

DATE: January 26, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24228

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Mark S. Zaid, Esq.

SYNOPSIS

In 1997, Applicant, a federal employee who held a security clearance, pled guilty to one count of theft/embezzlement of United States property, a misdemeanor. As a part of a plea agreement, Applicant made restitution of \$5,120, was sentenced to one year of supervised probation, paid a fine and special fee, and resigned from his Federal job. In the ensuing eight years, Applicant successfully mitigated the security concerns related to his personal and criminal conduct. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On February 18, 2005, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the Directive. Applicant submitted an answer to the SOR on March 18, 2005 and requested a hearing before an administrative judge. On June 20, 2005, the case was assigned to me. The parties agreed to a hearing set for October 5, 2005. By letter dated September 22, 2005, Applicant's

counsel requested the hearing be rescheduled. For good cause shown, the hearing was rescheduled, and an amended notice of hearing was sent to Applicant on September 29, 2005. On October 26, 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. At the hearing, the Government called no witnesses and submitted five exhibits, which were identified as Ex. 1 through 5. Applicant called one witness and submitted five exhibits, which were identified as Ex. A through E. Without objection, the Government's and Applicant's exhibits were entered into evidence. DOHA received the transcript (Tr.) of the proceeding on November 14, 2005.

FINDINGS OF FACT

The SOR in this case contains one allegation of disqualifying conduct under Guideline E, Personal Conduct and one allegation of disqualifying conduct under Guideline J, Criminal Conduct. In his answer to the SOR, Applicant admitted the Guideline E allegation and admitted in part and denied in part the Guideline J allegation. Applicant's admissions are incorporated as findings of fact.

Applicant is 37 years old and employed as a project manager by a government contractor. He is married and the father of a 10-year old child. (Ex. 1; Tr. 43).

Applicant received a bachelor of science degree in 1990. His first job after college was with a Federal agency, where he was employed as a security officer and held a security clearance. (Ex. 1.)

Applicant held his federal job, which required frequent travel, for over six years. From September 1996 to November 1997, Applicant lived in State A, and made he four or five official trips back to the agency's headquarters in State B. Applicant's parents lived in State B, not far from the agency's headquarters. When he made these official trips back to State B, Applicant did not stay in commercial lodgings but, instead, stayed with his parents in their home. (Ex. 2; Tr. 31.) Instead of using pre-paid phone cards issued him for use in conducting official business, Applicant placed business calls from his parents' telephone. He reimbursed them in cash for these and other expenses incurred as a guest in their home. (Ex. 2 at 1-2.)

Applicant was required to file travel vouchers for reimbursement of his travel expenses. During his six-year tenure, two travel accounting systems were in place in the agency. When Applicant first began to work at his federal job, it was required that employees file all receipts associated with their official travel. Later, the system was changed and receipts were only required for expenditures above a certain dollar amount. The agency did not require receipts for commercial lodging. (Tr. 31.) Applicant did not recollect that the agency provided training on how to file travel vouchers after the change from one system of accounting to another. (Tr. 62-63.) In submitting his travel accounting paper work for official trips made from State A to State B in the 1996-1997 time period, Applicant used a computer generated form on which he certified he had stayed in commercial lodging. (Ex. 2 at 2.)

In or about February 1997, May 1997, and June 1997, Applicant received advances of agency funds for authorized travel expenses. When he returned from his official travel, Applicant filed travel vouchers falsely stating he had incurred travel expenses for commercial lodging, when in fact he had stayed at his parents' home during his three official trips to State B. Applicant's false claims totaled \$4,960 for the three trips (Ex. 4, Statement of Facts, Criminal No. 97-1175-M, at 1-3). Additionally, in November 1996, March 1997, May 1997, and July 1997, Applicant received \$160 in agency funds in response to his claims for reimbursement for telephone calls relating to official business. Applicant did not use prepaid telephone cards for making business calls. Instead, he approximated the dollar amount of phone calls he made from his parents' telephone and, on his travel accounting, requested reimbursement for calls made on prepaid telephone cards. (Ex. 2 at 2; Ex. 4, Statement of Facts, Criminal No. 97-1175-M at 4.) Applicant claimed it was common practice in his office to use travel advances to stay with family members. (Tr. 32-33.)

In the summer of 1997, the agency investigators confronted Applicant regarding his travel claims. He admitted his falsifications. (Tr. 32.) Applicant was one of five or six individuals in his office similarly prosecuted for falsifying travel voucher claims. (Tr. 33.)

On November 21, 1997, Applicant entered into an agreement with authorized officials of the U.S. Justice Department whereby he agreed to plead guilty to one count of Theft/Embezzlement of United States Property, a misdemeanor. The plea agreement provided that Applicant would make restitution of \$5,120, pay a fine of \$1,000 and a special assessment of \$25, and resign from his Federal job. (Ex. 4, Plea Agreement, 97-1175-M.) On or about December 12, 1997, Applicant appeared in court and pled guilty to one count of Theft/Embezzlement of United States Property and made full restitution of \$5,120. (Ex. 2 at 3; Ex. 5.) In about February 1998, he was sentenced to one year of supervised probation. (Ex. 2, at 3.) He completed his probation. (Tr. 36.)

After leaving Federal employment, Applicant worked in the private sector, and in 2000 obtained employment as a government contractor. In his position as a contractor, he was granted access to classified information. (Tr. 40; Ex. D.) He informed his direct supervisor and other management officials of his criminal conduct. (Tr. 40.)

