**DEPARTMENT OF DEFENSE**
**DEFENSE OFFICE OF HEARINGS AND APPEALS**

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| In the matter of: | ) | |
| | ) | |
| | ) | ISCR Case No. 19-03606 |
| | ) | |
| Applicant for Security Clearance | ) | |

## Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: *Pro se*
03/31/2021

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## Decision

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NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense's (DOD) intent to deny his eligibility for a security clearance to work in the defense industry. Applicant stole information technology (IT) equipment from his employer and sold it to resolve his financial problems. Clearance is denied.

## Statement of the Case

On August 12, 2020, the DOD issued a Statement of Reasons (SOR) detailing security concerns under the criminal conduct and personal conduct guidelines. The Agency acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive), and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on June 8, 2017.

Based on the available information, DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant's security clearance and recommended that the case be submitted to a Defense Office of Hearings and Appeals (DOHA) administrative judge for a determination whether to grant or deny his security clearance.

Applicant timely answered the SOR and requested a hearing, which was convened on November 18, 2020. I admitted, as Hearing Exhibit (HE) I, the case management order I issued on November 9, 2020; and as HE II, the discovery letter the Government sent to Applicant, dated October 15, 2020. I also admitted Government's Exhibits (GE) 1 through 3 and Applicant's Exhibits (AE) A and B, without objection. DOHA received the transcript (Tr.) on December 14, 2020.

## Procedural Matters

### Evidentiary Issues

The government offered GE 2, a summary of Applicant's April 2019 enhanced subject interview prepared by a background investigator. At the hearing, Applicant reviewed the statement and confirmed its accuracy. (Tr. 15)

The government also offered GE 3, a 16-page investigation completed by Applicant's former employer, Company A. Without objection from the parties, I removed pages 5 through 9 and page 12 from the document because they contain information about other Company A employees not relevant to this case. (Tr. 16-17)

## Findings of Fact

Applicant, 61, has worked for his current employer, a federal contracting company, as an information technology specialist since October 2018. He was initially granted access to classified information in 1989 in connection with his military service. He retired from the U.S. Army in 2001, after 20 years of service. He worked for Company A, also a federal contracting company, from April 2002 until the company discharged him in March 2018. In his most recent security clearance application, dated January 2019, he explained that he was discharged "due to the misappropriation of information technology equipment." The SOR allegations are based on this act of misappropriation. (Tr. 20-23; GE 1)

In February 2018, a Company A IT manager noticed that three Apple iPads, which were new and in their original packaging, were missing from the IT supply room. The company launched an investigation, reviewing security footage of employees entering and exiting the supply room between January 18, 2018 and February 27, 2018. Security footage showed Applicant accessing the room three times with his access card. On the first occasion, the video showed Applicant removing two monitors from their boxes and leaving the supply room with them. Security footage then showed Applicant walking toward the employee parking lot with the monitors and then returning to the building without them. Two days later, the footage showed Applicant exiting the supply room with an iPad box and then leaving the parking garage with his laptop bag. On the third occasion, which occurred two weeks later, Applicant entered and exited the IT supply room with his laptop bag. The video did not capture the contents of Applicant's bag on his second and third visits to the supply room. No other employees were recorded removing iPads or any other equipment from building. The IT manager, who

discovered the missing iPads, advised the internal investigators that Applicant did not have any reason to remove the iPads or the monitors from the building. (GE 3)

During his interview with the internal investigators, Applicant admitted taking the missing items. He explained that he was having financial problems, and he pawned the items, but could not provide the name of the pawnshop. On March 16, 2018, Company A discharged Applicant from employment for "violating his duty to protect the assets of Company A and those assets entrusted to Company A." Applicant signed a document agreeing to have the value of the stolen items deducted from his final paycheck. (GE 3; AE B) In pertinent part, the agreement stated:

> I, [Applicant's initials], acknowledge a debt of $3,350.00 owed to [Company A] incurred as a result of my admitted misappropriation of certain IT equipment including three iPads (valued at $2,850.00), two computer monitors (valued at $400.00), and one digital camera (valued at $100.00) (AE B)

