

DATE: April 21, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0073

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russel-Hunter, Esquire, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On 16 January 1998, 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⁽¹⁾ that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 4 February 1998, Applicant answered the SOR and requested

a hearing. DOHA assigned the case to me on 17 March 1998, and I received the case the same day. On 18 March 1998, I set the case and issued a notice of hearing for 2 April 1998.

At the hearing, the Government presented two exhibits--admitted without objection--and no witnesses; Applicant presented three exhibits--A and B admitted without objection, C admitted over objection--and the testimony of one witness, himself. I received the transcript on 15 April 1998.

RULINGS ON PROCEDURE

At the hearing, the Government requested that I take official notice of the pertinent theft provisions of the state code under which Applicant's could have been charged. I granted the motion.

FINDINGS OF FACT

Applicant admitted the allegations of the SOR; accordingly those admissions are incorporated as findings of fact.

Applicant--a 25-year old employee of a defense contractor--seeks access to classified information.

In January 1997--when he was 24 years old--Applicant stole \$2,000.00 from his employer, a crime made possible by his fiduciary position with the company.⁽²⁾ Company financial officers noticed that one particular account seemed short of

funds; when the financial officers realized that this account included the quick lube receipts that were part of Applicant's responsibilities, the company's inquiry focused on the quick lube receipts. Applicant participated in a meeting in which he asked whether he knew anything about the missing money. Applicant initially denied having any knowledge about the missing money; later that day Applicant admitted to his department manager that he had stolen the money. On 11 February 1997 (the day these events transpired), Applicant signed a statement acknowledging his that he had received funds to which he was not entitled, and agreed to repay the \$2,000.00 by 15 May 1997. Applicant turned over his last paychecks and borrowed money from his family to repay the funds. Applicant resigned his position, and the company did not press charges.

Applicant did not really need the funds he stole, although he used them to pay down some

of his credit cards (he did not have a lot of discretionary income after meeting monthly expenses, and these card balance had risen higher than Applicant was comfortable with).

On 17 September 1997, Applicant disclosed that he had left this job under unfavorable circumstances on a Security Clearance Application (SF 86)(G.E. 1).⁽³⁾ When he was questioned by the Defense Investigative Service (DIS)⁽⁴⁾ (G.E. 2), Applicant disclosed the details of his criminal conduct.

In December 1997, Applicant was recommended for a spot bonus by his immediate supervisor at his defense contractor job. A friend and coworker from the car dealer (an assistant manager in another department) considers Applicant to have good character notwithstanding the theft of funds from the company.

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:

(5) a pattern of dishonesty or rule violations;

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;

(2) a single serious crime or multiple lesser offenses.

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. Applicant's theft of funds on multiple occasions is dishonest conduct that calls into question Applicant's judgment, reliability, and trustworthiness. Applicant's truthful disclosure of the incident on his clearance application and during the DIS interview, weighs in his favor (as well as being what is expected of Applicant's), but does not overcome the adverse inferences of his earlier dishonest conduct. I find criterion E. against the Applicant.

The Government has established its case under Criteria J. The Applicant's multiple thefts establish a pattern of criminal conduct--and in that sense is not isolated conduct. The fact that the pattern continued over a short period of time does not mitigate the seriousness of the offense or the fact that the amounts involved meet the state code requirements for felony theft. Applicant breached his fiduciary responsibility to his employer, meeting the code requirements for felony embezzlement. His fiduciary position in the company put him into a unique position to identify and take advantage of the accounting flaw. Also, the fact that this conduct did not occur before January 1997 and has not been repeated since, does not establish that Applicant is otherwise of good character. Applicant's character reference from the former coworker is insufficient proof of character. I find criterion J. against Applicant.

FORMAL FINDINGS

Paragraph 1. Criterion E: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Paragraph 2. Criterion J: AGAINST THE APPLICANT

Subparagraph a: 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. Applicant was a service biller with a local car dealer. As such he was aware of a flaw in the company's accountability system for quick-lube oil service--a service that cost about \$20.00. Where other billing/service documents were entered and tracked in the company's computer system, the quick lube receipts were not. Applicant was in a position to pocket the receipts, and the money that went along with them, at the end of the business day. During the month of January 1997 (over about 20 business days), Applicant pocketed between three and eight receipts per day, until he had stolen \$2,000.00 from the company.
3. However, he rather euphemistically referred to it as resigning when accused of improper conduct.
4. Now known as the Defense Security Service.