



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



In the matter of: )  
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----- ) ISCR Case No. 11-00135  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Julie R. Mendez, Esq., Department Counsel  
For Applicant: *Pro se*

02/23/2012

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**Decision**

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NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for a security clearance to work in the defense industry. In 2010, Applicant was convicted of petty larceny, a misdemeanor. He does not take responsibility for the underlying criminal conduct. Clearance is denied.

**Statement of the Case**

Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> on or about August 17, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) explaining that it was not clearly consistent with the national interest to grant Applicant access to classified information. The SOR detailed

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<sup>1</sup> This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

the factual basis for the action under the adjudicative guideline for criminal conduct (Guideline J).

Applicant timely answered the SOR and requested a decision on the written record. Objecting to the contents of Department Counsel's File of Relevant Material, Applicant requested a hearing on November 13, 2011. The hearing proceeded as scheduled on January 4, 2012. At hearing, Department Counsel offered Government's Exhibits (GE) 1 through 6. Exhibits 1,3, and 5 were admitted without objection. Applicant objected to the admission of GE 2, 4, and 6, which were admitted over his objections. Applicant testified and submitted Applicant's Exhibits (AE) A through B, which were admitted without objection. I appended to the record as Hearing Exhibit (HE) A, a receipt Applicant submitted to establish the authenticity of AE A and B. I received the transcript (Tr.) on June 15, 2011.

### **Findings of Fact**

Applicant is a 39-year-old employee of a federal contractor. While serving in the U.S. Navy between 1992 and 1998, he was granted access to classified information as well as sensitive compartmented information. He has worked with his current employer since October 2009. In February 2010, Applicant's employer filed an incident report in the Joint Personnel Adjudication System (JPAS) indicating that Applicant had been arrested in January 2010 on charges of grand larceny for allegedly stealing a camera from his former employer, a national camera retailer.<sup>2</sup>

In November 2009, a grand jury indicted Applicant on the grand larceny charge. Applicant went to trial in May 2010. In anticipation of trial, Applicant hired an attorney, who conducted discovery and represented him at trial. He pleaded not guilty and proceeded with a bench trial. At trial, Applicant, through counsel, had the opportunity to cross-examine the prosecution's witnesses, including his direct supervisor at the time of the incident. Applicant and his brother also testified. The court convicted Applicant of felony grand larceny. However, based on the pre-sentencing report, the court reduced the charge to petty larceny, a misdemeanor. The court then sentenced Applicant to 12 months in jail, with 11 months suspended conditioned on, among other requirements, three years good behavior and the payment of \$1,000 in restitution and court costs.<sup>3</sup>

Applicant has made several conflicting statements about the incidents leading up his conviction. In May 2008, Applicant admitted to a police detective that he sent the camera to his brother because he was interested in purchasing the same camera. In the written statement he provided to his employer after being released from jail in January 2010, Applicant claimed he accidentally sent a damaged camera to the wrong address. Four months later, he admitted to an Office of personnel Management (OPM) investigator that the incorrect address belonged to his brother and that he could not fathom how he made such a mistake. At hearing, Applicant testified that he had his

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<sup>2</sup> Tr. 27-28, GE 1, GE 6.

<sup>3</sup> Tr. 76-84; GE 4-5.

supervisor's permission to send his brother a box containing camera manuals and photo-editing software, but accidentally sent him the camera instead. Applicant offered explanations for the discrepancies in his statements. The statement he provided to his employer in January 2011 was incomplete because he was still unsettled from being incarcerated for five days and could not readily recall all of the pertinent details. He faults the police detective and the OPM investigator for inaccurately recording the statements he made to them in May 2008 and April 2010, respectively.<sup>4</sup>

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an Applicant's eligibility for access to classified information.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

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<sup>4</sup> Tr. 41-43, 47- 51, 95-99,103-110; GE 2- 3.

## Analysis

### Guideline E, Criminal Conduct

The security concern raised under the criminal conduct guideline is set forth in AG ¶ 30:

Criminal activity creates 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 31:

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted; and
- (d) individual is currently on parole or probation.

Of these, only AG 31(a) and (c) apply.

Applicant was convicted of petty larceny in 2010. While Applicant admits the conviction occurred, he maintains that he did not engage in the underlying criminal conduct.

