

DATE: April 13, 1998

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 97-0387

## **DECISION OF ADMINISTRATIVE JUDGE**

**PAUL J. MASON**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Marty H. Mogul, Esq., Department Counsel

#### **FOR APPLICANT**

Sheldon Cohen Esq.,

### **STATEMENT OF THE CASE**

On July 1, 1997, 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, amended by Change 3, February 13, 1996, 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 July 17, 1997.

The case was received by the undersigned on October 9, 1997. A notice of hearing was issued on December 17, 1997, and the case was heard on January 21, 1998. The Government and Applicant submitted documentary evidence. The Government called two witnesses. Testimony was taken from Applicant and thirteen witnesses. The last two transcripts were received on February 4, 1998. [\(U\)](#)

### **RULINGS ON PROCEDURE**

A pre-hearing conference was held on December 2, 1997. Two Government exhibits, which were admitted in evidence as Exhibits 1 and 2, shall be remarked as Exhibit 1a and 2a, respectively. (Tr. 9) Applicant's Exhibit A, which was admitted in evidence as Exhibit A, shall be remarked as Exhibit A1. (Tr. 13)

At the hearing, Applicant withdrew his Motion in Limine. (Tr. 62) His Motion to Strike portions of the SOR was denied because the Administrative Judge has no authority under Directive 5220.6 to remove allegations from the SOR. (Tr. 63) After reviewing the record at pages 69 through 71, and page 89, the contents of GE 2 may not be sufficiently identified or admitted in evidence. GE 2 is hereby admitted in evidence and consists of the following documents, described in the order they appear in the exhibit: (1) a three page position statement dated October 17, 1994; (2) 'Attachment A,' two pages in length (with no signatures on the second page; (3) a two page position statement with signatures on the second page, and dated November 17, 1994; (4) 'Attachment A,' two pages in length, with a proposed

action date of October 16, 1995, indicated on the first page; (5) 'Attachment B,' one page in length (unsigned); (6) five pages of employee time sheets or copies of time cards of time card of employee x (Employee X, subparagraph 1a); and, (7) a one page letter of reprimand dated November 29, 1994.

On February 19, 1998, Applicant submitted proposed corrections to the transcript. Those corrections are hereby **ACCEPTED**, and the corresponding changes shall be made in the transcript.

## **FINDINGS OF FACT**

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The SOR alleges criminal conduct (Criterion J) and personal conduct (Criterion E). Applicant is 54 years old and employed as a senior electronics engineer by a defense contractor. He seeks a secret level clearance.

Between September and October 1995 (subparagraph 1a), Applicant mischarged labor costs to a government contract when he knowingly submitted a false time card for an absent employee (Employee X). According to sworn statement (GE 3), dated September 20, 1996, Applicant explained, "I had a subordinate, [Employee X], that was not healthy and needed some time off. I did advise this employee how to account for the time, and acknowledge I signed off on his time card. [Employee X] took eight hours of vacation time he did not have, and I signed off on the time card....I also admit that the time recorded, but not worked, was charged to a US government contract."<sup>(2)</sup> At the hearing, Applicant explained that Employee X had indicated on his time card that he had worked on the Friday in question when, in actuality, he had taken leave; then, on the following Monday, Employee X worked his normal hours but indicated on his time card that he had taken leave. (Tr. 458-459; GE 2) There is no evidence that either the Government or Applicant benefited by Applicant's misconduct. (Tr. 416; 460)

While Applicant may have mischarged labor costs to government contracts in 1995 when he distributed contract numbers to employees, directing them to charge labor costs to these contracts on which they may not have directly worked,<sup>(3)</sup> I find he believed at the time he engaged in the mischarging, he was not doing anything wrong. This finding is based on the testimony of Special Agent A who interviewed Applicant on March 20, 1997.<sup>(4)</sup> After describing the interview procedure, and the initial position taken by Applicant and his change of position on mischarging of labor costs on government contracts, Special Agent A was asked by the Government:

"Did he ever tell your why he had initially denied [mischarging labor costs to government contracts by directing employees to charge labor to those contracts they may not have worked] and then admitted he had engaged in this conduct?"

