

DATE: December 30, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-09084

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was twice convicted of theft-related offenses (one in 1986 and the other in 1999) and was sentenced to more than a year on his most recent offense, suspended, and placed on probation for two years, subject to compliance with his two year probation conditions. Applicant's actions raise judgment and trustworthiness concerns. His mitigation efforts, while encouraging, are insufficient at this time to mitigate the Government's security concerns. Clearance is denied.

STATEMENT OF CASE

On May 27, 2004, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, 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, and recommended referral to an administrative judge for determination whether clearance should be granted or continued.

Applicant responded to the SOR on June 18, 2004, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on November 29, 2004 and timely responded to the FORM, although not detected until April 25, 2005. The case was assigned to me August 24, 2005.

SUMMARY OF PLEADINGS

Under Guideline J, Applicant is alleged to have been arrested in June 1998 for theft of property (2d degree felony), to which he pleaded guilty in July 1998, and was placed in a theft diversion program. Applicant is alleged to have failed to complete the program in July 1998, pleaded guilty to a theft charge in January 1999 and was sentenced to one year and one day of incarceration (suspended), placed on two years probation, fined \$250.00 and required to perform 100 hours of community service.

Additionally, Applicant is alleged to have been arrested in January 1986 for larceny of property (3d degree

misdemeanor) and fined.

For his answer to the SOR, Applicant admitted his 1986 and 1998 arrests but denied failing to complete the theft diversion program. He claimed to have been given a damaged plant holder by the charity he was assigned to work with by the court following his initial admission of guilt in July 1998 and was not aware he failed to complete the theft diversion program until he checked his police records. Appellant denied stealing any property in connection with his January 1986 arrest for which he was fined. He claimed to have been scared by his arrest and only agreed to pay the fine on the advice of a police official.

PROCEDURAL ISSUES

The Government moved to amend the SOR to delete the alleged application of 10 U.S.C. Sec. 986 (the Smith Amendment) in sub-paragraph 1.c to Applicant's situation for the cited reason that the Smith Amendment has since been revised to apply only to situations where the charged serves more than a year in confinement.

By its enactment of the Smith Amendment (10 U.S.C. Sec. 986(c)(1)) in 2001, Congress created a mandatory security clearance bar to any person who, *inter alia*, who has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding a year. In 2004, Congress revised the pertinent Smith Amendment provision barring persons from holding a security clearance who have been convicted of a crime and sentenced to more than a year of imprisonment by adding a requirement of actual imprisonment for more than a year. The 2004 change to the Smith Amendment is contained in Section 1071 of Title 10 (*referred to as the Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005*). There being no objection to the Government's amendment motion, and good cause being shown, the Government's amendment was granted.

Within the time permitted to supplement the record, Applicant supplemented the record to add character references. The references were not objected to by the Government and are admitted as Item 10.

FINDINGS OF FACT

Applicant is a 39-year-old quality assurance administrator for a defense contractors who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Applicant was arrested in January 1986 for stealing a cable connector (estimated cost \$100.00) from a retail store. Being young and afraid of his mother finding out, he paid a fine, which avoided his having to appear in court.

In June 1998, Applicant was arrested for larceny in a retail store after being observed by a security personnel official stuffing a suit (valued at \$425.00) in a bag and exiting the store. After spending a night in the city jail, he was charged with theft (a second degree felony). At his hearing before a local district judge, he admitted the theft charge and was placed in a theft diversion program and required to complete 200 hours of community service as a condition of his probation (*see item 9*).

While performing his community service with a Christmas charity, Applicant noticed that the charity operators were about to throw away a damaged plant holder. He claims he was told that since the plant holder was to be thrown away he could have it (*see item 7*). Soon after he exited the store with the stand in his possession, he received a call from the district attorney's office and was told not to call the charity any more. The charity complained it was harassed by Applicant. Although there are no documented accounts from the charity as to whether Applicant lacked permission to take the plant holder, he was required to appear in the circuit court and enter a plea to the original theft charges filed in the district court (*see item 9*). Applicant, in turn, filed an application in November 1998 to plead guilty to the original charges and did, in fact, plead guilty to the theft charges (a second degree felony) in January 1999.

Accepting Appellant's plea agreement with the district attorney at a January 1999 hearing, the circuit court this time sentenced Applicant to one year and one day of incarceration (suspended), placed him on two years probation, fined him \$250.00, ordered him to pay a victim's compensation fund the sum of \$100.00, and ordered him to complete 100 hours of community service as a condition of his probation (*see item 9*). Applicant's accepted plea by the circuit court reflects

a considered probation violation and warrants inferences the court did not accept any of Applicant claims of misunderstanding with the Christmas charity store operators. So, even though Applicant was not prosecuted for taking a old plant holder from the charity he briefly worked for, his inferred actions of taking the plant stand without clear permission represents an act of larceny totally separate from his earlier theft offense.

Applicant completed his two years of probation and fully complied with the court's other conditions (*i.e.*, payment of a \$250.00 fine, payment of \$100.00 into a victim's compensation fund, and completion of 100 hours of community service). He has been involved in no other documented incidents (*see* item 7).

Applicant is well regarded by his operations manager, pastor, and fellow community volunteer, as a person who has shown leadership abilities, dedication, courage and integrity. Although, none of Applicant's supporters indicate any familiarity with the underlying allegations of the SOR.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a

security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his

or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant is a meritorious quality assurance administrator who has been involved in two theft-related incidents over the past 20 years: one resulting in a misdemeanor theft conviction in 1986 and the other resulting in a felony theft conviction and a suspended sentence of more than a year following a probation violation and an ensuing Applicant plea agreement with the local district attorney in January 1999.

Since completing his two-years of probation, Applicant has not been involved in any other criminal activity. While Applicant seems to be a good role model in his work and community, he has had only four years to demonstrate learned lessons in judgment and trustworthiness outside the workplace. Because Applicant's situation reflects both recurrent and relatively recent criminal conduct, security concerns are raised under the Adjudicative Guidelines for criminal conduct.

Applicant's two convictions warrant the application of two disqualifying conditions of the Adjudicative Guidelines for criminal conduct: DC E2.A.10.1.2.1 (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and DC E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*). Applicant's two theft-related convictions reflect pattern activity even though they are separated by 13 years of elapsed time without another reported incident.

While Applicant's underlying actions leading to his 1986 and 1999 theft convictions warrant some consideration of three of the mitigating conditions of the guidelines for criminal conduct, *i.e.*, MC E2.A10.1.3.1 (*The criminal behavior was not recent*), MC E2.A10.1.3.2 (*The criminal behavior was an isolated incident*), and MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*), as well as the E2.2.2 factors, favorable application of these conditions and factors is not fully warranted.

Applicant's satisfaction of his probation conditions and his demonstrated showing of reliability and trust within his work and community reflect positively on his character. His imputed judgment and trust lapses reflected in these earlier theft convictions are still too recent, though, to be considered sufficiently mitigated to entitle him to the renewed level of trusted judgment and reliability necessary to afford him access to classified information. Taking into account all of the facts and circumstances developed in the record, unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a and 1.b of the SOR.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE J: (CRIMINAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: 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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley

Administrative Judge