

KEYWORD: Personal Conduct

DIGEST: Applicant is a self-employed electronics manufacturer and government contractor, who developed an undetectable telephone tap device. During a nationwide United States Customs Service investigation, he was arrested in 1998 for illegal trafficking and exporting of electronic communications intercept devices. Subsequent to his counsel's investigation of his product design and customer's use of the product, the U. S. Attorney declined to prosecute him for violation of federal law related to the design, manufacture and sale of this device. Because he had shipped one of his devices overseas and improperly labeled the customs declaration form, he pled guilty to a misdemeanor charge of providing false information. He has not been arrested since, nor does he have any financial problems or a history of other negative incidents. Clearance is granted.

CASE NO: 03-19099.h1

DATE: 04/12/2006

DATE: April 12, 2006

In re:

SSN:

Applicant for Security Clearance

ISCR Case No. 03-19099

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a self-employed electronics manufacturer and government contractor, who developed an undetectable telephone tap device. During a nationwide United States Customs Service investigation, he was arrested in 1998 for illegal trafficking and exporting of electronic communications intercept devices. Subsequent to his counsel's investigation of his product design and customer's use of the product, the U. S. Attorney declined to prosecute him for violation of federal law related to the design, manufacture and sale of this device. Because he had shipped one of his devices overseas and improperly labeled the customs declaration form, he pled guilty to a misdemeanor charge of providing false information. He has not been arrested since, nor does he have any financial problems or a history of other negative incidents. Clearance is granted.

STATEMENT OF THE CASE

On May 14, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR 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. Specifically, the SOR set forth security concerns arising under Guideline E (Personal Conduct) of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. On June 15, 2004, Applicant submitted a notarized response to the allegations. He elected to have his case decided on the written record in lieu of a hearing.

Department Counsel prepared a File of Relevant Material (FORM) and provided Applicant with a complete copy on September 3, 2004. Applicant had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He submitted a response, but no additional evidence. This case was assigned to me on February 14, 2006.

FINDINGS OF FACT

Applicant admitted the Guideline E allegations in subparagraphs 1.a. and 1.a.(1). of the SOR.⁽¹⁾ Those admissions are incorporated here as findings of fact. He denied the allegation in paragraph 1. of the SOR. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 52-year-old self-employed electronics manufacturer who sells to and installs products for the Department of Defense.⁽²⁾ He has owned his business for 25 years, and has contracted with the Department of Defense since 1991.⁽³⁾ He completed a security clearance application (SF 86) in October 2002.⁽⁴⁾

Applicant manufactures low-noise preamplifiers, with hundreds of standard frequency models and special frequency units, designed to increase the coverage area of communications systems, particularly small, low-power hand held radios.⁽⁵⁾ His equipment is primarily used by police and fire departments, military, and private industry, including medical facilities and manufacturing.⁽⁶⁾ In the mid-1990s, during a visit to a Radio Shack store, he observed an electronic device that allowed a tape recorder to be connected to a telephone jack for the purpose of recording telephone conversations undetected.⁽⁷⁾ Because of his electronics background, he thought that he could design, manufacture and sell a similar device.⁽⁸⁾ In 1994 or 1995, he developed an undetectable phone tap (UPT) which plugged into telephone lines, and sold 100 units over a period of approximately four years.⁽⁹⁾ With every device sold, he included a visible warning that use of the device under some circumstances could violate state or local laws, recommending that the purchaser consult with local authorities.⁽¹⁰⁾ Radio Shack used the same warning with its device.⁽¹¹⁾

Applicant marketed the UPT, a device he believed to be legal, to electronic hobbyists through periodic advertising in a trade magazine.⁽¹²⁾ His advertisement showed the UPT device, a rectangular box measuring 2 ½ inches by 4 1/8 inches by 1 ½ inches and weighing 6 ounces.⁽¹³⁾ It listed the following features: "1) sophisticated ultra-high impedance circuitry as used by CIA and KGB; 2) not-detectable by even the most advanced tap sweeping equipment; 3) monitor conversations, faxes and data without fear of detection; 4) universal design allows monitoring with headphones, telephone or tape recorder; 5) plug into any telephone line with no click, hum, noise or voltage change; 6) voice activated tape recorder control; 7) disguised as "telephone line tester"; and 8) compact size battery powered."⁽¹⁴⁾

