



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



In the matter of:)	
)	
-----)	ISCR Case No. 06-21972
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: Ronald P. Keller, Esquire

June 24, 2009

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his most recent Security Clearance Application (SF 86), on December 2, 2004. On June 12, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E for Applicant. The action was taken under Executive Order 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on July 15, 2008 and answered it on the same day. He requested a hearing before an Administrative Judge through Counsel. I received the case assignment on March 16, 2009. DOHA issued a notice of hearing on April 6, 2009, scheduling the hearing for May 8, 2009. Counsel for Applicant moved for a continuance. I granted the continuance. An amended notice of hearing was issued on May 7, 2009, and I convened the hearing as scheduled on June 2, 2009. The

government offered Exhibits (GE) 1 through 12, which were received without objections. The Government called three witnesses.¹ Applicant testified on his own behalf.² He submitted Exhibits (AE) A through L, without objections. DOHA received the transcript of the hearing (Tr.) on June 9, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

On June 1, 2009, Counsel for Applicant requested a waiver of the scheduled hearing. Applicant wished to submit the matter based upon written documents (in essence a review on the record or FORM). Department Counsel objected to Applicant's request based on timeliness. I denied Applicant's request.

Findings of Fact

In his Answer to the SOR, Applicant denied the factual allegations in ¶¶ 1.a-1.c of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 55 years old. He is divorced and has no children (Tr. 191). He obtained his undergraduate degree in 1975 from one of the U.S. military academies. After receiving two master's degrees, he received his Ph.D in computer science and engineering in 1989. He retired from the military at the officer paygrade of O-5 in 1999. He held a top secret security clearance during his military and civilian career. He has been with his current employer since 2004 (GE 7).

Applicant held civilian research positions on various military installations from 1999 until 2002 after his lengthy military career (GE 2). In 2003, he was working as a senior research scientist at a military base. He was, at the time, a probationary employee in federal service (GE 6).

Applicant's supervisor determined that Applicant displayed inappropriate behavior in the workplace in November 2003, when the supervisor observed Applicant in his office sitting at his desk preparing to fill a syringe with an unknown substance from a vial (Tr. 33). Applicant's supervisor was surprised and questioned Applicant. He asked Applicant if he was a diabetic and Applicant stated that he had an antibiotic and was preparing to inject it. Applicant had banged his head a week before and had a bandage on his forehead (Tr. 33). Applicant had a tumor removed years ago and said that when

¹ Witness testimony was received via video-teleconference and telephone. Counsel for Applicant did not object.

² At the hearing, Applicant's Counsel objected to the Government calling Applicant as a witness based on the fact that the Government did not notify Applicant. Applicant's Counsel did not plan to have Applicant testify at the hearing. Applicant had a prepared statement to submit for the record. Department Counsel objected and Applicant's Counsel agreed to have Applicant adopt his prepared statement as testimony. Department Counsel was then given the opportunity to cross-examine Applicant (Tr. 146-150).

he sustained a cut, he had to take antibiotics to avoid an infection (Tr. 34). He further explained that he had received the antibiotics and the syringe from the military medical unit (Tr. 37).

The supervisor conferred with his deputy who is a physician and was told that this did not make sense. Since this involved a medical issue and possible privacy concerns, the supervisor checked with a personnel specialist about what he could legally ask Applicant. After that, the supervisor asked Applicant for a copy of the prescription to confirm Applicant's explanation for the syringe and vial. (Tr. 38). Applicant never produced a prescription and he changed his explanation several times (Tr. 41).

Applicant's supervisor met with him and determined that his responses concerning the November 2003 incident were not credible and decided to terminate him (Tr. 48). The deputy was also at the meeting. Applicant's supervisor prepared a memorandum of record (GE 4) discussing the incident which told Applicant about his right to request a review by the division chief (GE 4). The memorandum was dated December 15, 2003 and the effective date of termination was December 19, 2003. The supervisor did not have a written acknowledgment of the termination (Tr. 52) and he acknowledged that he had never terminated anyone before this incident. He also acknowledged that it was possible that Applicant did not take the memorandum with him when he left the meeting (Tr. 82).

The Memorandum - Subject- Termination During Probationary Period, dated December 15, 2003 refers to "inappropriate behavior" as a basis for termination. Applicant's supervisor elaborated in the memorandum that Applicant's responses and explanations to requests and questions have not been credible. He states that "the inference, I have drawn is that the substance in the vial I observed on 20 November 2003 was non-prescription, and inappropriate"(GE 4). "This behavior has resulted in a lack of confidence and trust ... and serves as the basis for termination during your probationary period."

At the hearing, Applicant's supervisor testified that when he walked into Applicant's office, Applicant put the syringe and vial in his left hand and lowered them out of view (Tr. 35). Applicant's supervisor acknowledged that he wrote the memorandum of record, which was merged with other information from Personnel. He further explained that he met with Applicant and explained to him that he was being terminated since he did not provide documentation concerning the syringe and the vial (Tr. 47). Applicant's supervisor did not see the final paperwork that Applicant signed. Therefore, the supervisor did not write or provide any "remarks" to indicate additional or conflicting reasons for Applicant's resignation (Tr. 63-64).

