DATE: September 23, 2005

In Re:

SSN: ----------

Applicant for Security Clearance

CR Case No. 02-16379

DECISION OF ADMINISTRATIVE JUDGE

JOHN GRATTAN METZ, JR.

APPEARANCES

FOR GOVERNMENT

James Bradley Norman, Esquire, Department Counsel

FOR APPLICANT

Anthony F. Vergnetti, Esquire

SYNOPSIS

Applicant--a retired Navy Captain who served in the cryptography community--failed to mitigate the security concerns raised by his multiple security violations, which were both deliberate and negligent. Clearance denied.

STATEMENT OF THE CASE

Applicant challenges the 21 July 2003 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of security violations and personal conduct[(1)] Applicant answered the SOR on 28 August 2003 and requested a hearing. DOHA assigned the case to me 24 September 2004 and I convened a hearing on 25 January 2005. DOHA received the transcript 2 February 2005.

FINDINGS OF FACT

Applicant denied the SOR allegations, although he included explanatory material substantially admitting the underlying facts. He is a 59-year-old assistant vice president of a defense contractor, a job he has held since October 1998. He seeks continuation of the clearances he has held since he entered the U.S. Navy in July 1969, and transferred to his new employer in 1998.

Applicant is a retired Navy Captain (paygrade O-6), who served almost 30 years as a cryptographer. He has a bachelor's degree in physics, a master's degree in control engineering, a master of business administration degree in computer information systems, and has completed all the requirements for his doctorate in operations research, except the dissertation. He has an extensive post-graduate education and extraordinary career accomplishments (AE B).

In late 1995 or early 1996, toward the end of his command tour of a Navy information office, Applicant--who had been a note taker all during his Navy career--began to take classified notes in his personal notebook, an 8 x 11 binder.[(2)] He knew these notes were classified because he was careful to write as cryptically as possible to prevent anyone other than himself being able to readily identify the contents of the notes. No one knew he was taking classified notes. He did not

ask permission to take classified notes. He did not advise his superiors that he was taking classified notes. He did not properly mark the notes he took as classified. He did not enter them into an accountability system. He did not destroy them. To the extent he kept his personal notebook in a SCIF (Special Compartmented Information Facility, an area approved for the open storage of classified material), the classified information was properly stored. Otherwise, it was not properly stored as it traveled with Applicant to his home and out of town on business, where he did not have approved storage containers.

From May 1996 to October 1998, Applicant worked for the cognizant assistant secretary of defense as the office director in an emerging, and increasingly important, area of warfare. He considered it an exciting but stressful job (Tr. 97). He continued to take classified notes of briefings he attended, although by this time he had switched to a more manageable 6 x 8 zippered notebook.[(3)] He was seldom without the notebook, but again, it traveled with him places where it was not properly secured, to his home and out of town on business, sometimes overseas.

In October 1998, Applicant went on 90 days terminal leave from the Navy (his retirement was effective January 1999), and began work with his current employer. Although he intended to purge his notebook of classified information before leaving active duty, he did not do so. He took the notebook, with the classified notes, into retirement with him. Before retiring he had completed debriefing forms and non-disclosure agreements that certified he had not retained any classified information.

Applicant began to have misgivings about the notebook just before he retired. His sense that the notebook contained classified information began to bother him. He was uneasy about taking the notebook with him when he retired and meant to shred the classified pages, but never got around to it (Tr. 169). However, he continued to use the notebook in his new job. It continued to travel with him in an unsecured manner, to and from work, and overseas on business to Europe in November-December 1998 and February 1999. On one occasion overseas, it was left in his locked briefcase in an unattended cloakroom. Applicant thought about the notebook's contents occasionally, but took no action: "when I thought about it at all, I became afraid and tried to forget about the sensitive contents of the notebook entirely." (GE 2, 3)

In October 1998, while going through his Navy records, Applicant discovered a 20-year old notebook containing classified calculations.[(4)] Although he was still technically in the Navy and could have easily returned the notebook to the Navy, he did not do so. Instead, he destroyed the notebook at home. He did not know if it had been declassified (Tr. 142). Later that month, he discovered a 10-12 page top secret document of more recent vintage and a six-page confidential document. He destroyed both at home,[(5)] denying the Navy the opportunity to conduct a damage assessment on the material.

In September 1999, when he was confronted with taking a polygraph examination, Applicant disclosed information about his notebook and the classified documents he destroyed. In the subsequent investigation, Applicant discovered a number of other classified documents in his possession, some aged, some recent, some arguably unclassified but containing incorrect markings through administrative error (GE 4).[(6)] These he surrendered to the government, but the Navy command withdrew sponsorship of his clearance (GE 6). A damage assessment was done on the classified documents (Tr. 76-77), but that assessment did not become a part of the record other than determining that Applicant had not disclosed classified information to third parties, but had kept the classified information for his own use.