Starting in the fall of 1993, the United States Customs Service (Customs Service) investigated the illegal trafficking and exportation of communications intercepting devices, including those devices "primarily useful for" surreptitious interception of wire, oral or electronic communications, which is a violation of federal law.⁽¹⁵⁾ During the course of their investigation, Customs Service agents contacted Applicant twice in 1996 and twice in 1998, as businessmen seeking to purchase his UPT device.⁽¹⁶⁾ In September 1996, a Customs Agent ordered one UPT device and had it shipped to an address in the United States.⁽¹⁷⁾ On the second contact in 1996, a Customs Service agent ordered two

UPT devices, which were shipped to England, with a Customs Declaration and Dispatch Notice describing the contents as a UPT "phone line tester", as requested by the agent.⁽¹⁸⁾ In September 1998 and November 1998, acting as prospective customers, Customs Service agents contacted Applicant to discuss another UPT order for overseas.⁽¹⁹⁾ This order request was never completed.⁽²⁰⁾

On December 1, 1998, the Customs Service sought and obtained a search warrant for Applicant's place of business and an arrest warrant for him, alleging a violation of 18 U.S.C. § 2512(1)(a) and (1)(b).⁽²¹⁾ In support of its claim that Applicant violated 18 U.S.C. § 2512(1)(a) and (1)(b), the government submitted a copy of the Customs Service application and accompanying documentation for search and arrest warrants, and of the official court records.⁽²²⁾ The documents do not reflect the charges identified in the SOR and admitted by Applicant. The Customs Service executed the search warrant on December 2, 1998.⁽²³⁾ The Customs Service seized the UPT device developed by Applicant, but no other illegal intercepting equipment.⁽²⁴⁾ During the search, Applicant cooperated with the Customs Service agents, after waiving his Miranda rights.⁽²⁵⁾ He allowed the agents to search a storage facility not covered by the warrant, which contained business records.⁽²⁶⁾ He provided a statement on the same date.⁽²⁷⁾ The Customs Service agents arrested him for trafficking in electronic communications intercept devices, then processed him.⁽²⁸⁾ The court released him on a \$20,000.00 surety bond later the same day.⁽²⁹⁾

Applicant hired counsel following his arrest.⁽³⁰⁾ His counsel contacted purchasers of the UPT device and hired an engineering expert to examine the UPT device.⁽³¹⁾ His counsel's investigation revealed that purchasers used the UPT device for monitoring telephone calls of spouses or children, as test instruments, to record business dealings, or to record incoming fire emergency calls, all legal activities.⁽³²⁾ The engineering expert opined that the UPT device contained virtually identical electronic circuitry as the device sold by Radio Shack and other businesses.⁽³³⁾ His counsel provided this information to the U. S. Attorney, who then agreed that Applicant had not violated 18 U.S.C. § 2512(1)(a) or (1)(b), since the UPT device was not "primarily useful for" surreptitious interception of wire, oral or electronic communications.⁽³⁴⁾ Thus, the U.S. Attorney never brought charges against him under these statutory provisions of federal law.⁽³⁵⁾ However, the U.S. Attorney believed that by advertising his device in electronics catalogs, Applicant violated 18 U.S.C. § 2512(1)(c)(iii), which would be a felony.⁽³⁶⁾ After lengthy negotiations between the U.S. Attorney and his counsel, Applicant pled guilty to providing false information on the Customs Declaration form, a misdemeanor offense under 26 U.S.C. § 7207 and paid a \$2,500.00 fine.⁽³⁷⁾ In the court information charge, the U.S. Attorney stated that the UPT device was "capable of being used to" surreptitiously record or monitor telephone conversations.⁽³⁸⁾

Outside of this incident, Applicant has not had any other arrests, financial problems, or other negative incidents which may reflect on his character.⁽³⁹⁾ After his arrest, he stopped manufacturing the UPT device.⁽⁴⁰⁾ In 1999 and 2000, the Russian embassy contacted him about purchasing electronic splitters, one of his products.⁽⁴¹⁾ Before shipping the products and as he had done in the past, he cleared the sale through the Federal Bureau of Investigation (FBI), after he provided his contact agent with all the sale information.⁽⁴²⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically, these are: (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. ⁽⁴³⁾

