

DATE: July 12, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-12678

## **DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Ray T. Blank Jr., Esq., Department Counsel

#### **FOR APPLICANT**

Jerry L. Tanenbaum, Esq.

### **SYNOPSIS**

Applicant was arrested for shoplifting in August 2000. He knowingly and willfully failed to list this arrest in his security clearance application and tried to mislead a security investigator about the circumstances surrounding the offense. Applicant failed to mitigate personal conduct and criminal conduct security concerns. Clearance is denied.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. In accordance with Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on 26 August 2005 detailing the basis for its decision—security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on 26 September and 1 November 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on 29 November 2005. A hearing was originally scheduled for 9 May 2006, but was continued at Applicant's attorney's request until 21 June 2006. On that date, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (R.) on 5 July 2006.

### **FINDINGS OF FACT**

Applicant is a 44-year-old program manager for a defense contractor. He has held a security clearance since at least 1991 without any adverse security incidents. For the past six years, he has been rated as an exceptional contributor to his company. He is a volunteer for United Way, serves on its executive board, is a volunteer for the American Cancer Society, and tutors children at a local school.

In August 2000, Applicant went shopping in a grocery store. When he left the store, after purchasing more than \$100 worth of groceries, he was stopped by security officers for leaving the store without paying for an item. Applicant had a

strong odor of alcoholic beverages about him. Security wanted him to sign a form saying he shoplifted merchandise of a nominal value and to plead guilty. Applicant refused to sign it because he didn't believe he was guilty and because he thought to do so would affect his security clearance. R. 35. He refused to cooperate with store security-refused to take his hands out of his pockets, refused to return the item, and refused to provide personal information-and the police were called. Store security advised the responding police officer that they had video-taped Applicant taking a tube of cream out of its packaging, walking around the store with the tube in his hand, and then placing it in his pocket. Applicant then took his hands out of his pockets and returned the tube of cream. He was arrested for shoplifting and, when he was searched by the police, a package of cheese that was not paid for was found in his pants pocket. The police arrested Applicant for shoplifting, handcuffed him, and took him to jail. The total value of the two items was less than \$10.

Applicant was concerned about the effect of his arrest on his security clearance and made it known to his attorney, the prosecutor, and the judge. He was permitted to plead guilty to violating the peace and good order and pay a small fine. His attorney, the prosecutor, and the judge assured him that it would not go any further than the county, and suggested that it might later be expunged from his record. Applicant had the conviction expunged in January 2006. He did not tell his security manager or others at his place of employment about the incident until a few months before the hearing. R. 56.

On 29 August 2002, Applicant completed a security clearance application (SCA) by certifying that his answers were true, complete, and correct to the best of his knowledge and belief, and acknowledging that a knowing and willful false statement could be punished by fine and/or imprisonment under 18 U.S.C. § 1001. Question 26 asked if, in the previous seven years, he had been arrested for, charged with, or convicted of, any offense that he had not reported in answer to other questions in the SCA. Except for certain convictions under the Federal Controlled Substances Act for which the court has issued an expungement order, he was to report information regardless of whether the record had been "sealed" or otherwise stricken from the record. Applicant answered "no." Ex. 1 at 5.

On 15 July 2004, as part of the security clearance investigation, a Defense Security Service (DSS) agent interviewed Applicant about his shoplifting arrest. Applicant "said [the item] may have been left in his cart and not scanned, but he wasn't sure." Ex. 4 at 2. He assumed the incident would not have been discovered during a records check. He further claimed that his attorney told him that after 36 months, the proceeding would be removed from his record. *Id.*

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Each security clearance decision "must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy." Directive ¶ 6.3. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

## CONCLUSIONS

### **Guideline E-Personal Conduct**

In the SOR, DOHA alleged Applicant falsified material facts on his SCA by deliberately failing to disclose he had been

arrested for shoplifting in August 2000 (¶ 1.a); and falsified material facts during an interview with a security investigator by failing to disclose the circumstances surrounding the August 2000 shoplifting offense (¶ 1.b). In his Answer, Applicant denied both allegations, with explanation. He asserted that his attorney and the judge told him it was a municipal offense and would not be reported to state or federal authorities. "With this information, and the overall embarrassment of the whole event, I felt that it was unnecessary to report it."

