

DATE: November 23, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-05708

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esq., Department Counsel

FOR APPLICANT

Greg Bryant, Esq.

SYNOPSIS

The Government has not established a case under the criminal conduct guideline because there is no direct evidence indicating the items in question were stolen by Applicant. On the other hand, sufficient evidence from interviewed supervisors/coworkers indicates there was a policy of transferring all serviceable items to the re-utilization office or placing them on pallets for redistribution. Applicant's failure to comply with the policy has not been mitigated by his favorable character statements and performance evaluations. Clearance is denied.

STATEMENT OF CASE

On January 10, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6, dated January 2, 1992, as reissued through Change 4 thereto, dated April 20, 1999, 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 Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. On February 4, 2005, Applicant responded to the SOR and requested a hearing before an Administrative Judge.

The case was assigned to me on April 22, 2005. On April 25, 2005, this case was set for hearing on May 18, 2005. The Government submitted five exhibits (GE 1-5), and Applicant submitted one exhibit after the hearing. Testimony was taken from Applicant. On May 27, 2005, Applicant furnished the exhibit (two performance evaluations and five character references). Those documents are received in evidence as Applicant's Exhibit A (AE A). The transcript (Tr.) was received on June 6, 2005.

FINDINGS OF FACT

The SOR alleges criminal conduct (Guideline J) and personal conduct (Guideline E) that is based on the conversion of government property by Applicant between August and October 1999. Applicant denied both factual allegations and

requested a hearing. Applicant is 44 years old and has been employed as a local area engineer (LAN) with his employer since 1990. He seeks a secret security clearance.

According to GE 3, Applicant was investigated by the Air Force Office of Special Investigations (AFOSI) from August 24, 2001 to November 7, 2001. The investigation led to a charge against Applicant for Misappropriation of Government Funds (subparagraphs 1.a., a violation of 18 United States Code (U.S.C.) Section 641 ⁽¹⁾ and 2.a., rule violations. Applicant was granted Pre-Trial Diversion by the United States (U.S.) Attorney's Office on August 26, 2002. ⁽²⁾ Applicant received diversion because the prosecutor could not specifically ascertain how the 45 items (computer equipment and three cargo plane windshields) came into Applicant's possession. (GE 3, handwritten page 112). Prosecution was held in abeyance for a period of 12 months and Applicant was ordered to pay \$8,800.00 in restitution. On February 19, 2003, Applicant completed the restitution payments; on September 23, 2003, the diversion period ended and the charge of isappropriation of Funds was dismissed.

In the 1980s and 1990s, Applicant and his father attended and sometimes purchased items at auctions held at the military base where he works. In August 1999, Applicant's former employer was replaced by a new employer. Between August and October 1999, employees and equipment under the former employer were transitioned to the new employer. During the transition, all equipment owned by the government through the former employer's contract was to be inventoried and transferred to the re-utilization office for distribution or some type of additional action. (GE 2) The inventory process of equipment was not performed as efficiently as it should have been, and computer items and other equipment could not be accounted for. Applicant claims that after receiving permission, he removed equipment (some new, some used) from the same trash dumpster he saw two employees throw serviceable items into. (Tr. 55) ⁽³⁾ Applicant also claimed these discarded items were not compliant with the 21st century numbering system. He sold these items and three cargo-plane windshields (he had purchased in 1997 or 1998) on the internet for approximately \$24,000.00 to \$29,000.00. These items were discovered during the investigation between June and September 2001, and are listed on page 12 of GE 3. ⁽⁴⁾

While there is an independent source (Applicant's current supervisor and Applicant's third character reference) claiming Applicant received permission from a second supervisor (GE 3, p. 13) to remove items from the dumpster, the second supervisor denied he had granted anyone permission to remove computer equipment from the dumpster. (GE 3, p. 14) Regarding Applicant's claim of observing two individuals throwing serviceable items in the trash bin, there is no independent evidence corroborating Applicant's claim. ⁽⁵⁾ Rather, the procedure as described by the other transitioning employees (GE 3, pp. 14-17) was that the old equipment that was not scheduled for use by the new employer (contractor), was supposed to be turned into the re-utilization office for distribution or placed on pallets.

Applicant claimed he purchased the three cargo plane windshields from the re-utilization office in 1997 or 1998. The windshields he purchased were sealed in boxes with certificates of performance. Applicant contends he received proof of payment (credit card receipts) through the Freedom of Information Act (FOIA) to prove that he had purchased the windshields. No documentary information of the sale was produced. In addition, the three windshields that were listed on page 12 of GE 3 (investigation), are listed on the second page of the U.S. pretrial diversion report (GE 3, handwritten page 112 in the lower right hand corner) which was conducted in June 2002.

After considering the fact he had no prior record (Tr. 40-41), Applicant chose pretrial diversion because the restitution cost of the diversion would be lower than his legal bills at trial. (Tr. 43) ⁽⁶⁾ As noted, he successfully completed all components of diversion.

In Applicant's two performance evaluations for 2003 and 2004, his overall rating was "successful contributor." He received additional credit for his involvement in an electronic method of grading simulation exercises. A coworker and supervisor for 10 years recommends him for a position of trust. Another supervisor noted that Applicant is very trustworthy and knowledgeable with computers. A third character reference has known Applicant for 17 years, first as a coworker and then a supervisor. In that period, the third character reference has observed Applicant's dependability and integrity on the job. ⁽⁷⁾ The fourth character reference has been Applicant's coworker for five years and considers him trustworthy and diligent, even under pressing circumstances. The fifth reference has worked with Applicant for nine years and considers him a real team player who is always willing to assist others in reaching mission objectives.

