

DATE: June 20, 2002

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-12214

DECISION OF ADMINISTRATIVE JUDGE

BURT SMITH

APPEARANCES

FOR GOVERNMENT

Kathryn D. Mackinnon, Esq., Department Counsel

FOR APPLICANT

Michael J. Chamowitz, Esq.

SYNOPSIS

Applicant's lengthy and systematic embezzlement of his employer's business accounts cause doubt as to his reliability and trustworthiness in a security environment. Clearance is denied.

STATEMENT OF THE CASE

On January 7, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6 (Directive) dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons why DOHA could not make a 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 a clearance should be granted, continued, denied or revoked.

The Applicant responded to the SOR in a written answer notarized on February 1, 2002, and he requested a hearing. The case was originally assigned to another Administrative Judge, and it was transferred to the undersigned on March 12, 2002. On March 25, 2002, a Notice of Hearing was issued scheduling the hearing on April 30, 2002. Applicant's request for a continuance was denied. (Tr. 7-15.) At the hearing, the Government introduced seven documentary exhibits (hereafter Gov. Exs. 1 through 7) and the Applicant introduced twelve documentary exhibits and one post-hearing exhibit (hereafter App. Exs. A through M). The Government presented testimony from one witness, and the Applicant presented his testimony and testimony from four witnesses. The official transcript (Tr.) was received by DOHA on May 8, 2002.

FINDINGS OF FACT

The Applicant is 46 years old and employed by a defense contractor as a project manager. Applicant seeks a DoD security clearance in connection with his defense-related employment.

In its SOR, the Government alleges Applicant is ineligible for a security clearance because of his recurring financial difficulties (Guideline F); false material statements to the Government (Guideline E); and criminal conduct (Guideline J). The following findings of fact are entered as to the Government's allegations.

Paragraph 1 (Guideline F - Financial). The Government alleges Applicant is burdened with numerous overdue debts resulting from his addiction to gambling. Findings pertaining to these allegations will first consider the background of Applicant's financial situation, followed by an examination of specific debts of concern to the Government.

Background. In 1977 the Applicant graduated from one of the nation's federal military academies, and thereafter he completed several years of active duty as a commissioned officer. Eventually he elected to leave military service in order to pursue a civilian career in the computer field. The Applicant is married, and he has two sons.

The record is not clear regarding Applicant's early efforts to succeed in a civilian career, but after leaving the military the Applicant failed to meet his goals of economic prosperity. For several years, Applicant's income, combined with his wife's income, afforded the family little more than a modest living. Although Applicant was far from destitute, his credit card debts grew and he began to use his savings for living expenses.

In about November 1995, Applicant befriended a neighbor, a successful small business owner (the Owner), who offered Applicant a job with his firm in a position utilizing Applicant's computer skills. Applicant accepted the offer, even though it provided marginal compensation, and he began to assist the Owner in promoting an internet marketing program.

The small but successful firm was staffed only by the Owner, the Applicant, and an administrative assistant/secretary. Although the Owner was absent most of the time on extensive business travel, he and the Applicant developed a close personal relationship. While the Owner was away he entrusted Applicant with broad authority over the company's computer-managed books and bank accounts.

Despite his employment, Applicant continued to need more money. By early 1997 Applicant began to gamble at casinos, falsely believing he could win enough money to meet his growing debts. Applicant developed an addiction to gambling, and he pursued this addiction until his debts increased to more serious levels.

In about November 1997, Applicant began to forge checks from his employer's firm, cashing them to support his gambling addiction. He did not inform his wife of these activities, often visiting the casinos without her knowledge. During the next fourteen months Applicant systematically embezzled approximately \$49,600 from his employer, and he lost this money at the casinos. Usually away on travel, the Owner did not detect the loss of company funds, although his secretary once warned him of irregularities in the company's finances. Trusting the Applicant, the Owner ignored the warning.

In mid-January 1999, as part of his normal business practices, the Owner retained an accountant to examine the firm's books in order to obtain a routine picture of the company's financial position. The accountant visited the firm to review the books, with Applicant's assistance, and quickly discovered the company had been the victim of embezzlement. On that day, Applicant decided to leave the office early, claiming illness. The accountant then informed the Owner of his findings, although a final amount of the embezzlement was not fully known.

Applicant returned to the office the next day and made a full confession to the Owner, expressing his remorse and personal shame. Much to his credit as a humanitarian, the Owner responded by advising Applicant he would not file criminal charges against him. In the Owner's view, incarceration of the Applicant would only hurt his family, and in any event a criminal prosecution could not return the lost funds.

Despite his generosity of spirit in forgoing prosecution, the Owner told Applicant later that day "It's all over," and Applicant's employment was terminated. (Tr. 59.) In months to come, however, the owner did not object to Applicant's receipt of unemployment benefits (normally not granted where an employee is discharged for cause). He also offered Applicant an opportunity to "work off" some of the debt, albeit at a location away from the office. (App. Ex. B and Gov. Ex. 7.) The Owner testified that he has not sought restitution from the Applicant, although he accepts Applicant's monthly payments toward the indebtedness (discussed below).

Immediately upon the termination of his employment, Applicant made a concerted effort to regain control of his life and end his addiction to gambling. He contacted Gamblers Anonymous ("GA", a twelve-step support program based upon the tenets of Alcoholics Anonymous), and he began regular attendance at GA meetings. Applicant dedicated himself to the principles of GA, and he testified credibly that he has not gambled in any form for over three years. (Tr. 199-200.) A member of GA testified credibly that Applicant has diligently abided by GA principles. (Tr. 283-286.)

On the basis of Applicant's credible testimony, his close association with GA, his unbroken abstinence from gambling for three years, and supporting testimony from his character witnesses, it is found that Applicant is a recovering gambler who probably will always be in recovery but never cured. However, considering Applicant's strong evidence of reform, it is found unlikely he will return to his destructive behavior of the past.

Applicant assured the Owner he would repay the entire amount of money he embezzled, although the Owner did not request it. With the advice and support of GA counselors, Applicant began a program of repayment, starting with a monthly payment of only \$50, all he could afford at the time. (App. Ex. A.) At the security clearance hearing, Applicant presented persuasive testimony that he has made regular payments to the Owner for about three years, and his payments have grown to \$300 per month. At the time of the hearing, Applicant had repaid the Owner approximately \$6K of the \$49,600 he embezzled. (App. Ex. K.)

With regard to his financial recovery, Applicant tried for many months to find employment after his dismissal, but he was less than successful. Applicant accepted temporary work at reduced wages, even delivering newspapers with his wife at one time. Applicant advanced his education, and in June 1999 he secured a part-time teaching position at a local college. Subsequently, his efforts paid off, and he was offered a well-paying full time job with his present employer.

Applicant's first- and second-level supervisors testified that Applicant is a diligent and highly dedicated employee who has exceeded the defense contractor's expectations. Applicant has demonstrated reliable and responsible behavior at all times on the job, and he has been rewarded with supervisory authority over a large number of engineers. Applicant's sense of responsibility was illustrated on September 11, 2001 when terrorists crashed an airplane into the Pentagon, where Applicant was working. Applicant evacuated the building as ordered, but he quickly returned as a volunteer, and he worked through the night helping to restore computer services to Pentagon offices.

(Tr. 168-170.)

At the present time, Applicant's financial problems are largely behind him, with the exception of repayment of his large debt to his former employer. Applicant's annual income is substantial, and with the addition of his wife's earnings Applicant's combined family income is well over six figures per annum. (Tr. 195.)

Applicant's debts. In its SOR the Government alleges that Applicant is heavily indebted to numerous creditors and these debts are overdue. In his behalf, Applicant responds with evidence indicating the debts are now paid off or brought up to date, made possible by Applicant's increased earnings and additional funds acquired by the refinancing of his home. As to each debt alleged in Paragraph 1 of the SOR, Applicant's testimony and documentary exhibits support the following findings:

Subpara. 1.a. - Credit card, \$2,700. Paid in full. (App. Ex. J.)