Applicant had better reason than most to understand the proper handling of classified information. Beyond his training in cryptography, a highly-classified operational field, he had problems with a polygraph in 1984 because he disclosed classified information to a subordinate not cleared for the information and he kept classified documents with him overnight on two occasions.[(7)] In addition, throughout his career, he received periodic briefings on the handling requirements for classified information, including special programs he was read into. Indeed, Applicant testified: "I knew what the rules were" for properly handling and storing the classified material he was working with (Tr. 137-138).

Applicant offered a variety of explanations for his conduct: he had always been the "go-to guy" in his Navy career and wanted to continue that role in his new job, although the assistant secretary of defense did not ask him to maintain those notes. He saw no other way to get the job done (Tr. 115). He was experiencing some health issues that were affecting

his energy levels and stamina. He told himself that he was engaging in risk management, balancing competing issues of cost, mission, schedule, performance, and security (Tr. 110). However, he acknowledged that while he wrote as cryptically as he could, he was recording essentially everything that happened at the meetings he attended (Tr. 117). He claimed he was missing the accumulation of information in his notebook. He rationalized his note-taking. Ultimately, he acknowledged deliberately not facing the fact that he was creating classified notes (Tr. 179).

Applicant had an exemplary Navy career, during which he was awarded the Meritorious Service Medal, the Navy Commendation Medal, the Legion of Merit (twice), and the Defense Meritorious Service Medal (AE A). His impressive list of character witnesses included a former assistant secretary of defense, two retired Navy rear admirals, a retired Army major general, and a senior career civil servant. All the witnesses had known Applicant over twenty years, personally and professionally; some had known him nearly thirty years.[(8)] They all extol his honesty and integrity, his technical and professional competence, and his security consciousness--except for the incidents alleged in the SOR. Each is substantially, but not completely, aware of the allegations of the SOR. Each was surprised and disappointed to learn that Applicant had engaged in security violations, but believe he has owned up to his mistakes and learned from them, and is unlikely to commit them again. Each would grant Applicant his clearance. Tellingly, none of them condoned Applicant' security violations. And although each was in essentially the same line of work as Applicant, none of them ever committed the kind of security violations Applicant committed, and none of them ever had a subordinate who did so. Indeed, Applicant never had a subordinate commit a security violation during the command tour that earned him his second Legion of Merit. His company security manager reports that Applicant has been security conscious during his time at the company, and recommends retention of his clearance (AE C, Answer). His other character references also reach the same conclusion (AE D).

Applicant is a loyal, patriotic American, and I believe him when he says he never intended to harm U.S. interests. Since his September 1999 polygraph, he has stopped being a note-taker. He believes the industrial program he is now a part of focuses on risk avoidance and not risk management, and he is committed to conforming to the industrial program security rules.

POLICIES

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guidelines are Guideline K (Security Violations) and Guideline E (Personal Conduct).

Burden of Proof

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.[(9)]

CONCLUSIONS

The government established a case for disqualification under Guideline K by demonstrating that Applicant committed deliberate and negligent security violations while on active duty and after retirement.[(10)] For nearly two years, he deliberately and without authorization took classified notes at briefings he attended, and retained them for his personal use.[(11)] He neither destroyed the notes nor entered them into an accountability system as required by government regulations. He did not properly secure the notes, but kept them with him, including when he traveled overseas.

He deliberately took some documents into retirement with him, including one taken for pride-of-authorship reasons, and took others into retirement with him inadvertently. But on two different occasions in October 1998, he deliberately destroyed documents he had inadvertently retained, precluding the government from performing a damage assessment on the information, or confirming his testimony that he believed some of the information might have been declassified. Nor did he disclose that he had improperly retained the information. None of this information came to light until Applicant was confronted with a polygraph examination.

Most of the mitigating conditions are inapplicable to Applicant. The most serious security violations were deliberate; only the less serious were inadvertent.[(12)] The most serious security violations were frequent and repetitive, a continuing course of conduct.[(13)] Applicant had been properly and regularly trained on the security requirements of his positions.[(14)] The only potentially applicable mitigating condition concerns his attitude toward his security responsibilities since his violations were uncovered,[(15)] but this mitigating condition helps Applicant but little as his demonstrated attitude towards his security responsibilities before his violations were uncovered appear no different, yet they were markedly different in reality. Even if I concluded that Applicant would not deliberately violate security regulations in the future, based on his past conduct I have little confidence he would promptly disclose any inadvertent violation he committed. This is especially important in the industrial program where government supervision is less prevalent. I resolve Guideline K against Applicant.