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. ⁽⁴⁴⁾ The government has the burden of proving controverted facts. ⁽⁴⁵⁾ The burden of proof is something less than a preponderance of the evidence. ⁽⁴⁶⁾ Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. ⁽⁴⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. ⁽⁴⁸⁾

No one has a right to a security clearance, ⁽⁴⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." ⁽⁵⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive or classified information must be resolved in favor of protecting such information. ⁽⁵¹⁾ Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant. ⁽⁵²⁾ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

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

CONCLUSIONS

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

The government argues that by repeatedly selling the UPT device, and falsely labeling the device as a "telephone line tester", Applicant has shown a pattern of rules violations under Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.5. (*A pattern of dishonesty or rule violations, including any written or recorded agreement made between the individual and the agency.*). Specifically, the government asserts that he repeatedly violated 18 U.S.C. § 2512(1)(a) and (1)(b) because he sold approximately 100 UPT devices which were primarily useful for surreptitious interception of wire, oral or electronic communications, and that by falsely labeling the UPT as a "telephone line tester", he was encouraging his customers to act illegally.

The government has clearly established one rule violation when applicant was arrested by Customs Service agents in 1998 and pled guilty to one count of falsification for improperly labeling the Customs Declaration form, a misdemeanor crime. It, however, has not established a pattern of rule violations or dishonesty. After finding a telephone tap device, which was marketed as undetectable, at a Radio Shack store, Applicant decided he could design, manufacture and sell a similar device, which he did. Applicant did not believe that he had done anything illegal when he decided to manufacture and sell the UPT device. Because of his belief, he willingly waived his Miranda rights and cooperated with the Customs Service agents when they searched his business property. He offered them the opportunity to look at business records not covered by the search warrant and located in another facility, as he had nothing to hide. Had he knowingly been manufacturing intercept devices "primarily useful for" surreptitious surveillance, it is highly unlikely that he would have voluntarily provided business records to the Customs Service agents.

Applicant's decision to design and sell this product was strongly influenced by a similar product marketed and sold by Radio Shack, a highly visible, nationally known company. He had no reason to believe that Radio Shack would purposely develop, market and sell a product which would be primarily useful for illegal activities, simply because it could be plugged into a telephone line without being detected. Because his is a small company with limited production capability, he chose to limit his market by targeting his advertising to individuals for whom electronics is a hobby or small businesses with special legal electronic needs. By itself, this business decision does not make the manufacture and sale of UPT "primarily useful for" the surreptitious interception of electronic communications. The record evidence fails

to show he only marketed the UPT device to individuals or businesses whose sole purpose was surreptitious surveillance.

In advertising the UPT as undetectable and offering "to disguise" it as a telephone line tester, he has not automatically advertised that the UPT can only be used for deceptive and illegal purposes. Businesses may need to record conversations, to evaluate an employee's customer service skills on the telephone, to monitor business calls, or to record important business information, and can do so legally with previously obtained consent. Private individuals may want to record telephone calls of their children or spouse or even unwanted harassing telephone calls. His decision offering to conceal the UPT device reflects a conscious understanding that some purchasers could use his device for illegal purposes. Thus, like Radio Shack and as a precaution, he included a visible statement on his instruction sheet and product information sheet, warning that use of the UPT may be illegal. He advised his customers to check with local authorities. By placing this warning on his product, he clearly sought to give notice to his customers that his product would violate laws, if used for illegal purposes. Thus, through the use of this warning, he has shown he did not intend that his product be used only for illegal activities, although he knew it was capable of being used for illegal purposes.

When presented with concrete evidence that the UPT was substantially similar in circuitry to the device sold by Radio Shack and others, and that Applicant's customers used the device primarily for legal purposes, the U.S. Attorney agreed that Applicant had not violated 18 U.S.C. § 2512(1)(a) and (1)(b). The U. S. Attorney declined to proceed forward with felony charges related to the manufacture and sale of the UPT under these statutory provisions. While the device is clearly marketed as undetectable because it lacked the usual clicking sound made by other telephone tap devices, this fact does not make the device *per se* illegal. Small businesses, in particular, may have need to monitor employees' telephone activities and use of work equipment. Businesses are required to obtain employee consent to such monitoring at some point, and can do so through an employee handbook provided when hired. Consent is not necessary every time work is monitored. Therefore, it must be clear from all the evidence that Applicant had intended the UPT to be used primarily for illegal activities. Such intent is not clear in this case.

