

DATE: December 29, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-07245

ECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esquire, Department Counsel

FOR APPLICANT

John D. Morgan, Esquire

SYNOPSIS

Fifty-four-year-old Applicant--the victim of a scam--scrambled to save \$300,000.00 in investments (originally on a scheme to triple his money). His greed led him to a pattern of breaking the law by writing checks on accounts with insufficient funds, kiting checks, forging his wife's name on checks written against her account, and embezzling funds from a non-profit civic organization for which he was the interim treasurer. He was convicted of attempted theft 2nd degree and sentenced to 365 days in jail (suspended), fined \$5,000.00 (suspended), placed on unsupervised probation for one year, and the sentence was deferred for one year. One year later, the court ordered the finding of guilt to be withdrawn and the cause to be dismissed with prejudice. Grave questions and doubts remain as to his security eligibility and suitability. Clearance is denied.

STATEMENT OF THE CASE

On February 20, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR 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, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated April 19, 2004, Applicant responded to the allegations in the SOR and requested a hearing. The case was assigned to me on June 22, 2004. A notice of hearing was issued that same day, and the hearing was held before me on July 14, 2004. During the hearing, 1 joint exhibit, 9 government exhibits, and 16 Applicant exhibits, and the testimony of one Applicant witness (the Applicant), were received. The transcript (Tr.) was received on July 26, 2004.

FINDINGS OF FACT

Applicant has admitted most of the factual allegations pertaining to financial matters under Guideline F (subparagraphs 1.a. and 1.b.) and all the factual allegations pertaining to personal conduct under Guideline E (subparagraphs 3.a. and 3.b.). Those admissions are incorporated herein as findings of fact. He denied the factual allegation pertaining to criminal conduct under Guideline J (subparagraph 2.a.), as well as all the remaining allegation under Guideline F (subparagraph 1.c.).

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 54-year-old employee of a defense contractor seeking to retain the SECRET security clearance he had previously been granted in May 1995. ⁽¹⁾

Applicant was involved in an investment scheme--actually a scam with him as the victim--to nearly triple his initial investment, but the scheme unraveled with Applicant not only losing his initial investment, but substantial additional investments of his own and other persons, as well. He had previously purchased gemstones in 1990-91 for about \$15,000.00, ⁽²⁾ and in September 2001 was contacted by an offshore island group that offered to purchase the gemstones for about \$42,000.00. ⁽³⁾ In reality, the group was to serve as the broker in the resale of the gemstones. To facilitate the scheme--which had grown into a grand scheme purportedly involving other gemstone owners--Applicant invested an additional \$10,000.00. ⁽⁴⁾ All he received from the broker was additional promises and scenarios, but no money. ⁽⁵⁾ According to the broker, the scheme's success was close but still needed some more money. ⁽⁶⁾ Applicant's impression was that if he invested additional funds, his eventual profit would increase by \$30,000.00 to \$60,000.00. ⁽⁷⁾ If he did not agree to make the requested payments, his initial investments would be lost. ⁽⁸⁾ By June 2002, Applicant had invested in excess of \$250,000.00. ⁽⁹⁾

To generate the cash needed to keep the scheme afloat, Applicant took cash advances of approximately \$50,000.00 on his credit cards, depleted his savings, borrowed in excess of \$120,000.00 from friends (telling them of the scheme and promising to repay up to double the amounts of the loans), ⁽¹⁰⁾ cashed in insurance policies, and refinanced his home. ⁽¹¹⁾ He also wrote checks on accounts with insufficient funds, kited checks, ⁽¹²⁾ and forged his wife's name on checks written against her account. ⁽¹³⁾ Feeling the scheme was about to pay off, between May 9, 2002, and June 5, 2002, he embezzled \$3,800.00--nearly all the funds ⁽¹⁴⁾--from a non-profit civic organization for which he was the interim treasurer. ⁽¹⁵⁾