Applicant called one witness, a former special agent and criminal investigator for a military agency, who worked with Applicant for five years. The witness said Applicant had informed him of his previous criminal conduct. He praised Applicant's professional acumen, said he was absolutely trustworthy, and, in his opinion, merited a security clearance. (Tr. 20-27.)

Applicant offered three letters from former co-workers and supervisors in support of his character. (Ex. A, B, C.) The writers of the letters all acknowledged knowing about Applicant's earlier criminal conduct. One writer observed the Applicant "exercised terrible judgment that led to criminal charges." The writer, who has known Applicant for approximately 15 years, attributed Applicant's criminal conduct in 1997 to youthful

inexperience, and he observed he did not believe it "is indicative of an integrity problem or character flaw." The writer further stated he believed Applicant had "paid a high price for his misconduct" and "is a better person for his experience." He concluded he has "complete trust and confidence" in Applicant's honesty and integrity. (Ex. B at 1-2.) These observations were echoed in the other two letters of character reference offered by Applicant. (Ex A; Ex. C.)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

CONCLUSIONS

Guideline E- Personal Conduct

In the SOR, DOHA alleged under Guideline E that Applicant, as a federal employee, knowingly submitted several falsified travel vouchers in about 1996 and 1997 and received reimbursement for falsified prepaid telephone card expenses. These falsified claims totaled \$5,120.00 (§ 1.a.). Applicant's admitted falsifications raise security concerns under Guideline E, Personal Conduct, of the Directive. Guideline E conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations and could indicate that an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

Applicant's conduct raises concerns under three Guideline E Disqualifying Conditions (DC): DC E2.A5.1.2.2, DC E2.A5.1.2.4, and DC E2.A5.1.2.5. Applicant's conduct involved falsification of material facts on travel voucher forms used to award him money to compensate legitimate expenses in furtherance of his official government travel. Applicant's falsifications on the travel voucher forms and in regard to prepaid telephone cards breached his fiduciary responsibilities as a federal employee, raising concerns under DC E2.A5.1.2.2. Additionally, a security concern is raised under Guideline E when an individual engages in personal conduct or conceals information that increases his vulnerability to coercion, exploitation or duress. Of particular concern is conduct which, if revealed or made known, would affect the individual's personal, professional, or community standing or render the person susceptible to blackmail. Applicant's falsification of his travel vouchers therefore also raises security concerns under DC E2.A5.1.2.4. Applicant's conduct also revealed a pattern of dishonesty or rule violations, raising a concern under DC E2.A5.1.2.5.

Through Applicant's admissions, the Government has established its case. Applicant has the burden of presenting evidence to rebut the Government's evidence against him or to extenuate or mitigate the security concerns raised by his Guideline E conduct.

A review of the available mitigating conditions (MC) for Guideline E conduct indicates that MC E2.A5.1.3.1. does not apply to the instant case. The information that Applicant falsified on his travel vouchers was pertinent to a determination of his judgment, trustworthiness, and reliability. However, the falsification of his travel vouchers and claims for calls not made on prepaid telephone cards occurred in 1996 and 1997. This conduct was not recent and has not been repeated, thereby suggesting it was isolated. However, Applicant did not subsequently provide correct information voluntarily. Accordingly, MC E2.A5.1.3.2. applies only in part.

Applicant's behavior subsequent to his falsifications demonstrates he has taken positive steps to significantly reduce or eliminate his vulnerability, to coercion, exploitation, or duress. Accordingly, MC E2.A5.1.3.5 applies in mitigation to his case.

Guideline J - Criminal Conduct

Applicant's criminal activity also raises concerns under Guideline J, Criminal Conduct, because it creates doubt about his judgment, reliability and trustworthiness. Two Disqualifying Conditions (DC) under Guideline J merit examination in Applicant's case. First, Applicant admitted criminal conduct, raising a concern under DC E2.A10.1.2.1. His admitted criminal conduct consisted of one count of Theft/Embezzlement of United States Property, raising a concern under DC E2.A10.1.2.2.

We turn to an examination of Mitigating Conditions (MC) that might be applicable to Applicant's case. Applicant's only criminal behavior occurred in 1996 and 1997, approximately a decade ago. Applicant has not been involved in crime since that time, leading to the conclusion that his criminal activity was isolated and limited to a period extending from November 1996 to June 1997. That activity, involving three travel vouchers and four claims for reimbursement for telephone calls, led to a charge of one misdemeanor count of Theft/Embezzlement of United States Property. Applicant's employment record and his personal and professional conduct since his criminal conviction and completion of probation demonstrate successful rehabilitation. Accordingly, I conclude that MC E2.A10.1.3.1., MC E2.A10.1.3.2, and MC E2.A10.1.3.6 apply to Applicant's disqualifying conduct under Guideline J.

In my evaluation of the record, I have carefully considered each piece of evidence in the context of the totality of evidence and under all of the Directive guidelines that were generally applicable or might be applicable to the facts of this case. Under the whole person concept, I conclude that Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the allegations in subparagraphs 1.a. and 2.a. of the SOR are concluded for the Applicant.

FORMAL FINDINGS

The following are my conclusions as to the allegations in the SOR:

Paragraph 1. Guideline E: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Paragraph 2. Guideline J: FOR APPLICANT

Subparagraph 2.a.: For Applicant

DECISION

In light of all of 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 Applicant. Clearance is granted.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.