

DATE: August 22, 1997

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In Re:

Applicant for Security Clearance

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ISCR OSD Case No. 97-0025

## **DECISION OF ADMINISTRATIVE JUDGE**

**JOHN R. ERCK**

### **APPEARANCES**

#### **FOR THE GOVERNMENT**

Matthew E. Malone, Esquire

Attorney Advisor

#### **FOR THE APPLICANT**

Hugh O'Neill, Esq.

### **STATEMENT OF THE CASE**

On January 27, 1997, the Defense Office of Hearings and Appeals (DOHA), pursuant to 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 by Change 3, dated February 13, 1996, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make a preliminary determination that it was clearly consistent with the national interest to grant or continue a security clearance for him.

A copy of the SOR is attached to this Decision and included herein by reference.

Applicant responded to the SOR in writing on April 4, 1997, and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on April 30, 1997. On June 4, 1997, a hearing was convened for the purpose of considering whether it was clearly consistent with national security to continue Applicant's security clearance. The Government's case consisted of four exhibits and one witness; Applicant relied on his own testimony, on the testimony of four additional witnesses, and on ten exhibits. A transcript of the proceedings was received on June 17, 1997.

### **FINDINGS OF FACT**

Applicant has admitted, with an explanation, the single factual allegation set forth in the SOR under Criterion E; he has denied, with an explanation, the single factual allegation set forth in the SOR under Criterion J. I have accepted Applicant's admission and have incorporated it as part of my findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is a 43 years old and has been employed as Ship's Master<sup>(1)</sup> in the U.S. Merchant marine since 1990. Prior to becoming a Ship's Master, he has worked as a Merchant Seaman, beginning as an "ordinary seaman" in 1976 and

working up to his present position. He has held a secret clearance since 1982.

A question has arisen about Applicant's security clearance eligibility because of his 1991 involvement in a scheme organized by Company X--his employer at the time--to defraud the United States Government. Company X was a Department of Defense (DoD) contractor in the business of operating ships for the Department of the Navy -----  
----- . Applicant had actively participated in this scheme shortly after he became the Ship's Master of the USNS Z. Applicant had taken over as the Ship's Master at a time when Company X was having severe financial problems. In order to continue operations, Applicant, other Ship's Masters, and other employees had been instructed to submit time sheets claiming payment for corrective maintenance overtime when the employees--on whose behalf the claims were being submitted--were actually providing on-board

services which did not properly fall under the category of "corrective maintenance." Applicant's employer had resorted to this scheme because costs for corrective maintenance overtime were an additional cost to the contract that could be passed on directly to the U.S. Navy, whereas costs for other routine maintenance and repairs had to be absorbed under the original contract price. As a result of their initiating and participating in this fraudulent scheme, eight employees<sup>(2)</sup> of Company X were indicted by the U.S. Attorney for State Y on criminal charges (Tr. 73). Seven employees of Company X were convicted (Tr. 118). Although none of those convicted were incarcerated, Company X has agreed to reimburse the U.S. Treasury 1.4 million dollars as the result of a civil proceeding (Tr. 102-103).

Applicant had become the Ship's Master of the USNS Z on January 24, 1991 (Tr. 155). The USNS Z was in the Mediterranean Port of Q; there was a war in the Persian Gulf.<sup>(3)</sup> When Applicant took over as the Ship's Master, he learned that time sheets claiming reimbursement for corrective maintenance overtime were being sent back (Tr. 198-201); he also learned that his employer was in dire financial straits (Tr. 157,175). And he learned that submitting time sheets fraudulently claiming overtime for corrective maintenance was the means to which his employer had resorted in order to continue operations (Tr. 159). Applicant actively participated in this scheme because he did not see an alternative--at that time. Key members of the ship's crew were threatening to leave if they did not receive additional compensation, i.e., overtime (Tr. 159). Applicant recalled a specific occasion when he asked his chain of command within Company X how to respond to crew members who were threatening to jump ship if they did not receive overtime. Applicant was instructed to pay whatever overtime was requested and to write it up properly (Tr. 159). The ship could not legally leave port without a full crew (Tr. 158). Applicant did not feel comfortable going outside of his chain of command to the ----- (Tr. 159); he was concerned what abandoning ship would do for his career--so he participated. His participation included signing off on time sheets which he knew contained false information and changing entries on time sheets to reflect corrective maintenance entries, rather than entries which reflected the work that had actually been performed (Tr. 182-183, Govt. Exh. No. 3). Applicant continued as the Ship's Master of the USNS Z until July 14, 1991, and continued to work for Company X until February 1993.

