

DATE: February 13, 1997

In Re:

SSN: -----

Applicant for security clearance

ISCR OSD CASE No. 96-0203

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

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FOR THE APPLICANT

*Pro se*

STATEMENT OF CASE

On April 26, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which 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 for Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked. The SOR is attached. Applicant filed his Answer to the SOR on May 12, 1996.

The case was received by the undersigned on August 1, 1996. A notice of hearing was issued on September 27, 1996, and the case was heard on October 16, 1996. The Government and Applicant submitted documentary evidence. Testimony was taken from Applicant. The transcript was received on October 23, 1996.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. (Tr.) (1) The SOR alleges criminal conduct (Criterion J) and falsification (Criterion E). In his response to the SOR, Applicant admitted stealing approximately \$170 from the lumber company, but he did not steal the scrap material. The company delivery driver transferred all the scrap to his father's farm with the approval of the lumber yard managers. Under subparagraph 2a, Applicant denied intentionally omitting his employment at the lumber company from May 11 to September 18, 1991. Applicant admitted he falsified his September 27, 1995 sworn statement when he denied stealing

any money. He was afraid of losing his job. His theft was motivated by desperation and stupidity. He has made changes in his lifestyle, including divorcing his first wife, to prevent a recurrence of his past conduct. Applicant denied being evicted from the apartment in June 1991. The rental payments were always made in cash or by check and the owner gave him a good reference when he moved.

Applicant is 31 years old and employed as a ----- by a defense contractor.. He seeks a secret level clearance.

Applicant admitted stealing money from the lumber company in September 1991. (GE #3; Tr. 15). A customer's bill totaled approximately \$170. The customer gave Applicant \$170 in cash and Applicant reached in his pocket and provided change instead of ringing up the sale in the cash register and removing the change. Applicant stole the money because he was broke and his wife, a cocaine addict at the time (Tr. 16), was expecting a baby. (GE #3). He intentionally concealed the theft (GE #2, sworn statement of September 1995) because he was concerned about his security clearance and his job. (GE#3).

When Applicant filled out GE #1 (personnel agency questionnaire) in January 1995, he intentionally omitted his employment at the lumber yard.<sup>(2)</sup> He deliberately concealed the information because: (1) he had worked for the yard for approximately 6 months (Tr. 28) and recalled winning a sales contest (GE #2); (2) he stole approximately \$170 from the yard in September 1991; and, (3) he filled out GE #1 less than 3 ½ years after he terminated his employment with the yard.

Applicant did not steal the scrap and related material from the lumber yard in 1991.<sup>(3)</sup>

There is insufficient evidence to find Applicant was evicted from a residence in June 1991 for failure to pay rent from November 1990 to June 1991.<sup>(4)</sup>

Applicant has made positive adjustments to his lifestyle to prevent the criminal activity in 1991 from happening again. He is about to move into a new house. He spends more time at work and at home than in the past. He also has custody of his son. (Tr. 24).

The support manager recalled Applicant was a temporary employee and was ultimately hired because of his professionalism and job knowledge. Applicant is security conscious and honest.

The security officer considers Applicant a respected team player at the facility.

## POLICIES

Enclosure 2 of the Directive set forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

### **Criminal Conduct (Criterion J)**

#### Factors Against Clearance:

1. any criminal conduct, regardless of whether the person was formally charged.

#### Factors for Clearance:

1. the criminal conduct was not recent.
2. the crime was an isolated event.

3. the person was pressured or coerced into committing the act and those pressures are no longer present in that person's life.

### **Criterion E (falsification)**

#### Factors Against Clearance:

2. the deliberate omission...or relevant and material facts from any personnel security questionnaire...to...determine security clearance eligibility or trustworthiness....

3. deliberately providing false or misleading information concerning relevant and material matters to an investigator...in connection with personnel security or trustworthiness determination.

#### Factors for Clearance:

None.

### **General Policy Factors (Whole Person Concept)**

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 2-1 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) The presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; and, the likelihood of continuation or recurrence.

### **Burden of Proof**

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must establish all the factual allegations under Criterion J (criminal conduct) and Criterion E (personal conduct-falsification) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to the sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

### **CONCLUSIONS**

Applicant's theft from the lumber yard constitutes criminal conduct which creates doubt about Applicant's judgment, reliability and trustworthiness. In taking the money, Applicant breached his position of trust by simply keeping the proceeds from a sale instead of ringing the sale up on the cash register. The fact he was broke probably had a direct relationship to his wife's drug problems and the probability they were not ready to handle the responsibilities of raising a child. However, neither reason is sufficient to justify committing criminal conduct.

Applicant's falsification of his security form and his sworn statement establishes felonious conduct within the scope of 18 USC 1001 and also constitutes poor judgment and untrustworthiness under Criterion E. The information Applicant sought to conceal is material to determining his security qualifications. Having an applicant's complete and accurate chronological history of employment tells the Government an applicant can read and follow instructions properly. Having an applicant's job history provides the Government chronological reference points from which to conduct complete employment and related interviews to assess the applicant's performance on the job or his conduct in the community. The intentional omission by Applicant deprives the Government of adverse information that clearly affects Applicant security worthiness.

Applicant's intentional omission of the theft offense from his sworn statement in September 1995 represents questionable judgment, untrustworthiness and unreliability. The theft is material to Applicant's security qualifications because if a person is willing to steal to satisfy his objectives, then he may decide his own interests are more important than his paramount responsibilities associated with complying with security rules and regulations.

Applicant's professionalism and honesty on the job have been carefully evaluated. His positive lifestyle changes have been considered. However, Applicant's favorable character evidence does not outweigh his intentional falsifications of his security form (GE #1) in January 1995 and his sworn statement (GE #2) of September 1995. On the other hand, even though Applicant intentionally omitted his employment at the lumber yard and intentionally stole from the yard, there is no sound, evidentiary basis upon which to conclude Applicant played a part in the theft of the scrap material.

Similarly, although there may have been a logical reason to have rental problems with his landlord, there is insufficient evidence in the record to conclude Applicant was evicted from the apartment in June 1991.

### **FORMAL FINDINGS**

Formal Findings required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: AGAINST THE APPLICANT.

- a. For the Applicant.
- b. Against the Applicant.

Paragraph 2: AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant (money); for the Applicant (scraps).
- c. For the Applicant.

Factual support and reasons for the foregoing findings are set forth in FINDINGS OF FACT and CONCLUSIONS above.

### **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.

Paul J. Mason

Administrative Judge

1. The Government exhibits shall be identified as (GE) followed by the exhibit number. Applicant's exhibits shall be identified by letter.

2. Question 11 of GE #1 requires the applicant to list all periods of employment in chronological order. The question does not allow an applicant discretion in listing only the jobs related to his skill as Applicant claimed guided his thought process when he provided his previous job history. (Tr. 18).
3. The Government's evidence consists of an accusation without any documentation in support. Applicant steadfastly claimed the material was moved with the consent and approval of the managers at both yards because the regional managers were scheduled for an inspection and each yard had to be as clean as possible. (Tr. 16). The scrap was taken to Applicant's father's farm as scrap sales were slow. (Tr. 17). The finding that Applicant left his employment off his security form and stole the money could establish a weak inference Applicant stole the scrap. However, unlike his explanation for the missing information from the security form, his claim of approval is reasonable and cannot be dismissed as an after-fact rationalization for the wood being located at this father's farm.
4. Under subparagraph 2c, the Government's evidence amounts to an accusation unsupported by any documentation or other independent evidence. Applicant testified he stayed the full term of the lease and the landlord provided a favorable reference when Applicant moved. (Tr. 19).