Special Agent A replied,

"Well, I don't really believe -- and I may be speaking out of turn here -- but I don't really believe that [Applicant] felt he was doing anything wrong at the time, that it was based on a matter of how you looked at it. You know, perhaps, in his mind he felt that it all came out in the was and that ultimately every contractor would be, you know, charged the fair amount that they had worked on when, in actuality, they weren't being charged it at the time that was being worked." (Tr. 115)

Event though an agent's primary responsibility is to conduct background investigations by gathering the facts, Agent's A's assessments of Applicant's demeanor and conduct during the polygraph process cannot be overlooked. Given Special Agent A's testimony that Applicant perceived he had done nothing wrong at the time the labor costs were mischarged, it is impossible to find his conduct falls within the scope of subparagraph 2b of Criterion E.<sup>(5)</sup>

Because I find for Applicant under subparagraph 2b, I also find for Applicant under subparagraph 2a as the element of deliberateness is missing from Applicant's denial to the Special Agent B on September 20, 1997. Therefore, although Applicant admitted he signed off on a false entry on an employee's time card, he did not deliberately direct employees to charge labor costs to various government contracts on which they may not have worked.

Although the record reflects that Applicant was terminated on October 17, 1995,<sup>(6)</sup> there is insufficient evidence to find

that Applicant was terminated for directing his employees to mischarge labor costs to Government contracts they may not have worked. This finding is based on absence of credible evidence indicating he mischarged labor costs. (7)

Management warned Applicant not to use the contract number assignment system but could not provide a better means of keeping track of which employees were working on what contract at a specific time. (Tr. 434)

Applicant's character evidence is impressive. He worked for his previous employer for approximately 23 years without a security violation. His performance evaluations were satisfactory and he received pay increases in 1994 and 1995. He received three performance awards and one included a cash award. Applicant was considered to be a real contributor in a character reference written by coworker 5. Coworker 5 also found Applicant to be honest and security conscious.

Witness 1 worked with Applicant on a contract between 1981 and 1984. Applicant has always exhibited trustworthiness and dedication. Applicant demonstrated a good performance in 1994 and 1995. Witness 1, who was aware that Applicant was fired for falsifying the time card and believes Applicant recognizes the poor judgment manifested by such misconduct, could not imagine Applicant trying to defraud anyone.

Witness 2, Applicant's supervisor from September 1993 to March 1995, considers Applicant honest and trustworthy. Witness 2 found yellow post-it notes was a typical way for individual employees to keep track of contract numbers, although the number should be transferred from the post-it notes to the employee's time card at the end of the first business day. Witness 2 acknowledged that mischarging labor on a contract the employee was not working on, meant termination.

Witness 3 never knew Applicant was terminated. He recalled that Applicant and he worked on the same contracts but at different plants. Applicant always demonstrated honesty.

Witness 4 has been a program manager for four years. Applicant is performing excellently in his present job as liaison/coordinator between his former and present employer. Witness 4 realized that if a supervisor orders his employees to falsify their time cards, that is grounds for termination.

Witness 6 has been with Applicant's former employer for 28 years. Witness 6 made several accusations about management based on speculation. According to witness 6, falsifying a time card in the old days did not automatically mean termination.

Witness 7 has been a government consultant for five years. He considers Applicant a top quality performer who is honest and security conscious.

Witness 8 has been in the military for approximately sixteen and one-half years. He has known Applicant since 1993 when they both were working on a contract together. During that contract, Witness 8 relied on Applicant more than anyone else because Applicant always furnished candid answers and he would always get the job done. Witness 8 brought Applicant in to the project in 1995 because of his expertise.

Witness 9 has been a project engineer for three years and has known Applicant for four or five years. Applicant is an honest, excellent performer who could clarify problems or explain how equipment was to be operated. Witness 9 considers Applicant a respected liaison/coordinator between Applicant's former and present employer. While witness 9 believed Applicant was incapable of lying, he believed Applicant knew what he was doing when he falsified time card.