When Applicant was questioned about his involvement in the fraudulent scheme by the Defense Investigative Service (DIS), he was honest and forthright in admitting the full extent of his involvement (see Govt. Exh. No. 4). While he has provided an extensive account of the environment in which his participation in the scheme to defraud the U.S. Government had occurred, he has never attempted to argue that those circumstances justified his actions. At the hearing, he admitted again that he "was ultimately responsible for what went on." and that he could not "give... an excuse for anything what went on," (Tr. 174,189). He testified that since the events aboard the USNS Z, he has "gone to extreme measures to make sure that it has never happened again with me." Now he insists "upon clarification of orders from... superiors." If he were ever in a similar situation again, he testified that he "would now definitely call the NIS immediately" (Tr. 174).

Since the fraudulent scheme was uncovered in 1991, Applicant has continued to work as a Ship's Master for Company X, and later for Companies Y and Z. There is no evidence that he has been involved in any questionable or suspicious activity other than that which occurred aboard the USNS Z. Most of those who have come to know him through personal contact, as well as those who know him primarily by reputation, indicated that they were aware of events aboard the USNS Z. Of the individuals who had knowledge of those events, none of them expressed any doubts or reservations about Applicant's having a security clearance. All of his character references have praised him as a man of honesty and integrity. (Tr. 17-30, 31-40, 213-217. Appl. Exhs. Ltrs. B,C,D,E,F,G,H,I, and J).

Two of the witnesses who testified on Applicant's behalf were in positions which required them to be knowledgeable of his (Applicant's) character and reputation. Captain N is a Naval Officer with almost 30 years of commissioned service-- currently the commanding officer of the Naval Oceanographic Service. Captain N had become acquainted with Applicant when he served as Ship's aster on one of their ships during a survey mission. He was favorably impressed with Applicant when he met him prior to the mission and had an opportunity to watch him "in action." Captain N later received positive feedback--about Applicant-- during formal debriefing from the crew that had conducted the survey. Captain N described Applicant as a "man of integrity, a man of his word." (Tr. 31-33).<sup>(4)</sup> Mr. J is the vice president of the ----- . His organization supplies personnel to the companies that operate "TAGOS"<sup>(5)</sup> and oceanographic ships for the U.S. Navy. Mr. J testified that his company prides itself in sending quality people to operate the Navy's ships. Although aware of the events aboard the USNS Z, Mr. J testified that Applicant has an "outstanding reputation." (Tr. 213-220).

## POLICIES

The Adjudicative Guidelines of 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 with reasonable consistency that are clearly consistent with the interests of national security. In making those 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 the factors set forth in section F.3. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate that the facts proven have a nexus to an applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter.

### PERSONAL CONDUCT

(Criterion E)

Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

**Conditions that could raise a security clearance concern and may be disqualifying also include:**

- (5) A pattern of dishonesty or rule violations,
- (6) Association with persons involved in criminal activity.

**Conditions that could mitigate security concerns include:**

- (7) Association with persons involved in criminal activities has ceased.

### CRIMINAL CONDUCT

(Criterion J)

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

**Conditions that could raise a security concern and may be disqualifying include:**

- (1) Any criminal conduct, regardless of whether the person was formally charged;
- (2) A single serious crime or multiple lesser offenses.

**Conditions that could mitigate security concerns include:**

- (1) The criminal behavior was not recent;
- (2) The crime was an isolated incident;
- (4) The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;
- (5) There is clear evidence of successful rehabilitation.

### **ADJUDICATIVE PROCESS**

The following Adjudicative Process factors have been considered:

- The nature, extent, and seriousness of the conduct
- The circumstances surrounding the conduct, to include knowledgeable participation
- The frequency and recency of the conduct
- The individual's age and maturity at the time of the conduct
- The voluntariness of participation
- The presence or absence of rehabilitation and other pertinent behavioral changes
- The motivation for the conduct
- The potential for pressure, coercion, exploitation, or duress
- The likelihood of continuation or recurrence

### **Burden of Proof**

The Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to the applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates that it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands that Court's rationale, doubts are to be resolved against an applicant.

### **CONCLUSIONS**

. Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes that the Government has established its case with regard to Criteria E and J.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section F.3, as well as those referred to in the section dealing with the Adjudicative Process, both in the Directive.

Applicant's admitted, active participation in a scheme to defraud the U.S. Government-- together with other evidence in the record--establish his involvement in a serious criminal conspiracy. Through his participation in this conspiracy, Applicant demonstrated extremely poor judgment and failed to comply with applicable rules and regulations. His

conduct was especially serious because it continued for almost six months. During that time, there is little evidence that he attempted to report the criminal activity, or that he took steps to extricate himself from the situation in which he felt compelled to participate. The scheme in which he was participating would eventually defraud the U.S. Government of more than two million dollars. Although Applicant did not devise the scheme and was not a major player in its execution, the scheme would not have succeeded--for the time that it did--had it not been for his complicity and the complicity of others similarly situated.

