

KEYWORD: Criminal Conduct; Alcohol; Personal Conduct

DIGEST: Applicant's twenty nine year history of criminal conduct, alcohol abuse and poor personal conduct, from 1969 until May 1997, which includes numerous arrests, convictions and encounters with law enforcement have not been mitigated by sufficient evidence of reform and rehabilitation. Clearance is denied.

CASE NO: 98-0233.h1

DATE: 10/09/1998

DATE: October 9, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0233

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 28, 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 26, 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 July 29, 1998, and he submitted no response.

The case was transferred to the undersigned for resolution on October 1, 1998.

FINDINGS OF FACT

The Applicant is 48 years old, unmarried and is employed by a defense contractor as a Aircraft Mechanic. 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 Assault with a Deadly Weapon with Intent to Commit Murder, Theft of Personal Property, Attempted Murder, Inflicting Corporal Injury and Resisting or Obstructing an Officer in Discharge of Duties and Battery Against a Peace Officer.

The Applicant denies that his history of criminal conduct shows a pattern. He admits a history of criminal conduct as set forth in subparagraphs 1.a., 1.b., and 1.c. He denies subparagraphs 1.d., and 1.e. The record evidence indicates that beginning in 1969, and continuing until as recently as May 1997, the Applicant has engaged in criminal conduct resulting in numerous arrests. (See, Government Exhibits 1 through 19).

The Applicant was first arrested in August 1969, and charged with Assault with a Deadly Weapon with Intent to Commit Murder, a felony in the state in which it occurred. The Applicant and his friend went to a liquor store to buy some beer, where they met other males who were strangers to him. Together they drank beer and drove around in a car. The Applicant was then invited to go along with the males to kill someone. The Applicant claims that he was forced at gun point to participate in the crime. In fear for his own life, he agreed to help them.

Once at the victim's residence, they told the victim that someone wanted to see him down at the corner. Suspecting that something was up, the victim took a .22 caliber single shot rifle with him. When the victim arrived at the corner, one of the males fired at the victim with a pistol, striking him in the elbow and abdomen. The police report indicates that the Applicant did not witness the shooting as he had proceeded back to the waiting vehicle, which was parked a short distance away. The Applicant states that his drinking beer caused him to get into the situation. The Applicant pled guilty to an amended charge of Assault with Force with Intent to do Great Bodily Injury. He was placed on three years probation, and was fined \$300.00 plus penalty assessment. (See, Government Exhibits 5 and 10).

The Applicant was arrested in January 1980, and charged with Theft of Personal Property. The Applicant went into a department store to buy a lock for his tool box, put a wrench in his pocket and walked out of the store with it. He was stopped by store security and arrested. He pled guilty, and was sentenced to 48 hours in jail, and fined \$50.00 plus a penalty assessment.

The Applicant was arrested in October 1983, and charged with Obstructs/Resists Public Officer. (See, Government Exhibit 14).

The Applicant was arrested in September 1994, and charged with Attempted Murder, a felony in the state in which it occurred. The police report of the incident states that the Applicant and his girlfriend were in the Applicant's truck where they had been drinking and arguing. The Applicant's girlfriend pulled a .22 caliber pistol out of her purse and pointed it at the Applicant. As the Applicant grabbed the gun away from his girlfriend, it went off, shooting her in the neck. The Applicant drove her to the fire station where she was transported by paramedics to the hospital. She later died. The charges were dismissed as it was determined to either be an accident or self-defense. (See, Government Exhibit 12).

The Applicant was arrested in May 1997, and charged with Inflicting Corporal Injury, Resisting or Obstructing an Officer in Discharge of Duties, and Battery Against a Peace Officer. The Applicant had been drinking alcohol when a domestic dispute occurred between him and his girlfriend at their trailer. The police were summoned. The police report reveals that the Applicant hit his girlfriend several times with his fist on the back of her head. The Applicant denies ever hitting her. The Applicant claims that the police entered his trailer, and hit him in the back of his head which caused him to go unconscious. He was later transported to the hospital for stitches. The charges were dismissed. A probation revocation hearing was initiated. (Reference allegation 1.e., and See, Government Exhibit 17).

Paragraph 2 (Criterion G - Alcohol Consumption). The Government alleges that the Applicant is ineligible for clearance because he abuses intoxicants.

