

DATE: July 2, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR OSD Case No. 97-0061

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

Matthew E. Malone, Esquire

Attorney Advisor

FOR THE APPLICANT

Pro Se

STATEMENT OF THE CASE

On March 7, 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 11, 1997, and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on ay 7, 1997. On May 30, 1997, a hearing was convened for the purpose of considering whether it was clearly consistent with the national security to grant Applicant's security clearance. The Government's case consisted of thirteen exhibits and no witnesses; Applicant relied on his own testimony, on the testimony of two additional witnesses, and on seventeen exhibits. A transcript of the proceedings was received on June 9, 1997.

FINDINGS OF FACT

Applicant has admitted, with an explanation, the single factual allegation set forth in the SOR under Criterion K. I have accepted Applicant's admission and incorporate 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 65 year old, self employed, -----, who is seeking the restoration of his secret clearance. His resume includes 20 years of service in the United States Navy--from which he retired in 1970, service as a civilian employee of the Department of Navy from 1970 to September 1989⁽¹⁾ when he retired a second time, and employment with a Department of Defense (DoD) Contractor (Company X) from 1989 to June 1993. His employment with Company X was terminated in June 1993 after his security clearance had been suspended as a result of his disclosing classified information to an official of Country A. Applicant had held a security clearance--up to and including top secret--for most of his professional career.

The incident which led to the suspension of Applicant's security clearance in June 1993 occurred on or about August 26, 1992. Applicant had traveled to several foreign countries on a ----- trip for his employer, Company X, a technology company principally engaged in the business of -----
----- --for installation on ----- and ----- . One of the stops on this trip was to visit Country A, a country in the process of building and equipping a ----- . Applicant called on Country A's naval officials because his employer was interested in selling them ----- for installation on their ----- . When he met with Commander J, a naval officer of Country A, Commander J challenged Applicant's knowledge about the electronic systems he was attempting to sell. He asked him why this equipment was necessary, which other countries had this type of equipment, and he pressed for information on the technical capabilities of the signal intelligence systems used by various countries. In order to prove his expertise to Commander J, Applicant prepared a three page paper which disclosed Submarine SIGNIT (Signals Intelligence) Capabilities of at least four navies. In a matrix layout⁽²⁾, this paper identified the country, the platform type on which the equipment was installed, and the technical specifications, to include frequency ranges currently being used.

Applicant had used the services of a typist employed by Company Xx (a local, in-country affiliate and distributor for Company X) to prepare this three page document. The finished document included several pages from Company X's non-classified marketing brochure--in addition to the three pages Applicant had prepared. After the document was typed, Applicant provided a copy to a Company Xx official for delivery to Commander J the following day.⁽³⁾

Applicant had two additional copies of this document prepared. One copy of the document was given to the officials of Country A's navy and could not be recovered. One copy was sent back to Applicant's employer and remained on the desk of the Manager for ----- Programs for a week or more--unsecured--before it was opened by an uncleared secretary, and subsequently "handled and safeguarded as SECRET" in a GSA approved container.⁽⁴⁾ Company Xx's copy of the document remained in its possession until retrieved by a cleared Company X employee in September 1992 and burned in a local hotel room--in Country A.

In creating the three page document, Applicant admitted that he did not rely on information he had learned or accessed during his employment with Company X. He told the Defense Investigative Service (DID) in November 1992 that the principal source of knowledge for this information was his prior employment by the Department of the Navy (p.14, Govt. Exh. 2).

Subsequent review of this document by Company X officials revealed that it contained information about the Navy SIGNIT systems of Country Z which was classified as Country Z CONFIDENTIAL (Govt. Exh. 3). Further review of this document was conducted by the Assistant for Information and Personnel Security, Office of the Chief of Naval Operations, Department of the Navy. This review concluded that U.S. Navy information classified up to the Secret Level was involved (Govt. Exh. 5).

When questioned about the incident by the DIS in early November 1992, Applicant acknowledged that he had knowingly disclosed classified information. His comments in the sworn statement signed at that interview are instructive on his state of mind at the time. He indicated that he "was not very happy" and "did not feel very comfortable" (pp. 14, 15)⁽⁵⁾ about providing the information(in the document)to Commander J. He admitted that he "should have realized" the information in the document was classified (pp. 15-16). He further admitted that he realized disclosure of "this information was a security violation," (p.16) but turned the information over "anyway" to prove to Commander J that he (Applicant) was an expert in signal intelligence. Additional evidence of Applicant's concurrent knowledge about the classified nature of the information is found in his statement where he explained that he had

stressed the classified nature of the information to the Company Xx officials at the time the document was being prepared (p. 16).

Applicant now asks that his security clearance be restored because his disclosure on or about August 26, 1992, was an isolated incident; his employer had not provided adequate security briefings; and the information disclosed should not have been classified because it was readily accessible in open sources widely disseminated in the public domain.

To prove the latter point, Applicant has proffered numerous publications which supposedly contain the same information as was in the three page document he created for Commander J. Two of the documents relied on bear publication dates three and five years **after** Applicant's unauthorized disclosure.⁽⁶⁾

Since admitting to the DIS that he had knowingly released classified information to Commander J, Applicant has revised his assessment of the information in the three page document which he created on or about August 26, 1992. Both in his answer to the SOR and in testimony at his administrative hearing, Applicant asserted that the information disclosed "was available through commercial unclassified documentation and publications, and continues to be available through open source literature" (See answer to SOR and Tr. 42-48). However, on cross examination, Applicant admitted again that the information in the document he had created was classified (Tr. 90-91). The assessment of this information by Applicant's employer and the Department of Navy, establish conclusively that the document he (Applicant) released to Country A contained classified information.