While Applicant did participate in serious criminal activity, there were persuasive extenuating and mitigating circumstances. It is significant that Applicant's participation in the criminal conspiracy occurred six years ago, at a time shortly after he had assumed the duties of S----- for the first time. He was in a foreign port; he wanted to keep his crew together; and he was afraid of going outside the chain of command. He could not walk off the job, jump in his car, and drive to his home in the suburbs. And he obviously did not have the confidence in his own instincts that longer tenure in that position would have given him. He was overly concerned with establishing a reputation for being able to accomplish the mission under adverse conditions. Just as Applicant was in the throes of adjusting to the responsibilities of a new position, his employer was engaged in a massive conspiracy to defraud the U.S. Government of millions of dollars by submitting false vouchers for corrective maintenance overtime. Applicant was swept along in this conspiracy; he exercised poor judgment.

Had Applicant been involved in this conspiracy six months ago, or even two years ago, there would not have been sufficient time for him to re-establish his reputation, and provide a basis for concluding his poor judgment on that occasion was an "isolated" event in Applicant's career. However, it has been six years. During those six years, Applicant has continued to serve as a -----; he has established a reputation as a man of integrity. The time that has passed since the incident together with Applicant's unblemished prior record have served to isolate the events of early 1991 from an otherwise exemplary career. Applicant's record, before and after his tenure as the ----- of the ---- Z, corroborates his account of those events and persuades this Administrative Judge that he stumbled because of the difficult circumstances--not because of a criminal predisposition, a deep rooted character flaw or ingrained poor judgment.

Favorable consideration has been given to the fact that Applicant did not personally profit from his participation in the criminal conspiracy. Nor did he did participate in the conspiracy to obtain funds to cover gambling debts or to support an alcohol or drug habit. He benefited only to the extent that participating in the conspiracy enabled him to keep his job whereas refusing to participate may well have caused his employment to be terminated. Also given favorable consideration is that fact that Applicant did not play any role in devising the fraudulent scheme in which he felt compelled to participate.

Finally, Applicant impressed this Administrative Judge with his honesty and sincerity. He came across as being truly sorry and embarrassed about what he had done. He has accepted full responsibility for his actions. Since the events aboard the ---- Z, he has thought about the circumstances under which he submitted the fraudulent corrective maintenance overtime sheets and realizes there was a way out of the dilemma that he did not think of at the time. This reflection about the past has caused him to think about what he would do if he were in a similar situation in the future. He knows that he does not want to make the same mistake again. Because he has never attempted to avoid his responsibility, his testimony about his future intentions is credible, as was his testimony about the work environment under which he had been drawn into the criminal conspiracy.

Department Counsel is correct in pointing out that none of the character witnesses who testified on Applicant's behalf have had extensive one-on-one contact with him. However, that fact appears to be a function of what he does, rather than who he is. Being responsible for a ship on the high seas is not a job which lends itself to frequent contact with one's supervisors, or with anyone except the ship's crew--whose testimony would automatically be suspect because of their being subordinate. Although the men who have attested to Applicant's character and reputation may not have had day-to-day contact with him, at least two of them--Captain N and Mr. J--have a vested interest in being informed about his trustworthiness, honesty and integrity. These are men of substance, holding responsible positions. Because their own reputations and authority are on the line, their knowledge about Applicant is necessarily based on something more substantial than idle curiosity. Their positions require them to make decisions about Applicant's career or to influence the decisions made by others. It is unlikely that they will base those decisions or their recommendation of Applicant on

speculation or conjecture. They have no professional interest in promoting the reputation and career of someone who is a liar, or who has proven himself to be untrustworthy. And there is no evidence that they were touting Applicant's reputation because of friendship or family ties. Subparagraph 1.a. (Criterion E) and subparagraph 2.a. (Criterion J) are concluded for Applicant.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 (Criterion E) FOR THE APPLICANT

Subparagraph 1.a. For the Applicant

Paragraph 2 (Criterion J) FOR THE APPLICANT

Subparagraph 2.a. For the Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to continue Applicant's security clearance.

**John R. Erck**

**Administrative Judge**

1. A "ship's master" is the person in charge of a vessel operated by the Merchant Marine; he has authority and responsibility similar to that of a captain of a military vessel and is regularly referred to as "captain."
2. All of the indicted employees were corporate officials except for the chief engineer of the USNS Z; the chief engineer of USNS. Z was indicted because he had lied during the investigation (Tr. 131). Applicant was not indicted because the U.S. Attorney had decided not to indict anyone below the corporate level--with the exception noted above (Tr. 74).
3. The USNS Z was not on a mission related to the war; however, the logistical requirements of that effort caused the USNS Z's crew members to be in a seller's market as far as their services were concerned. (Tr. 181,190)
4. Captain N was permitted to testify out of order because the hearing had been delayed as a result of the court reporter being delayed. Captain N had another commitment which would not have permitted him to testify later in the hearing.
5. This term was used by Mr. J to identify a type of ship for which his organization provides personnel (Tr. 215). The term is not further identified.