On June 5, 2002, while attempting to cash a check at a bank where an alert had already been placed on the account because of unusual banking activities, the sheriff was called to the bank. After divulging the nature of the scheme to the sheriff, Applicant was released on his own recognizance and advised he would be charged with theft 1st degree (embezzlement) and fraud. ⁽¹⁶⁾ Applicant was eventually charged with theft 2nd degree, involving a series of theft transactions involving the bank and the civic organization. ⁽¹⁷⁾ Applicant's attorney and the district attorney negotiated a plea agreement and the charge was reduced to attempted theft 2nd degree. ⁽¹⁸⁾ On October 3, 2002, Applicant was convicted of the reduced charge and sentenced to 365 days in jail (suspended), fined \$5,000.00 (suspended), placed on unsupervised probation for one year, and the sentence was deferred for one year. ⁽¹⁹⁾ On October 9, 2003, the court ordered the finding of guilt to be withdrawn and the cause to be dismissed with prejudice. ⁽²⁰⁾

Applicant cashed in an insurance policy worth \$21,805.00 in July 2002, ⁽²¹⁾ and sold his residence in 2004 for \$443,000.00. ⁽²²⁾ He has repaid the bank around \$15,000.00, ⁽²³⁾ repaid the civic organization the embezzled amount, ⁽²⁴⁾ paid off a number of credit cards, ⁽²⁵⁾ and repaid, with interest, the five or six friends who loaned him varying amounts of money to invest. ⁽²⁶⁾ He paid \$13,100.00 to one couple (specified in subparagraph 1.a. of the SOR), ⁽²⁷⁾ paid \$29,019.13 to another couple (specified in subparagraph 1.b. of the SOR), ⁽²⁸⁾ and paid \$1,380.00 to a credit card

company (specified in subparagraph 1.c. of the SOR) in full satisfaction of a \$1,900.00 balance. (29)

Applicant has made no effort to recover the lost \$300,000.00 he had invested with the broker. (30) Instead, he chose to "just suffer through it, deal with it, get people paid off." (31) His former attorney contacted the district attorney on one occasion and the broker on several occasions simply to have the telephone harassment cease. (32)

In May 2002, Applicant was feeling depressed over the entire situation and approached the company's employee assistance program (EAP), self-reporting a "gambling-type" illness. (33) He was referred to a psychologist who referred him to a clinical psychologist. (34) When Applicant contacted the clinical psychologist in July 2002, Applicant exhibited "multiple signs of depression secondary to [his] recent arrest in conjunction with misappropriating funds." (35) He was administered a depression inventory that suggested a "moderate to severe level of depression consistent with his circumstances." (36) The clinical psychologist opined Applicant's condition was "situational and not chronic." (37)

Applicant received a B.A. degree in architecture in 1973, and has been employed by the same government contractor for an unspecified period where he now serves as a general architect. His most recent performance appraisals reflect that he meets performance expectations--the 4th level from the best--and is thought to be personable and sensitive to the needs of others, as well as very professional and detail oriented. He has been married for 27 years, and has two teenage children.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Financial Considerations - Guideline F: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

Criminal Conduct-Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Personal Conduct - Guideline E: 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, as well as those which could mitigate security concerns, pertaining to both adjudicative guidelines are set forth and discussed in the Conclusions section below.

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security," (38) or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of the witness credibility, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

The government has established its case under Guideline F. Applicant got caught up in a scheme in which he was to nearly triple his initial investment by selling gemstones. After the scheme unraveled, and Applicant began to have doubts about it, he became the victim of what was really a scam and scrambled to save his initial investment as well as substantial additional investments of his own and other persons. To generate the cash needed to keep the scheme afloat, Applicant took cash advances on his credit cards, depleted his savings, borrowed money from friends, cashed in insurance policies, and refinanced his home--all actions which were legally permissible. But he also crossed the line by writing checks on accounts with insufficient funds, kiting checks, forging his wife's name on checks written against her account, and embezzling funds from a non-profit civic organization for which he was the interim treasurer. His conduct pertaining to his financial obligations falls within Financial Considerations Disqualifying Condition (FC DC) E2.A6.1.2.1. (*history of not meeting financial obligations*), FC DC E2.A6.1.2.2. (*deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust*), and FC DC E2.A6.1.2.3. (*inability or unwillingness to satisfy debts*), and FC DC E2.A6.1.2.5. (*financial problems that are linked to gambling, drug abuse, alcoholism, or other issues of security concern*).

