

Date: December 31, 1997

In Re:

Applicant for Security Clearance

ISCR Case No. 97-0313

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On April 21, 1997, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense (DoD) Directive 5220.6 (Directive), dated January 2, 1992, as amended by Change 3, issued a Statement of Reasons (SOR) to the Applicant that 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 conduct proceedings and determine whether a clearance should be granted, denied or revoked.

A copy of the SOR is attached to this decision and is included herein by reference.

On May 9, 1997, Applicant responded to the allegations set forth in the SOR. Applicant elected to have the case determined by an Administrative Judge on the written record, i.e., without a hearing. A File of Relevant Material (FORM) was issued by Department Counsel on July 2, 1997. Applicant was notified that he could respond to the FORM within 30 days of his receipt of the FORM. Applicant submitted a response to the FORM on July 21, 1997. Despite its submission on that date, the response itself is dated May 9, 1997, which is the same date as his response to the SOR. I note some similarities between the two submissions but treat them as separate and successive responses to the SOR and FORM, respectively. This case was assigned to me for resolution on August 14, 1997.

FINDINGS OF FACT

* Applicant is a 45-year-old Senior Information Management Automation Technician. He has been employed by a major defense contractor since about November 1995. Applicant's employer is seeking a security clearance for Applicant (level not mentioned in the case file).

* The Government opposes the Applicant's request for a continued security clearance, based on the allegations set forth in the attached SOR, under Criterion J (Criminal Conduct). After a thorough review of all of the evidence in this case, including Applicant's responses to the SOR and to the File of Relevant Material, and upon due consideration of all of the record evidence, including Applicant's admissions and explanations, and all of the documentary evidence, this Administrative Judge makes the following findings of fact as to the Criterion J allegations in the SOR:

* In his response to the SOR, Applicant admitted allegation 1.a. and part of 1.c., without explanation. These admissions are accepted and incorporated into the findings of fact. In responding to the SOR, Applicant denied the remaining allegations: 1.b., part of 1.c., 1.d., and 1.e., with explanations. In his response to the FORM, Applicant specifically responded only to allegations 1.b., 1.d., and 1.e. In each case, he again denied the allegations and added more explanation.

* Allegation 1.a. - Applicant was charged on or about January 31, 1981, in State A, with telephone harassment of a girl friend. He pleaded nolo contendere and was fined approximately \$58 in costs and sentenced to four days in jail. Applicant admits this allegation in his response to the SOR (Gov Ex 3) and in his sworn statement to the Defense Investigative Service (DIS) (Gov Ex 5).

* Allegation 1.b. - Applicant was charged on December 11, 1992, in state B, with Threatening or Intimidating. He was found guilty and ordered to seek counseling. He was awarded six months probation (Gov Ex 6). Applicant had ordered a female newspaper delivery representative off his property and brandished a firearm at her and her ten-year-old son as they drove away in their car (Gov Ex 6).

* Allegation 1.c. - Applicant was charged on December 30, 1992, in state B, with Violation of an Order of Protection (six counts), in that Applicant had come within 25 feet of the protected female on a number of occasions in November and December 1992 and sent her a Christmas card on or about December 22, 1992. Applicant pleaded guilty to Count 6, and was fined approximately \$1,500, required to participate in a counseling program and complete 28 hours of community service, and was given six months probation. Counts 1-5 were dismissed (Gov Ex 7).

* Allegation 1.d. - Applicant was charged on October 10, 1995, in state B, with Violation of a Court Order of Protection and Interfering with a Judicial Proceeding. The charge was subsequently dismissed. Applicant violated a Court Order of protection by sending the protected female "three (3) faxed messages and one handwritten note to her residence" (Gov Ex 8).

* Allegation 1.e. - Applicant was charged on February 23, 1996, in state B, with (1) Disorderly Conduct, and (2) Telephone Harassment. Applicant pleaded guilty to both charges, was fined a total of approximately \$480, and was required to write a letter of apology to the victims. Applicant became enraged when a female store operator declined to allow Applicant to use the store restroom. Applicant thereupon urinated in a car in the store parking lot and later called the store (three times) and a store employee's home (one time) on the telephone and uttered curses and profanities. Applicant told the police he had been drinking that day and first denied, then admitted calling the store to complain, but continued to deny using profanity. Applicant also admitted telling the female store employee that he had urinated in a car in the parking lot, but later claimed that he had been joking (Gov Ex 9).

