



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



In the matter of:	)	
	)	
	)	ISCR Case No. 06-20098
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Braden Murphy, Esquire, Department Counsel  
For Applicant: Donald L. Schense, Esquire

March 31, 2010

**Decision**

HEINY, Claude R., Administrative Judge:

In 2003, Applicant’s employment was terminated for improperly charging for time he did not work. His answers on his 2004 security clearance application and during a 2005 personal interview could have been more complete, but were not falsifications. In 2003, he improperly recorded and stored the combinations for safes containing classified material. The passage of time and Applicant’s concerted efforts to adhere to security procedures has rebutted or mitigated the Government’s security concerns under handling protected information and personal conduct. Clearance is granted.

**Statement of the Case**

Applicant contests the Defense Department’s (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> the Defense Office of Hearings and Appeals (DOHA) issued a

<sup>1</sup> Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance*

Statement of Reasons (SOR) on April 9, 2009, detailing security concerns under handling protected information and personal conduct.

On May 3, 2009, Applicant answered the SOR, and requested a hearing. On August 7, 2009, I was assigned the case. On August 17, 2009, DOHA issued a notice of hearing for the hearing held on September 10, 2009. The Government offered Exhibits (Ex.) 1 through 10, which were admitted into evidence. Applicant testified on his own behalf and submitted Exhibits A through V, which were admitted into evidence. On September 25, 2009, DOHA received the transcript (Tr.).

### **Findings of Fact**

In Applicant's Answer to the SOR, he denied the factual allegations in ¶¶ 2.d and 2.e. He admitted the remaining factual allegations, with explanations. Applicant's admissions to the SOR allegations are incorporated herein. After a thorough review of the record, pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 56-year-old computer systems engineer (Ex. D) who has worked for a defense contractor since November 2004. His position as a computer systems engineer with his current company requires a security clearance. (Tr. 102) He has worked for various DoD contractors since 1984. (Tr. 151) Coworkers, supervisors, and associates state: Applicant is hard working, a team player, mature, and one who participates in activities above and beyond what is required of him. His dedication, character, and work ethic have been exemplary. For his outstanding work and commitment to customer service, he was recognized as engineer of the quarter. (Ex. B, C, E—H) His performance ratings have been "meets expectations," "exceeds expectations," or "outstanding." (Ex. E) Applicant has completed numerous training programs. (Ex. K—V) Applicant's supervisor has never had reason to question Applicant's character, integrity, reliability, or trustworthiness. (Tr. 43, 48) Over the past three years, Applicant has been nominated three times for employee of the quarter, which he won once. (Tr. 105)

In October 2003, Applicant was terminated from a DoD contractor job after an investigation concluded he had improperly charged for time he had not worked. (Ex. 2) Applicant was going to another state for two weeks for work and to attend a seminar. (Tr. 92) He left his job early the week before his trip. While in the other state, Applicant had no access to an electronic timecard so he called his supervisor to tell him he could not log his work hours from his location. (Ex. 6, Tr. 93) Applicant never told his supervisor he had left work early the previous week. On the third day of training, a security officer talked with him and told him to fly back immediately to his duty location, but not to return to his office until he heard from security. A couple of weeks later, Applicant was called, told he was being terminated, given the reason for his termination, and debriefed. (Tr. 94)

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*Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

Applicant's conduct violated his employer's code of ethics. In July 2005, during a personal subject interview, Applicant stated he had been terminated for "falsification of his time sheet." (Ex. 6) Applicant acknowledged he was aware of the ethics code and aware he had violated the code by having another person file his time card. (Ex. 6) Applicant admits he did not accurately annotate his hours on his time card, that this was wrong, and it led to his termination. (Tr. 148) Applicant did not dispute his termination because he knew he violated the company's policy. (Ex. 6)

During a personal subject interview in January 2007, Applicant acknowledged that in May 2003, five months prior to his termination, he had been verbally counseled by his supervisor about his work hours. (Ex. 6) The company had core hours from 9:00 to 3:00. (Tr. 133) Applicant was asked to start at 7:00 so he would be present should his expertise with the computer system be needed. (Tr. 133) Applicant had been working the core hours and later into the afternoon and evening. The counseling had nothing to do with the filling out of timecards. (Tr. 151)

