

DATE: January 28, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0454

DECISION OF ADMINISTRATIVE JUDGE

LOKEY-ANDERSON

APPEARANCES

FOR GOVERNMENT

Melvin H. Mogul, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On June 25, 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, issued the attached 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 the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR in writing on July 24, 1997, in which he elected to have the case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) to the Applicant on November 7, 1997. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM on November 21, 1997, and he submitted no reply.

This case was assigned to the undersigned for resolution on January 2, 1998.

FINDINGS OF FACT

The Applicant is 23 years old and single. He is employed by a defense contractor as an Electronics Technician, and he seeks to obtain a security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the attached Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and criterion in the SOR:

Paragraph 1 (Criterion J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he has engaged in criminal conduct.

In 1992, the Applicant became employed with a major video rental store as a salesclerk. In 1995, the Applicant felt that he was not getting paid enough, or getting enough hours to work. He was also experiencing some personal financial difficulties. Beginning on April 9, 1995, and continuing until June 26, 1995, the Applicant made fifteen separate fraudulent transfers of money from the store's Visa machine to his personal Visa account. These transactions all occurred over a three month period. Each transaction was made for a total of \$250.00, except one which was made for \$150.00. They collectively totaled \$3,650.00. The Applicant did not have permission or authority to access the store's Visa machine. Video store tapes show the Applicant in the commission of the crime. (See, Government Exhibit 5).

The Applicant was investigated, and voluntarily admitted to the fraudulent activity. On September 14, 1995, the Applicant was charged with Grand Theft embezzlement by employee, a felony in the state in which the violation occurred. The Applicant pled nolo contendere, was sentenced to 90 days in jail, and fined \$650.00. His jail sentence was suspended on condition that he complete 150 hours of community service. The Applicant was also required to pay restitution, and was placed on formal probation for three years. On June 16, 1996, the Applicant's sentence was reduced from a felony to a misdemeanor. The Applicant presently remains on probation, and contends that he has complied with all of the court's sentencing requirements. (See, Applicant's Answer to SOR).

As result of his criminal conduct, the Applicant was terminated from his employment on July 7, 1995.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on own common sense. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Criterion J (Criminal Conduct)

Conditions that could raise a security concern:

- (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:

None.

In addition, as set forth in Enclosure 2 of the Directive at page 2-1, "In evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes

- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility criteria established in the DOD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in criminal conduct, which demonstrates poor judgment, untrustworthiness or unreliability.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have 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. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

CONCLUSIONS

In DOHA cases the Government has the initial burden to go forward with *prima facie* evidence in support of the factual and conclusionary allegations in the SOR. If the Government meets this initial obligation, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's *prima facie* case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the interests of national security to grant him or her a security clearance.

Criminal Conduct reflects questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an Applicant has demonstrated a lack of respect for the law in his private affairs, then there exists the possibility that he or she may demonstrate the same attitude towards security rules and regulations.

In this case, the Government has met its initial burden of proving by *prima facie* evidence that the Applicant has engaged in criminal conduct (Criterion J). Where an Applicant engages in criminal conduct, it can be presumed that he or she will not take a serious attitude toward the important matter of protecting classified information. The Applicant, has failed to introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's *prima facie* case against him. Accordingly, he has failed to meet his ultimate burden of persuasion under Criterion J.

The record evidence establishes that the Applicant was charged and convicted of Grand Theft embezzlement by employee, a felony. The Applicant's criminal conduct was not isolated, as it began in April 1995, and continued until June 26, 1995, involving fifteen separate fraudulent transactions over the course of a three month period. The Applicant's last fraudulent transaction occurred on June 26, 1995, less than three years ago. Although it appears that the Applicant has satisfied the court's sentencing requirements, he remains on probation. It is noted, that the Applicant has no previous criminal record, and that his conviction was later reduced to a misdemeanor. However, there is no evidence in the record that the Applicant is even slightly remorseful for his past misconduct, or that his past misconduct will not happen again in the future.

There is no clear evidence of successful rehabilitation or reform. The Applicant failed to respond to the File of Relevant Material which leaves the record void on this issue. It is not clear that the Applicant has gained the insight into the seriousness of his criminal conduct, or whether he is prepared to act responsibly in the future. I cannot say that he is unlikely to repeat his irresponsible conduct. The Applicant does not express genuine remorse, nor does it appear that he understands that the Department of Defense will not tolerate his criminal conduct. I find that the Applicant's criminal conduct was not isolated, was recent, and could possibly recur in the future. Accordingly, Criterion J (Criminal Conduct), is found against the Applicant.

On balance, it is concluded that the Applicant has failed to overcome the Government's *prima facie* case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: Against the Applicant.

Subpara. 1.a.: Against the Applicant.

Subpara. 1.b.: Against the Applicant.

DECISION

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

DARLENE LOKEY-ANDERSON

Administrative Judge