

KEYWORD: Personal Conduct

DIGEST: During 2000 and 2001, Applicant downloaded personal software onto his company computer, and he copied some games from his company computer for use on his personal computer at home. On several occasions between 1992 and 2000, he borrowed 50 to 75 cents from an informal soda fund, and he took \$15 on one occasion. When he filed an insurance claim for an auto accident, he was assured by passengers in his car that he had obeyed a stop sign, but he did not tell his insurance company he could not personally remember whether he stopped. He refuted the allegation of deceiving his insurance company and mitigated security concerns based on his computer misuse and taking money from the soda fund. Clearance is granted.

CASENO: 06-06678.h1

DATE: 09/26/2007

DATE: September 26, 2007

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| In re: |) | |
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| SSN: ----- |) | ISCR Case No. 06-06678 |
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| Applicant for Security Clearance |) | |
| |) | |

**DECISION OF ADMINISTRATIVE JUDGE
LEROY F. FOREMAN**

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

During 2000 and 2001, Applicant downloaded personal software onto his company computer, and he copied some games from his company computer for use on his personal computer at home. On several occasions between 1992 and 2000, he borrowed 50 to 75 cents from an informal soda fund, and he took \$15 on one occasion. When he filed an insurance claim for an auto accident, he was assured by passengers in his car that he had obeyed a stop sign, but he did not tell his insurance company he could not personally remember whether he stopped. He refuted the allegation of deceiving his insurance company and mitigated security concerns based on his computer misuse and taking money from the soda fund. Clearance is granted.

STATEMENT OF THE CASE

On June 29, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive); and the revised adjudicative guidelines (AG) approved by the President on December 29, 2005, and implemented effective September 1, 2006. The SOR alleges security concerns under E (Personal Conduct).

Applicant answered the SOR in writing on July 13, 2007, denied some allegations and admitted some, offered explanations, and requested a hearing. The case was assigned to me on August 15, 2007, and heard as scheduled on September 13, 2007. I kept the record open until September 21, 2007, to enable Applicant to submit additional evidence. I received his evidence on September 19, 2007, and it was admitted as Applicant's Exhibit (AX) B. DOHA received the transcript (Tr.) on September 21, 2007.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 41-year-old network engineer for a defense contractor. He has worked for his current employer since January 2006 (Government Exhibit (GX) 2 at 17). He was married in June 1988, and has three children, ages 18, 17, and 12.

Applicant served in the U.S. Army from June 1984 to June 1988 and was honorably discharged. He received a clearance in February 1985, while in the Army. He received a clearance as a government contractor in June 1989 (GX 1 at 31-32).

Applicant's security clearance was revoked in October 2003, and his employment with a federal contractor was terminated because a clearance was a condition of employment. The revocation of his clearance was based on the three events alleged in the SOR. He applied for restoration of his clearance in September 2005.

The SOR alleges that in 2000 and 2001, Applicant installed personal software on his work computer and took software from his work computer for use on his personal computer (SOR ¶1.a.1). Applicant had an unclassified stand-alone personal computer configured to monitor and manage several dial-up modems. He testified there were no formal rules governing his use of his stand-alone computer (Tr. 30). He admitted installing a streaming music player on this computer without authorization and copying games from his work computer and installing them on his personal computer at home. He also admitted installing his personal email account on his work computer, installing software for a personal business site, and periodically checking his personal email at work. He admitted downloading management software for the modems but asserted he had verbal authorization for the download (Tr. 32).

The SOR also alleges Applicant took money for personal use, in amounts up to \$15 at a time, between 1992 and 2000, from an informal soda fund operated by his coworkers (SOR ¶ 1.a.2). He admitted borrowing 50 or 75 cents at a time, on no more than ten occasions, to make purchases from a vending machine. He admitted taking \$15 from the fund on one occasion when he paid for parking in connection with official business. He stated his two colleagues refused to share the cost of the parking. He asked for reimbursement from the “front office,” but when he was told there was no petty cash fund, he took \$15 from the soda fund to reimburse himself (Tr. 47).

Applicant never disclosed to his coworkers that he was borrowing money from the fund. He testified he often put more money into the fund than the price of items he used, and he believed his periodic overpayments were sufficient to cover the sums he took from time to time. However, he admitted he never reimbursed the fund for the \$15 and never told his colleagues about it (Tr. 65).

Finally, the SOR alleges Applicant deliberately left out unfavorable facts from a claim he submitted to his insurance company (SOR ¶ 1.a.3). In December 2001, Applicant was involved in an auto accident in a grocery store parking lot. He testified he could not personally remember if he stopped at a stop sign, but his wife and three children with him in the car assured him he had stopped. He did not tell the insurance company he could not personally remember if he stopped (Tr. 33-36). After he received reimbursement checks from both his insurance company and the other driver’s insurance company, he returned the check he received from his own insurance company (Tr. 36). He denied lying to his insurance company (Tr. 37).

