

DATE: April 27, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23809

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was terminated from his job as a retail sales associate in February 2000 for helping a coworker remove memory from a computer and for taking computer disks, items valued at approximately \$500. Personal conduct concerns persist despite his immaturity at the time of the incident as he has not been candid with the government about his involvement. Misuse of information technology systems does not apply where the conduct involved theft of computer components rather than illegal or unauthorized tampering with an information technology system. Clearance is denied.

STATEMENT OF THE CASE

On May 10, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the 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 the Applicant. [\(1\)](#) DOHA recommended referral to an administrative judge to determine whether his clearance should be granted, continued, denied, or revoked. The SOR was based on personal conduct (Guideline E) and misuse of information technology systems (Guideline M).

Applicant filed an undated response to the SOR allegations, which DOHA received on June 7, 2004. He requested a hearing before a DOHA administrative judge, and the case was assigned to me on September 15, 2004. Pursuant to formal notice of September 16, 2004, a hearing was held as scheduled on October 7, 2004. At the hearing, five government exhibits were admitted into the record (exhibit 2 over Applicant's objection), and Applicant testified, as reflected in a transcript received on October 19, 2004.

The record was held open until October 21, 2004, for Applicant to submit documentation of his work performance in his co-op employment with the research and development laboratory, and to corroborate his account of what led to his termination from an office supply retailer in February 2000. Applicant timely forwarded evaluation forms of his performance for the periods January 2003 to June 2003 and January 2004 to June 2004. The final deadline for any

objections by the government was November 12, 2004. No objections having been filed by the due date, the documents were marked and entered as exhibits A and B, respectively.

FINDINGS OF FACT

DOHA alleges Applicant was terminated from his employment with an office supply retailer in February 2000 for removing memory from a computer and theft of other electronic items valued at about \$500, and that he was fined about \$100 for minor in possession of alcohol in June 2001. In his Answer, Applicant denied he had taken any merchandise from the retailer. Applicant asserted he elected to sign a statement acknowledging culpability rather than face prosecution. He cited his compliance with the rules and procedures regarding information technology systems at the research laboratory where he ensures personal computers are prepared for classification review and certification. Applicant acknowledged his arrest on the alcohol charge, which had been dismissed without an admission of guilt. After a complete and thorough review of the evidence of record, I make the following findings of fact:

Applicant is a 22-year-old full-time university student who was employed in a co-op position with a research and development laboratory during the spring semesters from September 2001 through June 2004. While he was not in a position that required a clearance as of his hearing, he indicated the company planned to offer him employment once he earned his degree. [\(2\)](#)

In June 1999, while still in high school, Applicant began working as a sales associate for an office supply retailer. In early February 2000, Applicant was interviewed by the store manager and a loss prevention employee investigating the theft of memory from a computer valued at \$500. Applicant executed a statement in which he wrote that he had taken some compact disks and helped fellow employee (employee X)--a close friend--remove some memory from a computer in the store's receiving area:

I took opened packages of CDR's in the range of 12-15 pcs. and assisted in the defacing of a computer for the purpose of removing the memory for another associate [employee X]. I knew that this was wrong and that I am fully responsible for my actions. I would like to state my apology and I regret what I have done. I thank [the store manager and loss prevention employee] for taking the time and being honest with me to help resolve this situation.

Applicant was terminated from his employment and was not criminally prosecuted.

In September 2000, Applicant began undergraduate studies in computer science in a university co-op program. While attending a concert at a local stadium in mid-June 2001, Applicant was arrested for possession of liquor by a person under age 21 after he was observed carrying a cooler containing nine beers. The charge was dismissed on payment of \$100 costs.

On November 2, 2001, Applicant applied for a security clearance in conjunction with his co-op student duties supporting computer network operations at a defense contractor laboratory. On his security clearance application (SF 86), Applicant disclosed that in February 2000 he had left his sales associate position with an office supply retailer following allegations of theft-related misconduct. Applicant also listed his arrest in June 2001 for underage possession of alcohol.

On May 19, 2003, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about his employment termination in February 2000, his arrest for underage possession of liquor, and his consumption of alcohol. Applicant explained his termination from his sales associate position with the office store, as follows:

There were allegations that property was stolen from the store, specifically either a computer or computer parts. There was probably other shortages as well that typically come from shrinkage or shoplifting and sometimes from theft by employees. I had not stolen anything from the store nor was I aware of anyone specifically who had. I was accused and threatened with prosecution. As I really did not like the policies of the management of the store anyway, I said I would leave. I was asked to sign a waiver indicating that I would not sue the store. I was only 17 at the time and felt that I had signed the statement under duress. The statement was not an admission of any theft that I recall.

Applicant also detailed his arrest at age 18 for minor in possession. He acknowledged engaging in underage drinking,

sharing a bottle of liquor with friends as a senior in high school, and consuming a six-pack to a dozen beers as a freshman most weekends. His drinking has since moderated to less than a six-pack once or twice monthly. While aware of the illegality of drinking underage, Applicant indicated it was an accepted norm in society and he did not personally view it as criminal.