The government established a Guideline E case by demonstrating Applicant's questionable judgment in executing his security responsibilities over an extended period of time.[(16)] He appears to have initially misled his polygrapher in September 1999.[(17)] He certainly violated security regulations over at least a two-year period.[(18)]

Applicant meets none of the mitigating conditions under personal conduct. His conduct was substantiated and pertinent to a judgment determination.[(19)] While his misleading statements during the first polygraph may have been isolated and not recent, the circumstances of the polygraph undercut Applicant's claim of voluntary disclosure,[(20)] although he did cooperate with the investigation once the security violations were disclosed. He did not disclose the security violations until he was confronted with the adverse polygraph results.[(21)] Nor did Applicant receive bad advice about what he should reveal during the polygraph.[(22)] I resolve Guideline E against Applicant.

I believe Applicant a patriotic, loyal American, and his expressions of remorse genuine to a point. But his patriotism is not at issue in this hearing and his remorse misapprehends part of the security concern that remains. I have considered that Applicant's security violations were not committed for ulterior motives or personal gain and did not result in any apparent compromise of the information. Yet for two years the potential risk was a near-constant presence and the potential damage to national security, if the highly classified information was compromised, was great. I have also considered that clearance determinations are not intended to be punishments or rewards for an Applicant's conduct. However, the industrial security program puts a premium on individual's who are willing to put themselves on report should an inadvertent security violation occur, and Applicant has demonstrated himself to be singularly unwilling to do that until confronted with a polygraph. Under the circumstances of this case, I consider it inappropriate to continue Applicant's access to classified information.

FORMAL FINDINGS

Paragraph 1. Guideline B: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Paragraph 2. Guideline E: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

DECISION

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

John G. Metz, Jr.

Administrative Judge

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

2. Previously, Applicant had kept classified notes in secured spaces and had a separate notebook for his personal notes.

3. And when he switched, he purged his old notebook of classified information and destroyed it.

4. In those days, Applicant used a 3 x 5 flip notebook typically used by division officers. Applicant has given varying explanations about how it came to be in his possession. In his May 2000 sworn statement, he states that the notebook was full, probably kept in his workspace, and thus inadvertently brought home with his retirement boxes. At hearing, he testified that the notebook was substantially empty, kept for that reason, and inadvertently taken home when he retired (Tr. 165).

5. Applicant asserted he panicked when he say the top secret document and took the first action that occurred to him (Tr. 121, 184).

6. Applicant asserted that the older documents were inadvertently taken with him when he retired, which begs the question how the classified documents came to be in his possession and retained in his personal papers all those years. At least one of the recent documents, a critique of the programs at his last job, he retained because of pride of ownership and his feeling that it might be over-classified at the secret level.

7. In the first instance, Applicant was participating in a war game when he concluded that a line subordinate had a need to know the classified information he was not cleared for in order to successfully complete the mission. However, he disclosed the information to the subordinate, reported that disclosure to his superiors after the exercise, and ensured that the subordinate obtained the necessary clearances for that category of information in the future. The end result was no disciplinary action or other consequence to Applicant (AE E). In the latter instance, Applicant made the judgment call that "mission accomplishment" justified his keeping the classified information overnight (and unsecured) because he needed to get some sleep before an early start to attend meetings requiring the classified information. Again, Applicant suffered no adverse consequences, and subsequently passed follow-on polygraphs.

8. The three retired military officers knew Applicant professionally while they were all in the military, and now all work at the same defense contractor.

9. *See*, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

10. E2.A2.11.1.2.2. Violations that are deliberate or multiple or due to negligence.

11. Albeit, the personal use was to help keep him up to speed on the increasingly demanding requirements of his job for information.

12. E2.A2.11.1.3. Conditions that could mitigate security concerns include actions that: E2.A2.11.1.3.1. Were inadvertent;

13. E2.A2.11.1.3.2. . . .Were isolated or infrequent;

14. E2.A2.11.1.3.3. . . .Were due to improper or inadequate training;

15. E2.A2.11.1.3.4. . . .Demonstrate a positive attitude towards the discharge of security responsibilities.

16. E2.A5.1.2.1. Reliable unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances;

17. E2.A5.1.2.3. Deliberately providing false or 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;

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

19. E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;

20. E2.A5.1.2.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;

21. E2.A5.1.2.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;

22. E2.A5.1.2.4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided;