

DATE: April 26, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-05007

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER E. WILLMETH**

**APPEARANCES**

**FOR GOVERNMENT**

Erin C. Hogan, Department Counsel

**FOR APPLICANT**

John F. Mardula, Esq.

**SYNOPSIS**

Applicant acknowledged to a Defense Security Service investigator that he been a party to the removal and distribution of his former employer's computers to other employees. Applicant had become concerned that what he had done under his supervisor's direction was not authorized. However, the record establishes that the division manager and corporate vice president of Applicant's former employer authorized and directed the distribution of the surplus company computers to laid off employees. Evidence suggesting wrongdoing by Applicant has not been substantiated. Clearance is granted.

**STATEMENT OF THE CASE**

On November 10, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> issued a Statement Reasons (SOR) to Applicant. The SOR details security concerns under Guideline E (Personal Conduct). The SOR states that DOHA was unable to find that it is clearly consistent with the national interest to grant him access to classified information and recommends that his case be submitted to an Administrative Judge.

On December 12, 2003, Applicant responded to the SOR and requested a hearing. The case was assigned to me on February 3, 2004. A notice of hearing was issued on March 23, 2004 and the hearing was held on April 15, 2004. During the hearing, two Government (Govt) exhibits and the testimony of four Applicant witnesses, including Applicant, were received. The transcript (Tr) was received on April 23, 2004.

**FINDINGS OF FACT**

Having thoroughly considered the evidence in the record, I make the following findings of fact:

Applicant is a 27-year-old software engineer who is employed by a defense contractor. He is seeking a security

clearance.

In December 2001, the company by whom Applicant was employed closed the division in which he worked and laid off its employees.

The division manager, who was a corporate vice president, authorized the distribution of company computers to employees who were being laid off and so informed corporate headquarters.

At the direction of his supervisor, Applicant and his supervisor removed 20 computers from the division to Applicant's home, from which Applicant was directed to distribute computers to former employees.

Subsequently, Applicant received a call from an official at corporate headquarters and was asked to return 10 of the computers.

Applicant retrieved the computers from the former employees to whom he had distributed them and returned them to the company.

Although Applicant had thought his possession and distribution of the computers was authorized, he became concerned that it was not.

On April 22, 2002, Applicant submitted a security clearance application.

On June 3, 2002, Applicant was interviewed by an contract investigator for the Defense Security Service (DSS).

During the interview, Applicant raised his possession of the computers. Under the direction the investigator, Applicant provided a written statement in which he acknowledged the "theft" of the computers.

### **POLICIES**

Department Counsel is responsible for presenting witnesses and other evidence to establish controverted facts in the SOR. Directive E3.1.14. The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Directive E3.1.15.

Eligibility for access to classified information is predicated upon an individual meeting adjudicative guidelines discussed in Enclosure 2 of the Directive. An evaluation of whether an applicant meets these guidelines also includes the consideration of a number of variables known as the "whole person concept." Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a decision. This assessment should include the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 pertinent 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. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of national security. Directive E2.2.2.

Enclosure 2 provides conditions for each guideline that could raise a concern and may be disqualifying, as well as further conditions that could mitigate a concern and support granting a clearance. The following guideline is applicable to this case.

Guideline E, Personal Conduct, concerns 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. Conditions that could raise a security concern and may be disqualifying under Guideline E include E2.A5.1.2.4 (Disqualifying Condition 4). Disqualifying Condition 4 addresses personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as

engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail.

Conditions that could mitigate security concerns include E2.A5.1.3.1, the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability (Mitigating Condition 1).

### **CONCLUSIONS**

Applicant's admission of a theft of his former company's property is personal conduct that increases his vulnerability to coercion, exploitation, or duress. Therefore, Applicant's apparent conduct, as addressed by SOR ¶ 1.a, is evidence of Disqualifying Condition 4.

Unfortunately for Applicant, he became concerned that he may have been a party to a theft of company property. Fortunately for Applicant, the record establishes that no theft occurred.

The division manager, who was a corporate vice president, testified that she authorized the distribution of company computers to employees who were being laid off and so informed corporate headquarters. Both she and Applicant's former supervisor explained that the computers at that division had been fully depreciated by the company, it would be costly to ship them to another location, and the company had no need for them elsewhere. The division manager, feeling bad about laying off employees at Christmas, decided to give computers to employees who were being laid off.

Because many of the employees had already been laid off and the division office was about to close, Applicant's supervisor helped him remove the computers to Applicant's residence. Applicant's supervisor authorized him to keep computers for his use and distribute the others to former employees. Management even intended for former employees, who did programming, to have a second computer for that purpose.

Both the division manager directed and Applicant's supervisor told him that they needed to be "discrete" in removing the computers. Applicant later became concerned that this was evidence the removal was not authorized. Actually, it reflected management's concern that other employees might regard the removal as an indication to take other property, such as furniture, which was not authorized.

Applicant became especially concerned when corporate headquarters contacted him to retrieve 10 of the computers. As management explained, there was no need for the computers but rather certain software on them. Because of the software licenses, it was easier to transfer the computers than the software licenses to other computers.

Since the record establishes that Applicant's removal and distribution of the computers was authorized, the information that there was a theft has not been substantiated. The apparent disqualifying condition has been rebutted in accordance with Mitigating Condition 1. Therefore, I find in favor of Applicant.

### **FORMAL FINDINGS**

Formal findings, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1. Guideline E: FOR APPLICANT

Subparagraph 1.a: For Applicant

### **DECISION**

In light of the evidence of record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant

*Signed*

**Roger E. Willmeth**

## **Administrative Judge**

1. Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified.