

KEYWORD: Personal Conduct

DIGEST: Applicant is 29 years old and has been a consultant working with web and online initiatives for a defense contractor since June 2003. He did not falsify material facts in either his security clearance application or declaration of federal employment. Applicant has mitigated the personal conduct security concerns. Clearance is granted.

CASENO: 05-11406.h1

DATE: 05/31/2007

DATE: May 31, 2007

In re:)	
)	
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SSN: -----)	ISCR Case: 05-11406
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
JACQUELINE T. WILLIAMS**

APPEARANCES

FOR GOVERNMENT

Robert Coacher, Esq., Department Counsel

FOR APPLICANT

William F. Savarino, Esq.

SYNOPSIS

Applicant is 29 years old and has been a consultant working with web and online initiatives for a defense contractor since June 2003. He did not falsify material facts in either his security

clearance application or declaration of federal employment. Applicant has mitigated the personal conduct security concerns. Clearance is granted.

STATEMENT OF THE CASE

On August 6, 2004, Applicant executed a Security Clearance Application (SF 86).¹ On January 17, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR detailed reasons under Guideline E (Personal Conduct) 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 Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted or revoked.

In a document, dated February 9, 2006, Applicant responded to the SOR allegations and requested an in-person hearing. He also stated that he had retained counsel. The case was assigned to me on February 16, 2007. A Notice of Hearing was issued on March 1, 2007, scheduling the hearing for March 15, 2007. The hearing was conducted as scheduled. At the hearing, the Government offered three exhibits, Exs. 1 to 3. Applicant offered three exhibits, Exs. A to C, as well as six exhibits, Exs. A-1 to A-6, requesting for Administrative Notice. All exhibits were admitted into the record without objection. The transcript (Tr.) was received on March 28, 2007.

FINDINGS OF FACT

Applicant admitted the allegations under Guideline E, personal conduct, subparagraphs 1.a and 1.c. Applicant's admissions to the allegations in the SOR are incorporated herein. He denied the allegations in subparagraphs 1.b and 1.d. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Applicant is 29 years old and since June 2003 has been a consultant dealing with web and online initiatives for a defense contractor. He attended college from 1996 to 2000, and was awarded a bachelor's degree in 2001. He is single and has no children.²

From January 1998 to August 1999, Applicant worked as a consultant at a college.³ The college had a computer laboratory, and he was responsible for maintaining, setting up, and generally supporting the computers.⁴ He was required to submit a paper time card, which included filling out the hours, portions of hour, signing in, dating time worked, and putting in specific cost codes. He was dismissed from employment after he failed to sign his time cards properly. At the hearing, he testified that on at least six occasions during the course of his employment, he failed or forgot to sign

¹Ex. 1 (Security Clearance Application, dated August 6, 2004).

²Tr. 21-22.

³Tr. 24.

⁴Tr. 25.

his time cards or put in the cost codes. He testified that the secretary complained about his lapses and his contract was terminated.⁵ Applicant indicated that there was never an issue concerning the amount of time billed on his cards, and he received payment for all the time that he billed.⁶

On November 13, 2001, Applicant completed a Declaration for Federal Employment (Optional Form 306). In response to question 11 (*Background Information During the last 5 years, were you ever fired from any job for any reason, did you quit after being told that you would be fired, did you leave any job by mutual agreement because of specific problems, or were you debarred from Federal employment by the Office of Personnel Management?*), he answered “no.” He failed to list that he was dismissed from a college where he had been employed. At the hearing, Applicant did not recall specifically when he filled out Optional Form 306.⁷ He testified that his response to the question “was likely an error or a misstatement.”⁸ His intention was not “to deceive the federal government or anybody else about what happened at [the college].”⁹ He did reveal his termination from the college when he completed the SF 86 on August 6, 2004.¹⁰

From July 2000 to June 2001, Applicant worked as a technical engineer for a corporation.¹¹ His job required that he travel. His company reimbursed him for expenses, which included car travel for business, gas, and telephone charges. The payment process was via an electronic, automated telephone system. He dialed a telephone number, which allowed him access to the automated system. He then entered his pin number, which was provided by the Human Resources Office, that identified him as the user. He entered the appropriate information for reimbursement.¹² The receipts for reimbursement were turned over to his manager.¹³ Once processing was completed, the funds were deposited into Applicant’s checking account, which was a separate account designated for travel-related expenses.¹⁴ He had another checking account that he used for his every day, routine, living expenses.

Applicant was called into a meeting and told that there was a list of expenses he submitted for reimbursement that were either unauthorized or without receipts. At that time, he had no idea what the office was talking about. One June 13, 2001, Applicant was terminated for alleged questionable expenses. The period involved was February 2001 through June 2001. On June 27,

⁵Tr. 26.

⁶Tr. 27.

⁷Tr. 51; Ex. 2 (Declaration of Federal Employment, dated November 13, 2001).

⁸Tr. 52.

⁹Tr. 53.

¹⁰Tr. 57; Ex. 1, *supra*, note 1.

¹¹Tr. 29.

¹²Tr. 30.

¹³Tr. 31.

¹⁴Tr. 30-32.

