

DATE: February 15, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-05729

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 49-year-old senior engineer/scientist for a defense contractor. In February 2001, Applicant went into a warehouse store and put two DVDs down his pants. He left the store without paying for the merchandise. Applicant put the merchandise in his car, returned to the store and did the same thing, stealing two more DVDs. Applicant was arrested, charged and convicted of petty theft. Applicant completed his security clearance application in June 2002, and falsified his application by failing to divulge his arrest and conviction. Clearance is denied.

STATEMENT OF THE CASE

On September 21, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J for criminal conduct and Guideline E for personal conduct.

In a sworn statement, dated October 26, 2004, Applicant responded to the SOR allegations, and elected to have his case decided on the written record, in lieu of a hearing. In his SOR response, Applicant admitted some allegations and denied other allegations contained in the SOR. Department Counsel submitted the government's case on December 2, 2004. A complete copy of the file of relevant material (FORM) was received by Applicant on December 15, 2004. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the FORM, and did not provide any additional material. The case was assigned to me on February 11, 2004.

FINDINGS OF FACT

Applicants' admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and statements, I make the following findings of fact:

Applicant is 49 years old and works as a senior engineer/scientist for a defense contractor. Applicant has worked as an engineer for different companies since 1991. Applicant is married and a college graduate.

On February 3, 2001, Applicant entered a wholesale department store and placed two DVDs in the front of his pants and left the store without paying for the items. He placed the items in his car and immediately returned to the store. Applicant again placed two DVDs in the front of his pants, obtained some grocery items and proceeded to the checkout counter. Applicant paid for the grocery items and proceeded to exit the store. Applicant was stopped by a store employee.

Applicant admitted to store personnel he stole four DVDs on two separate trips in the store. Applicant offered to pay for the DVDs. Applicant was subsequently arrested and charged with theft. At a later court date, Applicant pled guilty to stealing the DVDs. He was sentenced in April 2001, to one day in jail, placed on three years probation and ordered to pay a fine. Applicant paid the fine and was credited with time served for his one day sentence.

Applicant stated he stole the merchandise because he thought he could get away with it. Applicant regrets his actions. Applicant stated "I learned that I must pay for all my purchases. Stealing is wrong."⁽²⁾

Applicant completed a security clearance application (SF 86) on June 4, 2002. Applicant answered "no" to question 23: *(For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the court record. Section (f): In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above . . .)* Applicant claimed he thought question 23 meant "a serious offense."⁽³⁾ Applicant completed his SF 86 certifying it to be true and acknowledging its accuracy. He signed his application certifying: *"My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both."*⁽⁴⁾ The answer to question 23 (f) on his SF 86, provided by Applicant, under penalty of law, regarding his past criminal conduct was false. Applicant did not correct the information on his SF 86 until he was asked about it by the Defense Security Service (DSS) investigator in December 2002.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, and Guideline E, pertaining to personal conduct, with their respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision 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 and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

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.⁽⁵⁾ The government has the burden of proving controverted facts.⁽⁶⁾ The burden of proof is something less than a preponderance of evidence.⁽⁷⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Any reasonable doubt about whether an applicant

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should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. ⁽¹³⁾ 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.

CONCLUSION

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Based on all the evidence, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.*), and CC DC E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses.*) apply in this case. Applicant admitted his criminal activity of stealing. While still on probation for this offense, and fourteen months after he was sentenced, Applicant failed to tell the truth on his SF 86. It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the Government of the United States. ⁽¹⁴⁾ Security clearances are within the jurisdiction of the executive branch of the Government of the United States. ⁽¹⁵⁾ Applicant deliberately lied in the signed, sworn statement he completed for the purpose of obtaining a security clearance. Under all the circumstances, Applicant failed to convince me that he did not knowingly and willfully falsify his SF 86. An applicant may be disqualified if allegations of criminal conduct are raised against him. Applicant went to court, received a sentence, spent a day in jail and was on probation for three years for his offense. For a 49-year-old senior engineer to be convicted of theft and then view it as not serious enough to report it on his SF 86 is not believable.

I have considered all the Criminal Conduct Mitigating Conditions (CC MC) and specifically considered CC MC E2.A10.1.3.2. (*The crime was an isolated incident.*), and CC MC (*There is clear evidence of successful rehabilitation.*) and conclude they do not apply. Although Applicant had only one criminal offense that he went to court for, when combined with his false statement on his SF 86, a violation of federal law, it is a clear he was attempting to conceal his criminal actions, and has not provided any evidence of successful rehabilitation.

Personal Conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Personal 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.

Based on all the evidence Personal Conduct Disqualifying Condition (PE DC) PE DC E2.A5.1.2.2. (*The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits, or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.*) applies in this case.

I have considered all the Personal Conduct Mitigating Conditions (PC MC), and specifically considered PC MC E2.A5.1.3.2. (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*) and, PC MC E2.A5.1.3.3. (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.*), and conclude they not apply. Applicant was well aware of his criminal conduct when he failed to disclose it on his SF86 in June 2002. Applicant had more than six months to contact DSS and correct the false statement. Applicant did not provide the correct information until confronted by the DSS investigator in December 2002.

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination

that the person is eligible for a security clearance. Indeed the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered all the evidence in this case. I have also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I am persuaded by the totality of the evidence in this case that it is not clearly consistent with the national interest to grant Applicant a security clearance. Applicant has failed to mitigate the security concerns caused by his criminal conduct and personal conduct. Accordingly, Guideline J, pertaining to criminal conduct, and Guideline E, pertaining to personal conduct are decided against 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 Criminal Conduct (Guideline J) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Paragraph 2 Personal Conduct (Guideline E) AGAINST THE APPLICANT

Subparagraph 2.a. Against 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.

Carol G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. Answer.

3. Answer

4. 18 U.S.C. § 1001.

5. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

6. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.

7. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

8. ISCR Case No. 94-1075 (August 10, 1995) at pp.3-4; Directive, Enclosure 3, ¶ E3.1.15.

9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15

10. *Egan*, 484 U.S. at 531.

11. Id.
12. Id.; Directive, Enclosure 2, ¶ E2.2.2.
13. Executive Order 10865 § 7.
14. 18 U.S.C. § 1001
15. *See Egan*, 484 U.S. at 527.