



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



In the matter of: )  
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----- ) ISCR Case No. 17-04329  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Aubrey M. De Angelis, Esq., Department Counsel  
For Applicant: *Pro se*

08/06/2019

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for access to classified information. He was terminated from employment in February 2015 due to intentional time mischarging. He explained that it was his common practice to work more hours than the 40 hours he charged. His workplace misconduct is mitigated as an isolated incident that is unlikely to recur and does not cast doubt on his reliability, trustworthiness, or good judgment. Accordingly, this case is decided for Applicant.

**Statement of the Case**

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on April 30, 2015. (Exhibit 1) This document is commonly known as a security clearance application. Thereafter, on March 27, 2018, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information. The SOR is similar to a complaint. It

detailed the factual reasons for the action under the security guideline known as Guideline E for personal conduct. The SOR alleged the following two matters: (1) Applicant was terminated from his employment in about February 2015 due to intentional time mischarging; and (2) he falsified his April 2015 security clearance application by omitting the February 2015 termination in response to a question about his employment history.

Applicant answered the SOR on April 11, 2018. He admitted the SOR allegations with explanations in which he denied intentionally lying on his security clearance application. He requested a decision based on the written record in lieu of a hearing. Thereafter, Department Counsel made a timely request for a hearing. (Tr. 18-21; Appellate Exhibit I)

The case was assigned to me on July 25, 2018. The hearing was conducted as scheduled on September 20, 2018. Department Counsel offered documentary exhibits, which were admitted without objections as Exhibits 1, 2, and 3, but Exhibit 4 was not admitted. Applicant offered three letters of recommendation, which were admitted as Exhibits A, B, and C. Other than Applicant, no witnesses were called.

Exhibit 4 is a three-page letter, dated February 19, 2015, from Applicant's former employer. (Tr. 49-56) The writer is identified as an assistant general counsel of the company. The letter is a summarized account of the investigative steps and findings that led to Applicant's termination in February 2015. The letter was offered after Department Counsel completed their case-in-chief and during cross-examination of Applicant. The letter was not obtained during the course of Applicant's background investigation; it was obtained by Department Counsel about a week before the hearing; it was not provided to Applicant in advance of the hearing; and he saw the document for the first time during the hearing. (Tr. 50-52)

Applicant objected, and Exhibit 4 was not admitted due to lack of authentication as required under ¶ E3.1.20 of Enclosure 3 to the Directive. (Tr. 52-56) Upon further review of the exhibit, it is difficult to determine if the assistant general counsel had first-hand knowledge of the information he was relating in the document or if he was relying on information provided by others in the company. In addition, admission of Exhibit 4, without an authenticating witness, would have deprived Applicant of the opportunity to cross-examine the person or persons who produced Exhibit 4 on information adverse to Applicant, contrary to Executive Order 10865 § 3(6) and ¶ 4.3.3 of the Directive.

In closing argument, Department Counsel stated they found Applicant's testimony and explanation sufficiently credible and they were no longer concerned about the falsification allegation in SOR ¶ 1.b. (Tr. 76) Accordingly, given Department Counsel's position, the falsification allegation is decided for Applicant, and it will not be addressed further herein. The hearing transcript (Tr.) was received on September 26, 2018.

## Findings of Fact

Applicant is a 46-year-old employee who is seeking to retain a security clearance previously granted to him by the Defense Department. He is employed by a company working in the defense industry as a satellite communications engineer. He has had his current job since March 2018. His current employment contract is for about \$170,000 annually. His formal education consists of a high school diploma and some college. His employment history includes honorable service in the U.S. Army during 1990-1988. He served for the first three years as a tanker (the armor branch), and the last five years in satellite communications. He was granted a security clearance for the first time during his military service. He has worked for a number of companies in the defense industry since 1998. He has spent about 18 years working overseas in several countries in the Middle East, including eight years in Afghanistan and four years in Iraq. (Tr. 69-71)

Applicant's February 2015 termination arises from the timeframe of December 2014-January 2015, when he was working at a temporary duty location in the continental United States. He was employed with this company for less than a year, beginning in August 2014 and ending with his termination in February 2015. Upon his termination, the former employer's security office submitted an adverse information report, which stated that an investigation conducted by the company's internal audit office determined that Applicant had engaged in intentional time mischarging, and that Applicant was terminated as a result on February 6, 2015. (Exhibit 2) No further details of the incident were provided in the report.

