

DATE: June 19, 2003

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-24106

**DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn D. MacKinnon, Esq., Department Counsel

**FOR APPLICANT**

Edward J. Plaza, Esq.

**SYNOPSIS**

Fifty-six-year-old computer network engineer pled guilty to, and was convicted of, conspiracy and grand larceny of over \$1 million by stealing from his employer. In 1991, he was sentenced to imprisonment for from 3 1/3 to 10 years. Applicant failed to demonstrate it is in the national interest to grant him a clearance. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. In accordance with the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR) on 18 December 2002 detailing why a clearance was not granted and recommending Applicant's case be referred to an administrative judge to determine whether the clearance should be denied/revoked. In the SOR, DOHA alleged Applicant failed to meet the criminal conduct (Guideline J) and personal conduct (Guideline E) personnel security guidelines of the Directive.

Applicant answered the SOR in writing on 3 February 2003. The case was assigned to me on 12 March 2003. A hearing was originally scheduled for 25 April 2003, but was delayed until 19 May 2003 so that Applicant could engage an attorney to represent him. On 3 April 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of four exhibits. Applicant testified on his own behalf, called one witness, and submitted 22 exhibits. DOHA received the transcript (Tr.) of the proceeding on 28 May 2003.

**FINDINGS OF FACT**

Applicant is 56-year-old senior computer network engineer employed by a defense contractor to work on the computer network at a military installation. Ex. 1 at 1. Tr. 25. He has been married for 33 years and has two grown children. Tr. 39.

After graduating from college in 1968, Applicant worked for insurance companies in State A. Applicant lives in State B. He was trained to handle reinsurance on international accounts overseas. Tr. 44. In 1980, he transferred to a different company to start up its reinsurance department. Tr. 44-45. As such he was responsible for a department that included 120 employees. Tr. 76-77. A U.S. company wanting liability insurance, for its overseas operations, in excess of that provided by insurance companies would seek such protection from a reinsurer or broker. Applicant would evaluate the risk and determine the appropriate premiums. Tr. 78. The company would pay the broker who would remit the appropriate premium to the reinsurer. Tr. 81. Often reinsurers would share the risk on a particular liability threat.

In 1990, an investigation generated by a claim against Applicant's employer revealed that premiums had been withheld/delayed to the tune of over \$1 million. The company initiated a civil complaint against Applicant and others in State A and filed a complaint with law enforcement officials. Ex. K at 5. As a result of an indictment returned in State A, Applicant was arrested on 18 July 1990, at his home in State B, as a fugitive from State A. On 18 August 1990, the charge in State B was dismissed. Ex. 3 at 3.

On 4 October 1990, Applicant was arrested in State A on the indictment. On 25 October 1991, as a result of his guilty plea to conspiracy 4<sup>th</sup> degree, grand larceny 1<sup>st</sup> degree (two counts), and grand larceny 2<sup>nd</sup> degree (two counts), Applicant was sentenced to serve a term of from 3 1/3 to 10 years imprisonment. Ex. N. He was imprisoned from October 1991 until March 1993 and has been gainfully employed since his release. Ex. 2 at 3.

After his release from prison, and while working days, Applicant attended night school and obtained a diploma in computer networking. Ex. 1 at 1; Tr. 62-63. He has worked for his current employer since December 1999. He has been declared mission essential for the military installation because he is "required to efficiently run mission operations as required, in an emergency Force Protection/ThreatCon situation." Ex. C. He has performed his duties well and has the support and trust of his neighbors, employer, and the government agency whose network he supports.

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to

grant or continue his security clearance." ISCR Case No. 01-20700 at 3. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

## CONCLUSIONS

### **Guideline J-Criminal Conduct**

In the SOR, DOHA alleged under Guideline J that Applicant was arrested and charged with being a fugitive from justice (¶ 1.a.), convicted of grand larceny and conspiracy (¶ 1.b.), and was sentenced to more than a year in jail, making him ineligible for a security clearance under 10 U.S.C. § 986 (¶ 1.c.). A history of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. An applicant who has been convicted of in a federal or state court and sentenced to imprisonment for a term exceeding one year may not be granted a security clearance absent a waiver from the Secretary of Defense. 10 U.S.C. § 986.

