

DATE: August 21, 1997

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In Re:

Applicant for Security Clearance

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ISCR OSD Case No. 97-0087

## **DECISION OF ADMINISTRATIVE JUDGE**

**JOHN R. ERCK**

### **APPEARANCES**

#### **FOR THE GOVERNMENT**

Michael H. Leonard

Department Counsel

#### **FOR THE APPLICANT**

*Pro Se*

### **STATEMENT OF THE CASE**

On February 21, 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's undated answer to the SOR was received by DOHA on March 25, 1997. In it, he requested that his case be decided without a hearing. Applicant received the Government's File of Relevant Material (FORM) consisting of seven exhibits on May 5, 1997. He did not respond to the Government's FORM. The case record was closed on June 4, 1997, and assigned to this DOHA Administrative Judge for decision on the same date.

### **FINDINGS OF FACT**

In his answer to the Statement of Reasons, Applicant admitted all factual allegations set forth under paragraph 1 (Criterion K) and under paragraph 2 (Criterion E). 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 62 years old and has held a secret clearance since 1984. The record does not disclose the length of time he has worked for Company X, the defense contractor who is his current employer. His title and responsibilities at the time of the misconduct alleged in the SOR were vice president and facility security officer (FSO).

Applicant's suitability to retain his security clearance is in question because as FSO of Company X, he knowingly and willfully failed to follow the security requirements prescribed by the Industrial Security Manual for Safeguarding



Classified Information - DoD 5220.22M, dated January 1991 (ISM) and by the National Industrial Security Operating Manual - DoD 5220.22M, dated January 1995 (NISPOM).

Beginning on an undisclosed date in 1992, Applicant allowed two uncleared employees (Mr. A and Mr. B) access to classified information at Company X's principal place of business. In addition, he prepared numerous classified visit letters (CVL's) for each of them which authorized them to access classified information at government facilities and at facilities operated by other defense contractors. Both Mr. A and Mr. B had completed security questionnaires at the time they began working for Company X, but Applicant (the FSO) was preoccupied with other work and did not submit their paperwork to the Department of Defense for processing.

More recently in May 1996, Applicant allowed Mr. C (an uncleared Company X employee) to process classified information on a Company network analyzer. He did not think he was violating security regulations because he had turned off the monitor display so Mr. C could not see the frequencies which were being tested.

When Applicant was questioned by the Defense Investigative Service (DIS) on November 13, 1996, he readily admitted his responsibility for several security violations. In a signed, sworn statement (FORM Item # 7), he admitted that he "knowingly and willingly allowed (Mr. A) access to information that he had no clearance for." He admitted that he had "willfully generated and sent a falsified classified visit letter" which allowed Mr. A to visit a facility in another state. As if to further explain, he added "I knew it was wrong and that it was a security violation for (Mr. A) to have access to classified information but I did it anyway." In the same statement, he admitted that he had allowed Mr. B access to classified information when he "knew (Mr. B) did not have a security clearance. And he admitted that he had "willfully generated a falsified CVL" to enable this employee to visit another defense contractor.

Applicant attributes his failure to observe security procedures to job-related stress. He was overwhelmed by the multiple responsibilities he had assumed in a company which was experiencing serious cash-flow problems because of a shrinking market for its products. His statement to the DIS--in addition to being an admission of wrongdoing--is also an attempt by Applicant to understand (for himself) what had gone wrong, why he had been so overwhelmed, and why it became impossible for him to fulfill all of his responsibilities. He acknowledges that he was aware of security regulations from reading the ISM and NISPOM, and also from visits and inspections by the Industrial Security Representative.

The record discloses that Company X has hired another FSO since these violations occurred.

### **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;
- (2) Violations that are deliberate or multiple or due to negligence.

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

None Applicable

**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 concern and may be disqualifying also include:**

- (5) A pattern of dishonesty or rule violations.

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

None Applicable

**Burden of Proof**

The Government has the burden of proving any controverted facts 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 K and E.

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.

The Government has established its case with respect to Criterion K. In both his signed, sworn statement to the DIS, and in his response to the allegations in the SOR, Applicant has admitted that he knowingly and willfully committed security violations. While serving as FSO for Company X, he allowed two uncleared employees access to classified information on numerous occasions over a four year period. On several occasions, he prepared classified visit letters for these employees which authorized them to visit and access classified information at other facilities. More recently, he allowed a third uncleared employee access to classified information by having him process this information on company equipment. Applicant knew what he was doing on each occasion, and he knew that he was violating security regulations.

Applicant receives little benefit from the mitigating considerations in the Directive's Adjudicative Guidelines. His



actions were not inadvertent because he admits that he "willfully provided classified information to two uncleared individuals." As the FSO for Company X, he knew that uncleared employees should not have access to classified information. His actions were not isolated or infrequent; he allowed uncleared employees access to classified information on different occasions and under different circumstances over a four year period. And Applicant's violations of security regulations were not caused by improper or inadequate training. He admits that he was familiar with the ISM and NISPOM, that he had a working knowledge of security requirements, and that he had been briefed by a Industrial Security Representative annually.

In his signed, sworn statement to the DIS, Applicant stated his intention to hire a "full time FSO" with experience. An attachment to his answer (to the SOR) confirms that a new FSO has been hired.

Consideration has been given to the circumstances under which the violations occurred. Applicant has painted a convincing portrait of a very difficult work environment in which he had assumed an array of responsibilities that were almost impossible for him to fulfill. The record fails to disclose how, when, and why the situation deteriorated to the point that it had when the security violations occurred. While Applicant's predicament may be deserving of sympathy, it does not provide a basis for mitigating his numerous, knowing and willful violations of security regulations. Subparagraphs 1.a (1), 1.a. (2), and 1.a. (3) and Criterion K are concluded against Applicant.

Criterion E addresses conduct involving questionable judgment or unwillingness to comply with rules and regulations. By failing to comply with security regulations on numerous occasions over a four year period, Applicant demonstrated both questionable judgment and an unwillingness to comply with rules and regulations.

Favorable consideration has been given to Applicant's cooperation, honesty and truthfulness during the DIS investigation. He freely acknowledged in his signed, sworn statement that he had knowingly violated security regulations by allowing uncleared employees access to classified information and by preparing classified visit letters for them. However the good judgment and cooperation demonstrated by Applicant during the DIS investigation is insufficient to mitigate the pattern of security violations which he committed and allowed to occur as the FSO of Company X. Subparagraph 2.a. and Criterion E are 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**

##### **Subparagraph 1.a. (1). Against the Applicant**

##### **Subparagraph 1.a. (2) Against the Applicant**

##### **Subparagraph 1.a. (3). Against the Applicant**

#### **Paragraph 2 (Criterion E) AGAINST THE APPLICANT**

##### **Subparagraph 2.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 continue Applicant's security clearance.

**John R. Erck**

**Administrative Judge**