

DATE: February 14, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-05886

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Eric H. Borgstrom, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant was issued a letter of reprimand and discharged from the Naval Reserve with an other than honorable discharge in 1998 based on his attempted theft of a government computer. He was convicted of shoplifting in 2002, and failed to reveal that conviction during the course of a security clearance eligibility interview. Applicant has failed to mitigate the security concerns caused by his criminal and personal conduct. Clearance is denied.

**STATEMENT OF THE CASE**

On April 29, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J (criminal conduct) and Guideline E (personal conduct). Applicant submitted an answer to the SOR that was received by DOHA on May 17, 2004. He admitted the allegation contained in SOR subparagraph 1.a., denied the allegation in subparagraph 2.a., and admitted all other allegations with explanations. Applicant requested a hearing.

The case was assigned to me on September 15, 2004. A notice of hearing was issued on November 30, 2004, scheduling the hearing for December 15, 2004. The hearing was conducted as scheduled. The government submitted five documentary exhibits that were marked as Government Exhibits (GE) 1-5 and admitted into the record without objection. Applicant testified and submitted seven documentary exhibits that were marked as Applicant Exhibits (AE) 1-7. AE 1 was admitted into the record without objection. AE 2-7 were admitted into the record over Department Counsel's objection. The transcript was received on December 29, 2004.

**FINDINGS OF FACT**

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

Applicant is a 46-year-old man who has been employed by a government contractor, presently as a senior engineer, since June 1988. He graduated from college in December 1982 and was awarded a bachelor of science degree in aerospace engineering. Applicant has been married since October 1990, although his wife took their three children and moved out of the marital residence in early 2004. He is now seeking to regain custody of the children.

Applicant served on active duty in the U.S. Navy from October 1983 to June 1988. He was a lieutenant at the time of his release from active duty, and, after affiliating with the Naval Reserve as a drilling reservist, was eventually promoted to the rank of lieutenant commander. Applicant received a punitive letter of reprimand in 1998 for attempting to misappropriate a government computer for his personal use. He was thereafter discharged with an other than honorable (OTH) discharge.

The circumstances leading to issuance of the reprimand and subsequent discharge began with Applicant's efforts to purchase a used government computer from a government resale facility. Frustrated in his efforts because others apparently received advance notice when computers would be available at the resale facility, and without adequate funds to buy a new computer, Applicant decided to take a computer that had been designated as scrap from a government building. He attempted to conceal the computer after he was observed carrying it from the building to his personal automobile, however, his involvement in the attempted theft was discovered as the result of a criminal investigation. Applicant was in a drill status at the time of the incident.

Applicant was arrested on June 11, 2002 and charged with shoplifting. His version of the incident leading up to the arrest is that he went to a store to purchase a lightbulb, discovered empty bags in a cart he was using, and for unexplainable reasons placed a number of items in the bags and was apprehended after he left the store without paying for those items. He was convicted of the offense on July 9, 2002, and sentenced to 60 days in jail (suspended), placed on three months probation, ordered to perform 25 hours community service work, and fined \$100.00.

Applicant's wife, parents, and children are unaware of his criminal actions, and he does not want them to find out about them. He is concerned about the impact that learning of these incidents would have on his spouse's mental health and his parent's physical health. He does not think his children need to know of them because of their ages.

Applicant did not disclose the computer theft incident in a security clearance application (SF 86) he submitted on May 6, 2002 in response to a question asking about military disciplinary proceedings. He testified he was unsure of how to answer the question because he does not know if he had been subjected to proceedings under the Uniform Code of Military Justice (UCMJ). In response to other questions in the SF 86, Applicant did disclose he had received an OTH discharge and that he left the Naval Reserve because of allegations of misconduct and poor judgment. Accordingly, I find his explanation for the apparent incorrect answer credible.

Applicant was interviewed by a Special Agent of the Defense Security Service (DSS) on September 23, 2002. During the course of that interview he did not disclose his 2002 conviction for shoplifting. His justification for not telling the special agent about the conviction is that the agent didn't ask him about it and it is his belief that if you're not asked about something you shouldn't volunteer information.

Applicant places much of the blame for his two criminal actions on his physical health and his wife's mental health. Specifically, he suffered a stroke in 1996, and possibly two earlier undetected strokes, that he attributes, at least in part, to his wife having mental health problems that originated from her being the victim of childhood mistreatment. While it is somewhat unclear what exactly he sees as the connection, it appears he believes his physical problems, the medication he is taking, and the stress of coping with her mental problems have combined to cause him to have lapses in judgment.

Applicant is still taking the medications, and, as evidenced by the marital separation and ongoing child custody dispute, is still attempting to cope with the stress. A further complication from these issues is that Applicant has difficulty with his short-term memory. Accordingly, he takes and retains copious notes about pretty much everything that is occurring in his life because he believes he would otherwise forget the information.

## POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security

clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. 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. 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, are most relevant in this case.

### **BURDEN OF PROOF**

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(2)</sup> The government has the burden of proving controverted facts.<sup>(3)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(4)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(5)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(6)</sup> 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.<sup>(7)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(8)</sup>

No one has a right to a security clearance<sup>(9)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(10)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(11)</sup>

### **CONCLUSIONS**

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.

The government has established its case against Applicant under Guideline J based upon the attempted theft of the government computer and the shoplifting incident. Although the record does not contain definitive evidence that Applicant was subjected to disciplinary proceedings under the UCMJ, he admits attempting to misappropriate the computer for his personal use and to being reprimanded for his actions. Disqualifying Conditions (DC) 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply.

I have considered all possible mitigating conditions, and none apply. Most notably, Applicant attributes his two criminal misdeeds to a combination of his physical health, his spouse's mental health, and short-term memory problems. All of those factors are still present in Applicant's life, and, considering his wife took their children and moved out of the marital residence last year bringing about an ongoing child custody dispute, may well be greater now than ever before. Accordingly, there is no basis in the record to find that Mitigating Conditions (MC) 1: *The criminal behavior was not recent*; MC 4: *. . . the factors leading to the violation are not likely to recur*; and MC 6: *There is clear evidence of successful rehabilitation* apply. The remaining mitigating conditions have no applicability to the facts of this case. Guideline J is decided against Applicant.

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.

Applicant, an officer, violated the trust and confidence placed in him when he was granted a commission in the U. S. Navy by attempting to steal a government computer. As a result he was discharged from the Navy under other than honorable terms. He has concealed his criminal conduct from his wife, parents, and children for years. He remains concerned about what effect the discovery of such information would have on his wife's mental health and his parent's

physical well-being.

Applicant also failed to disclose a very recent arrest and conviction during the course of a security clearance eligibility interview with a DSS special agent in 2002. His explanation that he believes if you're not asked, you shouldn't volunteer information is hardly consistent with the judgment that must be demanded of a person who is to be entrusted with the nation's secrets.

DC 4: *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* applies. Guideline E is decided against Applicant.

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 trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Considering all relevant and material facts and circumstances present in this case, including the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has failed to overcome the case against him and satisfied his ultimate burden of persuasion.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline J: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

SOR ¶ 2-Guideline E: Against Applicant

Subparagraph a: For Applicant

Subparagraph a: Against Applicant

Subparagraph c: Against Applicant

Subparagraph d: Against Applicant

Subparagraph e: Against 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.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.