

DATE: October 30, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-03287

DECISION OF ADMINISTRATIVE JUDGE

ARTHUR E. MARSHALL, JR.

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant is a 64-year-old male serving on the board of directors of a defense contractor. After completing his purchases in a store and eating it its café, he was detained in a store for consuming some Ibuprofen he had not yet bought. When his earlier purchases were returned to him, a tax software package for which he had not paid was found in his previously unattended cart. He was charged with Theft by Shoplifting (over \$50) and, on the advice of a court administrator, he entered a pretrial diversion deferred prosecution agreement. Applicant has mitigated security concerns regarding his criminal conduct. Clearance is granted.

STATEMENT OF THE CASE

On July 10, 2004, Applicant applied for a security clearance and submitted a Security Clearance Application (SF 86). On February 21, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, 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. The SOR detailed reasons, under Guideline J (Criminal Conduct), 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 notarized statement, dated March 15, 2006, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel prepared the government's written case on May 30, 2006. A complete copy of the file of relevant material (FORM) was provided to Applicant, which he received on August 31, 2006, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant's response to the FORM, dated September 1, 2006, was timely received on September 6, 2006. The case was assigned to me on October 12, 2006.

FINDINGS OF FACT

Applicant's admission to the allegation in the SOR is incorporated herein.⁽¹⁾ In addition, after a thorough and careful review of the evidence and exhibits, I make the following findings of fact:

Applicant is a 64-year-old director serving on the board of directors of a defense contractor. He returned to the work force after a six year retirement in order to assume his current position. Prior to his retirement in 1994, he had been the executive officer of a health service for approximately two decades. Married to his current spouse for 30 years, he has two grown children and one grown stepchild. While serving in the U.S. Army National Guard as a Specialist 4/Corporal [E-4] between 1957 and 1965, he attended college for two academic years.

In the winter of 2004, Applicant was experiencing dental problems with two teeth serving as anchors for a dental bridge. Because of the problems with the anchoring teeth, an appointment had been made to remove the faulty and painful bridge in early January 2005. In the interim, his dentist had prescribed strong painkillers to address any resultant, intermittent pain.

On the afternoon December 30, 2004, Applicant shopped at one of a well-known chain of membership warehouses catering to small-to-medium-sized businesses and individual customers. After purchasing approximately \$100 worth of merchandise, he remained in the store and proceeded with his purchases to the warehouse's food court area and bought lunch and a cola. Drinking the soda triggered pain related to his faulty bridge, but he did not have his prescription painkillers with him. He left his lunch and his shopping cart of purchases in the food court area, proceeded through the busy checkout area, and located a bottle of Ibuprofen in the store. He then went to the restroom, where he consumed some of the pills to address his pain.

Upon exiting the restroom, Applicant was confronted by four irate employees who detained him for several hours. When he was eventually released, he requested that his shopping cart and its contents be returned to him so he could leave. When the cart was returned to him, a copy of Turbo Tax, a popular computer-based tax preparation program, was noted in his cart. Applicant had not purchased the product and he has no idea as to how it came to be in his cart. He posits that it could have been accidentally placed in his unattended cart during the hours he was detained, or a passerby might have dropped it into his cart. Because it was in his cart, however, it was added to the Ibuprofen in the charge of theft. Ultimately, he was charged with Theft by Shoplifting (over \$50).

On February 1, 2005, Applicant appeared in court to address the shoplifting charge. The court administrator advised him that telling his story "to the Judge would be risky and could result in a record from the charged offense, regardless of [his] urgent need to deal with [his] pain at the time of the incident."⁽²⁾ Therefore, he followed the court administrator's advice and accepted a pretrial diversion deferred prosecution agreement and paid the court \$350. The case was subsequently dismissed on May 17, 2005.

The FORM does not include any police or court documentation regarding the incident. Therefore, the only sources for what transpired are Applicant's un rebutted responses to the SOR and to the FORM. Today, Applicant still has his membership with the wholesaler, and he still actively shops there. Meanwhile, he continues to address his dental problems. His failing anchor teeth have been replaced by three stainless steel dental implants. In the spring of 2006, he was completing the process of having those implants mounted with crowns in the same area the faulty dental bridgework once covered.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of

the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The burden of proof is something less than a preponderance of evidence.⁽⁵⁾ 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.⁽⁶⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁷⁾

No one has a right to a security clearance⁽⁸⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽⁹⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽¹⁰⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽¹¹⁾ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a security clearance.

