

DATE: September 26, 2006

In Re:

SSN: -----

Applicant for Security Clearance

P Case No. 06-05469

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was arrested and convicted of misdemeanor theft in 2004. While employed as a cashier at a major department store, Applicant along with two co-worker cashiers, and their supervisor, ran items through their check out lines without scanning them. This scheme continued for a lengthy period of time until discovered by store security. Applicant, along with the other employees, were fired, and turned over to the local police. These facts raised criminal and personal conduct concerns, which Applicant was unable to mitigate. Clearance is denied.

STATEMENT OF THE CASE

On April 3, 2006, the Defense Office of Hearings and Appeals (DOHA), under 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 under Guideline E (Personal Conduct), and 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 conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn statement, dated April 20, 2006, Applicant responded to the SOR allegations. She requested her case be decided on the written record in lieu of a hearing.

On May 23, 2006, Department Counsel submitted the government's case through a file of relevant material (FORM), ⁽¹⁾ a copy of which was provided to the Applicant.

Applicant was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. She received the FORM on May 31, 2006, and was instructed to file any objections to this information, or to supply

additional information within 30 days of receipt. Applicant did not submit any information within the 30 day time period after receipt of the FORM. The case was assigned to another administrative judge on July 25, 2006, and was reassigned to me on August 8, 2006.

FINDINGS OF FACT

Applicant admitted all allegations in the SOR, ¶¶ 1., 1.a., 2., and 2.b. These admissions are incorporated as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact:

Applicant is a 21-year-old woman employed by a defense contractor. She seeks a security clearance as an employment requirement. Applicant's security clearance application, dated December 16, 2004, indicates she is unmarried and has no dependents. ⁽²⁾

On September 22, 2004, Applicant was arrested and charged with theft. At the time of her arrest, Applicant was employed as a cashier for a major department store. She, along with two cashiers and her supervisor, devised a scheme where they would check out goods for each other without scanning or paying for the item. Store security uncovered the scheme and confronted the supervisor. Under questioning by store security, the supervisor identified Applicant and two of her fellow cashiers as participants in the scheme. All four employees were terminated and turned over to the local police department.

Upon arriving at the police station, Applicant was charged with misdemeanor theft and released. In October 2004, she plead guilty to misdemeanor theft. She was ordered to pay a fine of \$100.00, and to pay restitution totaling \$314.00, and placed on unsupervised probation for one year.

This was Applicant's first offense. In a statement to the Defense Security Service dated April 12, 2005, she said does "not plan to make a mistake like this ever again." ⁽³⁾

The Appellant did not submit any mitigating evidence and the record is void of letters of reference, employee evaluations, or evidence of rehabilitation.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, administrative judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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 has restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to

abide by regulations governing the use, handling, and protection of classified information." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

Guideline J: Criminal Conduct

E2.A.10.1.1. *The Concern*: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Concerning Guideline J, the government has established its case. Applicant was convicted, pursuant to her plea, of misdemeanor theft. Particularly troubling about this incident are the underlying facts. Employed as a cashier, Applicant entered into a scheme with two co-worker cashiers and her supervisor. They agreed to check merchandise for each other without scanning or paying for the items. The record is void concerning the nature or quality of the items involved.

This was not a one-time incident, but rather continuous conduct. Applicant was in a position of trust and responsibility as a cashier and substantially abused the trust and responsibility placed in her. Applicant offered no evidence of rehabilitation other than her assertion that she does "not plan to make a mistake like this ever again." Based on the evidence as a whole, I am unable to reach a favorable conclusion for Applicant.

Applicable Criminal Conduct Disqualifying Conditions (CC DC) 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and CC DC 2: *A single serious crime or multiple lesser offenses*. Applicable Criminal Conduct Mitigating Condition(s): None. I conclude against Applicant on this concern.

Guideline E - Personal Conduct:

E2.A5.1.1. *The Concern*: 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.

Concerning Guideline E, the government established its case. Inasmuch as the underlying conduct, i.e. Appellant's arrest and conviction for misdemeanor theft is the sole basis for this allegation, the discussion above under Guideline J is incorporated.

Applicable Personal Conduct Disqualifying Condition (PC DC) 5: *A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*. Applicable Personal Conduct Mitigation Condition(s): None. I conclude against Applicant on this concern.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1, Guideline E.: Against Applicant

Subparagraph 1.a.: Against Applicant

Paragraph 2, Guideline J.: Against Applicant

Subparagraph 2.a.: Against Applicant

DECISION

In light of all the circumstances and facts 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 J. Tuider

Administrative Judge

1. The Government submitted six items or exhibits in support of its contention.
2. Item 4 at 5.
3. Item 5 at 2.