



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
-----) ISCR Case No. 08-06149
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Department Counsel
For Applicant: William F. Savarino, Attorney At Law

December 15, 2009

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) dated May 19, 2006. (Government Exhibit 1). On April 14, 2009, 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 a Statement of Reasons (SOR) to the 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.

Applicant answered the SOR in writing on May 4, 2009, and requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on June 22, 2009. A notice of hearing was issued on July 13, 2009, and the matter was scheduled for hearing on August 18, 2009. The Government presented five exhibits, referred to as Government Exhibits 1 through 5, which were received without objection. The Applicant presented three exhibits, referred to as Applicant's Exhibits A through C, which were received without objection. The Applicant called two witnesses and testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on August 25,

2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

FINDINGS OF FACT

The Applicant is 36 years old, single, and has a Bachelor's Degree in Bioengineering. He is employed by a defense contractor as an Engineer, and is applying for a security clearance in connection with his employment.

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

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he has engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The Applicant has an extensive history of criminal conduct and poor personal conduct, which includes a pattern of thefts and numerous other incidents of questionable judgment and dishonesty described below. He graduated from high school in 1991, and from college in 1996. He became a partner at a defense contracting firm in July 2004. He received his Secret level security clearance in 1997, and a Top Secret clearance in 2002. During his application process for SCI access, he was required to take a polygraph examination. It was during the polygraph examination process that the information below was revealed. In May 2007, Applicant was denied his SCI access.

In 1991, the Applicant was employed at a movie theater. During the course his employment, he and a coworker found different ways to steal from their employer. Over the course of a year, the Applicant stole six credit cards from wallets accidentally left by customers at the theater and illegally used the credit cards to make purchases. He charged between \$500.00 - \$1,000.00 on each credit card over a month period before the card was cancelled by the owner. (Government Exhibits 2, 3 and 4).

While working at the movie theater, in 1991, the Applicant obtained the combination of one of the theater's safes, and on two separate occasions stole approximately \$2,500.00. Over a four to six month period in 1991, the Applicant also stole approximately \$40.00 a week from his employer through various illegal activities such as "short changing" the customer, changing ticket sales and over-charging concession stand items. The Applicant also, about ten times, stole \$20.00 from a sponsored charity, which were contributions donated by customers to the employer for the charity. (Government Exhibits 2, 3 and 4). Applicant acknowledged that as a result of his thefts, his employer could not determine who was stealing so the entire staff was terminated. (Tr. pp. 132-133).

Between 1985 and 1991, while in junior high school and high school, the Applicant engaged in petty shoplifting of items such as candy, magazines, and comic books from liquor stores, drug stores and comic book stores. In his own words, "I stole a lot of things." (Tr. p. 132). The Applicant explained that at the time he committed the thefts, he wanted to make some extra money and knew he would not get caught. (Tr. p. 85).

From 1990 to 1993, the Applicant used false identification to purchase alcohol while underage, and on at least one occasion used the false identification to verify purchases he made with stolen credit cards. (Government Exhibits 2, 3 and 4).

In 1994-95, while in college and working as a student aide on a United States military installation, (in the excess inventory department), the Applicant noticed lots of excess computer equipment, that included mice, keyboards, old computer parts, and old computers. (Tr. p. 92). A report of the Applicant's interview dated August 21, 2006, indicates that the Applicant stole numerous and various Government owned computer parts over a thirteen year period. (Government Exhibit 2). Applicant contends that he stole one of the laptops, and used it for his personal use, mainly for school work, since he did not have a computer. (Tr. p. 94). He claims that there was a proper procedure that could have allowed him to legally take the laptop, but he failed to follow those procedures. Applicant claims that he stole only one time from this employer and that the investigator misunderstood him during the interview. (Government Exhibits 2, 3 and 4).

In the summer of 2005, while gambling at a casino, the Applicant won a significant amount of \$6,800, in a poker tournament. Applicant states that the cashier told him that he had no tax withholdings. Despite this, he states that he knew it was taxable income. (Tr. p. 104-105). He failed to claim or report the \$6,800.00 of poker winnings on his 2005 income tax return. In early 2006, he again won a poker tournament and a significant amount of money. This time he won \$4,000. Again, he failed to claim or report this \$4,000.00 of poker winnings on his 2006 income tax return. In the summer of 2007, the Applicant hired a tax preparer to clean up his tax issues. (Tr. p. 107 and Government Exhibits 4 and 5). Nothing was done until late 2008 or early 2009. Applicant was required to pay additional taxes that he has paid. (Tr. p. 109 and Applicant's Exhibits A and B).

During the period from 2003 to 2005, the Applicant explained that he was accessing computer files on a peer to peer network (allowing free access to files without going through a central server) at home. He downloaded numerous (not to exceed 10) sexually explicit videos some of which were underage females engaging in intercourse and fellatio. Applicant explained that he believed some of the females in the video were underage because they did not appear fully developed or like other pornography he had seen in the past. The Applicant suggested that the females in the videos might be between the ages of 13 and 18 and that the titles of some of the videos he downloaded were described as "underaged". While watching the videos, on numerous occasions the Applicant masturbated to the underage females sexual intercourse and fellatio. (Government Exhibits 2, 3 and 4). Applicant saved the underage videos on the hard drive of his computer for between two and four months, and then deleted the videos because he was afraid he would get into trouble if he were found with the videos in his

possession. (Government Exhibits 2 and 4). Applicant explained that during the course of this conduct, he was very careful to make sure that nobody could get into his system. (Tr. P. 117).