POLICIES

The adjudication process established by DoD Directive 5220.6 is based on the "whole person" concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive, as amended by Change 3, sets forth specific adjudicative guidelines that must be carefully considered according to the pertinent criterion in making the overall common sense determination required. In addition, each adjudicative decision must also include an assessment of the seriousness, recency, frequency and motivation for an Applicant's conduct; the circumstances or consequences involved; the age of the Applicant; the presence or absence of rehabilitation; the potential for coercion or duress; and the probability that the conduct will or will not recur in the future. *See* Directive 5220.6, Section F.3. and Enclosure 2.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

CRITERION J (CRIMINAL CONDUCT)

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

- (1) any criminal conduct, regardless of whether the person was formally charged;
- (2) a single serious offense or multiple lesser offenses.

Conditions that could mitigate security concerns:

None

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest." In reaching the fair and impartial overall common sense determination required by the Directive, the Administrative Judge can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for a security clearance may be involved in criminal conduct that demonstrates poor judgment, untrustworthiness, or unreliability on the part of an Applicant. These concerns include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the Applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by an Applicant's admissions or by other evidence) and establishes conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person who seeks access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. When the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly

consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the Applicant.

CONCLUSIONS

Applicant pleaded guilty or was found guilty of all the violations cited in the SOR, except for allegation 1.d., in which case the charge was dropped. Even in that case, however, there is substantial evidence of the existence of the criminal conduct (Gov Ex. 3, Gov Ex 5, and Gov Ex 8.). Having considered the evidence of record in light of the appropriate legal standards and factors, and having assessed the credibility of Applicant's written testimony, this Administrative Judge concludes that the Government has established its case as to all SOR allegation (under Criterion J).

The trial court, in the December 1992 proceeding cited in allegation 1.d., reached the conclusion that Applicant "has a serious problem that is exhibited by a desire or need to intimidate and cause great fear to persons that may appear weak or vulnerable. Defendant appears to try to gain obedience from others, through the means described above" (Gov Ex 6). It is noteworthy that as to each SOR allegation in which the victim is identified, both before and after the December 1992 court order, that victim is a female, and threats and acts of intimidation by Applicant were a common feature. In addition, Applicant's explanations for his conduct range from strange (being barred from attending church services because of differences with another attendee) to bizarre (urinating in a car in a store parking lot). In considering Applicant's explanations, I conclude, individually and collectively, that his explanations lack credibility. In fact, I conclude that the evaluation of Applicant by the Judge in the December 1992 case was correct at the time and remains so today.

The evidence adverse to Applicant consists of Applicant's own statements and the contents of a variety of official records from separate proceedings over a period of years. On the other hand, Applicant's evidence offered in mitigation consists primarily of his own explanations as to how he became involved in so many situations resulting in criminal charges. Except for the information in allegation 1.a., which Applicant admits even though he doesn't recall the details, the remainder of his evidence consists of denying responsibility or seeking to shift responsibility to others, portraying other people as liars, or claiming that the violations never occurred the way the violations are discussed in the official records or are alleged in the SOR. His evidence is not convincing or persuasive.

In summary, Applicant has provided no credible evidence to contradict the overwhelming pattern of criminal conduct that began when he was about 29 and has continued for some 16 years, with the last incident occurring less than two years ago, when he was in his mid-40s. This history indicates that Applicant's problems are not those of an immature youth but, rather, began and continued through a period when the maturity that generally comes with the passing years should have produced wisdom and better judgment.

I find a continuing pattern of denial and failure by Applicant to accept responsibility for his own conduct. Finally, I conclude that he continues to lack the requisite good judgment, reliability, and trustworthiness required of someone seeking access to classified information.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

CRITERION J AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. 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 Applicant.

BARRY M. SAX

ADMINISTRATIVE JUDGE