Subpara. 1.b. - Credit card, \$2,017. Payments current. (App. Ex. I.)

Subpara. 1.c. - Credit card, \$172. Payments current. (App. Ex. I.)

Subpara. 1.d. - Credit card. \$457. Paid in full. (App. Ex. G.)

Subpara. 1.e. - Credit card. \$637. Paid in full. (App. Ex. G.)

Subpara. 1.f. - Credit card. \$383. Paid in full. (App. Ex. I.)

Subpara. 1.g. - Credit card. \$100. Paid in full. (App. Ex. G.)

Subpara. 1.h. - Credit card. \$4,7612. Paid in full. (App. Ex. G.)

Subpara. 1.i. - County taxes. \$1,734. Paid in full. (App. Ex. H.)

Subpara. 1.j. - Debt to Owner. \$49,600. \$6,000 repaid. (App. Ex. K.).

In summary, it is found that during the approximate period 1997 - 1999 Applicant experienced financial difficulties, and he turned to gambling in a failed attempt to raise money. In the process, Applicant developed a gambling addiction generating losses that drove him further into debt. To compensate, Applicant systematically looted his employer's business accounts on a regular basis, stealing nearly \$50,000 in a one-year period through repeated check forgeries.

Applicant did not confess his thefts or accept responsibility for his actions until his unlawful conduct was discovered by the victim and Applicant then had no choice but to admit his culpability. Fortunately for Applicant his employer declined to prosecute, and Applicant was afforded an opportunity to reform his life. He took advantage of this opportunity, and he has given up gambling, found rewarding employment, and restored his personal finances, with the exception of full reimbursement of his victim's lost funds.

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges Applicant is ineligible for clearance because he falsified material information when he completed a background questionnaire during the security clearance screening process.

On July 1, 1999, six months after he was dismissed by the Owner, Applicant completed a DoD questionnaire as part of his application for a security clearance with his next job. (Gov. Ex. 1b, generally known as a form SF86.) Question 20 asks Applicant whether he has ever left a job under unfavorable circumstances such as discharged for misconduct, poor performance, etc. Applicant answered "Yes" and explained "There were disagreements between myself and my employer that were serious enough to warrant me leaving, by mutual agreement." (Gov. Ex. 1b., Question 20.)

The Government argues that Applicant was intentionally dishonest because he did not admit unequivocally that he was discharged by the Owner for stealing company funds. Applicant responds that his answer was intended only as a prelude to his full disclosure during an upcoming personal interview with a Government investigative agent.

At the hearing the Government's agent testified that when he commenced his personal interview with Applicant on December 7, 1999 he was unaware of Applicant's theft of company funds. (Tr. 96, 101-102.) He testified that Applicant readily admitted to his misconduct and to the true nature of his dismissal, without the necessity of prompting. The agent further testified that Applicant was forthright and candid during all phases of the interview.

Based upon testimony of the Applicant and the Government's agent, it is found that Applicant's version of his intentions is credible and he was not deliberately untruthful when he answered Question 20 of the SF86. Because it was obvious the Government would eventually learn all the facts of Applicant's dismissal, it is not likely he harbored a belief that he could successfully deceive the Government by falsifying his background questionnaire.

Paragraph 3 (Guideline J - Criminal Conduct). The Government alleges Applicant is ineligible for clearance because he engaged in embezzlement, a criminal offense under applicable state law, and he intentionally furnished false material statements to the Government on his SF86, a criminal offense under federal law.

The Government's allegations of embezzlement and false statements are founded upon the factual allegations set forth under Paragraphs 1 and 2 of the SOR, discussed above. Therefore the factual findings entered as to Paragraphs 1 and 2 are incorporated herein and entered as to Paragraph 3 as well, to include findings regarding Applicant's evidence of reform and rehabilitation.

