

DATE: March 31, 1998

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 97-0753

**DECISION OF ADMINISTRATIVE JUDGE**

**JOHN G. METZ, JR.**

**APPEARANCES**

**FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**STATEMENT OF THE CASE**

On 7 November 1997, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding<sup>(1)</sup> that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 21 November 1997, Applicant answered the SOR and requested a hearing. DOHA assigned the case to me on 11 February 1998, and I received the case the same day. On 12 February 1998, I set the case and issued a notice of hearing for 12 March 1998.

At the hearing, the Government presented eleven exhibits--admitted without objection--and two witnesses; Applicant presented four exhibits--admitted without objection--and the testimony of one witness, himself. I received the transcript on 23 March 1998.

**RULINGS ON PROCEDURE**

At the hearing, the Government moved in limine to separate from Applicant's Answer to the SOR four enclosures, without prejudice to Applicant's introducing the documents as evidence during his case. The Government also requested that I take official notice of the pertinent theft provisions of the state code under which Applicant was charged with theft. I granted both motions.

**FINDINGS OF FACT**

Applicant essentially denied the original allegations of the SOR, except for admitting the underlying theft that provides the background for the SOR.

Applicant--a 28-year old employee of a defense contractor--seeks access to classified information.

In 1992--when he was 22 years old--Applicant stole \$910.00 from his employer, a crime made possible by his fiduciary

position with the company. Although suspicion quickly focused on Applicant, he falsely maintained his innocence until confronted with overwhelming evidence of his guilt.<sup>(2)</sup> He ultimately gave a statement acknowledging his guilt, and later worked a plea arrangement to plead to misdemeanor theft vice the felony theft originally charged.

In September 1996, Applicant applied for a job with his employer. Applicant falsified his 2 September 1996 employment application when he failed to disclose the above theft charge and failed to disclose the employer from whom Applicant stole.<sup>(3)</sup>

On 31 October 1996, Applicant falsified a Security Clearance Application (SF 86)(G.E. 1) when he failed to disclose his felony theft arrest, failed to disclose his employment at the company from whom he stole, and failed to disclose that he had been fired from that employment.<sup>(4)</sup> During an 11 April 1997 subject interview with the Defense Investigative Service (DIS)<sup>(5)</sup>, Applicant falsely denied that he had committed the theft. On 22 May 1997 (at 1333), Applicant falsified a sworn statement to the DIS by repeating his denial of the theft. On 22 May 1997 (1410), Applicant falsified another sworn statement to the DIS by again denying he committed the theft--even though he was confronted by the agent with the signed confession from the original theft case. It was not until Applicant was confronted with the prospect of a polygraph on 16 September 1997, that Applicant admitted that he had committed the theft--and falsified his earlier clearance application and interviews with the DIS.

Applicant was not truthful with the DIS because he feared losing his job or going to jail.<sup>(6)</sup>

A former employer considers Applicant an honest and trustworthy worker, although he does not indicate any awareness of Applicant's criminal history. Applicant's present employer has rated his performance satisfactory, and he has received an "attaboy" from the firm's government client.

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

### **PERSONAL CONDUCT (CRITERION E)**

Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying include:

(2) the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

(3) deliberately providing false or misleading information concerning relevant and material matters to an investigator, . . . in connection with a personnel security or trustworthiness determination;

Conditions that could mitigate security concerns include:

None.

**CRIMINAL CONDUCT (CRITERION J)**

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;

Conditions that could mitigate security concerns include:

None.

**Burden of Proof**

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

**CONCLUSIONS**

The Government has established its case under Criteria E. The information sought by the Government on the clearance application and during the various subject interviews was relevant and material to the Government's investigation of the Applicant's fitness for access to classified information, and the Applicant knowingly and wilfully falsified that information. The Applicant's failure to admit the theft until he was confronted with the prospect of a polygraph examination, suggests that he cannot be relied upon to speak the truth if the truth presents possible adverse consequences for his own interests. He knew the answers he provided were false; and indeed he knew the answers had to be false for him to protect his interests--in his job and security clearance. At no time before the polygraph interview did Applicant make any effort to admit the theft, much less a prompt, good faith effort. Indeed, until that interview, Applicant systematically sought to hide the fact of the theft conviction from both his employer and the Government. I find criterion E. against the Applicant.

The Government has established its case under Criteria J. The Applicant's knowing falsifications to an agency of the federal government on matters within that agency's jurisdiction clearly violate 18 U.S.C. §1001. The falsifications had the potential to influence the course of the background investigation in areas of legitimate concern to the Government. The underlying theft also remains disqualifying. Applicant breached his fiduciary duty to his employer, and while the incident is somewhat distant, it is the first dishonest act in what has been an extended series of dishonest acts. There is insufficient evidence of rehabilitation on the record to lead me to conclude that Applicant will not engage in criminal conduct in the future. I find criterion J. against Applicant.

**FORMAL FINDINGS**

Paragraph 1. Criterion E: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

Subparagraph f: Against the Applicant

Subparagraph g: Against the Applicant

Subparagraph h: Against the Applicant

Paragraph 2. Criterion J: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph 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 national interest to grant or continue a security clearance for Applicant.

**John G. Metz, Jr.**

### **Administrative Judge**

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996 (Directive).
2. Although these falsifications are not alleged in the SOR, and thus not a part of the case on the merits, I have considered the falsifications on the issue of Applicant's overall credibility.
3. The application required Applicant to disclose any charges aside from minor traffic violations, and asked for all employers over the last ten years--or back to 1986.
4. Even if I accepted Applicant's claim that he failed to list the felony arrest because he had pleaded to misdemeanor theft, Applicant also failed to disclose the incident under a question that asked for any arrests not otherwise covered elsewhere in the application.
5. Now known as the Defense Security Service.
6. I have considered Applicant's various claims that he did not report the either the employment or the theft arrest and conviction because the record was expunged, or because the prosecuting attorney told him the record would be expunged, or because he only worked at that employer for a short period of time, or his father--who is not employed in any security-related position--advised against disclosing the information. I reject these explanations. The balance of the evidence is that Applicant systematically withheld any information from his job or security clearance applications, and his DIS interviews and sworn statements that would tend to lead to the discovery of the theft charge.