To his credit, Applicant's actions in eventually repaying his creditors and making restitution to the victims of his criminal conduct fall within Financial Considerations Mitigating Condition (FC MC) E2.A6.1.3.6. (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*). However, the overall impact of that condition is minimized because of when the efforts occurred. Applicant was seemingly unmotivated to resolve his overdue debts and preferred to ignore them as long as he could, until the security clearance review process commenced. In this regard, it should be noted that he did not repay two of his friends until May and June 2004--months after receiving the SOR. Because of his favorable psychological assessment, Applicant also receives the benefit of FC MC E2.A6.1.3.4. (*the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control*).

Applicant has argued for the applicability of FC MC E2.A6.1.3.2. (*it was an isolated incident*). I decline to apply this condition since Applicant's overall actions occurred during a period of approximately nine months, and his illegal actions--constituting a pattern--involved several different incidents over a shorter period. In neither case were his actions isolated. Likewise, I fail to see the relevancy of FC MC E2.A6.1.3.3. (*the conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)*). Applicant's actions were not of the type characterized in this condition, but were, instead, caused initially by greed and subsequently by unbelievably poor judgment. Nevertheless, I am mindful the creditors and victims have all been repaid. Consequently, I conclude Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case with respect to Guideline F. Accordingly, allegations 1.a. through 1.c. of the SOR are concluded in favor of Applicant.

The government has established its case under Guideline J. As note above, Applicant became the victim of what was really a scam and scrambled to save the investments he had already made to keep the original scheme afloat. His greed led him to a pattern of breaking the law by writing checks on accounts with insufficient funds, kiting checks, forging his wife's name on checks written against her account, and embezzling funds from a non-profit civic organization for which he was the interim treasurer. He also got careless and was questioned by the sheriff while attempting to cash a check at a bank where an alert had already been placed on the account. Applicant was eventually charged with theft 2nd degree, involving a series of theft transactions involving the bank and the civic organization, but Applicant's attorney and the district attorney negotiated a plea agreement and the charge was reduced to attempted theft 2nd degree. In October 2002, Applicant was convicted of the reduced charge and sentenced to 365 days in jail (suspended), fined \$5,000.00 (suspended), placed on unsupervised probation for one year, and the sentence was deferred for one year. One year later, the court ordered the finding of guilt to be withdrawn and the cause to be dismissed with prejudice. Applicant's criminal conduct in this regard clearly falls within 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*). In this regard, I reject Applicant's argument that the charge of attempted theft 2nd degree is not a "serious" crime because it is not a felony, but rather merely a misdemeanor handled in a court of lesser jurisdiction.

Applicant has also argued in favor of several Criminal Conduct Mitigating Conditions (FC MC). This matter does not come within CC MC E2.A6.1.3.1. (*the criminal behavior was not recent*) or CC MC E2.A6.1.3.2. (*it was an isolated incident*) since Applicant's illegal actions took place in mid-2002 and involved several different incidents and victims. Likewise, this matter does not come within CC MC E2.A6.1.3.3. (*the person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*) or CC MC E2.A6.1.3.4. (*the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*). Applicant was not pressured or coerced to violate the law. He was merely driven by greed and the fear of losing a substantial amount of money--both self-motivators arising out of his personal value system. Finally, the order of the court that the finding of guilt was to be withdrawn and the cause dismissed with prejudice does not raise CC MC E2.A6.1.3.1. (*acquittal*). This action is dissimilar from an acquittal, as Applicant was not exonerated of the charge, and the underlying criminal conduct was not discounted by the court. An acquittal occurs when a defendant is found not guilty because all the elements of the crime charged were not proven beyond a reasonable doubt. The legal maneuver here does not equate to an acquittal. In this instance, Applicant was fortunate enough to have his sentence initially suspended, then deferred, and eventually withdrawn, with the charge dismissed. Under these circumstances, Applicant has failed to mitigate or overcome the government's case, for the evidence leaves me with grave questions and doubts as to Applicant's

continued security eligibility and suitability. Accordingly, allegation 2.a. of the SOR is concluded against Applicant.

