

DATE: May 3, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-06770

## **DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

#### **FOR APPLICANT**

David P. Tracy, Esq.

### **SYNOPSIS**

Applicant was cited for shoplifting from a retail store in 1994, appeared in court, and the charge was dismissed after he entered into an agreement to compromise the misdemeanor with the retailer and paid \$50.00 court costs. Applicant did not disclose this incident in the security clearance application he signed in January 2000 or when he was initially questioned by Special Agents from the Defense Security Service. Applicant has failed to mitigate the security clearance concern caused by his personal conduct and the related criminal conduct in providing false information. Clearance is denied.

### **STATEMENT OF THE CASE**

On August 11, 2003, 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. [\(U\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline E (personal conduct) and Guideline J (criminal conduct). Applicant submitted an answer to the SOR that was received by DOHA on October 3, 2003. He admitted one SOR allegation, admitted two other allegations while providing clarification as to what was alleged, denied five allegations, and did not address the criminal conduct allegation. Applicant requested a hearing.

The case was assigned to another administrative judge on November 4, 2003, transferred to a second administrative judge on December 23, 2003, and reassigned to me on January 7, 2004, due to caseload considerations. A notice of hearing was issued on January 13, 2004, scheduling the hearing for February 6, 2004. The hearing was conducted as scheduled.

The government submitted six documentary exhibits that were marked as Government Exhibits (GE) 1-6. GE 1 and 3-5 were admitted into the record without an objection. GE 2 was admitted into the record over Applicant's objection. GE 6 was a multi-page document that was admitted in part and to which objections were sustained in part. The government also called two Special Agents from the Defense Security Service (DSS) as witnesses. Applicant testified at the hearing and submitted ten documentary exhibits that were marked as Applicant Exhibits (AE) 1-10. AE 1 and 3-10 were admitted into the record without an objection. AE 2 was admitted into the record over the government's objection. The transcript was

received on February 27, 2004.

## FINDINGS OF FACT

Applicant's admission and admissions with clarification 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 42-year-old man who has been employed as an engineer by a government contractor since November 1984. He has been married since August 1985, has two children, ages fifteen and twelve, and has lived in the same residence since October 1989. He received a bachelor of science degree in electrical engineering in June 1983. He has possessed a security clearance since 1983, without any complaints ever being made alleging he has mishandled classified material. The performance evaluations, employment certificates, and salary history submitted by Applicant attest to his reputation for being a capable engineer who is considered to be an outstanding leader with recognized management potential.

Applicant was issued a criminal non-traffic citation on January 5, 1994 charging him with Theft III. The citation was issued after a retail store security guard observed Applicant remove sports cards valued at \$39.99 from their packaging, discard the packaging, and conceal the cards in his pockets. (GE 2) The guard detained Applicant and called police. The responding police officer interviewed Applicant and recorded Applicant's statement as follows: "(Applicant) stated that he came to (the store) to price t.v.s, saw the box of trading cards, wanted them, but simply didn't want to pay for them, and made a 'big mistake'." (GE 2)

Applicant disputes the recitation of events and the statement attributed to him in GE 2. According to Applicant, he had purchased items at the store, and was waiting with his receipt for an employee to check his purchase when some individuals who were being detained by security pointed in his direction. A security guard approached him, holding baseball cards in his hand, and asked if he knew the individuals who were being detained. He denied knowing them, was detained by security, a police officer arrived, Applicant stated "this is a big mistake . . .," (Tr. pg. 65) and was issued a citation.

Applicant retained an attorney to represent him following issuance of the citation. The attorney filed an entry of appearance, waiver of arraignment, entry of a plea of not guilty, demand for jury trial, and reservation of right to present a petition for deferred prosecution on January 14, 1994. Applicant appeared in court with his attorney on February 16, 1994 and agreed to a continuance. Applicant appeared in court a second time with his attorney on March 16, 1994, presented a compromise of misdemeanor, paid \$50.00 court costs, and the case was dismissed. (GE 4)

The compromise of a misdemeanor was memorialized in a document entitled *Motion to Compromise a Misdemeanor* signed by Applicant on March 7, 1994. (AE 1) In that document, Applicant agreed the retailer had probable cause to stop him for shoplifting, agreed to pay the retailer \$240.00 in complete satisfaction of all claims it might have against him, and agreed not to return to the retail store, or any of the chains other stores, for one year. In return the retailer agreed to compromise the misdemeanor. [\(2\)](#)

Applicant signed a security clearance application (SF 86) on January 27, 2000, in which he answered "No" to question 26: *Your Police Record - Other Offenses - In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150.00 unless the violation was alcohol or drug related.)* . . . Applicant was also questioned by Special Agents from the DSS on May 3, 2001, and answered "No" when asked if he had ever been arrested or appeared in court. Having been charged with Theft III in January 1994, the answers he provided in the SF 86 and to the Special Agents were false.

