

DATE: January 22, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-00900

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In March 2001, the Applicant was terminated for cause for taking company property, an action which violated company guidelines. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from such serious personal misconduct. Clearance is denied.

STATEMENT OF THE CASE

On April 11, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding [\(1\)](#) it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. In an undated response the Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing.

On September 26, 2003, the Applicant received a complete copy of the file of relevant material (FORM) dated September 13, 2003, and was given the opportunity to file objections and submit material in extenuation, mitigation, or refutation. The Applicant responded to the FORM on October 17, 2003. Department Counsel (DC) did not object to the Applicant's response. In the FORM, DC presented eight exhibits (Items). I was assigned the case on November 6, 2003.

FINDINGS OF FACT

The SOR alleges two incidents of personal conduct under Guideline E. The Applicant denies the allegations. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact.

The Applicant is 56-years-old, has worked for a defense contractor since July 2001, and is seeking a security clearance.

In May 1996, a routine audit discovered the Applicant had viewed inappropriate internet sites on a company computer on eight occasions. The Applicant was on the internet searching for a particular topic when he was misdirected to

inappropriate web sites. When he reached the inappropriate web site he would immediately exit the site. When explaining what happen to his supervisor, the supervisor stated the same thing had happened to him. In July 1996, he received a formal written warning informing him that any further use of company terminals to access internet sites for other than company business was cause for immediate involuntary separation. The Applicant states he was researching a subject when he was inadvertently taken to inappropriate internet sites, sites he had not requested. When he inadvertently entered these sites, he immediately exited and tried to find the proper site. He states the accessing of the sites was unintentional on his part.

In March 2001, the Applicant was terminated for putting company equipment in his car. His conduct violated the company's business practice guidelines specifically personal conduct and company assets. At the time of his termination, the applicant had worked for the company for 22 years. There was no appeal process for his termination. (Item 7, p 18)

The Applicant said the property was obsolete and was taken from a "scrap bin." The Applicant alleges his only mistake was failing to file a "Material ovement Form." The property transfer form is used to determine if material or equipment is officially "scrap," which could be released to employees. The appropriate signature and approval are necessary on the form before the property can be removed.

When asked about the equipment the Applicant freely admitted he had taken the equipment, identified it as discarded scrap, and showed the property to his manager. The Applicant was asked about the property movement form. Until asked, he had forgotten about the form. He then asked to complete one, but was not allowed to do so. The company attempted to determine if anyone had put the equipment in the scrap box by asking some individuals who replied they had not put the equipment in the scrap box. The Applicant also questioned the cursory nature of the investigation.

The Applicant put his case before the director of manufacturing and was told there was no appeal for stealing company assets. The Applicant told the director the assets were obsolete, discarded, and of questionable value. He then offered to resign, but was told the decision to terminate had been made to previous day and would not be reconsidered. Just prior to his termination, the company has sent out a warning letter stating 100 employees would be laid off the following month. At the time of his termination, the Applicant's eight person shop had already been reduced to three.

POLICIES

The Adjudicative Guidelines in 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 determinations that are clearly consistent with the interests of national security. In making 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 in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines apply:

Personal Conduct, Guideline E. 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. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility: (E2.A5.1.1.)

5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency. (E2.A5.1.2.5.)

Conditions that could mitigate security concerns include:

None apply.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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." Executive Order 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.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "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 ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. In March 2001, the Appellant was terminated from his employment for wrongfully taking company equipment, a violation of the company guidelines. The company found his action to be egregious, in violation of company guidelines, grounds for termination, and the Applicant was terminated for cause after having been with the company for 22 years. Disqualifying Condition (DC) 5-⁽²⁾ applies.

The Applicant admitted he took the equipment, but argues his only fault was failing to complete a Material Movement Form. The Applicant made this argument to his employer at the time of the incident and it was found insufficient to prevent his termination. This serious misconduct creates doubt about the Appellant's judgement and trustworthiness. His answers to the SOR and FORM were insufficient to mitigate or extenuate this conduct. None of the Mitigating Conditions (MC) apply. I find against the Applicant as to SOR 1.a.

In reviewing the evidence, I did consider the company was downsizing, the Applicant's eight person shop had already been reduced to three and, just prior to the termination, the company had sent out a warning letter stating 100 employees would be laid off the following month. The mere speculation the Applicant's termination was part of the downsizing is insufficient to overcome his termination for cause.

In July 1996, the Applicant received a formal written warning informing him the company computer were for company

business and use for other purposes was cause for immediate involuntary separation. The Applicant was searching on the web when he was taken to inappropriate web sites that he had not sought. His supervisor acknowledged he had had a similar experience when using the web. The Applicant received a formal written warning for his action. The incident is dated--having occurred more than seven years ago-- and was handled administratively by a written warning. Although Applicant's conduct resulted in an infraction of the rules, there must be a nexus or rational connection between conduct and an applicant's security suitability. I do not find a nexus or rational connection. I find for the Applicant as to SOR 1.b.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1, Personal Conduct, Guideline E : AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.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 or continue a security clearance for the Applicant. Clearance is denied.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

2. DC 5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency.