

DATE: April 6, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0676

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN M. BRAEMAN

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq. and Carol Marchant, Esq., Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on October 14, 1997. The SOR detailed reasons why the Government 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. (U) The SOR alleges Criterion J (pattern of criminal activity) in paragraph 1.

Applicant responded to these SOR allegations on November 14, 1997, admitted allegation 1.a, but denied 1.b., and requested a hearing. Subsequently, the Department Counsel then assigned to the case filed a Motion to Amend the Statement of Reasons to add the same two allegations under paragraph 1 also under paragraph 2, Criterion E (Personal Conduct) on January 16, 1998.

Initially, the case was assigned to another administrative judge on January 20, 1998. To accommodate Applicant's travel schedule for his work, this matter was assigned to me on February 25, 1998, in order to set the matter for hearing at a location convenient for Applicant on Wednesday, March 11, 1998. (TR 9, 13) The notice was issued on February 27, 1998. On March 2, 1998, I issued an Order that Applicant respond to whether or not he objected to the Motion to Amend the and to supply answers to the new allegations by Monday, March 9, 1998. He did not do so, but at the hearing held on arch 11, 1998, he indicated that he had no objection to the Amended SOR. (TR 7). He admitted allegation 2.a, but denied 2.b. (TR 7-8) At the hearing he testified and offered two exhibits which were admitted into evidence; the government offered four exhibits that were admitted into evidence; and they also asked that Administrative Notice be taken of relevant portion of state statutes and the U.S. Code. Applicant asked for and was granted additional time of one week until March 18, 1998, to transmit an additional exhibit; but on March 17, 1998, he notified me that he would not be submitting any additional evidence. (TR 9-11) Thus the record closed on that date. The transcript (TR) was received on March 23, 1998.

FINDINGS OF FACT

Applicant admitted subparagraphs 1.a. and 2.a. in the SOR: I incorporate these admissions as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following additional Findings of Fact:

Applicant is a 24 year-old field engineer for a government contractor where he began work in March 1996. In March 1997 he was transferred to a job in the same company where he did need a security clearance. He does quality assurance work, but has not been formally evaluated. (Gov't Ex. 1; TR 30-31,34) Previously he worked as a cashier at a casino (Employer #3) from November 1995 to January 1996 and before that at a fast food restaurant (Employer #2) from August 1995 to November 1995. Earlier he worked at a music store (Employer #1) from October 1994 to December 1994 where he did customer service. (Gov't Ex. 1) Applicant got a high school diploma in 1992 and did three semesters of state university work. (TR 36, 38) He is married and has a 15 month old son, and has changed during the two years he has been married. (TR 34-35)

Criminal and Personal Conduct

Applicant completed his Questionnaire for National Security Position (QNSP) on March 3, 1997, and disclosed two adverse incidents in his employment record in response to Question 22: he was "fired for withholding money" by Employer #1 in December 1994 and he was "accused of theft" by Employer #3 in January 1996. (Gov't Ex. 1; TR 50) Applicant was never prosecuted for either incident by state or federal authorities. (TR 24, 61, 63)

Employer #1

When interviewed by the Defense Security Service (DSS) on September 11, 1997, he conceded in a signed, sworn statement that he had taken money from Employer #1, a music store, and kept \$600 of the store's money at home because he resented the fact that he had been promoted, but not been given the raise he anticipated. To get back at the store manager for her "empty promises," he withheld money in protest. He denied the he was going to keep the money. After he was fired, he paid back all of the money he had set aside. (Gov't Ex. 2; TR 23-25) The store manager's Notice of Discipline for this incident in December 1994 reflects that he was given a written warning because of a cash shortage; for example, one day he was short \$188.16 and another day he was over \$36.57. No notice of termination or the basis for termination is in the exhibit. (Gov't Ex. 3) Applicant who was 20 years old at that time was never trained by the store on how to sue the cash register or how to handle cash. (TR 39; 60) He would take small amounts of cash intermittently during a three to four week period, and put it underneath the register. (TR 40-47) Other times he would put money back into the register because he felt guilty. (TR 42-43, 48) He never spent any of the money he took. (TR 49)