2001, he received a letter from the Corporation giving an accounting of the expenses authorized by his manager for payment, but no receipts were submitted to substantiate the expenses.¹⁵ He was requested to supply his employer with all the necessary receipts for the authorized expenses or to reimburse the Corporation \$2,659. He was also requested to reimburse the Corporation for all unauthorized expenses paid, totaling \$15,959. In April 2001, he reported to the Corporation's Human Resource Office that he lost a piece of paper with his pin number on it for the account in question.¹⁶ He was given a new card, which used the same pin number.¹⁷ He denied knowledge of why unauthorized funds were in his account.¹⁸ He testified that at the time that he did not "look at any bank statement [Applicant] ever received at that time."¹⁹ He hired a lawyer to assist him in this matter.²⁰ The money was found, untouched in his checking account.²¹ He reimbursed the Corporation \$16,539 because the money was still in his account, and he had not requested reimbursement for those expenses.

Applicant challenged the Government's argument that he was terminated for cause. He testified that his employer had announced a lay off of about 1,100 people.²² In June 2001, his employer told him that he was being laid off because of financial reasons.²³ On June 27, 2001, he applied for unemployment insurance. He received his first check on July 7, 2001. His last check was for the period ending November 24, 2001.²⁴ Each check was approximately \$954.

On August 6, 2004, he executed a SF 86 and in response to question 20 (*Your Employment Record Has any of the following happened to you in the last 10 years? - Fired from job - Quit a job after being told you'd be fired - Left a job by mutual agreement following allegations of misconduct - Left a job by mutual agreement following allegations of unsatisfactory performance - Left a job for other reason under unfavorable circumstances*), and he responded "yes." He listed that he was terminated from a college. He also indicated that he was laid off from a Corporation because an automated service was making deposits into his account without anyone's knowledge. He failed to disclose that he was terminated for cause for irregularities in his corporate expense account

¹⁵Tr. 35; Ex. 3 (Business Records regarding Applicant's termination and unauthorized expenses).

¹⁶Tr. 41, 71.

¹⁷Tr. 41.

¹⁸Tr. 39.

¹⁹Tr. 42.

²⁰Tr. 38.

²¹Tr. 43.

²²Ex. A-1 (Article from *Wall Street Journal*, dated May 30, 2001, [Corporation] to Pare World-Wide Staff by 4%); Ex. A-2 (Internet article from *The Register*, dated May 29, 2001, "[Corporation] to chop 1,100 staff"); Ex. A-3 (Internet article from *Computerworld*, dated June 4, 2001, "[Corporation] to Reduce Workforce by 1,100").

²³Tr. 45.

²⁴Tr. 47; Ex. B (Report from State Division of Employment and Training indicating unemployment benefits received by Applicant, dated April 17, 2004).

_____Applicant's supervisor submitted an affidavit regarding his professional relationship with Applicant at work.²⁵ His supervisor stated:

Overall, I've found [Applicant] to be an extremely trustworthy individual who has earned my trust. His integrity, discretion, and character are core virtues that I value and seek for members of my staff.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.²⁶ The Government has the burden of proving controverted facts.²⁷ The burden of proof is something less than a preponderance of evidence.²⁸ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.²⁹ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.³⁰

²⁵Ex. C (Affidavit, dated March 5, 2007).

²⁶ISCR Case No. 96-0277 (July 11, 1997) at 2.

²⁷ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.

²⁸*Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

²⁹ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.

³⁰ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.

No one has a right to a security clearance³¹ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”³² Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.³³ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.³⁴ 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.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards, and I reach the following conclusions.

Personal conduct is always a security concern because it asks the central question whether the person’s past conduct justifies confidence the person can be trusted to properly safeguard classified information. The Government has not established a *prima facie* case for disqualification under Guideline E, personal conduct.

Honesty is critical to a position of trust in safeguarding classified information. I found Applicant’s testimony to be credible and honest. I believe that he mistakenly omitted the termination from his college employment on Optional Form 306 when he completed it in 2001. Moreover, he did include the information about the college in the SF 86 he completed in 2004. Additionally, the 2001 incident is mitigated by time. Thus, Personal Conduct Mitigating Conditions (PC MC) 17 (a) (*the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*) and PC MC 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*) apply. Applicant refuted the argument that he was terminated for cause from the Corporation after irregularities concerning questionable expenses were found in his expense account. The evidence clearly supports Applicant’s contention that he was laid off and not terminated. He proffered evidence that he received unemployment benefits from June 2001 through November 2001. Additionally, the evidence supports his position that he was unaware of why there were excessive funds in his bank account used at the Corporation to reimburse him for travel expenses. After he hired an attorney to challenge the allegation that he misappropriated their money, the Corporation requested payment of the overpaid funds. A check was written for \$16,539 from the bank account Applicant used with the Corporation. There is no evidence that he received the money from any other bank accounts. There is no evidence that he absconded the funds for his own personal gain. I conclude that PC MC 17(e) (*the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*) and PC MC 17(d) (*the information was unsubstantiated or from a source of*

³¹*Egan*, 484 U.S. at 531.

³²*Id.*

³³*Id.*; Directive, Enclosure 2, ¶ E2.2.2.

³⁴Executive Order 10865 § 7.

questionable reliability) apply. Accordingly, allegations 1.a through 1.d of the SOR are concluded for Applicant.

I have considered all the evidence in the case. I have also considered the “whole person” concept in evaluating Applicant’s risk and vulnerability in protecting our national interests. Applicant appears to be a mature your man, who is flourishing in his profession. He has successfully provided evidence to refute the allegations against him. For the reasons stated, I conclude Applicant is suitable for access to classified information.

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:

Paragraph 1. Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Jacqueline T. Williams
Administrative Judge