In 2003, following his termination, when his work area was cleared, a number of post-it notes were found containing the combinations to safes containing classified information. (Ex. 2, 5) In December 2003, an investigation found that a compromise of the safe combinations had occurred. (Ex. 3) Applicant never saw the incident report until it was sent to him a few weeks before this hearing. (Tr. 127) Applicant has never denied there were safes combinations written down in his work area. (Tr. 87) The combinations were in an unclassified area where other employees or contract laborers would have found them. There was no evidence of an active compromise of classified information. (Ex. 3)

Applicant did not dispute the handling protected information violation related to the safe combinations existed. Applicant also admitted writing down passwords to the classified computer system at work because he could not remember the passwords. (Ex. 6)

DoD 5520.22-M, National Industrial Security Program Operating Manual (NISPOM), dated January 1995 (Ex. 9), and February 28, 2006 (Ex. 10), paragraph 5-308, Protection of Combinations to Security Containers, Cabinets, Vaults, and Closed Areas, provides:

- c. The combination shall be safeguarded in accordance with the highest classification of the material authorized for storage in the container.
- d. If a record is made of a combination, the record shall be marked with the highest classification of material authorized for storage in the container.

The January 1995 NISPOM, paragraph 5-308(c) additionally requires that superseded combinations shall be destroyed. (Ex. 9) Applicant's supervisor testified that

combinations for safes which store classified information are classified to the level of the highest classification of the container. (Tr. 55)

From October 2003 through November 2004, Applicant was out of work following his termination. (Ex. 6) In November 2004, Applicant completed a security clearance application, Standard Form (SF) 86. Question 20 of that form asked if Applicant had been fired from a job. Applicant stated he had been fired from a job in October 2003. He admitted he had someone fill out his time card. He stated this was a violation of the company's time card standards. During a July 2005 interview, Applicant told an investigator he was terminated for falsifying his time card by having another employee fill out his time card. He did not say he was terminated for improperly charging for time when he was not at work.

At his current job, Applicant has never had a breach of security. (Tr. 59) Once he returned to the industry, he made a concerted effort to be more aware of security concerns. (Tr. 98) He no longer writes down combinations.

Applicant has been married 30 years. He has two sons, the last one graduated from college a year ago. (Tr. 100) Except for this one-year of unemployment, he has spent 25 years working in the defense industry. (Tr. 100) In his current job, Applicant has yearly security training and yearly ethics training. (Tr. 118) Information Assurance training is received quarterly. (Tr. 100) Applicant documents every single hour that he works. (Tr. 158) For the past five years, Applicant has tried to mitigate his wrongful conduct in 2003. (Tr. 158)

In his closing argument, Department Counsel argued that what Applicant said about his termination was not false, but he failed to give the entire picture of Applicant's termination. He asserted that Applicant should have provided more information than he did. (Tr. 162)

## **Policies**

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

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 as to obtaining 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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).

## **Analysis**

### **Guideline K, Handling Protected Information**

Adjudicative Guideline (AG) ¶ 33 articulates the security concerns relating to handling protected information:

Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

AG ¶ 34 describes conditions that could raise a security concern and may be disqualifying:

(g) any failure to comply with rules for the protection of classified or other sensitive information.

The Government has an unequivocal need to protect classified information within the defense industry. Only those applicants who demonstrate the appropriate good judgment and reliability in the protection of such information will be granted the privilege of a security clearance. Applicant failed to properly safeguard the combinations to safes containing classified information, which violates paragraph 5-308 of DoD 5520.22-M, the NISPOM. Disqualifying Condition AG ¶ 34(g) applies.

AG ¶ 35 provides two conditions that could mitigate security concerns:

(a) so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities.