Employer #3

When interviewed by the Defense Security Service (DSS) on September 11, 1997, he conceded in a signed, sworn statement that he had used poor judgment in handling money for Employer #3, a casino, but that he "never intended to keep money that was not mine." (Gov't Ex. 2) He explained that all money had to be accounted for in a "Z-out" at the end of the shift. (Gov't Ex. 2; TR 25-26) Employees have to pay for any money they were short out of their own money or tips. One night when he was working the gaming floor he did not consistently keep his tips separate from the casino's money because of the hectic pace. He believed that he had \$30 of his tip money intermixed with the operational money so he put \$30 to the side until the casino cash was accounted for; he learned that he was \$33.75 short, so he gave the \$30 he had set aside to cover the shortage and believed that "everything was settled." (Gov't Ex. 2; TR 26-27) He remembers when he turned the \$30 over that he told his supervisor, "Okay, I guess this was not my tip money." (TR 27) Several days later he was fired even though he denied he was stealing or that he intended to steal. (TR 27)

Casino records reflect that in January 1996, the security officer witnessed Applicant "withhold approximately \$30 in cash from supervisor." Applicant later did submit the \$30 after he realized he was short on the paperwork. He was reported to have explained to his supervisor that he withheld the money because "I wasn't sure if I would be coming out short or not." The supervisor informed him he must turn in all the money immediately on beginning the accounting. The security officer reported his "impression" that Applicant's action was that he intended to keep the \$30.00 if the accounting had been even. The supervisor reported Applicant saying when he was short, "Oh, well here's the thirty dollars."⁽²⁾ She reported that he had not added that thirty dollars in with the rest of the money "because when we

(cashiers) come out over, we don't get to keep it. ('It' meant any dollar overages.). She reported that "apparently the money wasn't (*sic*) out of his own pocket to begin with," because as soon as he was told he was short he put that money on the counter right way and did not take it out of his pockets. She described the security present being "one of the new officers." She advised that security "needs to be informed of what needs to be verified." Two days later the general manager of the casino removed Applicant from his position as cashier during his probationary period and used this incident as the basis. The manager advised him that the casino had "zero tolerance for thefts of money and for dishonest actions." He advised Applicant that he had "no grievance or appeal rights" as he was terminated during his probationary period. (Gov't Ex. 4) The letter of termination was the only notice Applicant ever received, but because he was a probationary employee he could not contest his termination. (TR 28-29)

Applicant was not provided any training by Employer #3 on how to handle cash, nor was he told of the required procedures on how to handle cash. (TR 51) He testified that the casino had a policy that if individuals were short less than \$50, they did not have to pay the money back to the casino unless the amount exceeded \$50. (TR 52) He believed that his tip money got mixed in with the casino money on the night in question as it was a busy night. (TR 53) I find Applicant credible in his denial of his intent to steal the small sum of \$30.00 as he immediately turned in the \$30.00 shortage and because his trial testimony was consistent with his previous DSS statement and was consistent both in direct and cross-examination. (Gov't Ex. 1; TR 59-60) Further, he voluntarily revealed this problem with Employer #3 in his security questionnaire and did not try to conceal any adverse information from his employment history. (Gov't Ex. 1, TR 61-62)

References

A supervisor who has known Applicant for one year commends Applicant, especially his ability to become proficient in his job in a short time. This supervisor assesses him as working at an outstanding level. In addition to being proficient, he is self-motivated with family-oriented values. He is an excellent comrade to his peers and has not engaged in any misbehavior or improper conduct during or after work hours. (Applicant's Exhibit A-1; TR 31, 54-55)

