DATE: July 31, 2006

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 05-09190

DECISION OF ADMINISTRATIVE JUDGE

JOHN GRATTAN METZ, JR

APPEARANCES

FOR GOVERNMENT

J. Theodore Hammer, Department Counsel

Kathryn D. MacKinnon, Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's breach of his fiduciary duty to both the U.S. Army and his military subordinates demonstrated poor judgement, untrustworthiness, and unreliability--disqualifying him for a security clearance. Clearance denied.

STATEMENT OF THE CASE

Applicant challenges the 14 November 2005 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of personal conduct.[(1)] Applicant answered the SOR 29 November 2005 and requested a hearing. DOHA assigned the case to me 12 January 2006 and I convened a hearing on 22 February 2006. DOHA received the transcript on 3 March 2006.

FINDINGS OF FACT

Applicant admitted the SOR allegations; accordingly, I incorporate his admissions as findings of fact. He is a 38-year-old assistant project leader employed by a defense contractor since March 2003, seeking reinstatement of the clearance he held in the U.S. Army until February 2003.

In January 2003, Applicant was charged under the Uniform Code of Military Justice (UCMJ) with four specifications of larceny, one specification of attempted larceny, and five specifications of forgery (G.E. 9). Under the UCMJ, Applicant faced a maximum sentence of a dishonorable discharge, total forfeitures of pay and allowances, reduction-in-rate to paygrade E-1, and ten years imprisonment.[(2)] With the advice of military defense counsel, he requested a discharge under other-than-honorable conditions (OTH) in lieu of court-martial (G.E. 4). In his request, he acknowledged that he was guilty of at least one charge and specification for which a dishonorable discharge was an authorized punishment. His request was granted and he was discharged in February 2003 (G.E. 3).

From 1995 until he was discharged, Applicant was a sergeant first class (SFC, paygrade E-7). He had nearly 18 years exemplary military service (A.E. G). Because of his OTH discharge, he was automatically reduced in rate to paygrade E-1, lost all his military privileges, and did not serve enough draw retired pay. Applicant estimates that his discharge will cost him over one million dollars over his lifetime.

The precipitating event for these adverse disciplinary and administrative actions was a criminal enterprise begun by Applicant on 2 October 2002 and continuing until at least late November 2002. In fall 2002, he had just moved to a new permanent duty station and was experiencing some financial difficulties related to the move. He had taken an advance on his pay which he used to bring a house he owned at his earlier duty station up to rental condition. He contacted Army Community Services for financial assistance but learned he was ineligible because of his senior enlisted status. He did not otherwise seek financial counseling with the Army or the local community.

Applicant's job at his new duty station was in the command administration department, where he supervised a sergeant (SGT, paygrade E-5) and two privates first class (PFC, paygrade E-3). On 2 October 2002, Applicant created a set of orders, effective 30 July 2002, to authorize himself to receive flight pay, to which he was not entitled. Because of his position within the command, he was able to ensure that the orders were in the proper format, including the correct authorizing official--the command adjutant. He then forged the adjutant's signature and submitted the orders through proper channels.

The military pay system is such that it takes a while for pay changes to be processed, but service members receive advance copies of their leave and earnings statements (LES) before payday. In late October 2002, Applicant's LES reflected that the pay change had become effective. Emboldened, on 29 October 2002, Applicant created a second set of orders, effective 25 October 2002, to authorize himself to receive dive pay, to which he was not entitled. He again forged the adjutant's signature and submitted the orders.

On 1 November 2002, Applicant created three sets of orders to authorize his three subordinates to receive flight pay, effective 28 October 2002. He forged the three required signatures and submitted the orders. None of his subordinates was entitled to flight pay.

When the sergeant learned of Applicant's conduct, he told Applicant he did not want pay he was not entitled to, and Applicant canceled those orders before they could become effective. The sergeant also reported Applicant's conduct to his chain-of-command, resulting in the investigation that lead to Applicant's discharge from the Army. However, before the investigation was completed, Applicant stole at least $240 flight pay and $258 dive pay for himself, and $165 each for the two privates first class. Applicant's fraudulent orders were not cancelled until the command became aware of Applicant's scheme.

Applicant's conduct potentially exposed his subordinates to criminal charges for conspiring with him to steal flight pay, although it appears they were unaware of his actions at the time. At a minimum, Applicant's conduct exposed his subordinates to financial difficulties of their own because the military regularly pursues recoupment of amounts erroneously paid to members--absent extraordinary circumstances.

At hearing, and throughout his written statements, Applicant has stated that he was motivated by his concern for the financial circumstances of his subordinates,[(3)] and only submitted his orders first to ensure they would be processed correctly.

Applicant presented himself at hearing impeccably dressed, extremely organized, and thoroughly professional in his presentation. However, the overall impression created was of disingenuousness, and I found his testimony less than credible and convincing. Contributing to this impression was the testimony of his character witnesses (3), each of whom considered Applicant an excellent and honest worker, but none of whom seemed completely aware of the facts and circumstances surrounding Applicant's discharge from the Army.

POLICIES AND BURDEN OF PROOF

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for

access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guidelines are Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.[(4)]

CONCLUSIONS

The government established a Guideline E case and Applicant did not mitigate the security concerns. This crime occurred little more than three years ago, and although confined to a 60-day period, cannot be considered isolated. On three occasions within a month, Applicant used his specialized knowledge to create five apparently valid sets of orders to enrich himself and his subordinates. His claim that he acted out of concern for this subordinates financial issues is incredible, and undercut by several factors in the record. First, Applicant himself was having financial difficulties. Second, he put himself in for a second incentive payment before submitting orders for his subordinates. Finally, he did not terminate his orders once he had submitted orders for his subordinates, but kept receiving the unauthorized payments until they were terminated as a result of the criminal investigation. A more likely explanation is that Applicant submitted orders for his subordinates either to provide cover for his own activities or to implicate them in his own criminal activities, possibly to include conspiracy to commit larceny.

Applicant's misconduct was egregious and demonstrates extraordinarily poor judgement, untrustworthiness, and unreliability inconsistent with access to classified information. He breached his fiduciary duty not only to the Army, which expected him to perform his duties honestly, but to his subordinates, who should have expected their supervisor to know and suggest legitimate means of obtaining financial guidance through Army channels. Instead, Applicant potentially subjected them to both criminal and financial penalties. But for his approved request for an OTH in lieu of court-martial, Applicant faced the possibility of 10 years in prison and a dishonorable discharge for his conduct. Applicant pleads the passage of time, a desire for a second chance, and his remorse for his conduct as a basis for receiving his clearance. None of these substitutes for actual evidence of extenuation, mitigation, or rehabilitation, which Applicant failed to provide. Further, his disingenuousness at hearing renders his claims of remorse hollow. I resolve Guideline E against Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline E: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph 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 denied.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865 and Department of Defense Directive 5220.6, as amended (Directive).

2. Assuming that the court found the charges and specifications multiplicious for sentencing purposes.

3. All of whom were in Applicant's situation: at a command where they were not drawing any of the various incentive payments they might be eligible for, but preparing for deployment overseas in January or February 2003 when they would be entitled to some incentive payments.

4. *See*, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).