The government has established its case under Guideline E. Examination of Applicant's actions reveals conduct involving questionable judgment, untrustworthiness, unreliability, and unwillingness to comply with rules and regulations. There is little dispute surrounding Applicant's dishonesty. As noted above, Applicant's greed led him to a pattern of breaking the law, in part by forging his wife's name on checks written against her account, and embezzling funds from a non-profit civic organization for which he was the interim treasurer. The nature of Applicant's actions, and the sundering of his fiduciary relationships with his wife and the civic organization, therefore pose a serious potential risk to the nation's security precautions that go to the very heart of the nation's security system. Applicant's overall questionable personal conduct in this regard clearly falls within Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.5. (*a pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*). None of the Mitigating Conditions apply. I do not take this position lightly, but based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my evaluation of the evidence, and my application of the pertinent conditions and factors under the Adjudicative Process, Applicant has failed to mitigate or overcome the government's case. The evidence leaves me with grave questions and doubts as to Applicant's continued security eligibility and suitability. Accordingly, allegations 3.a. and 3.b. of the SOR are concluded against Applicant.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

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., Guideline F: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Paragraph 2., Guideline J: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Paragraph 3., Guideline E: AGAINST THE APPLICANT

Subparagraph 3.a.: Against the Applicant

Subparagraph 3.b.: 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.

Robert Robinson Gales

Chief Administrative Judge

1. Government Exhibit 1 (Adverse Information Report, dated June 10, 2002).
2. Tr., at 23.

3. Government Exhibit 2 (Statement, dated February 21, 2003), at 1.
4. *Id.*
5. *Id.*
6. *Id.*
7. Tr., at 25.
8. Government Exhibit 2, *supra* note 3, at 1.
9. *Id.*, at 2.
10. Tr., at 64.
11. Government Exhibit 2, *supra* note 3, at 2.
12. *Id.*
13. Response to SOR, dated April 19, 2004, at 2.
14. Newspaper article, dated June 7, 2002, at 2, attached to Government Exhibit 1, *supra* note 1.
15. Response to SOR, *supra* note 13, at 3; Tr., at 31-32.
16. Government Exhibit 3 (Sheriff's Incident/Investigation Report, dated June 5, 2002), at 4.
17. Government Exhibit 4 (Court Records-Criminal Complaint, dated August 23, 2002), at 1.
18. Government Exhibit 2, *supra* note 3, at 3.
19. Government Exhibit 4 (Court Records-Judgment and Sentence, dated October 3, 2002), *supra* note 17.
20. Order of Dismissal, dated October 9, 2003, attached to Response to SOR, *supra* note 13.
21. Applicant Exhibit A (Letter from insurance company, dated July 11, 2002).
22. Tr., at 43.
23. Tr., at 67.
24. Tr., at 38.
25. Government Exhibit 2, *supra* note 3, at 2.
26. Tr., at 30.
27. Applicant Exhibit E (Letter and Receipt, signed June 5, 2004).
28. Applicant Exhibit D (Letter and Receipt, signed May 31, 2004).
29. Tr., at 70.
30. Tr., at 79.
31. Tr., at 79.

32. Tr., at 78-79, 82.

33. Tr., at 40-41.

34. Tr., at 41.

35. Letter from clinical psychologist, dated August 20, 2002, attached to Response to SOR, *supra* note 13, at 1.

36. *Id.*

37. Applicant Exhibit B (Sworn statement from clinical psychologist, dated July 11, 2004), at 1.

38. Exec. Or. 12,968, "*Access to Classified Information;*" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program,*" dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.)