The Applicant denies subparagraphs 2.a., through 2.f. The record evidence reveals, to the contrary, that at the time of the arrests of August 3, 1969, September 4, 1994, January 9, 1996, January 22, 1996, and May 22, 1997, he was under the influence of alcohol. The Applicant began drinking in 1969 and drank alcohol habitually to excess until at least May 1997. He states that until May 1997, he consumed about a twelve pack of beer on a weekly basis. In May 1997, he quit drinking altogether and has no intentions of ever drinking again as he wants to get his life turned around. (See, Applicant's Answer to SOR).

The Applicant was arrested for Driving Under the Influence of Alcohol on January 9, 1996, and again on January 22, 1996. In both instances, he pled either nolo contendere, or guilty to an amended charge of Reckless Driving. For each offense, he was ordered to complete 40 hours of community service, and fined \$25.00.

Paragraph 3 (Criterion E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because his conduct involves questionable judgment, untrustworthiness and unreliability, or an unwillingness to comply with rules and regulations.

The Applicant admits subparagraph 3.a., and 3.b., and denies subparagraph 3.c. The record evidence indicates that the Applicant was arrested in October 1970, and was charged with Reckless Driving, and an outstanding bench warrant for Disturbing the Peace. He was found guilty of disturbing the peace and was sentenced to serve ten days in jail or a fine of \$65.00. (See, Government Exhibit 4).

The Applicant was cited in July 1996, for Driving with a Suspended License, and Tail Light needed to illuminate License Plate. He pled guilty to an amended charge of Driving with a Suspended License on the highway. The Applicant was placed on one year probation and fined \$135.00. In July 1997, the Applicant's probation was revoked due to the fact that he was arrested again as set forth in allegation 1.e. His probation was subsequently reinstated and extended until October 1999. He was sentenced to 30 days in jail, and was released after one day served.

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 G (Alcohol Consumption)

Conditions that could raise a security concern:

(1) alcohol related incidents away from work, such as driving while under the influence.

(4) habitual or binge consumption of alcohol to the point of impaired judgement.

Conditions that could mitigate security concerns:

None.

Criterion E (Personal Conduct)

Conditions that could raise a security concern:

(5) a pattern of dishonesty or rule violations

(6) association with persons involved in criminal activity.

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, alcohol abuse and personal 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), alcohol abuse (Criterion G), and poor personal conduct (Criterion E). This evidence indicates poor

judgment, unreliability and untrustworthiness on the part of the Applicant.

Where an Applicant engages in criminal conduct, or poor personal conduct, it can be presumed that he or she will not take a serious attitude toward the important matter of protecting classified information. Criminal Conduct reflects questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an Applicant has demonstrated a lack of respect for the law in his private affairs, then there exists the possibility that he or she may demonstrate the same attitude towards security rules and regulations.

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 29 years ago, that has continued until as recently as May of last year. The Applicant remains on probation until October 1999. His criminal offenses are numerous, serious, recent, and show immaturity and extreme poor judgment. Furthermore, as the police reports and the Applicant's version of the criminal conduct alleged in each incident are so contradictory, I do not find the Applicant to be candid, credible or forthright concerning his involvement.

With respect to the Applicant's history of alcohol abuse, at least five of his arrests occurred when he was under the influence of alcohol. His two arrests for Driving Under the Influence of alcohol occurred about thirty-four months ago, in January 1996. His most recent alcohol related arrest occurred in May of last year. Although he states that as of May 1997, he has stopped drinking, given the serious extent of his past abusive drinking pattern, which occurred repeatedly over a period of 29 years, sufficient time in sobriety has not passed to ensure that he will not return to his old ways. Accordingly, Criterion G (Alcohol Abuse), is found against the Applicant.

The Applicant has also failed to respond to the File of Relevant Material, which leaves the record silent on the issue of rehabilitation. The Applicant does not shows remorse or 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 personal 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 and personal conduct was not isolated, was recent, and could possibly recur in the future. Accordingly, Criterion J, (Criminal Conduct), and Criterion E, (Personal Conduct) are 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, 2, and 3 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.: For the Applicant.

Subpara. 1.e.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subpara. 2.a.: Against the Applicant.

Subpara. 2.b.: Against the Applicant.

Subpara. 2.c.: Against the Applicant.

Subpara. 2.d.: Against the Applicant.

Subpara. 2.e.: Against the Applicant.

Subpara. 2.f.: Against the Applicant.

Paragraph 3: Against the Applicant.

Subpara. 3.a.: Against the Applicant.

Subpara. 3.b.: Against the Applicant.

Subpara. 3.c.: Against 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