

DATE: September 17, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0328

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY-ANDERSON

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On April 30, 1998, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued the attached Statement of Reasons (SOR) to the 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 clearance should be denied or revoked.

The Applicant responded to the SOR in writing on May 15, 1998, in which he elected to have the 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 16, 1998. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM on August 28, 1998, and he submitted no response.

The case was assigned to the undersigned for resolution on September 1, 1998.

FINDINGS OF FACT

The Applicant is 23 years old, unmarried and is employed by a defense contractor as a Laborer. He is applying for a Secret-level security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, on the basis of 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:

Paragraph 1 (Criterion J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he has engaged in a history of criminal conduct, including auto burglary, public intoxication, assault with a dangerous weapon, and domestic violence.

The Applicant has admitted to a history of criminal conduct beginning as a juvenile, back in 1990, and continuing until as recently as February 1998.

The Applicant was first arrested on October 4, 1990, and charged with auto burglary, a felony in violation of the law in the state in which it occurred. The Applicant was referred to Juvenile Court and placed on probation.

The Applicant was arrested a second time on September 5, 1992. He was charged with Challenging to Fight, and Drunk in Public. He was again referred to Juvenile Court.

The Applicant was arrested a third time on October 29, 1994, and charged with Aggravated Assault with a Dangerous Weapon, and Disorderly Conduct. The Applicant explains that he and his cousin were driving around when an individual, with whom his cousin had an ongoing dispute, forced them to pull over. The individual got out of his car, came over to the driver's side of the car, and started hitting the Applicant's cousin with his fist. The Applicant got out of the car, ran to his house and picked up his .22 caliber automatic pistol. The Applicant and his cousin then got back in the car, picked up three other persons, and drove around until they spotted the individual who had beaten his cousin. As the individual was running toward their car, the Applicant fired the gun in the air through the window on his cousin's side of the vehicle. The Applicant claims that he did not intend to shoot or kill the individual, as his .22 pistol was loaded with bird shot. The Applicant was found guilty of both charges. He was sentenced to the state prison for eight years of hard labor, with six years suspended, placed on probation for six years following incarceration, and fined \$1,250.00 including costs for Aggravated Assault with a Dangerous Weapon. He was sentenced to ten days in jail and fined \$100.00 for Disorderly Conduct. The Applicant served 30 days in state prison, and in February 1995, elected to spend the rest of his rehabilitation in a boot camp program at a correctional training center. The Applicant completed the boot camp program in May 1995, and was transferred to a half way house where he worked until August 1995, when he was paroled. The Applicant will remain on supervised parole until 2002. (See, Government Exhibit 4).

The Applicant was arrested on two occasions in December 1996. On December 5, 1996, he was arrested and charged with Criminal Mischief. The police were summoned to the Applicant's residence on a domestic call because the Applicant had trashed his and his girlfriend's apartment. The Applicant was detained overnight, and the charges were dismissed. On December 15, 1996, the Applicant was arrested again for Criminal Mischief because he had kicked in his apartment door. The charges were subsequently dismissed. (See, Government Exhibit 7).

On February 9, 1998, the Applicant was arrested and charged with Battery That Constitutes Domestic Violence, a misdemeanor. The incident started during a discussion about the Applicant moving out, and giving up his parental rights to his son. The Applicant became disturbed, threw a bowl of food at his girlfriend, and then put his hands around her neck and stated, "I want to rip your neck off". A fight ensued. The Applicant was found guilty, and was sentenced to ten days in jail, with credit for time already served. Since this arrest, the Applicant has continued to live with his girlfriend to give himself enough time to find a place of his own. He and his girlfriend are considering relationship counseling to try to reconcile their relationship. (See, Government Exhibit 6).

Paragraph 2 (Criterion E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in conduct involving questionable judgment, untrustworthiness, unreliability, or an unwillingness to comply with rules and regulations.

On January 4, 1998, the Applicant completed a Questionnaire for National Security Positions which required him to indicate whether in the last seven years, he has ever been arrested for, charged with, or convicted of, any offenses not listed in response to a, b, c, d or e, above. The Applicant responded "no." (See, Government Exhibit 5, Question 23.f.) The Applicant stated that he had no intention of concealing his past arrest history. (See, Applicant's Answer to SOR). I note that the Applicant admitted his more serious aggravated assault, and firearm conviction on the application. (See, Applicant's Answer to Question 23.a, and b. on the Questionnaire for National Security Position). I find that the Applicant was not careful in filling out the application, but that he did not deliberately omit, or intentionally conceal his arrest history.

The Applicant provided a signed sworn statement dated March 17, 1998, to the Defense Investigative Service wherein he failed to mention his arrests of December 5, 1996, and December 15, 1996, although he mentions four other arrests.

(See, Government Exhibit 8). The Applicant explained that because the charges were dropped, he didn't think the information was relevant. (See, Applicant's Answer to SOR).

Mitigation.

The Applicant states that his experience in state prison and boot camp have benefitted him tremendously, and that he has changed his life because of it. He realizes the responsibility of raising a two year old son, and that his criminal behavior of the past must cease.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; 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 conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on own common sense. 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:

None.

Criterion E (Personal Conduct)

Conditions that could raise a security concern:

- (2) deliberate omission, concealment, falsification or misrepresentation of relevant and material facts from any personnel security questionnaire;
- (3) deliberately providing false or misleading information concerning relevant and material matters to an investigator in connection with a personnel security or trustworthiness determination.

Conditions that could mitigate security concerns:

None.

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 general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- 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, posed in Section 2 of Executive Order 10865, 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, which demonstrates poor judgment, untrustworthiness or unreliability.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have 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

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 per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in criminal and dishonest conduct, which demonstrates poor judgment or unreliability.

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 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 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 evidence that the Applicant has engaged in criminal conduct (Criterion J). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant.

With respect to the Applicant's deliberate omission of material information concerning his complete arrest history on his security clearance questionnaire, and in his sworn statement to the Defense Investigative Service, I find that it was not intentional. Accordingly, Criterion E (Personal Conduct), is found for the Applicant.

Where an Applicant engages in criminal conduct, it can be presumed that he or she will not take a serious attitude toward the important matter of protecting classified information. This Applicant has failed to introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him.

The record evidence establishes that the Applicant has engaged in a pattern and history of criminal conduct starting about eight years ago, and continuing until as recently as February of this year. His criminal offenses are serious, recent, and show immaturity and extreme poor judgment. As a result of his 1994 felony conviction, the Applicant remains on parole until 2002.

The Applicant has also failed to respond to the File of Relevant Material, which leaves the record silent on the issue of rehabilitation. Although the Applicant shows some sensitivity to his past wrong behavior, it is not clear that the Applicant has gained the necessary insight into the seriousness of his criminal conduct, or whether he is prepared to act responsibly in the future. I cannot say that he is unlikely to repeat his irresponsible conduct. I find that the Applicant's criminal conduct was not isolated, was recent, and could possibly recur in the future. Accordingly, Criterion Criterion J (Criminal Conduct), is found against the Applicant.

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

Subpara. 1.a.: Against the Applicant.

Subpara. 1.b.: Against the Applicant.

Subpara. 1.c.: Against the Applicant.

Subpara. 1.d.: Against the Applicant.

Subpara. 1.e.: Against the Applicant.

Subpara. 1.f.: Against the Applicant.

Subpara. 1.g.: Against the Applicant.

Paragraph 2: For the Applicant.

Subpara. 1.a.: For the Applicant.

Subpara. 1.b.: For the Applicant.

DECISION

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

DARLENE LOKEY-ANDERSON

Administrative Judge