With regard to subpara. 3.a., in the state where Applicant's embezzlement was committed it is a crime to wrongfully appropriate the property of another with the intent to deprive the owner thereof. ⁽¹⁾ The findings entered under Paragraph 1 establish that Applicant wrongfully and intentionally appropriated approximately \$49,600 from his employer. In his response, Applicant admits to the essential elements of this offense, and it is found that he engaged in

criminal conduct under state law, as alleged.

In subpara. 3.b. the Government alleges that Applicant engaged in criminal conduct by intentionally furnishing false material information to the Government when he answered question 20 of the SF86. Under the provisions of 18 USC 1001, it is a felony criminal offense to knowingly and willfully make false material statements in matters before the US Government or an agency thereof. However, Applicant did not harbor an intent to deceive when he furnished his answers on the SF86, and in the absence of criminal intent there is no violation of 18 USC 1001.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. The guidelines are divided into those that may be considered in deciding whether to deny or revoke an Applicant's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's request for access to classified information (Mitigating Conditions).

Based upon a consideration of the entire record, I find the following adjudicative guidelines have application in this case:

Guideline F - Financial. *The concern.* An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

Disqualifying Conditions applicable:

1. A history of not meeting financial obligations;
2. Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust;
5. Financial problems that are linked to gambling, drug abuse, alcoholism, or other issues of security concern;

Mitigating Conditions applicable:

1. The behavior was not recent;
4. The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control.
6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Guideline E - Personal Conduct. *The concern:* Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Disqualifying Conditions applicable:

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;
4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;

Mitigating Conditions applicable:

1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability.
5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress;

Guideline J - Criminal Conduct. *The concern:* A history of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Disqualifying Conditions applicable:

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Mitigating Conditions applicable:

1. The criminal behavior was not recent;
6. There is clear evidence of successful rehabilitation.

The whole person concept. In addition to these guidelines the Directive provides in Para. E2.2.1. that under the "whole person concept" the Administrative Judge shall also consider (1) the nature, extent and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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 a day. The Government is therefore appropriately concerned where reliable information indicates an Applicant for clearance may be seriously in debt, dishonest, or engaged in criminal acts. In a commonsense view, these types of misconduct reasonably could lead to a compromise or loss of classified defense secrets.

With regard to burdens of proof in DOHA cases, the Government must first prove all controverted facts that tend to demonstrate Applicant is ineligible for clearance. Once this burden is met, the Applicant must overcome the Government's case by persuasive evidence in refutation, mitigation, or changed circumstances. However, the Applicant always bears the ultimate burden of proving that it is clearly consistent with the national interest to grant him or her a security clearance. The Directive provides that "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, Para. E2.2.2.) Thus, the Applicant's burden is a heavy one.

Conclusions as to allegations of indebtedness and false statements (SOR Paragraphs 1 and 2, and subpara. 3.b.). The Government has met its burden of proving that during 1997 - 1999 Applicant had a need for funds, and he turned to gambling, which then became an addiction with resulting financial losses. To compensate for his losses Applicant embezzled his employer's funds, and before his unlawful acts were discovered, he had stolen nearly \$50,000 over a fourteen-month period.

Applicant has presented persuasive evidence that his gambling addiction, if not cured, is under control and likely will not recur in the future. Also, Applicant proves that the debts he incurred are now either paid in full or current. His debt to his employer is being regularly repaid, and the employer has no objection to the method or amount of payment. Given the state of Applicant's evidence in mitigation, it is concluded that his indebtedness is not a source of vulnerability or coercion. For these reasons, Paragraph 1 of the SOR, as it pertains to Applicant's debts, is concluded in Applicant's

favor.