Company A acknowledged that Applicant's act of misappropriation is the only adverse action he committed during his 16-year tenure. He did not have a history of disciplinary problems. (GE 3)

A year later, in April 2019, a background investigator conducted an enhanced subject interview with Applicant in connection with his January 2019 security clearance application. During the interview, Applicant discussed his discharge from Company A. According to the statement, Applicant admitted that he stole two iPads, photography equipment, and a camera, which he sold to a pawnshop for $200. Applicant told the background investor that he was not coerced into stealing the equipment. He admitted that it was an irresponsible decision. He further explained that the equipment was old and that he thought no one would miss it. (GE 2)

In response to the SOR, Applicant admitted taking only the three iPads. He denied taking the monitors or a camera from Company A. He also denied selling any of Company A's assets to a pawnshop.

At the hearing, Applicant denied misappropriating or stealing any equipment from Company A. He testified that in his position, he was authorized to take equipment from the supply closet and transport it in his private vehicle to sites around the local area to complete his assigned projects. He admitted taking the three iPads, but he claimed that one never left Company A property, and that he took the other two tablets home to facilitate his ability to telework. Applicant testified that he admitted to the theft after being confronted by the Company A investigators, because he felt as if he was not given an opportunity to explain himself. He also stated that he did not tell Company A investigators that he sold the missing items to a pawn shop, but that the investigator made it up. He also denied telling the background investigator that he pawned the stolen items. He denied his previous admissions of financial problems to Company A investigators. Applicant testified that he is financially stable and has never experienced financial problems. (Tr. 39-48, 61-76)

When asked what happened to the equipment, Applicant explained that he removed the SIM cards from the two iPads he had in his possession and then destroyed them. He could not explain why he did not return the items to Company A. (Tr. 31-36)

## Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## Analysis

The SOR alleges disqualifying conduct under the criminal conduct and personal conduct guidelines. The government has established a *prima facie* case under each. The evidence supports the finding that Applicant stole Company A assets valued at $3,330 and pawned them for $200. Potentially disqualifying conduct under both guidelines raises concerns about an individual's judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, and ultimately concerns about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. (*See* AG ¶ 15 and AG ¶ 30) Specifically, the following disqualifying conditions apply:

**Personal Conduct**

AG ¶ 16(g): Violation of a written or recorded commitment made by an individual to the employer as a condition of employment; and,

**Criminal Conduct**

AG ¶ 31(b) Evidence . . . of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

The relevant mitigating condition under both guidelines, AG ¶ 17(c) and AG ¶ 32 (a), share similar language, focusing on the significance and recency of the misconduct, the circumstances under which the misconduct occurred, the likelihood of recurrence, and the continued impact of the misconduct of the applicant's reliability, trustworthiness, or good judgment. Even though Applicant engaged in single act of misconduct and the dollar value was not large, his conduct is not insignificant or minor. When confronted with a conflict of interest between duty to his employer and his personal circumstances, he resolved the conflicts in his self-interest.

Based on the record, I have significant reservations about Applicant's ongoing security worthiness. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(d). The record supports a negative whole-person assessment. In his testimony at hearing, Applicant made multiple conflicting statements about the nature of his misconduct. Based on Applicant's statements he provided incriminating, but false statements to his former employer during an investigation into his alleged misconduct and again to a background investigator in connection with his security clearance. The truthful statements he claims to have made at the hearing provide an alternate version of events that defies belief, all raising more questions and concerns Applicant's ongoing security worthiness.

The purpose of the security clearance adjudication is to make "an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk."[1] Despite having a clearance for more than 30 years,

[1] AG ¶ 2(d).

Applicant has engaged in conduct that shows he no longer possesses the good judgment, reliability, and trustworthiness required of individual's with access to classified information. Ultimately, he is no longer an acceptable security risk.

## Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

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| Paragraph 1, Criminal Conduct | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant |
| Paragraph 2, Personal Conduct | AGAINST APPPLICANT |
| Subparagraph 2.a: | Against Applicant |

## Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

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Nichole L. Noel
Administrative Judge