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. The deliberate omission of relevant and material facts from any SCA is a security concern and may be disqualifying. DC E2.A5.1.2.2. Information is material if it would affect a final agency decision or, if incorrect, would impede a thorough and complete investigation of an applicant's background. ISCR Case No. 01-06870, 2002 WL 32114535 (App. Bd. Sep. 13, 2002). An applicant's criminal history is a matter that could affect a final agency decision on whether to grant the applicant a clearance, and his failure to fully disclose it would impede a thorough investigation of the applicant's background.

It is a potentially disqualifying conditions under Guideline E to deliberately omit any relevant and material facts from an SCA. DC E2.A5.1.2.2. The evidence established Applicant deliberately omitted his arrest for shoplifting from his SCA because he was concerned about its affect on his security clearance. Deliberately providing misleading information to an investigator in connection with a personnel security determination is potentially disqualifying. DC E3.A5.1.2.3. Applicant deliberately provided misleading information concerning his shoplifting arrest to the DSS agent by claiming he thought it was just a misunderstanding about merchandise left in the shopping cart. His statement to the DSS agent that he was unsure of the details of his arrest was disingenuous at best.

An Applicant may mitigate personal conduct security concerns by showing the omission was caused by or significantly contributed to by improper or inadequate advice of authorized personnel (MC E2.A5.1.3.4) or he has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress (MC E2.A5.1.3.5). Applicant implies that he received such improper advice from the judge, the prosecutor, and the attorney who represented him at his shoplifting trial. But they were not authorized to give advice about security clearances, and Applicant knew it. Applicant is an educated man and Question 26 is quite clear. Applicant deliberately omitted the information from his SCA and tried to mislead the DSS agent about the circumstances surrounding his arrest and his culpability for shoplifting. Applicant still refuses to fully accept responsibility for his actions. Even at the hearing, he was still trying to suggest that the incident was so minor it did not warrant reporting. R. 38. After carefully considering all of the evidence, including the adjudicative process factors, I find against Applicant on ¶ 1.

## **Guideline J-Criminal Conduct**

In the SOR, DOHA alleged Applicant was convicted of violating peace and good order after an August 2000 arrest for shoplifting (¶ 2.a); and violated 18 U.S.C. ¶ 1001 by knowingly and willfully failing to disclose the facts surrounding his shoplifting arrest in his SCA and in an interview with a security investigator (¶ 2.b). In his Answer, Applicant admitted ¶ 2.a, but denied ¶ 2.b.

It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. A violation of 18 U.S.C. § 1001 is a serious offense as it may be punished by imprisonment for up to five years. Applicant knowingly and willfully made a materially false statement on his SCA by denying he had been convicted of any criminal offenses in the previous seven years, not otherwise listed on his SCA.

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. An applicant may be disqualified if allegations of criminal conduct are raised against him (DC E2.A10.1.2.1) for a single serious crime or multiple lesser offenses (DC E2.A10.1.2.2). Applicant committed a serious offense by deliberately omitting his shoplifting arrest from his SCA.

An applicant may mitigate criminal conduct security concerns by showing the factors leading to the violation are not likely to recur (MC E2.A10.1.3.4) or there is clear evidence of successful rehabilitation (MC E2.A10.1.3.6). Applicant

insists a violation will not recur, and he has taken steps to reduce his vulnerability by telling his security officer and the persons who submitted letters of recommendation on his behalf. I conclude neither of these mitigating conditions apply. Applicant has reduced his vulnerability but only after being confronted by the DSS agent with his deception. The shoplifting on its own was a minor offense. But Applicant aggravated the situation by failing to accept responsibility for the shoplifting and by falsifying his SCA. After weighing all of the evidence, including the adjudicative process factors, I find against Applicant on ¶ 2.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

### **DECISION**

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

James A. Young

Administrative Judge