Applicant has worked for DoD contractors since 1984. The 2003 conduct is the only incident of Applicant having failed to properly safeguard classified information. He has never denied he wrote down safe combinations to safes containing classified information. Applicant has worked in his current position for five years and has never had a breach of security related to classified material. (Tr. 59) Applicant has tried to mitigate his 2003 wrongful conduct. (Tr. 158)

His security violation occurred six years ago. Applicant has heightened his awareness toward security and he has demonstrated a positive attitude toward the discharge of his security responsibilities. AG ¶ 35(a) and ¶ 35(b) apply.

### **Guideline E, Personal Conduct**

AG ¶ 15 articulates the security concerns relating to personal conduct:

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.

The following sections of AG ¶ 16 describe conditions that could raise a security concern and may be disqualifying:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment

qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(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 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. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations.

In October 2003, Applicant was terminated for improperly charging for time when he was not at work. Following his termination, when his work area was cleared, it was discovered Applicant had improperly recorded and stored combinations to safes containing classified material. As previously discussed, this was a security violation, in violation of paragraph 5-308, DoD 5220.22-M. AG ¶ 16(d)(3) applies to the time card violation and his termination. The security violation and termination have already been discussed in the Guideline K analysis. There is nothing under the personal conduct security concerns, which would indicate a different finding that what is provided above.

Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government, when applying for a security clearance, is a security concern. But every inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully.

What Applicant stated in his SF 86 was true. He was fired for a violation of his company's time card standards. What he said during his 2005 interview was also true. He specifically stated he had been terminated for falsification of his time sheet. He could have gone farther and stated he had claimed he was working when he was not at work, but did not.

Department Counsel acknowledged Applicant's statements about his termination were not false, but asserted Applicant should have provided more information than he did. He argues Applicant's responses did not go far enough. Applicant should have revealed he was terminated for improperly charging for time he had not worked. In this case, Applicant's failure to provide additional information does not, in itself, prove he did so in a deliberate effort to conceal those facts from the government. From his answers, the government knew he was terminated because he had falsified his time card.

Applicant did not dispute his termination because he knew he violated the company's policy and acknowledged he was aware of the ethics code. Applicant credibly testified that he was not trying to mislead the government. Applicant's statements about his intent, or state of mind, at the time he executed his SF 86 and during his interview are relevant and material, but not conclusive. Intent to deceive or

mislead the government does not require direct evidence and can be inferred from circumstantial evidence, but this is not the case here. When his statements are weighted in light of the evidence as a whole, I find his answers on his SF 86 and during his interview were not deliberate omissions, concealments, or falsifications, Therefore, none of the disqualifying conditions under personal conduct apply.

In May 2003, Applicant was counseled about his working hours. The counseling dealt with making sure he, as a computer technician, was at work during the hours when the customers or clients were most likely to need computer support. He had been working the core hours of 9:00 to 3:00, but his supervisor wanted him to come in earlier in the day instead of staying later in the day as was Applicant's habit. The counseling had nothing to do with accounting for his work on his timecards. Nothing about the counseling casts doubt on Applicant's trustworthiness, judgment, reliability, or willingness and ability to safeguard classified information.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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 individual'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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Six years ago, Applicant was terminated from his job for improperly charging for time he did not work. He acknowledged this was wrong and inappropriate conduct. He has shown he has learned his lesson. In the past six years, he has done all that he could do to have trust in him restored. Following a year of unemployment, he has acted to mitigate his wrongful conduct in 2003. Once he returned to the industry, he made a concerted effort to be more aware of security concerns. (Tr. 98) He no longer writes down combinations. Applicant is now extremely vigilant as to handling protected information. He is very careful to safeguard classified material. He has yearly security training, yearly ethics training, and quarterly information assurance training. He has spent 25 years in the



defense industry. Knowing what his inappropriate conduct cost him in 2003, it is unlikely he would repeat that conduct. His answers to his SF 86 and during his 2005 interview could have been more complete, but he did not falsify his answers.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his handling protected information and personal conduct.

### **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, Handling Protected Information: FOR APPLICANT

Subparagraph 1.a: For Applicant

Paragraph 2, Personal Conduct: FOR APPLICANT

Subparagraphs 2.a—2.e: For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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CLAUDE R. HEINY II  
Administrative Judge