

DATE: January 28, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-05330

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

After admitting he had wrongfully appropriated property from his employer of nine years, Applicant was asked to resign voluntarily, or to be involuntarily terminated. Applicant voluntarily resigned in January 1996. Three and one-half years later, he completed a *Security Clearance Application* (SF 86) and answered "no" to question 20 which asked him if he had quit a job (in the last ten years) after being told he would be fired. The circumstances under which Applicant terminated his employment after nine years was a relevant and material fact, and Applicant's explanations for not being truthful do not provide an extenuating circumstance for his omission, nor do they diminish the materiality of the information deliberately withheld. Clearance is denied.

STATEMENT OF THE CASE

On August 27, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960, as amended, and modified, and Department of Defense Directive 5220.6, "*Defense Industrial Personnel Security Clearance Review Program*" (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary finding under the Directive that it is clearly consistent with the national interest to grant a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether a security clearance should be granted, denied or continued.

Applicant answered the SOR on September 27, 2001, and stated he wanted his case decided without a hearing. Applicant received the File of Relevant Material (FORM) consisting of six items on November 19, 2001. He submitted his response on January 8, 2002, and the case was assigned to me the same day.

FINDINGS OF FACT

The SOR charged Applicant with a single allegation of falsifying material facts on a *Security Clearance Application* (SF 86). Applicant admitted this allegation in his answer to the SOR. I accept his admission, and after a complete and

thorough review of the evidence of record, and upon due consideration of the same, I make the following additional findings of fact.

Applicant is a 50-year-old project manager for DoD contractor. He served in the United States Armed Forces from January 1969 to December 1972, and has worked for his current employer since January 1999. The record does not indicate whether he has previously held a security clearance, or the level of security clearance for which he is currently applying.

From August 1987 to January 1996, Applicant was employed as a Sheriff's Deputy for a county sheriff's department. Sometime after September 1995, he was questioned by his employer about whether he had ever taken county property for personal use. He admitted taking small quantities of motor oil, windshield washer fluid, film, and paper towels for his personal use during the nine years he worked for the department. As a result of this admission, his employer gave him the choice of resigning or being terminated. Applicant resigned in lieu of termination.

When Applicant completed his *Security Clearance Application* (SF 86) in July 1999, he answered "no" to question 20 which asked him if, in the last ten years: he had been fired from a job, quit a job after being told he would be fired, left a job by mutual agreement following allegations of misconduct, left a job by mutual agreement following allegations of unsatisfactory performance, or left a job for other reasons under unfavorable circumstances. Applicant answered "no" to question 20 even though the circumstances under which he resigned from the Sheriff's department required him to answer "yes."

Applicant eventually disclosed the circumstances under which he terminated his employment with the sheriff's department in a signed, sworn statement to the Defense Security Service (DSS) in August 2000. In the same statement, he admitted he had not disclosed the circumstances of his departure from the sheriff's department on the "security form," and during an earlier DSS interview. ⁽¹⁾ He explained that he had previously omitted this information because he considered the sheriff's department internal affairs investigation to have been a "witch hunt" (Item 6).

As noted above, Applicant's answer to the SOR admitted the allegation charging him with falsifying material facts by answering "no" to question 20 on his *Security Clearance Application*.

Along with his answer, Applicant included a brief notarized statement explaining he had answered "no" to question 20 "because of the advice of his attorney, who was representing (him) in divorce proceedings, at the time." He does not explain how or why he consulted the attorney handling his divorce about how to complete his security questionnaire. Applicant further stated he had been investigated for theft only because of the divorce he was going through at the time. ⁽²⁾ Applicant repeated much of this information again in his response to the File of Relevant Material. He also stated that other deputies had "misused" the same items of sheriff's department property for which he was asked to resign. Applicant asks that his security clearance be granted because he has consistently and continuously lived by the oath of loyalty to the United States he took when he entered military service.

Applicant's immediate supervisor, Mr. S, has submitted a letter on his (Applicant's) behalf. Applicant has worked directly for Mr. S the entire time he has been employed by his current employer. Mr. S indicates an awareness of the circumstances leading to the issuance of the SOR, and states he is aware of, and supportive of the process through which security clearances are granted. Mr. S states Applicant's performance, character, and trustworthiness have been unquestionable; he has demonstrated "the character as a model of a trusting employee."

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case by case basis with an eye toward making decisions with reasonable consistency which are clearly consistent with the interests of national security. In making these overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but also in the context of the factors set forth in Section E2.2 of the Directive. In that vein, the Government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to Applicant's lack of security

worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter:

PERSONAL CONDUCT

(Guideline E)

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonest, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

E2.A5.1.2. Conditions that could raise a security concern and may be disqualifying also include:

E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

E2.A5.1.2.3. Deliberately providing false and misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.

E2.A5.1.3. Conditions that could mitigate security concerns include:

None Applicable

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shift to Applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates it is clearly consistent with the national interest to grant or continue his security clearance.

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

CONCLUSION

Having considered the record evidence under the appropriate legal precepts and factors, this Administrative Judge concludes the Government has established its case with regard to Guideline E. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section E.2..2, as well as those referred to in the section dealing with the Adjudicative Process.

A security concern has been raised by Applicant's failure to provide a truthful answer to question 20 on the *Security Clearance Application*. He admits his "no" answer to this question was not the truth, and he has provided several explanations for providing the false answer. This demonstration of questionable judgment could indicate he may not properly safeguard classified information.

In January 1996, Applicant resigned from a position he had held for nine years. He resigned voluntarily, rather than face

termination proceedings for admitting he had wrongfully appropriated property from his employer in violation of the trust reposed in him. It is understandable he did not want the Department of Defense to know about this event. However, an employment of nine years which ended under these circumstances less than 4 years before Applicant completed the security questionnaire was/is a relevant and material fact. It was information which Applicant was required to provide in response to question 20 because it was/is relevant and material to a determination of his trustworthiness and reliability. His explanations for not answering question 20 truthfully do not provide an extenuating circumstance for his omission, or diminish the materiality of the information deliberately withheld.

Although Applicant claims he was advised by the attorney--whom he had retained to assist him with his divorce--to omit information of his involuntary resignation from the sheriff's department, there is insufficient information of this attorney's advice to warrant a conclusion the advice constituted "improper or inadequate advice of authorized personnel," within the meaning of MC E2.A5.1.3.4. Moreover, Applicant is unable to benefit from this mitigating condition because he did not promptly and fully provide information of his involuntary resignation during his initial DSS interview. Guideline E is concluded against Applicant.

FORMAL FINDINGS

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

Paragraph 1, (Guideline E) 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 Applicant's security clearance.

John R. Erck

Administrative Judge

1. The date of this interview is unknown; Applicant's signed, sworn statement is the only reference to this interview.
2. Applicant had claimed in his signed, sworn statement to DSS that his wife had been having an affair with a sheriff's deputy (Item 6). He and his wife are now divorced.