

DATE: March 17, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0615

DECISION OF ADMINISTRATIVE JUDGE

LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

Melvin H. Howry, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On October 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, 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 October 28, 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 January 14, 1998. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM on January 20, 1998, and he submitted no response.

This case was assigned to the undersigned for resolution on February 24, 1998.

FINDINGS OF FACT

The Applicant is 29 years old, and he is employed by a defense contractor. He seeks a DoD security clearance and Special Compartmented Information access in connection with his employment in the defense industry.

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 E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance

because he engaged in conduct involving questionable judgment, untrustworthiness, unreliability, or an unwillingness to comply with rules and regulations.

From August 1995 until December 19, 1995, the Applicant used his corporate credit card to purchase personal items. The Applicant claims that at the time, there was no stated company policy that prohibited this. The Applicant's abuse of the card resulted in it being taken away from him.

During the same five month period, the Applicant made \$63.75 in personal telephone calls with the company telephone, without authority. He was ordered to reimburse his employer for the full amount. (See, Applicant's Answer to SOR).

On September 24, 1995, the Applicant stole \$460.00 from his employer. When the Applicant was confronted about it, he lied, for fear of losing his job, and stated that he had spent the money on the purchase of a magazine subscription for the company. When he could not prove that he actually paid for the subscription, the Applicant was suspended from work without pay for one week. His privilege of purchasing business related items for the company was also suspended. The Applicant was offered a polygraph examination by his employer, which he took and passed. (See, Government Exhibit 5).

On November 26, 1996, the Applicant provided a sworn statement to the Defense Security Service (DSS) wherein he denied committing the theft. (See, Government Exhibit 6). The Applicant was then asked if he would be willing to undergo a polygraph examination administered by the government. Before the polygraph examination, the Applicant provided a second sworn statement and admitted that he had stolen the money from his company. (See, Government Exhibit 7). The Applicant explained that he and his wife had separated, and had been experiencing serious financial difficulties. The Applicant was overdue on his bills, including his rent, and he had used the money to catch up on his bills. The Applicant intends to repay his employer all of the money he stole.

Paragraph 2 (Criterion J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he stole money from his employer and he knowingly and willfully violated the felony provisions of 18 USC 1001, a federal criminal statute.

The Applicant committed the crime of theft by stealing money from his employer, and he intentionally lied about it to his employer and the Department of Defense.

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 E (Poor Judgment)

Conditions that could raise a security concern:

(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

Conditions that could mitigate security concerns:

None.

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 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 per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in repeated instances of illegal drug and alcohol abuse, serious dishonesty, and criminal conduct, which demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a *prima facie* case has been established, 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 of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by *prima facie* evidence that the Applicant has failed to comply with his company's rules and regulations (Criterion E); and that he has engaged in criminal conduct (Criterion J). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant.

The Applicant's pattern of dishonesty and rule violations 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.

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. This 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 Criteria E and J.

The record evidence establishes that the Applicant has engaged in a pattern of dishonesty and rule breaking beginning in August 1995, and continuing until at least November 1996. Although each of the violations appear minor in nature, collectively, they reveal the profile of a person who cannot be trusted. The Applicant was entrusted with certain privileges as an employee of his company and continually abused those privileges. He abused the company credit card, and the telephone. He stole \$460.00 from his company, and lied about it to the company and to the Department of Defense. Although he was not arrested for theft, he committed a felony in the state in which the incident occurred. (See, Government Exhibit 8). He also violated Title 18, USC 1001, a federal felony by providing false information to the Department of Defense during his background investigation. The Applicant's conduct was not isolated, as it began in August 1995, and continued until at least November 1996. The Applicant's last dishonest incident occurred less than two years ago. The Applicant appears remorseful about his past misconduct.

There is, however, no clear evidence of successful rehabilitation, reform, or that this individual can be trusted. The Applicant failed to respond to the File of Relevant Material, which leaves the record silent 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. I find that the Applicant's poor judgment and criminal conduct was not isolated, was recent, and could possibly recur in the future. Accordingly, Criterion E (Poor Judgment), and Criterion J (Criminal Conduct), are 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 and 2 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.

Subpara. 1.c.: Against the Applicant.

Subpara. 1.d.: Against the Applicant.

Subpara. 1.e.: Against the Applicant

Paragraph 2: 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 interests of national security to grant or continue a security clearance for the Applicant.

DARLENE LOKEY-ANDERSON

Administrative Judge