As a general rule, an applicant convicted of a criminal offense is precluded from denying his or her guilt in subsequent civil proceedings.<sup>5</sup> This concept, known as collateral estoppel, is based on the premise that an individual's right to administrative due process does not give him or her the right to litigate again matters properly adjudicated in an earlier proceeding.<sup>6</sup>

The Appeal Board has held that the doctrine of collateral estoppel applies in industrial security cases. Moreover, the Appeal Board has ruled repeatedly that an administrative judge may not engage in a *de novo* review of an applicant's guilt or innocence of a criminal charge of which he or she was convicted in a criminal court.<sup>7</sup> The Appeal Board further held that 28 U.S.C. § 1738, the statute that requires federal courts to apply the doctrine of collateral estoppel to state court judgments whenever the courts of the state from which the judgment was rendered would do, also applies in

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<sup>5</sup> DISCR Case No. 94-1213 at 3 (App. Bd. June 7, 1996).

<sup>6</sup> *Chisholm v. Defense Logistics Agency*, 656 F. 2d 42, 46 (3rd Cir. 1981).

<sup>7</sup> ISCR Case No. 99-0116 at 2 (App. Bd. May 1, 2000); ISCR Case No. 96-0525 at 4 (App. Bd. June 17, 1997); ISCR Case No. 94-1213 (App. Bd. June 7, 1996).

industrial security clearance cases involving a state court misdemeanor conviction. Relying on federal case law, the Appeal Board articulated a three-part analysis to determine the appropriateness of applying collateral estoppel in such cases:

First, the party against whom the earlier decision is asserted must have been afforded a 'full and fair opportunity' to litigate that issue in the earlier case. Second, the issues presented for collateral estoppel must be the same as those resolved against the opposing party in the first trial. Collateral estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution. Third, the application of collateral estoppel in the second hearing must not result in unfairness.<sup>8</sup>

I find that all three parts of the test have been satisfied. Applicant fully litigated the issues in his criminal trial. He had the benefit of counsel, of his choosing, who actively represented him in all phases of his trial. Furthermore, Applicant presented a full defense for the court's consideration. The issue alleged in the SOR is the same issue Applicant litigated in his criminal trial. Under these circumstances, the application of collateral estoppel in this context does not result in unfairness to Applicant. Accordingly, his petty larceny conviction is disqualifying under AG ¶¶ 31(a) and (c).

The application of AG 31(d), however, is not supported by the facts of this case. The relevant state statute indicates that "after a conviction the court may . . . suspend the sentence in whole or in part and in addition may place the defendant on probation under such conditions as the court shall determine . . ."<sup>9</sup> This statute distinguishes the suspension of a sentence and probation as distinct concepts, which must be specifically prescribed by the court.<sup>10</sup> The statute also recognizes the court's inherent authority to place conditions on a suspended sentence or terms of probation.<sup>11</sup> In other words, the terms "good behavior" and "unsupervised probation" are not synonymous.<sup>12</sup> In this case, the sentencing court did not prescribe probation of any kind, but did impose a condition of good behavior on a suspended sentence.<sup>13</sup>

None of the mitigation conditions available under AG ¶ 32 apply. Applicant's criminal conduct is recent and by its nature casts doubts on his reliability, trustworthiness, and good judgment. Applicant was not coerced into his criminal act. Rather, he used his position to divert his employer's property for his own purposes. While Applicant has complied with the conditions of his suspended sentence, he has refused to take responsibility for his actions, thus prohibiting a finding of mitigation.

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<sup>8</sup> ISCR Case No. 04-05712 at 6 (App. Bd. Oct 31, 2006).

<sup>9</sup> Va Code §19.2-303 (2011).

<sup>10</sup> *Grant v. Virginia*, 292 S.E.2d 348, 350-351 (1982).

<sup>11</sup> *See Dyke v. Virginia*, 69 S.E.2d 483,485-486 (1952).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

I have serious reservations about Applicant's current reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I have also considered the whole-person factors described at AG ¶ 2. Applicant stole from his employer. In doing so, he acted in disregard of his employer's interests and violated his employer's trust. His position that he is being held criminally responsible for an innocent mistake is disingenuous. Applicant intentionally diverted his employer's property to his brother likely believing that the damaged camera would not be missed. Because Applicant refuses to acknowledge his culpability, I cannot find that he would not engage in similar behavior if presented with the opportunity to do so.

In addition to the security concerns raised by his actions, Applicant's lack of candor also reflects negatively on his security worthiness. Throughout the adjudication process, he has provided conflicting explanations about the events leading up to his conviction. Finally, the status of Applicant's suspended sentence cannot be overlooked in determining his suitability to hold a security clearance. Although Applicant is not on probation, he and his case remain under the jurisdiction of a state criminal court until the expiration of his good behavior period in 2013. Accordingly, this case is decided against Applicant.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

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|---------------------------|-------------------|
| Paragraph 1, Guideline J: | AGAINST APPLICANT |
| Subparagraph 1.a.:        | Against Applicant |
| Subparagraph 1b.:         | For Applicant     |

### **Conclusion**

In light of all of the circumstances, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is denied.

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Nichole L. Noel  
Administrative Judge