

DATE: February 4, 1997

In Re:

SSN: -----

Applicant for security clearance

ISCR OSD Case No. 96-0404

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Matthew E. Malone, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF CASE

On August 22, 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 September 11, 1996.

Applicant elected to have his case determined on a written record in lieu of a hearing. Department Counsel submitted the File of Relevant Material (FORM) on October 22, 1996. Applicant was instructed to submit objections or information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received a copy on November 1, 1996. Applicant's reply was due on December 1, 1996. No reply was received. The case was received by the undersigned for resolution on December 10, 1996.

FINDINGS OF FACT

The Following Findings of Fact are based on the documentation and testimony. The SOR alleges Criterion J (criminal conduct) and Criterion E (personal judgment). Applicant denied subparagraph 1b and 1c and admitted the other allegations.

Applicant stole approximately \$5161 from a slot machine fund bank (change drawers) between early 1986 and December 1987 while employed at a military recreation center located in a foreign country.⁽¹⁾

Applicant did not file state tax returns for 1993 and 1994.⁽²⁾

Applicant admitted he falsified his November 19, 1997 sworn statement when he denied any knowledge of stolen money from the slot machine change drawers at the recreation center as described in subparagraph 1a. He also admitted he lied on June 23, 1988 and August 30, 1995 when he denied any knowledge of the stolen money from the recreation center change drawers as described in subparagraph 1a.⁽³⁾

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:

Criterion J (Criminal Conduct)

Factors Against Clearance:

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

Factors for Clearance:

None.

Criterion E (Personal Conduct)

Factors Against Clearance:

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

Factors for Clearance:

None.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under several additional factors that make up the whole person concept. The factors include the nature and seriousness of the conduct, the circumstances surrounding the conduct, the frequency and recency of the conduct, the individual's age and maturity at the time, the presence or absence of rehabilitation, other pertinent behavioral changes, the motivation for the conduct, and the likelihood of 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) 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 criminal conduct between early 1986 to December 1987 has been clearly established. Some time in 1986, he became the supervisor of the military recreation center. His position of trust provided him access to the slot machine change drawers where the change for the slot machines was kept. He knew the money generated from the slot machines was utilized to finance programs for the military. He violated his position of trust by repeatedly stealing change from the drawers to finance his addiction to the slot machines. He continued stealing money from the drawers even after the military interview in November 1987 when he denied any involvement in the theft. He even believed he would have continued playing the machines, and stealing the money had he not been caught.

The theft occurred more than 10 years ago. If the theft had been one single incident, then mitigating factor #1 may have intervened to mitigate the conduct. However, the conduct occurred over and over again because Applicant could not play the machines without repeatedly marauding change drawers from early 1986 to December 1987. The repeated character of the conduct eliminates the application of mitigating factor #2 under Criterion J. Given the lack of evidence under mitigating factor #3 and #4, there is insufficient evidence to confidently conclude Applicant will not capitulate to the same pressures which could lead to a recurrence of the past criminal conduct. Applicant's simple removal from the location of the criminal conduct in 1987 does not translate to evidence of successful rehabilitation.

Applicant's failure to file state returns in 1993 and 1994 is demonstrative of criminal conduct. Applicant has provided no persuasive reason to believe he filed his 1993 and 1994 state returns. The evidence presented by Applicant on th returns issue supports the opposite conclusion. Earlier contradictory explanations provided by Applicant in Item #5 and Item #7 undermine Applicant's overall credibility and support the conclusion he did not file the returns in question.

Applicant deliberately chose to repeatedly lie about the theft in his sworn statement in November 1987, in his interview June 1988, and in his sworn statement of August 30, 1995. He made these denials in two sworn statements and one interview. The falsifications were admittedly intentional and constitute seriously poor judgment under Criterion E.

Applicant claimed he continued to steal money from the change drawers and play the machines because he became addicted. When a person discovers he has an addiction, it is his responsibility to seek for help as one would do if he developed an alcohol or drug addiction. The routine change of location in 1987 represents insignificant evidence by itself to conclude the gambling could not recur under similar circumstances in the future. Neither does the mere passage of time mean the gambling could not happen again, particularly because of Applicant's brazen attitude in 1987 to continue stealing from the changes drawer even after he was discovered he was one of the primary subject of the investigation.

Applicant also claimed he continue to steal because he was afraid of what his wife would do if she found out about the theft. His fear of her reaction does not justify first repeatedly stealing from Government.

His claim he was afraid of losing his job does not justify repeatedly lying to the Government. Applicant's original falsification in November 1987 is aggravated by his repeated falsification of his criminal conduct for more than nine years. A person applying for a security clearance must demonstrate his truthfulness throughout the security investigation.

Applicant's criminal conduct of 1987, which he tried to hide for almost 9 years in three official Government

investigations, establishes a heavy cloud over Applicant's judgment and reliability. His more recent poor judgment in covering up his failure to file state returns supports a conclusion Applicant does not warrant security clearance access.

FORMAL FINDINGS

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

Paragraph 1: AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant.
- c. Against the Applicant.
- d. Against the Applicant.
- e. Against the Applicant.

Paragraph 2: AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant.
- c. Against the Applicant.

Factual support and reasons for the foregoing findings are set forth in FINDING 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. According to Item #6 (sworn statement dated December 7, 1995) of the File or Relevant aternal (FORM), Applicant was manager of the recreation center where the slot machines were located. All the proceeds from the slot machines were returned to the finance programs for the center. Applicant became addicted to the slot machines but could not afford the time he committed to the machines. He began to take money from the two change drawers to finance his addiction. He started taking a little money at a time. He was always able to conceal the money shortages because he was also responsible for auditing the change drawers. Applicant played so much sometimes his fingers turned black.
2. Applicant offered no explanation in his response to the SOR why he denied he did not file tax returns. However, he indicated in Item #5 (sworn statement dated March 27, 1996) "...I have not yet filed 1993 or 1994 [state] taxes even though I am due refunds for both years. I have put it off because I know it will be complicated and will take several hours to do so." In Item #7 (sworn statement dated August 30, 1995), Applicant claimed his 1993 return was returned because he had not claimed his wife's wages, and, he had not filed the 1994 return because he knew the return would returned for the same reason. The two contradictory reasons severely damage the credibility of both uncorroborated reasons and support a finding the returns were not filed.
3. In November 1987, Applicant was interviewed and denied any involvement. He claimed he could not execute the check out process correctly without having someone verify his initial money count. Applicant even accused the military investigation service of harassing him. He continued to steal money even after the initial interview in November 1987

until he quit the job in December 1987. He finally admitted he did not tell the truth about the theft because he was afraid of the impact on his wife and he did not want to lose his job. See, Item #6.