defendant (Applicant) and his wife used the (High School) Booster's Club bank checking account for their own personal use and gain for some period of time. Personal checks were written to the Defendant (Applicant) through the Booster Club account amounting to over \$2800. Additionally, \$25,000 in stolen (High School) funds were funneled through the Booster's Club account and used to arrange bail for the (Applicant's) son.

Although the Defendant (Applicant) has admitted his guilt to the Court, at the time of the probation interview he denied any wrongdoing in this matter. He went so far as to indicate that there is proof available to support his claim of innocence. It is disturbing that the Defendant (Applicant) continues to attempt to manipulate this situation, and denying his culpability in this matter, rather than accept his responsibility for what has occurred. Even more shameful is the fact that the Defendant (Applicant) has victimized innocent individuals who relied upon the funds he stole in order to continue their education. (Government Exhibit 6 at 17-18.)

## **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;

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 criminal conduct 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 felony criminal misconduct. The Applicant, on the other hand, has not introduced sufficient evidence to overcome the Government's case against him.

There is more than sufficient evidence in the record to show that the Applicant was involved in this criminal conduct, either directly or by acquiescence. His stepson stole the check and the funds wound up in the Booster Club bank account, which is controlled by the Applicant and his wife. He pleaded nolo contendere to a felony and, in my opinion, has not introduced any evidence to show that I should not accept the plea as an admission of guilt. His argument that he received \$19,000.00 from a "friend" who he does not want to name is an excuse that lacks credibility. Without the name of this friend, the Defense Investigative Service cannot complete their investigative duties, and I am foreclosed from essential evidence. This crime occurred three years ago, and there is no evidence of a pattern. However, as shown by the probation department report and in the pleadings in this case, the Applicant continues to fail to accept responsibility or culpability for this offense. Accordingly, I cannot make the affirmative finding for the Applicant required by the Directive before he can be considered eligible for a security clearance.

On balance, it is concluded that the Applicant has failed to overcome the Government's information opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the 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: Against the Applicant.

Subparagraph 1.a.: Against 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