

KEYWORD: Criminal Conduct

DIGEST: Applicant is a defense contractor employee who retired from the Navy as a Master Chief Petty Officer after 26 years of service. The allegation is that he has a history or pattern of criminal activity. He received non-judicial punishment under the UCMJ when he first entered the service in 1971. After his discharge he was charged with petty larceny of a \$4.00 item in 2000 and received punishment. His employer holds him in high regard. The allegations are mitigated by passage of time and evidence of rehabilitation. Clearance is granted.

CASENO: 02-29525.h1

DATE: 03/18/2005

DATE: March 18, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-29525

**DECISION OF ADMINISTRATIVE JUDGE**

**CHARLES D. ABLARD**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esq. , Department Counsel

## **FOR APPLICANT**

Alan V. Edmunds, Esq.

### **SYNOPSIS**

Applicant is a defense contractor employee who retired from the Navy as a Master Chief Petty Officer after 26 years of service. The allegation is that he has a history or pattern of criminal activity. He received non-judicial punishment under the UCMJ when he first entered the service in 1971. After his discharge he was charged with petty larceny of a \$4.00 item in 2000 and received punishment. His employer holds him in high regard. The allegations are mitigated by passage of time and evidence of rehabilitation. Clearance is granted.

### **STATEMENT OF CASE**

On August 17, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, 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 affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On September 7, 2004, Applicant responded to the SOR allegations, and requested a hearing. A notice of hearing was issued on January 13, 2005, and the matter was assigned to me on January 14, 2005, for a hearing on February 7, 2005, held that day. Six government exhibits and ten exhibits for Applicant were admitted into evidence. A security investigator testified for the government and the Applicant testified. The transcript was received on March 10, 2005.

### **FINDINGS OF FACT**

Applicant admitted two allegations with explanation and denied a third. After a complete review of the record, I make the following additional findings of fact:

Applicant is a 51-year-old software systems employee of a defense contractor who retired from the Navy in 1997 as a Master Chief Petty Officer with 26 years of service.

In 1971 when he was 18 years old at the beginning of his Navy career he was punished under Article 15 of the Uniform code of Military Justice for larceny and wrongful appropriation of a \$47.00 item. His punishment consisted of ten days of correctional custody, a fine of \$50.00, and a reduction of one grade.

Applicant was interviewed by the DSS agent who testified. In the course of the interview he mentioned a 1996 incident when he had purchased a computer and discovered two cables in the box that he did not buy and returned them to the store. He declined to elaborate on a question put to him by the investigator as to whether he shoplifted as a "regular activity". He acknowledged that he had occasionally shoplifted small items as a teenager for which he was punished by his family.

In December 2000 after discharge from the Navy he was arrested and charged with petty theft and trespass with intent to interfere. The stolen items consisted of electronics valued at \$4.00. The theft charge was dismissed and he pled guilty to trespass and was sentenced to a three year suspended sentence, fined \$300.00 with restitution of 100.00, required to attend a shoplifters course, and not visit the store where the incident occurred.

Applicant has a good record with his employer and valued for his professionalism. He has been employed with the company for three years and his supervisors and colleagues speak highly of him in their letters of support.

## **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.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the 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. The applicant then bears the burden of demonstrating it is clearly consistent with the national interest to grant or continue a security clearance. "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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b).

## CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to all allegations set forth in the SOR:

Guideline J (Criminal Conduct) is alleged. The Government has established a sufficient basis that Disqualifying Condition E2.A10.1.1. might be applicable to Applicant in that he has twice been charged with criminal offenses. It could be mitigated by application of the facts in the case to certain of the Mitigating Conditions (MC).

The first criminal conduct with which Applicant was charged occurred when he was 18 years old at the beginning of a Navy career that continued and ended very successfully. The second occurred over four years ago and the conviction was for trespass, not the more serious allegation of theft. This was an incident concerning a low value theft about which the Applicant has been candid in his admission and is sufficiently embarrassed that it is most unlikely to recur. The

matter in 1996 was revealed by Applicant in his interview apparently in an effort to show that he did not have a shoplifting habit and, when property came into his possession that was not his, he returned it to the owner.

The most recent criminal behavior occurred almost four years ago (E2.A10.1.3.1.), both incidents were isolated occurring almost 30 years apart (E2.A10.1.3.2.), and there is clear evidence of rehabilitation (E2.A10.1.3.6.). Thus, the mitigating conditions are applicable.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information.

The "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Applicant has a good record with his company and served honorably in the highest ranking a non-commissioned officer in the Navy.

After considering all the evidence in its totality, and as an integrated whole to focus on the whole person of Applicant, I conclude Applicant's record of conduct justifies a finding that it is clearly consistent with the national interest to grant a security clearance.

### **FORMAL FINDINGS**

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

**DECISION**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or renew a security clearance for Applicant. Clearance is granted.

Charles D. Ablard  
Administrative Judge