When directly confronted by the Special Agents with the shoplifting offense, Applicant admitted the incident and provided the same explanation of what he claimed to have occurred recited above. He justifies his failure to list the offense on the SF 86 on the facts that he was issued a citation as opposed to being taken into custody and the charge was dismissed. He claims he did not initially tell the Special Agents about the incident because they questioned him in 2001 and only asked him about arrests that occurred within the previous seven years.

Applicant was investigated by his employer in 1997 concerning allegations he had falsified or improperly documented his time card, and used his company computer to access pornographic web sites and conduct personal business. He denies ever accessing pornographic web sites, admits using his work computer to conduct personal business on a few occasions, and explains the time card issue arose from the way he was instructed by his supervisor to record overtime he had worked. There is no evidence the company took any disciplinary action against him

## 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 E, pertaining to personal conduct, and Guideline J, pertaining to criminal 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>(3)</sup> The government has the burden of proving controverted facts.<sup>(4)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(5)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(6)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(7)</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>(8)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(9)</sup>

No one has a right to a security clearance<sup>(10)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(11)</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>(12)</sup>

## **CONCLUSIONS**

The explanation Applicant gave to the Special Agents from DSS for how he came to be cited for shoplifting is not credible. It is impossible to accept his claim that three thieves pointed him out in an effort to shift blame from themselves, a security guard, with nothing further to go on, then lied to police claiming he saw Applicant attempting to steal merchandise, and a police officer then submitted a false report claiming Applicant made the admissions attributed to him by the officer. I have considered Applicant's appearance, demeanor, and manner of testifying, along with the substance of his testimony and find he deliberately provided false information to the Special Agents about the shoplifting incident.

Likewise, Applicant's explanation for failing to disclose the shoplifting incident in the SF 86 is not credible. While he was not arrested in the common understanding of that term, he certainly was charged with an offense. Once again, it is impossible to believe an individual with Applicant's education and experience would not consider himself to have been charged with an offense, especially in view of his actions in hiring an attorney, making two court appearances, paying court costs, entering into an agreement memorialized by a document entitled *Motion to Compromise a Misdemeanor*, acknowledging the existence of probable cause to stop him, and paying \$240.00 to the complainant. I have again considered Applicant's appearance, demeanor, and manner of testifying, and the substance of his testimony, particularly in responding to the questions posed to him on cross-examination, and find he deliberately provided a false answer in the SF 86.

Finally, I do not accept Applicant's claim that the Special Agents limited their inquiry to offenses that occurred within the preceding seven years. I find the Special Agents testimony on this issue completely credible.

There is no evidence to substantiate the claim that Applicant used his work computer to access pornographic web sites. His explanation about why he documented his time card as he did is credible. Applicant admits using his work computer to conduct private business. However, this appears to be a minimal violation of his employer's regulations considering there is no indication any disciplinary action was taken against him. I do not find this substantiated SOR allegation raises any security clearance concern.

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's failure to disclose the 1994 shoplifting charge in the SF 86, and the false answers and information he provided to the Special Agents severely undermine the ability to place trust and confidence in him at the present time. His false answers, and the reasons he has given for providing those answers, raise significant security concerns.

Disqualifying Conditions (DC) 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*; and DC 3: *Deliberately providing false or misleading information concerning relevant and material matter to an investigator, security official, competent medical authority, or other representative in connection with a personnel security or trustworthiness determination* apply in this case. I have considered all Mitigating Conditions under Guideline E and none apply. Guideline E is decided against Applicant.

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 false answer he gave in the SF 86 and the false information he provided to the Special Agents. Disqualifying Condition (DC) 1: *Allegations or admissions of criminal conduct, regardless of whether the person was formally charged* applies in this case. I have considered all Mitigating Conditions under Guideline J and none apply. Guideline J is decided against Applicant.

**FORMAL FINDINGS**

SOR ¶ 1-Guideline E: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: For the Applicant

SOR ¶ 2-Guideline J: 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. 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. The applicable state law provides that when a defendant is prosecuted for a misdemeanor, for which the injured party has a civil remedy, the offense may be compromised, Wash Rev. Stat. 10.22.010; and the trial court may, in its discretion, upon written acknowledgment that the injured party has received satisfaction for its damages, and on payment of costs, order the proceedings discontinued and discharge the defendant, Wash Rev. Stat. 10.22.020.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id* at 531.
12. *Egan*, Executive Order 10865, and the Directive.