

Date: August 22, 1997

---

In re:

Applicant for Security Clearance

---

ISCR Case No. 97-0384

## **DECISION OF ADMINISTRATIVE JUDGE**

**JEROME H. SILBER**

### **APPEARANCES**

#### **FOR THE GOVERNMENT**

Pamela C. Benson, Esq.

Department Counsel

#### **FOR THE APPLICANT**

*Pro se*

### **STATEMENT OF THE CASE**

On May 29, 1997, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. In a sworn written but undated statement the Applicant responded to the allegations set forth in the SOR and elected to have his case decided on a written record, in lieu of a hearing. A copy of the SOR is attached to this Decision and incorporated herein by reference.

The Applicant received a complete copy of the file of relevant material (FORM) on July 9, 1997. The Applicant also received an opportunity then to file objections and submit material in refutation, extenuation, or mitigation. The Applicant elected not to respond to the FORM within the requisite 30 days, *i.e.*, on or before August 8, 1997. The record in this case closed on August 8, 1997. The undersigned Administrative Judge received the case assignment on August 18, 1997.

### **FINDINGS OF FACT**

The Statement of Reasons (SOR) consisted of allegations predicated on a single criterion: paragraph 1, Criterion J (criminal conduct). The Applicant has admitted the factual allegations contained in both subparagraphs of the SOR. Except as noted herein, the Applicant's admissions are hereby incorporated as findings of fact.

The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following additional Findings of Fact:

The Applicant is a 36-year-old audiovisual specialist employed by a U.S. Government contractor since June 1996. The Applicant seeks to obtain a personnel security clearance.

The Applicant was hired by company X, a discount appliance retailer, in August 1992 as a management trainee. A year later he became an Assistant Manager, serving as an inventory manager for company X. That company fired him in November 1995 when it discovered that he had been stealing merchandise from them for two months. During that two-month period he had stolen two camcorders, a tripod, five compact disks, and a briefcase worth \$1,945 in total. He was arrested on November 7, 1995, and charged with felony theft (class 3). He was admitted to the deferred prosecution program, and the charge was dismissed by the prosecution upon payment of \$300 for admission into the program and payment of full restitution to company X. He was placed on one year's probation.

The Applicant explained in a sworn statement (FORM item 5) given on February 27, 1997, to a Defense Investigative Service (DIS) agent that he did not get along with a new manager who had been appointed in August 1995 and that he felt he was going to lose his job. The Applicant consequently felt "vindictive" and "bitter" and felt that "the store owed [him] something."

On March 12, 1996, while on probation, the Applicant was arrested in an adjacent state on a misdemeanor charge of Operating a vehicle While Intoxicated (OWI). His blood alcohol content (BAC) was tested at 0.249% shortly after he was involved in a one-car accident and was hospitalized. He pleaded guilty and was required to pay the minimum fine of \$500 plus costs.

## POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The criteria, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

### **CRITERION J - CRIMINAL CONDUCT**

**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:**

- (2) the crime was an isolated incident;

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section F.3:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.

- e. Absence or presence of rehabilitation.
- f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

- 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

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge may only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations.

*Dept. of the Navy v. Egan*, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum **quantum** of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence -- rather than as an indication of the Court's tolerance for error below. <sup>(1)</sup>

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance. <sup>(2)</sup>

## CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, the undersigned concludes that the Government established its case with regard to Criterion J.

The Applicant's pattern of multiple thefts during two months of 1995 constitute serious criminal behavior that was recent, voluntary, and willful. They cannot be excused as "isolated," or "not recent," or the acts of a juvenile, or committed under extenuating circumstances. They fall within the scope of DC #1 and DC #2, identified on page 3 *supra*. No mitigating evidence has been submitted. SOR ¶ 1.a. is concluded adversely to the Applicant.

On the other hand, the OWI conduct, while criminal, does not form part of a pattern of criminal behavior or otherwise shares significant common attributes with the felony thefts. The Applicant's particular OWI behavior was not especially serious conduct--although serious consequences may ensue in general from OWIs and his BAC was extraordinarily high. As such, the OWI was an isolated criminal incident and mitigated. Therefore, SOR ¶ 1.b. is concluded favorably to the Applicant.

Each case decision is required to consider, as appropriate, the factors listed in Section F.3 and enclosure 2 to the Directive. Those factors are identified on pages 3-4 *supra*. The nature of the thefts was planned, voluntary, and deliberate. The amount of the property stolen was significant. The thefts occurred as recently as within the last two years and at a time when the Applicant was of mature age and in a position of trust. Little evidence of rehabilitation is available in the record.

### **FORMAL FINDINGS**

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Criterion J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is the determination of the undersigned that it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

---

Jerome H. Silber

Administrative Judge

1. The rule has been restated as requiring "that security clearances should be revoked [*sic*] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). *Cf.* with regard to the *quantum* of evidence the DISCR Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DISCR] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).

2. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance

(Enclosure 3 to the Directive).