The Government has also met its initial burden of proving that Applicant did not provide a complete and accurate response to Question 20 of SF86 which asks about the circumstances of his termination of employment. However, Applicant convincingly explains that he intended to provide all required information at his upcoming interview, and he did not intend to deceive the Government in his answers to the questionnaire. Testimony of the Government's investigative agent confirms that Applicant was forthright and honest during the interview. There being no intent to deceive established by the evidence, Paragraph 2 and subpara. 3.b. are concluded in Applicant's favor.

Conclusions as to allegations of criminal conduct (SOR, subpara. 3.a.). In its SOR at subpara. 3.a. the Government focuses on Applicant's criminal behavior as evidence of dishonesty and lack of integrity. The Government has met its burden of proving that Applicant methodically embezzled a large sum of money from his employer for over a year, in violation of applicable state laws. Applicant's evidence of reform and rehabilitation is insufficiently persuasive to conclude at this time that he has overcome the security implications of his criminal misconduct.

While it is concluded that Applicant's gambling addiction is reformed, it is not necessarily true that, by extension, his crime of embezzlement is reformed as well. It is commendable that Applicant has control of his gambling addiction and he has paid most resulting debts. However, this does not fully address the more serious misconduct of a calculated embezzlement demonstrating dishonesty and repeated criminal behavior.

Given the Government's need for trust, integrity and honesty in the security clearance program the Applicant's present state of reform must be assessed with great care. To be sure, Applicant's embezzlement was a means of supporting a now-reformed gambling addiction, but it is reasonable to conclude that his acts of embezzlement, if not fully rehabilitated, might recur in the future to pay financial burdens of another kind.

In evaluating the seriousness of Applicant's criminal acts, several factors associated with the embezzlements must be considered. These factors are the motive, method, victim, and consequences.

As to Applicant's motive, he needed money to meet growing debts, but the record does not indicate Applicant was destitute. Also, the method of Applicant's theft was a carefully crafted scheme designed to remove his employer's funds with little or no evidence that might raise questions. The victim of Applicant's embezzlement was an unsuspecting and vulnerable friend who went out of his way to extend Applicant a hand of friendship and trust. As a consequence of his crime, Applicant lost the confidence and faith of his employer and many others around him. Despite the foreseeable nature of these results, Applicant did not cease his criminal acts until the embezzlement was discovered and he had no choice except to confess.

The Applicant is making a personal effort at rehabilitation, and testimony from supporting witnesses indicates he is on the right track. However, Applicant's present state of reform must be balanced against his criminal and treacherous behavior of only three years ago. Furthermore, the lack of prosecution and conviction precludes a regular and systematic evaluation of his reform through established programs of parole, probation or counseling. Applicant's rehabilitation is left in his hands alone, without monitor or supervision.

With these considerations in mind, it is concluded that Applicant has not yet presented evidence of reform and rehabilitation sufficient to outweigh the very serious nature of his embezzlement scheme carried out over a lengthy period against a largely unprotected, vulnerable and trusting victim. Therefore Paragraph 3 and subpara. 3.a. must be concluded against the Applicant.

This decision should not be construed as a determination that Applicant can not or will not demonstrate reform and rehabilitation necessary to insure that he is eligible for access to classified information in the future. Applicant is engaged in a personal effort to reclaim his life and his reputation, and it is reasonable to believe he may be successful in his endeavor. If this proves true, Applicant might then re-apply for a security clearance and be afforded an opportunity to demonstrate the personal qualifications required to earn the privilege of access to the nation's defense secrets.

FORMAL FINDINGS

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

Paragraph 1. Guideline F: FOR THE APPLICANT.

Subparas. 1.a.-1.j.: For the Applicant.

Paragraph 2. Guideline E: FOR THE APPLICANT.

Subpara. 2.a.: For the Applicant

Paragraph 3. Guideline J.: AGAINST THE APPLICANT.

Subpara. 3.a.: Against the Applicant.

Subpara. 3.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 national interest to grant Applicant's request for a security clearance.

Burt Smith

Administrative Judge

1. Section 18.2-111, Virginia Code Annotated.