Based upon consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline J - Criminal Conduct. *The Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.⁽¹²⁾

Conditions pertaining to this adjudicative guideline that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has demonstrated that Applicant was arrested and charged with Theft by Shoplifting. Applicant admits that this incident occurred. Consequently, under Guideline J, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) applies.

With the government's case established, the burden shifts to Applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. Here, Applicant admits that the incident occurred in December 2004. Therefore, Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1 (*The criminal conduct was not recent*) does not apply. Moreover, neither CC MC E2.A10.1.3.3 (*The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*) nor CC MC E2.A10.1.3.5 (*Acquittal*) are applicable under these facts.

The SOR, however, does not point to any other criminal conduct or incident in Applicant's life raising similar security concerns. Indeed, both Department Counsel and Applicant limit their argument solely to the one shoplifting charge. Consequently, CC MC E2.A10.1.3.2 (*The crime was an isolated incident*) applies.

The facts at issue raise one pivotal question: Did Applicant intend to steal the pain killers and the software? With regard to the pain reliever, Applicant purchased about \$100 worth of merchandise, went through the checkout line, directly proceeded to the warehouse's food court, ordered lunch, experienced a severe episode of dental pain triggered by his soda, traversed the store, found a bottle of Ibuprofen, and went to the restroom to consume some pain relievers. While it is true that the facts do not indicate why he chose to take the tablets in the restroom instead of the food court, it is also true that they do not indicate that he attempted to conceal the product.⁽¹³⁾ In the absence of additional facts, and given Applicant's un rebutted explanation, there is no indication that he ever intended to steal the pain reliever.

As for the tax software, inasmuch as Applicant proceeded directly from his shopping, through a busy checkout line, past a cashier, and into the food court area, it seems there would have been little opportunity for him to have purloined the product and then brazenly placed it into his open cart either before or after checkout. Moreover, there are a myriad of ways an item can find its way into an unattended shopping cart over the span of an hour or two. Regardless, there is no evidence that he intended to steal the tax software.

I have considered both the record evidence and Applicant in light of the "whole person" concept. He is a mature, educated, family man who retired at age 52 after a career in the health service industry. There is no indication that he has ever been accused of a similar crime in the past, nor is there any evidence that he will find himself in a similar situation in the future. Similarly, there is no indication that he is in financial need or otherwise prone to risky conduct or thrilling behavior. It is highly unlikely that he intended to stealthily go from the restroom to the exit, sacrificing his lunch and his substantial purchases for want of a bottle of Ibuprofen. Conversely, it is highly likely that an idle shopping cart would find itself as a repository for a discarded item.

At the time in question, Applicant was undergoing a dental problem that can induce substantial oral pain, and he sought to seek relief as expediently as possible. The explanation presented by Applicant is credible and rational. Regardless, the incident at issue is singular, there is no indication that this or any similar activity will be repeated, and the facts do not seriously bring into question this particular Applicant's judgment, reliability, and trustworthiness. Applicant has mitigated the security concerns arising under Guideline J (Criminal Conduct). Consequently, clearance is granted.

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 J (Criminal Conduct): FOR APPLICANT

Subparagraph 1.a. For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant a security clearance for Applicant. Clearance is granted.

Arthur E. Marshall, Jr.

Administrative Judge

1. Applicant admitted to the arrest and charge giving rise to the Guideline J security concerns.
2. Answer to the SOR, dated March 15, 2006.
3. ISCR Case No. 96-0277 at 2 (App. Bd. Jul 11, 1997).
4. ISCR Case No. 97-0016 at 3 (App. Bd. Dec 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
5. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
6. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
7. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
8. *Egan*, 484 U.S. 518, at 531.
9. *Id.*

10. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

11. Executive Order 10865 § 7.

12. Directive, Enclosure 2, ¶ E2.A10.1.1

13. Indeed, in some ways, this scenario varies little from the situation where a customer opens a box of cookies for a treat while conducting the weekly grocery shopping.