Because of his problems with the Customs Service, he decided to discontinue the manufacture and sale of the UPT device, which had marginal impact on his business revenue. In running his business operations, Applicant recognized the need to contact the appropriate authorities when he received requests for electronic parts from nations unfriendly to the United States. His work with the FBI when contacted by the Russian embassy reflects his clear intent to remain in compliance with federal law when dealing with unfriendly foreign countries, and negates any intent to develop and sell an illegal product.

Prior to his arrest in 1998, Applicant had never been arrested for any criminal conduct, nor has he since this time. He stopped manufacturing the UPT device eight years ago. He continues to manufacture and sell his usual product line: low-noise preamplifiers and associated materials. He works with the FBI when unfriendly countries seek to purchase his products to eliminate any problems concerning the sale of his product. Given that he manufactured only this one device, which he believed to be legal, and his immediate decision after his arrest to stop its manufacture, and his new understanding of the problems he could encounter, a reoccurrence of similar conduct is highly unlikely. Accordingly, for the reasons stated, I find that it is clearly consistent with the national interest to grant a security clearance to Applicant.

FORMAL FINDINGS

Formal findings For or Against 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 E (Personal Conduct): FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.a.1: 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 a security clearance for Applicant. Clearance is granted.

Mary E. Henry

Administrative Judge

2. Item 5 (Applicant's security clearance application, dated October 31, 2002) at 1; Item 8 (Applicant's signed statement, dated February 26, 2003) at 5-6.
3. Item 5, *supra* note 2, at 1.
4. *Id.*
5. Item 9 (Company profile) at 1.
6. *Id.*
7. Item 4 (Letter, dated June 15, 2004) at 2; Applicant's supplemental response, dated September 27, 2004, at 1.
8. Item 4, *supra* note 7, at 2.
9. *Id.*
10. *Id.*; Item 6 (United States Customs Service Report of Investigation, dated October 23, 2000, and documents in support of search and arrest warrants, dated December 1, 1998) at 33, 38.
11. Item 4, *supra* note 7, at 2.
12. Item 8, *supra* note 2, at 2-3.
13. Item 6, *supra* note 10, at 31, 38.
14. *Id.*
15. Item 6, *supra* note 10, at 19; 18 U.S.C. § 2512.
16. *Id.* at 22-25.
17. *Id.* at 22-23.
18. *Id.* at 23-25.
19. *Id.* at 25.
20. *Id.*
21. *Id.* at 29.
22. Item 6, *supra* note 10; Item 7 (U. S. Court documents related to charges filed against Applicant, dated July and October 2000) at 3-4.
23. *Id.* at 6.
24. *Id.* at 6-9.
25. *Id.* at 7; Item 8, *supra* note 2, at 3.
26. Item 6, *supra* note 10, at 9; Item 8, *supra* note 2, at 3.
27. Item 6, *supra* note 10, at 7-9.
28. *Id.* at 9-10.

29. *Id.*
30. Item 4, *supra* note 7, at 1.
31. *Id.* at 2.
32. Item 8, *supra* note 2, at 3.
33. *Id.* at 4; Item 4, *supra* note 7, at 2.
34. Item 4, *supra* note 7, at 2.
35. *Id.*; Item 7, *supra* note 22.
36. *Id.*
37. *Id.*
38. *Id.*
39. Item 5, *supra* note 2, at 4-7.
40. Item 8, *supra* note 2, at 5.
41. *Id.* at 6; Item 5, *supra* note 2, at 4.
42. *Id.*
43. Directive, Enclosure 2, ¶ E2.2.1.1. through E2.2.1.9.
44. ISCR Case No. 96-0277 (July 11, 1997) at 2.
45. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
46. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
47. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
48. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
49. *Egan*, 484 U.S. at 531.
50. *Id.*
51. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
52. Executive Order No. 10865 § 7.