Applicant's arrest in State B on the fugitive warrant from State A appears to have been merely a procedural measure required for State A to get jurisdiction over Applicant who lived in State B. The charge was based on the charges in State A and was eventually dismissed. Finding is for Applicant.

Through his guilty plea, Applicant admitted committing serious criminal conduct-grand larceny and conspiracy. DC 1 and 2. Applicant's convictions resulted in a sentence to imprisonment for a term exceeding one year. DC 3.

Applicant asserts he was not guilty of the offenses to which he pled guilty, but merely pled guilty on the advice of counsel and on the understanding his guilty plea would result in a sentence to imprisonment for four years (requiring him to spend only a short time in jail). He claims his attorney was not licensed to practice law in State A, was inexperienced in criminal matters, misled him about his qualifications and the plea agreement, and provided ineffective assistance. Applicant understands that, as he was convicted of felony offenses, he is collaterally estopped from contesting the merits of his conviction in an ISCR hearing. ISCR Case No. 99-0116, 2000 DOHA LEXIS 136 at \*\*3-4 (App. Bd. May 1, 2000). Instead, he introduced evidence of the circumstances surrounding the alleged offenses and his guilty pleas to mitigate the case against him and to show that he is deserving of a waiver.

The criminal conduct, having occurred in 1990, was not recent. MC 1. It is not clear whether the criminal conduct was an isolated incident (MC 2) or occurred over a period of time. But the larceny involved the withholding or delaying in the payment of premiums and Applicant was convicted on two counts. It appears it was a continuing crime. Applicant did not establish MC 2 applies. Clear evidence of successful rehabilitation may be a mitigating condition. MC 6. Applicant served his time, went back to work and to his family, found a new profession, and has prospered in his work as a contract employee at a military installation. There is no evidence that Applicant has engaged in any further criminal conduct. MC 6 applies.

The mere applicability of these mitigating conditions, however, does not compel a favorable decision. The administrative judge must weigh the mitigating conditions in light of the record evidence as a whole. ISCR Case No. 00-0489 at 10 (App. Bd. Jan. 10, 2002). In this case, Applicant pled guilty to stealing over \$1 million from his employer. Such conduct goes to the very heart of a decision as to whether the Government can trust Applicant to protect classified information. After weighing all of the evidence, the disqualifying conditions, and the mitigating conditions, I conclude Applicant failed to demonstrate it is in the national interest to grant him a security clearance. Finding is against Applicant.

### **Guideline E-Personal Conduct**

In the SOR, DOHA alleged under Guideline E that Applicant was fired by a former employer for misconduct and manipulating funds. Under Guideline E, conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the person may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

Applicant admits being fired by his employer for stealing from the company. Applicant subsequently pled guilty to grand larceny and conspiracy for his part in the larceny. Thus, there is reliable unfavorable information provided by his

employer that raises a security concern about Applicant's judgment. DC 1. Applicant does not appear to be vulnerable to coercion, exploitation, or duress as a result of this conduct. *See* MC 5. Nevertheless, after weighing all the evidence, Applicant has not demonstrated it is in the national interest to grant him a clearance.

### **Applicability of 10 U.S.C. § 986(d)**

Applicant's sentence to more than a year in jail triggers application of 10 U.S.C. § 986. However, as I decided against Applicant on the underlying criminal conduct alleged in SOR ¶ 1.b. and the security concerns alleged in SOR ¶ 2.a. under Guideline E, Applicant is not eligible for waiver consideration.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

### **DECISION**

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

**James A. Young**

**Administrative Judge**

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.