At his hearing, Applicant denied he was a participant in any theft of computer memory or compact disks from the office supply retailer. One of three part-time employees that left the job after being interviewed, Applicant initially testified he brought in some computer disks to make restitution, having been told that if he returned the items and signed the statement, he would not be prosecuted. Applicant then corrected the record to reflect he had not brought in any disks to replace those missing. He described a scenario where his close friend, employee X, was interviewed first by store management. His friend had obviously been crying but said nothing to him as he left the store. Applicant was told during his interview by store management that employee X had "admitted to a whole bunch of things." Describing store officials as intimidating and overbearing ("along the lines of subtle threats"), Applicant asserted he took the easiest way out and agreed to write in his own hand under the instruction of the store loss prevention official that he had taken 12 to 15 computer disks and helped employee X remove computer memory.

Company records entered over Applicant's objection indicate Applicant "admitted without reservation to assisting in the removal of memory for and other electronic items from the [city Y] store. [Applicant] provided a written admission and promptly returned all the stolen product. He was subsequently terminated and exited without incident." The incident report also reflects a net loss of \$15 as the computer disks were not recovered.

Given that Applicant was only 17 at the time of the office supply retailer's investigation into the theft of computer memory, it is not surprising that he felt nervous or intimidated when interviewed by store management. Yet, Applicant also had a close relationship with employee X, who, on exiting his interview, looked like he had been crying and apparently had said nothing to Applicant. Applicant is not likely to have incriminated himself and his friend in specific acts unless he was involved or knew that his friend had been involved. I reject as not credible his denials of any knowledge of the theft of computer memory or of any personal involvement. ⁽³⁾

Applicant performed his co-op duties for the defense contractor laboratory in a knowledgeable and professional manner. Responsible for the administration and maintenance of several computers in the space surveillance department from January 2003 to June 2003, Applicant required little supervision. He displayed an overall skill level of 9 out of 10 (high) and exceeded the rater's expectations for his performance from January 2004 to mid-June 2004.

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

Enclosure 2 of the Directive sets forth personnel 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 the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the government established its case with respect to Guideline E, personal conduct. 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. (Directive ¶ E2.A5.1.1) Applicant exercised extremely poor judgment in helping a close friend remove memory from a computer in a receiving area at their place of employment and in taking several blank computer disks from an opened package in early 2000. Such an egregious violation of his employer's trust engenders serious concerns for his security suitability. Personal conduct concerns are also raised by his repeated violation of the laws prohibiting underage drinking. While such behavior may well have been accepted by his peers, it generates doubt as to whether Applicant is likely to comply with rules and regulations he might find personally inconvenient or disagreeable. Disqualifying condition (DC) E2.A5.1.2.1. *Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*, clearly applies. DC E2.A5.1.2.5. *A pattern of dishonesty or rule violations*, must be considered as well to the extent that he knowingly violated the laws regarding underage drinking.

While none of the mitigating conditions under Guideline E are directly applicable, ¶ E2.2 of the Directive enumerates several factors which must be considered in evaluating an applicant's security eligibility under the whole person concept. These factors are the nature, extent, and seriousness of the conduct (¶ E2.2.1.1), the circumstances surrounding the conduct, to include knowledgeable participation (¶ E2.2.1.2) the frequency and recency of the conduct (¶ E2.2.1.3), the individual's age and maturity at the time of the conduct (¶ E2.2.1.4), the voluntariness of participation (¶ E2.2.1.5), the presence or absence of rehabilitation and other pertinent behavioral changes (¶ E2.2.1.6), the motivation for the conduct (¶ E2.2.1.7), the potential for pressure, coercion, exploitation, or duress (¶ E2.2.1.8), and the likelihood of continuation or recurrence (¶ E2.2.1.9). Applicant's immaturity at the time of the incidents alleged in the SOR is noted. Youthful indiscretion can be mitigating, and whereas he is now of legal age, there is no risk of future underage drinking. His involvement in theft from his employer occurred when he was 17, and has not been repeated. Yet, concerns persist about his judgment, reliability, and trustworthiness, despite the absence of recurrence of similar conduct.

Applicant has not been candid with the Department of Defense about his role in the removal of computer memory and computer disks from his employer in 2000. In May 2003, Applicant told a DSS agent not only that he had not stolen anything from the store, but that he was unaware of anyone who specifically had taken a computer or computer parts from his former employer. At his hearing, he again denied any involvement and falsely claimed he had been intimidated into admitting acts he had not committed. Such deliberate misrepresentations do not engender confidence in his ability to place the government's interests before his own, and would be actionable under Guideline E in their own right (*see* DC 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*). SOR ¶ 1.a. is resolved against Applicant.

The government's case for security disqualification under Guideline M, misuse of information technology systems, is not persuasive. The concern underlying Guideline M is a failure to comply with rules, procedures, guidelines or regulations pertaining to information technology systems. (Directive ¶ E2.A13.1.1) There is no evidence Applicant in any way tampered with his employer's information technology system, whether by gaining unauthorized or illegal entry to media; by modifying, manipulating or destroying data on the system; by removing hardware or software from the system; or by introducing hardware or software from the system without authorization. The nature of the conduct at issue here is theft, not misuse of an information technology system. Accordingly, SOR ¶ 2.a. is resolved in Applicant's favor.

FORMAL FINDINGS

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

Paragraph 1. Guideline E: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: For the Applicant

Paragraph 2. Guideline M: FOR THE APPLICANT

Subparagraph 2.a.: 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 Applicant. Clearance is denied.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of Executive Order 10865 (as amended by Executive Orders 10909, 11328, and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).
2. The government had received no notification from the company that processing of Applicant's clearance should be discontinued.
3. Applicant failed to present any evidence corroborating his denial of any involvement in the theft of disks and computer memory even though he was given the opportunity to do so.