Witness 10, an employee of Applicant's present employer for 17 years, and a team leader who supervised Applicant from April 1996 to May 1997, met Applicant in 1994 when Applicant was working at his former employer. Except for Applicant's time card alteration, witness 10 has no other reason to question Applicant's integrity. Witness 10 has received good reviews on Applicant's job performance.

Witness 11 has known Applicant since 1982 with regular contact between 1993 and October 1995. Applicant is an honest person and produces invaluable work.

Witness 12 has been working for Applicant's present employer for 26 years and is now a principal engineer. He has

known Applicant for approximately four and one-half years and considers Applicant a competent and honest engineer.

Witness 13 has been with Applicant's present employer for approximately fourteen and one-half years and is presently the surveillance security manager. He conducted an investigation in September 1995 which uncovered no problems with Applicant's clearance. (Tr. 369, 399)

I find that Applicant recognizes the stupidity of his conduct in falsifying an employee's time card because he violated the trust that was placed in him. (Tr. 416-417) The testimony of thirteen colleagues and supervisors reflects very positively on Applicant's honesty and consistently high caliber work performance. Applicant's only security violation occurred in 1978 when he forgot to properly spin the dial on his safe.

## **POLICIES**

Enclosure 2 of the Directive sets 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;
2. a single serious crimina or multiple lesser offenses.

#### Factors for the Clearance;

1. the criminal behavior 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 the person's life;
5. there is clear evidence of successful rehabilitation.

### **Personal Conduct (Criterion E)**

#### 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.
5. a pattern of dishonesty or rule violations.

#### Factors for Clearance:

2. the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

### **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, (8) 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 common sense 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 **criminal conduct** (Criterion J) and **personal conduct** (Criterion E), 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**

Criterion J refers to criminal conduct which is in violation of federal, state or local law. In view of Applicant's good faith belief that he had not mischarged labor costs, there can be no violation of violation of 18 U.S.C. 1001 (subparagraph 1d), which requires a knowing or willful falsification or concealment of a material fact. Furthermore, while Applicant's mischarging of labor costs to government contracts was a material fact which he concealed from both Special Agents, Applicant had been employing the procedure for about five years.<sup>(8)</sup> Although management knew about his system, they offered no improvement.

Having weighed and balanced GE 2 against the testimony of fourteen witnesses, it is reasonable to conclude Applicant was terminated for his falsification of one employee time card and not for mischarging labor costs on government contracts by directing employees to charge labor costs to contracts they may not have worked on (subparagraph 1b). In addition, even though the Government has proven subparagraph 1c, the conduct is satisfactorily mitigated by strong character evidence that persuades me the conduct will not be repeated in the future.

Applicant exercised seriously poor judgment when he falsified Employee X's time card in October 1995 (subparagraph 1a). Since the falsification of the time card violated a fiduciary duty not only with his employer, but ultimately with the United States Government, Applicant's conduct shall be adjudicated under factors against clearance pertaining to personal conduct (Criterion E). In Applicant's job capacity as manager of the laboratory, Applicant had a duty to make certain the time card contained accurate information when he submitted the card up the chain of command. Applicant breached that duty of trust when he falsified the time card. Even though his employee may have

needed additional time off for medical or other reasons, Applicant had no authority to independently decide how he was going to remedy the employee's need for leave.

Notwithstanding the magnitude of the time card falsification, the record reflects that Applicant is remorseful and will not let the facts and circumstances repeat themselves in the future. The motivation for the conduct has been removed

with Applicant's new job which he has held for almost two years. With the positive character evidence of Applicant's job performance and his attention to security, Applicant has satisfactorily met his burden of persuasion under Criterion J and Criterion E.

### **FORMAL FINDINGS**

Having weighed the specific policy factors with the general factors (whole person concept), the following Findings of Fact are:

Paragraph 1 (**Criminal Conduct**): FOR THE APPLICANT.