Applicant's termination was reviewed during the course of his most recent background investigation. According to a report of investigation (ROI), Applicant was interviewed in April 2016 and provided information about his previous termination. (Exhibit 3) The ROI states, among other things, that Applicant "volunteered that he was terminated from employment with [former employer] due to filling out his time card incorrectly by not claiming all hours that [he] worked. Applicant was physically working 65-70 hours a week and was only claiming 40 hours per week on his time card." In other words, Applicant was undercharging as opposed to overcharging his hours.

Applicant provided the same explanation during the hearing. (Tr. 28-31) He stated that he was accustomed to a workplace culture that expected an employee to put in extra hours. But he also acknowledged his practice was "kind of cheating" because it gave an inaccurate account of his time. (Tr. 29) He unequivocally denied overcharging by claiming more hours than actually worked. (Tr. 44, 47, and 60-61) He stated that during the termination or exit interview his former employer told him the basis for termination was undercharging hours, and they made the point it was just as bad or wrongful as overcharging hours. (Tr. 44)

Applicant presented three highly favorable letters of recommendation. A former direct supervisor wrote that Applicant always displayed outstanding professionalism, great integrity, and teamwork. (Exhibit A) The former supervisor also wrote that Applicant had no incidents or violations in handling classified information over a three-year period while working overseas, nor did Applicant have any timecard issues.

Applicant's current officer-in-charge, a chief warrant officer four in the U.S. Army, described Applicant's duty performance as superb. (Exhibit B) His current project manager and direct supervisor described Applicant as an expert in the field of satellite technologies and telecommunications. (Exhibit C) The supervisor also praised Applicant's work ethic and diligence in his timesheet recording and communication of work performed. The supervisor concluded his letter by writing that Applicant is one of his best employees.

## Law and Policies

This case is adjudicated under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.

It is well-established law that no one has a right to a security clearance.<sup>1</sup> As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>2</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.<sup>3</sup> The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>4</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>5</sup> Under the Directive, the parties have the following burdens: (1) Department Counsel has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted; (2) an applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven; and (3) an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>6</sup>

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<sup>1</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

<sup>2</sup> 484 U.S. at 531.

<sup>3</sup> 484 U.S. at 531.

<sup>4</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>5</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>6</sup> Directive, Enclosure 3, ¶¶ E3.1.14 and E.3.1.15.

## Discussion

Under Guideline E, personal conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about a person's reliability, trustworthiness, and ability to protect classified or sensitive information. The concern is stated fully in AG ¶ 15.

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions as most pertinent:

AG ¶ 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 the 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 individual may not properly safeguard classified or sensitive 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 government protected information; (2) any disruptive, violent, or other inappropriate behavior; (3) a pattern of dishonesty or rule violations; and (4) evidence of significant misuse of government or other employer's time or resources; and

AG ¶ 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.

As set forth in the findings of fact, Applicant was fired from his job in February 2015 due to intentional time mischarging. He does not dispute this fact. He certainly used questionable judgment in mischarging his time during December 2014-January 2015 timeframe. His mischarging was serious enough to justify termination. The mischarging also qualifies as workplace misconduct sufficient to raise a concern under the personal conduct guideline.

In mitigation, Applicant explained that the incident stemmed from his practice of working more hours than the 40 hours he charged on the timesheet. He has worked for two employers since the 2015 termination, and he has been diligent in timesheet recording and communication of work performed. (Exhibits A and C) Moving forward to September 2018 when the evidentiary record closed, the incident is now more than three years old, and there is no evidence of recurrence of similar conduct since the February 2015 termination. The passage of time without recurrence weighs in Applicant's favor. On balance, I am persuaded that Applicant's workplace misconduct is mitigated as an isolated incident that occurred during a longtime career working in the

defense industry, it is unlikely to recur, and it does not cast doubt on his reliability, trustworthiness, or good judgment.

Following *Egan* and the clearly consistent standard, I have no doubts about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified or sensitive information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also considered the whole-person concept. I conclude that he met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

### **Formal Findings**

The formal findings on the SOR allegations are:

Paragraph 1, Guideline E:	For Applicant
Subparagraphs 1.a and 1.b:	For Applicant

### **Conclusion**

It is clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Eligibility granted.

Michael H. Leonard  
Administrative Judge