Applicant submitted evidence of his insurance claim history for the past five years. It reflects three claims: a towing claim in December 2002 and a glass loss in December 2004, both of which were not Applicant’s fault; and one claim in October 2004, when Applicant rear-ended another vehicle and was determined to be at fault (AX B at 13).

The allegations in the SOR were based entirely on Applicant’s admissions during a polygraph interview triggered by his application to upgrade his clearance. The evidence provided by Applicant in response to DOHA interrogatories reflects that the initial decision to revoke his clearance was based on the versions of Guideline M (Misuse of Information Technology Systems) and Guideline E (Personal Conduct) in effect at the time. Applicant appealed the revocation decision, and the Guideline M security concerns were resolved in his favor, but the decision to revoke his clearance was upheld under Guideline E. The appellate decision does not state whether any of the allegations under Guideline E were resolved in Applicant’s favor.

At the hearing, Applicant expressed embarrassment and regret for his behavior. He testified he has learned from his experience and now pays for everything out of pocket. He testified, “If I can’t afford it, I don’t have it.” He takes nothing from the common work area and often pays for his own office supplies (Tr. 57-58).

A former co-worker, colleague, and personal friend of Applicant who has known him for 12 years described Applicant as having excellent judgment, ethical behavior, and honesty while working in classified environments. He stated Applicant received numerous spot awards and certificates of appreciation from multiple customers while working on classified projects (AX A).

Applicant's latest performance appraisal, dated January 16, 2007, gave him the top rating of "superior" in quality of work, creativity, quantity of work, initiative, attendance and punctuality, and attitude/attentiveness. He received the next highest rating of "exceeds expectations" in all other performance categories. His overall rating was "superior." His rating official wants to make him a supervisor. GX 2 at 17-18.

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the Guidelines. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, the disqualifying conditions and mitigating conditions under each specific guideline, and the factors listed in AG ¶¶ 2(a)(1)-(9).

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, 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 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 which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The Guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein 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. *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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

CONCLUSIONS

Guideline E (Personal Conduct)

The concern under this guideline is as follows: “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.” AG ¶ 15.

SOR ¶ 1.a.3, alleging Applicant deliberately left out unfavorable details in his insurance claims, is not supported by substantial evidence. The evidence shows Applicant believed, based on assurances from his wife and three children, that he stopped at the stop sign. His failure to disclose that he could not personally remember stopping was not a material omission. There is no evidence of deception or fraud. I resolve SOR ¶ 1.a.3 in Applicant’s favor.

The evidence supporting the remaining two allegations raise the following disqualifying conditions under this guideline:

AG ¶ 16(c) is raised by “credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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.”

AG ¶ 16(d)(3) and (4) are raised by “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,” including “a pattern of dishonesty or rule violations” and “evidence of significant misuse of Government or other employer's time or resources.”

Finally, AG ¶ 16(e)(1) is raised by “personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.”

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 16(c), (d)(3), (d)(4), and (e)(1), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline can be mitigated by showing “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.” AG ¶ 17(c). Applicant’s misuse of his company computer was minor and last occurred in 2001. His unauthorized borrowing of small amounts from the soda fund and one-time theft of \$15 were petty crimes, but they were not infrequent and they were significant

breaches of his colleagues' trust. However, they last occurred in 2000. I conclude this mitigating condition is only partially established.

Security concerns also can be mitigated by showing “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.” AG ¶ 17(d). Applicant has acknowledged and expressed remorse for his misconduct. His career took a serious setback when he disclosed it. He has learned his lesson and now buys only what he can afford out-of-pocket. I am satisfied his misconduct is unlikely to recur. I conclude AG ¶ 17(d) is established.

Finally, security concerns can be mitigated by showing “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(e). Applicant voluntarily disclosed his misconduct during his polygraph interview, admitted it in response to DOHA interrogatories, admitted it in his answer to the current SOR, and admitted it at the hearing. I conclude AG ¶ 17(e) is established.

Whole Person Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. AG ¶¶ 2(a)(1)-(9). Several of these factors were discussed above, but some merit further comment.

Applicant held a clearance during his Army service and from June 1989 to October 2003. His misuse of his company computer occurred in a loosely-controlled environment. His misuse of his computer, unauthorized borrowing from the soda fund, and petty theft of \$15 cost him his clearance and his job and severely limited his opportunity for advancement. He appears to have learned his lesson, and there is no record of any misconduct since 2001. Notwithstanding his career setback, he worked hard and performed well, to the extent that his current supervisor would like to make him a supervisor. He was remorseful, sincere, candid, and credible at the hearing.

After weighing the disqualifying and mitigating conditions under Guideline E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has refuted the allegation in SOR ¶ 1.a.3, and mitigated the security concerns based on the remaining allegations. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him a security clearance.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline E (Personal Conduct): FOR APPLICANT

Subparagraphs 1.a.1-1.a.3:

For Applicant

DECISION

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

LeRoy F. Foreman
Administrative Judge