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.
- d. For the Applicant.

Paragraph 2 (**Personal Conduct**): FOR THE APPLICANT.

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

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national to grant or continue a security clearance for Applicant.

Paul J. Mason

Administrative Judge

1. A pre-hearing conference was held on December 2, 1997.
2. During the company investigation in October 1995, Applicant initially stated that Employee X was too ill to work but Applicant persuaded Employee X to come and work that day because of scheduling problems. When Applicant was told that Employee x had worked his normal time, Applicant provided another explanation that Employee X had come to work then reported ill and wanted to leave. See, GE 2. Applicant admitted both explanations were untrue. (Tr. 441) Although the two acknowledged falsifications were not alleged in the SOR, the falsifications undercut Applicant's credibility.
3. Applicant began using the procedure five to six years before his termination in October 1995. (Tr. 429) The system began with the program managers or the project managers receiving the project contract numbers. (Tr. 419) Then, Applicant, as manager of the laboratory, would tell his employees which project they were working on and passed the charge numbers to them on yellow post-it notes. The yellow post-its were used to avoid errors and put the contract numbers in writing. (Tr. 422) The employees were then supposed to transfer the numbers from the post-its notes to their time cards. (Tr. 425) Applicant usually gave out the contract numbers to the employees at the end of the week because errors in assignment could always be corrected with the help of audit reports. (*Id.*) After checking the their respective time cards, the employees would sign them as accurate and submit them to Applicant for his signature. Then, the time cards would move up the chain of command.

During the life of each contract, there were also laboratory costs, i.e., costs for equipment needed to complete a contract, which had to be apportioned to determine how much of a particular contract used each particular piece of equipment, or level of effort type of charging. (Tr. 427) As manager of the laboratory, Applicant was responsible for deciding which

employee was going to work on what project and how long he was going to work on that project. (Tr. 428) These employee decisions had to be made in eight and fifteen ongoing contracts (Tr. 418), with Applicant's work force dispersed throughout the plant. (Tr. 426) Because of their concern that no project was depleted entirely by maintenance costs, Program managers checked to ensure the maintenance costs were being apportioned among projects. (Tr. 430)

4. Special Agent A spent several hours with Applicant on March 20, 1997. (Tr. 113)

5. Applicant's unequivocal denial that he admitted he mischarged labor costs on government contracts, is simply not supported by the record. (Tr. 446-447) Special Agent A's demeanor and conduct was closely observed and I found her to be a very credible witness. I find no reason to believe she would have anything to gain by lying about what Applicant told her in the mischarging of labor costs to government contracts. Although Applicant's denial that he ultimately admitted he had mischarged labor costs, is not alleged in the SOR and has not been considered on the merits of the case, his denial undermines his overall credibility.

6. See, Applicant's Answer, transcript, at page 70.

7. Even though GE 2 (specifically the documents covering the falsification of the time card in September/October 1995 and mischarging of labor costs in 1995) was stipulated to by the parties and may have been admitted in evidence under the business record exception to the hearsay rule, I must still weigh the exhibit for its intrinsic reliability, the credibility of its source(s) and the relative lack or presence of interest or bias of the hearsay declarant. GE 2 has several infirmities: (1) there is no indication who drafted the attachments (relating to the events just before the termination in October 1995); (2) regarding the mischarging of labor costs, the time frame as to when the mischarging took place is very general and there is no indication of how many contracts were involved; (3) there are no signatures from management on the exhibit to reflect when the proposed action was taken; and, (4) while there is plenty of supposition and speculation that the mischarging was a second reason for Applicant's termination, there is no clear direct testimony to corroborate the Government's allegation that Applicant was also terminated for mischarging labor costs to government contracts.

8. A formal finding under subparagraph 1b is warranted as there is insufficient evidence to show Applicant had any level of criminal intent necessary to commit the conduct. Also, formal findings in Applicant's favor are warranted under subparagraphs 2a and 2b because Applicant believed that the underlying conduct (mischarging of labor costs to government contracts) was not improper.