A co-worker who has known Applicant for one year describes him as having a great personality and working well with others. He takes his job seriously and meets all standards. (Applicant's Exhibit A-2; TR 31-32; 56-57)

A co-worker who has known Applicant for two years commends him for his excellent work and as someone reliable and responsible both on and off work. (Applicant's Exhibit A-3; TR 32-33)

His immediate supervisor for whom Applicant has worked for one year finds him professional in his work habits; he is reliable and responsible and has taken the initiative and become proficient. He has never been counseled for any negative actions. Applicant has known his supervisor his entire life as he was his neighbor. (Applicant's Exhibit A-4; TR 33; 58-59)

Applicant's mother describes him as a good person who is caring and supportive of his family. He enjoys his work and is willing to learn. (Applicant's Exhibit B)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive.

Based on a consideration of the evidence as a whole in evaluating this case, I weighed relevant Adjudication Guidelines as set forth below :

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;
- (4) the factors leading to the violation are not likely to recur;
- (5) there is clear evidence of successful rehabilitation.

Criterion E: Personal Conduct**Conditions that could raise a security concern and may be disqualifying also include:**

- (1) reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances;
- (4) personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure;

Conditions that could mitigate security concerns include:

- (5) the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure;

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order

to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance.

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 after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS**Criterion J - Criminal Conduct**

The government established its case with regard to criminal conduct, Criterion J, with respect to subparagraph 1.a.: Applicant admits he stole \$600 from Employer #1 in 1994 which was criminal conduct, even though he was not criminally charged by the music store. To his credit Applicant repaid the money he took over a series of days after he was confronted by the store's manager. Conditions that can raise a security concern and may be disqualifying include: (1) any criminal conduct, regardless of whether the person was formally charged; or (2) a single serious crime or multiple lesser offenses.

Applicant's conduct with Employer #1, while egregious and repeated over a series of days, can be mitigated as he now meets several Mitigation Factors (MF): (2) the crime was an isolated incident. He has no other criminal arrests or convictions. Further mitigation factors that apply to subparagraph 1.a include MF (4): factors leading to the violation are not likely to recur and MF (5). There is clear evidence of successful rehabilitation: he has now matured and realizes that his actions at the music store were wrong. Applicant was only 20 years old in 1994: he is now married, is a father, and is

successfully working in his field of expertise. Applicant now has outstanding reviews from both supervisors at the defense contractor firm where he has worked for two years.

While he had an incident in 1996 where he was, to use his words, "accused of theft" at the casino and terminated, he denies allegation 1.b. The termination letter, in fact, does not accuse Applicant of theft, as he did produce the \$30.00 when he was found short in the Z-out. Employer #3 simply made a policy statement that they had "zero tolerance for thefts of money and for dishonest actions." The amount in dispute was only \$30.00, less than the \$50.00 ceiling where employees had to repay. Even the allegation in SOR 1.b. only states that Applicant "kept" approximately \$30.00 in 1996 from his employer. Indeed, allegation 1.b, which Applicant denies, is factually incorrect as Government's exhibit 4 documents he turned in the \$30.00 kept aside during the initial Z-out. Thus, Applicant was not terminated from his employment because of the "theft" as alleged in subparagraph 1.b.; Employer #3 in the termination letter specifically acknowledges Applicant turned into the casino the disputed \$30.00. In sum, I find Applicant credible when he says he had no intent to keep the money at the casino and believed it was his tip money mixed in with the casino's money on a busy night. He engaged in no criminal conduct at the casino under either state or federal statute as he did not keep any money and had no intent to do so. He was never prosecuted and did not even have an informal hearing where he could clear his name.

Consequently, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraph 1.a. and 1.b. under Paragraph 1.

Criterion E - Personal Conduct

Personal Conduct raises security concerns when that conduct involves questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations; such conduct could indicate that the person may not properly safeguard classified information. Conditions pertinent to this case that could raise a security concern and may be disqualifying include: (1) reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances; (4) personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure. In this case Appellant has rebutted the government's case because he has met conditions that could mitigate security concerns: (5) the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure.