Applicant now denies that any of the titles had the name "underaged" in them. (Tr. p. 113). He claims that he was not sure that the females were underage. He also contends that he masturbated only to the adult pornography he downloaded, and not to the underage female pornography. (Tr. p. 116). Applicant believes the investigator may have misunderstood him or there was some mistake on the Applicant's part.

Two witnesses testified on behalf of the Applicant. One of them has known the Applicant since junior high school, over twenty years, and works in the IT Department at a major university, the other is the President and Facility Security Officer of the Engineering consulting firm the Applicant currently works for. Both individuals consider the Applicant to be highly trustworthy and responsible, and recommend him for a position of trust. (Tr. pp. 25-34 and 46-58).

Letters of recommendation from program managers and systems engineer, one of whom has known the Applicant for as much as seven years, and all of whom have known him for at least four years, in a mixture of both professional environment at work and in social situations, consider the Applicant to be trustworthy, diligent, dedicated, dependable, professional, mature, reliable and ethical. He is said to have always properly protected sensitive, classified and proprietary information. (Applicant's Exhibit C).

The Applicant realizes his mistakes of the past. He is remorseful, humiliated and embarrassed by his conduct.

POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline J (Criminal Conduct)

30. *The Concern.* Criminal activity creates a doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Conditions that could raise a security concern:

31.(a) a single serious crime or multiple offenses;

31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Conditions that could mitigate security concerns:

32.(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

32.(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Guideline E (Personal Conduct)

15. *The Concern.* Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Conditions that could raise a security concern:

16.(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations;

(4) evidence of significant misuse of Government or other employer's time or resources.

Conditions that could mitigate security concerns:

17.(c) The offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

17.(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors,

circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

17.(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, extent, and seriousness of the conduct;
- 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 extent to which participation is voluntary;
- 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.

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. 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."

CONCLUSION

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 criminal conduct and personal conduct that 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 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 case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in criminal conduct (Guideline J), and dishonesty and poor judgment (Guideline E). The totality of this evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guidelines J and E of the SOR.

Under Guideline J, Criminal Conduct, disqualifying conditions, *31.(a) a single serious crime or multiple offenses* and *31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted* apply. I have also considered mitigation conditions *32.(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment, and 32.(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*. Arguably some of the Applicant's criminal conduct and questionable judgment occurred many years ago, but viewed in total, it demonstrates a pattern of misconduct that has continued over an extended period and last occurred as recently as 2006, when he intentionally understated his income to avoid taxes. Stealing from his employer, its customers and a charity, stealing a laptop computer and possibly more from the Government, shoplifting on numerous occasions, and viewing underaged pornography on his home computer casts serious doubt on the Applicant's character. Additionally, the Applicant has not been candid or upfront with the Government. Many of the facts that he provided the investigator during his earlier interviews, he retracted at the hearing, and now believes the investigator misunderstood. I do not find this argument persuasive. Possibly

brought on by embarrassment, but obviously no excuse, I find that the Applicant has not been entirely credible or candid.

Applicant's conduct under Guideline E, Personal Conduct disqualifying condition 16.(d) *credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; (2) disruptive, violent, or other inappropriate behavior in the workplace; (3) a pattern of dishonesty or rule violations, and (4) evidence of significant misuse of Government or other employer's time or resources applies.* I have considered mitigating conditions 17.(c) *The offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment,* 17.(d) *the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur and* 17.(e) *the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress, but they are not compelling.* The offenses committed by the Applicant over the years are not minor, he has received no counseling for his behavior, and in fact he has done little other than apologize for his greed. The Government relies heavily upon the integrity and honesty of clearance holders. It is a negative factor for security clearance purposes if an Applicant has a pattern of misconduct that demonstrates serious unreliability, such as is true with this Applicant.

I have also considered the "whole person concept" in evaluating the Applicant's eligibility for access to classified information. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole person assessment of questionable judgement, untrustworthiness, unreliability, lack of candor, an unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard classified information.

Given his extensive criminal history, and his numerous incidents of questionable judgment, the most recent which occurred just three years ago, in 2006, the Applicant clearly does not meet the qualifications of an individual that can be trusted with the national secrets. Assuming that he now realizes his childish, immature and criminal behavior can no longer continue, more time is needed to ensure the Government that the Applicant will not revert to his old ways. Furthermore, the Applicant has not demonstrated that he is trustworthy, and does not meet the eligibility requirements for access to classified information. Accordingly, I find against the Applicant under Guidelines J (Criminal Conduct) and E (Personal Conduct).

On balance, it is concluded that the Applicant has failed to overcome the Government's 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 Paragraphs 1 and 2 of the SOR.

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.
- Subpara. 1.f.: Against the Applicant.
- Subpara. 1.g.: Against the Applicant.
- Subpara. 1.h.: Against the Applicant.
- Subpara. 1.i.: Against the Applicant.
- Subpara. 1.j.: Against the Applicant.

Paragraph 2: Against the Applicant.

- Subpara. 2.a.: Against the Applicant.
- Subpara. 2.b.: Against the Applicant.
- Subpara. 2.c.: 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 the Applicant.

Darlene Lokey Anderson
Administrative Judge