To support his contention that the restoration of his security clearance is consistent with the national interest, Applicant has proffered numerous letters of reference and other documents which attest to his good character and his reputation for being attentive to protecting classified information.

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.

SECURITY VIOLATIONS

(Criterion K)

Noncompliance with security regulations raises doubt about an individual's trustworthiness, willingness, and ability to safeguard classified information.

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

- (1) Unauthorized disclosure of classified information;
- (3) Violations that are deliberate or multiple or due to negligence.

Conditions that could mitigate security concerns include actions that:

- (2) Were isolated or infrequent.

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 Criterion K.

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 has admitted that he disclosed classified information to a representative of a foreign government. With his admission, he acknowledges that his creation and disposition of a classified document violated the sections of the Industrial Security Manual cited in the SOR. He admits that he did not protect the classified document which he had created (ISM 5-101); he admits that he transmitted classified material to a foreign interest (ISM 5-405); he admits that he disclosed classified information to a foreign person without proper authorization (ISM 5-507); he admits that he did not follow the proper procedure for disclosing information to a foreign person (ISM 10-201); and he admits that he disclosed classified information of a foreign government without the prior written consent of that government (ISM 10-305).

Applicant has attempted to mitigate his malfeasance by claiming that it was an isolated incident in his forty year career of handling and protecting classified information. He also argues that his security clearance should be restored because his unauthorized disclosure resulted from an inadequate security briefing by his employer. Finally Applicant contends that his security clearance should be restored because the information disclosed was readily accessible in publications available in the public domain.

There is merit to Applicant's claim that the disclosure occurring on or about August 26, 1992, was an isolated incident. In a lifetime of handling classified documents and information, there is no allegation or evidence of a similar departure from the rules and regulations established for handling and safeguarding classified information. However, there is little merit to Applicant's other claims.

Applicant has failed to establish a causal relationship between his employer's security responsibilities and the unauthorized disclosure which he made to officials of Country A in August 1992. If Applicant had disclosed information which he had had access to as a result of his employment with Company X, his argument would have an air of plausibility. Company X bears a responsibility for instructing its employees on how to properly handle and secure the classified information they have occasion to access and use in the course of their employment. Company X is not primarily responsible for preventing the disclosure of knowledge and information which its employees have learned through their employment elsewhere. That is the situation here. Applicant did not disclose information learned during his employment with Company X. Applicant has admitted that he had learned the signal intelligence information disclosed to officials of Country A during previous employment with the United States Department of the Navy.

Applicant's claim--that the information disclosed to officials of Country A was/is available from open sources--is not supported by the evidence. The publications which Applicant has proffered contain technical information but the information is not presented in the matrix format which Applicant had used in the document he had prepared for

Commander J. Applicant's Exhibit G is a publication of Company Y, another manufacturer of --- equipment. This publication compares Company Y's --- equipment to the --- equipment of yet another manufacturer. While this publication contains information about equipment sensitivity, dynamic range, frequency accuracy, and makes a number of other comparisons between the two product lines, this publication does not indicate which navy is using their (Company Y's) system and which navy is using the system of their competitor, nor does the publication indicate the platform (----- or -----) on which the equipment is being used. Significantly, this publication (Applicant's Exhibit G) is dated October 19, 1995, more than three years after Applicant had made the unauthorized disclosure to Country A.

Moreover, the assessments of the information in the three page document by Applicant's employer, and by the Department of the Navy, provide persuasive evidence that the information in that document was classified. Contributing to the persuasive character of these assessments is Applicant's near-in-time acknowledgment that the information was classified. In his signed, sworn statement to the DIS in November 1992--less than three months after the event-- Applicant repeatedly made admissions which reveal his state of mind at the time. His professed unease at turning the document over to Commander J can only be attributed to an awareness that information in the document was classified. On page 16 (Govt. Exh. 2), Applicant went so far as to admit that he knew the information was classified, but decided to release it "anyway," because he wanted to "prove a point;" he wanted to demonstrate his expertise to Commander J. Applicant released classified information to a representative of a foreign government in order to salvage his bruised ego.

Because Applicant has not had access to classified information for the past four years, there is no basis upon which to evaluate his professed rehabilitation. He receives no assistance from his inconsistent interpretation of the events which led to the loss of his clearance. In the past four years, Applicant has vacillated between complaining about the injustice of losing his security clearance for disclosing information that was available in open sources, and contritely admitting that he had wrongfully and deliberately disclosed classified information to an official of Country A--in order to repair a damaged ego. If Applicant truly does not understand the difference between equipment specifications in a company marketing brochure, and linking specific equipment capabilities with an on-duty ----- of a foreign navy or foreign air force, he has not learned from his mistake. And he has not persuaded this Administrative Judge that he has been rehabilitated. Criterion K is concluded against 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 K) AGAINST THE APPLICANT

Subparagraph 1.a. 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 Applicant's security clearance.

John R. Erck

Administrative Judge

1. Applicant was employed by Company X for 18 months in 1978.
2. In his signed, sworn statement to the Defense Investigative Service, Applicant identified this three page paper as a "chart". Department Counsel referred to it as a "matrix" during his cross examination of Applicant.
3. Applicant stated that he was scheduled to visit another facility and was unable to personally deliver the document to Commander J.
4. The document was stored in a GSA container after it was determined to contain classified information (See Government Exhibit 3).
5. All references in this paragraph are to Government Exhibit 2.

6. Applicant Exhibit D was published in March 1997 and Applicant Exhibit G was published in October 1995.