While certainly Applicant showed questionable judgment in his dealings with Employer #1 as alleged in subparagraph 2.a, I do not conclude he similarly showed poor judgment in the incident with Employer #3 as alleged in subparagraph 2.b. His actions over the \$30.00 at the time of the casino Z-out though challenged by his employer, do not clearly establish a security concern of his personal conduct as I find his explanation credible. Thus his conduct does not fall within disqualifying factor (5), a pattern of dishonesty or rule violations. I conclude there was only one incident with Employer #1 that showed poor judgment. Significantly, he consistently denied allegation 2.b. (and 1.b. discussed above); and the government did not establish, as it argued, that he had "his hand in the till"⁽³⁾ at the casino. In fact there was no till and no theft. Applicant testified believably that he had no intent to steal and on cross-examination clarified that the casino had not provided any training on how to handle cash. Indeed, the casino had a policy that if individuals were short less than \$50.00 they did not have to pay the money back. When he testified that he believed that his tip money got mixed in with the casino money on the night in question as it was a busy night, I find him credible; the fact that he immediately produced the \$30.00 at the time of Z-out could be interpreted to his credit. The fact that his employer reached a different conclusion and fired him as a probationary employee does not establish his bad conduct. To do so they did not have to meet any standards of proof. In fact, even their letter of termination does not accuse Applicant of theft but merely asserts he "purposely withheld \$30.00 cash, assuming you would be over that amount and could then keep the cash." In fact, when he was short, he produce the \$30.00 cash. The fact that two people at the casino believed he might have kept the \$30.00 if he had not come out short in the Z-out does not establish his poor judgment, especially where as a probationary employee, he had no opportunity to present his views at a hearing. He had no grievance or appeal rights. Given his denial of the government's allegation that he "kept approximately \$30.00," when in fact the government's evidence does not support that fact, I am not willing to go further and agree with their inference that Applicant was terminated from his employment "because of the theft."

To his credit under Criterion E, Applicant did not in any way try to conceal these past difficulties with employers.

Significantly, he fully disclosed this information on his security questionnaire in response to Question 22 where he revealed he was "accused of theft" at the casino in 1996 and was "fired for withholding money" at the music store in 1994. He also disclosed additional details when he was interviewed by the DSS agent and testified consistently on these two incidents at his hearing. While such personal conduct with Employer #1 is reprehensible, he has now matured and taken "positive steps to significantly reduce or eliminate" his vulnerability to coercion, exploitation, or pressure. He has done so not only by his required frankness in the process of obtaining his security clearance; but also by his responsible work ethic for two years for his current employer, a defense contractor. Both his co-workers and supervisors commend him. His overall supervisor on the project speaks of his ability to become proficient in his job in a short time and assesses him as outstanding. In addition to being proficient, he finds Applicant self-motivated with family-oriented values who has not engaged in any misbehavior or improper conduct during or after work hours. His direct supervisor similarly praised him as professional in his work habits; he assesses Appellant as reliable and responsible and as someone who has taken the initiative and become proficient. The supervisor has never counseled Applicant for any negative actions. In addition to his positive references, Applicant himself has matured. He acknowledges his past misdeeds when he was younger, but is now married with a child and willing to take more responsibility on his job and in his life. Balancing his dated misconduct in 1994 with his current sterling performance, I conclude these misdeeds are not of sufficient gravity to remain of security concern. He repaid the \$600.00 in 1994, and he never took the disputed \$30.00 in 1996. Consequently, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraph 2.a. and 2.b. under Paragraph 1.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Criterion J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Paragraph 2. Criterion E: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

DECISION

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

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), and as amended by Change 3 dated February 16, 1996.

2. Applicant contests this report and claims he did not say "'Oh, well, here's the money then.'" (TR 27)

3. Closing argument. (TR 68)