Having weighed all the evidence, including Applicant's demeanor and testimony at the hearing, Applicant's credibility is undermined by the absence of independent evidence to support his claims about receiving permission to remove items from the bin, about seeing anyone throw serviceable products in the dumpster, and about the purchase and sale of the plane windshields.

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Criminal Conduct (Guideline J)

A pattern of criminal activity reflects poor judgment, unreliability and untrustworthiness.

Personal Conduct (Guideline E)

Demonstrating an unwillingness to comply with rules and regulations could indicate a person may not properly safeguard classified information.

CONCLUSIONS

Violating the law reflects poor judgment, unreliability and untrustworthiness within the purview the criminal conduct (CC) guideline. Applicant was charged with violating 18 U.S.C. 641, the conversion of anything of value for one's own use. A review of the pretrial diversion report ostensibly reflects his admission to the offense and an acceptance of full responsibility for his actions. While the pretrial diversion report indicates he was responsible for converting \$25,300.00 of computer equipment and three plane windshields, plea bargaining reduced the amount of restitution to \$8,800.00 Applicant was required to pay. However, as discussed in POLICIES, the Government must establish their case through substantial evidence. Applicant's conduct falls outside CC disqualifying condition (DC) E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*) as there is insufficient evidence to show ownership of the scrutinized items, and there is insufficient evidence to warrant a conclusion Applicant stole the items listed on page 12 and handwritten page 112 of GE 3. While Applicant's explanation for obtaining possession of the scrutinized items for resale .e.g., receiving permission to remove the items from the dumpster, observing two other coworkers discard serviceable items in the dumpster, has been substantially rebutted, the government has not presented all the elements of the 18 U.S.C. 641. Accordingly, I find for Applicant under the criminal conduct guideline.

The personal conduct (PC) guideline refers to rule violations that could infer or suggest an individual may be a unsuitable candidate to safeguard classified information. The surrounding circumstances of this case call for the application of PC DC E2.A5.1.2.5. (*a pattern of rule violations, including violation of any written or recorded*

agreement made between the individual and the agency) Having evaluated the entire record, specifically the statements of the witnesses in GE 3, there was a policy of inventorying the government equipment and taking it to the re-utilization office for distribution. Though the policy was not being followed as closely as it should have been, Applicant violated that policy. There is no credible evidence exempting Applicant from the policy or supporting Applicant's claim of receiving permission for removing items from the dumpster. The third character reference had an opportunity in his statement (AE A) to reinforce Applicant's "permission" explanation, and did not. Second,. there is no evidence supporting Applicant's observation of two individuals throwing serviceable items in the dumpster. Third, had Applicant provided proof-of-purchase documentation for the windshields, it logically follows those windshields would not have remained on the list of scrutinized items that were a part of the subsequent Pretrial Diversion report in June 2002. (GE 3, handwritten page 112 in the lower right hand corner).

Even though the policy pertaining to the government equipment may not have been written or posted, almost all the other interviewed employees knew the old equipment was to be inventoried and transferred to the re-utilization office. And even if knowledge of the policy had not been as widespread, commonsense should have guided Applicant to conclude he was not free to remove the items from the dumpster when none of the other employees were removing the items.

Applicant's character evidence from his colleagues has been examined carefully. The positive character evidence and performance evaluations for 2003 and 2004, coupled with his successful completion of diversion in September 2003, weighs in Applicant's favor. However, given the scope of Applicant's violation of the policy of returning the items to the re-utilization office (in part driven by his unfounded belief he had permission to take the items) instead of selling over 40 items on the internet, the eighteen month period since his discharge from diversion in September 2003 is not sufficient to establish Applicant's ultimate burden of persuasion under the personal conduct guideline (E2.A5.) and the general factors of the whole person concept at E2.2.1. of the Directive.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

Paragraph 1 (Criminal Conduct, Guideline J): FOR THE APPLICANT.

subparagraph a. For the Applicant.

Paragraph 2 (Personal Conduct, 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 not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Paul J. Mason

Administrative Judge

1. The statute refers to conversion of anything of value. If the converted property is worth more than \$1,000.00, the individual shall be fined and imprisoned no more than 10 years; if the value is less than \$1,000.00, then imprisonment can be no more than one year.
2. The general conditions included: (1) not to violate any law; (2) attending work regularly; (3) reporting to supervisor at all times; and (4) complying with any special conditions . The special conditions was restitution in the amount of \$8,800.00. Applicant signed the diversion agreement on August 21, 2002.
3. However, Applicant indicated in his sworn statement (GE 2), "I have no idea how much equipment was being thrown

away nor do I know the parties involved in the process. I noticed that the dumpster contained a lot of useable equipment and I retrieved a lot of items from the dumpster, exact amounts unrecalled."

4. The same list appears in the subsequent pretrial report that also is a part of GE 3.

5. One of the individuals identified by Applicant stated that the only items she saw being tossed into the trash bin were old books, unuseable power cords and broken wires, and nothing that was valuable. GE3

6. The reduced amount of restitution is a result of plea negotiations and prosecutorial discretion in choosing to offer Applicant pretrial diversion. (GE 3, pp. 16-19) over prosecution.

7. Significantly, the third character reference did not discuss his purported knowledge that Applicant had received permission to remove items from the trash bin between August and October 1999.