Applicant's supervisor knew that the division chief had the authority to override his decision. He learned later from the division chief that Applicant met with him and provided results from a drug test that showed he was not using drugs (hair sample). However, the termination proceeded. Applicant's supervisor also admitted that until a

few days ago he did not know that Applicant had resigned a few hours before being terminated (Tr. 47).

Applicant signed an SF 52 (Request for Personnel Action) on December 19, 2003. The Request For Action is Resignation and Applicant listed "Personal Reasons" for the resignation (GE 5). Under Part F (Remarks) directly below his signature he corrected his forwarding address with his initials. The Agency Finding was directly below that line and stated: Employee resigned after receiving written notice on 15-DEC-2003 of termination during probationary period for inappropriate behavior (GE 5). An SF 50 (Notification of Personnel Action) confirms a resignation for personal reasons and also lists the Agency Finding of resignation after receiving written notice of termination during probationary period for inappropriate behavior (GE 6).

Applicant's work performance was very good and there were no problems with security breaches. His supervisor testified that he hired Applicant and had respect for him (Tr. 70). He had not seen any erratic behavior before the November 2003 incident.

On December 2, 2004, Applicant completed a security clearance application. He answered "no" to question 20 concerning his employment record in the past seven years. He did not acknowledge that he had "quit a job after being told [he would be] fired or that he left a job for other reason under unfavorable circumstances.

In March 2006, a special agent from the Office of Personnel Management (OPM) interviewed Applicant (GE 10). She prepared a report of the investigation. She testified at the hearing that Applicant when questioned during the interview did not report anything about a syringe and vial and his former supervisor (Tr. 92). Applicant did not disclose that he had been terminated in 2003. He did state that he had not used illegal drugs and that his former supervisor had made allegations concerning illegal drug use (Tr. 100). The agent also reviewed Question 20 with Applicant concerning previous employment (Tr. 111). She explained that she asked him if he had been fired or resigned under adverse conditions and he said "no" (Tr. 114).

In 2007, Applicant was interviewed by a field agent. She prepared a report concerning the investigation. Agent B testified at the hearing that she confronted Applicant specifically about the November 2003 incident that his supervisor described concerning a syringe and a vial. Applicant claimed that he did not know anything about such an incident (Tr. 137). He denied that he was going to be terminated and that he explained he was never asked why he left the employment.

In 2007, Applicant was investigated for sensitive compartmented information (SCI) access (GE 8). Information concerning the November 2003 incident was reviewed. Applicant declined to answer an interrogatory explaining the situation (GE 9).

In March 2008, Applicant responded to DOHA interrogatories with a prepared statement and enclosures (GE 10). He commented on the accuracy of the agent's interviews. He focused on the fact that he presented a negative hair drug screen to his

employer in 2003. He stressed that he did not use illegal drugs or abuse legal drugs. He further explained that “he was certain that he intended to quit” and that is why he did not discuss being fired. He admitted that he had no evidence or paperwork to substantiate his recollection. He stressed that he did not have the time or energy to fight “false observations, conclusions, statements, or whatever they were” due to his ex-wife’s grave medical condition. He stated that he was willing to take a lie detector test.

At the hearing, Applicant did not wish to testify. He adopted his written statement (AE K), and answered questions on cross-examination. He again denied all allegations. He did not recall any incident with a syringe or a vial (Tr. 159). He explained that he never received a notice of termination. He had no recollections of any conversations with his supervisor after the first day (Tr 159). When asked if the “first day” was November 13, 2003, he answered that he had no reason to dispute it (Tr. 160). He did not recall any meeting with his supervisor where he was told that he would be terminated for inappropriate behavior. He said he looked through his paperwork and he has no copy of the notice of termination (Tr. 161). He did not recall meeting with his division chief. He did recall that although “his recollection was extremely hazy”, he had the impression that his supervisor was worried about Applicant’s illegal drug use after a conversation that took place (Tr. 162). Applicant explained that he had a hair sample done that was negative for drugs. He wanted to resign as soon as possible given the allegations. He agreed that he signed the SF 52 but did not see the Agency Finding concerning termination. He testified that he did not recall seeing that line (Tr. 166).

Applicant stressed that he left the position for personal reasons. “I would have left even if I had been asked to stay in the position” (AE K). By marking “yes” to question 20 on the security questionnaire, I would have been implicitly admitting that one of the conditions was true. By my knowledge at the time, none of the conditions were true” (AE K). As regards the first allegation, I deny having in my possession a termination notice and I deny knowing of a termination notice” (AE K).

Applicant testified at the hearing that he had no problems on the job, but he had problems with his supervisor (Tr. 170). He explained that his supervisor made an allegation that he was using illegal drugs, and Applicant did not respect his research (Tr. 170). Applicant stated that he does not have a clear recollection of a conversation but when he left “that meeting” he did not know if his supervisor told him he would be fired (Tr. 171). When asked about what he wrote in his March 2008 interrogatories concerning his intention to quit as soon as possible, he said he did not want to be delayed by some minimal number of days notification problem. Applicant explained that he was not referring to the termination notice (Tr. 177). When asked again, Applicant said “no” .. I will leave it at that time. I don’t want to say too much” (Tr. 178).

Applicant summed up his testimony by stating that he did not know of any termination action against him. “At the time I resigned, I thought, given the negative drug screen, I’m getting out of here for personal reasons and this situation’s over and closed” (Tr. 193).

Applicant submitted numerous character references (AE A-I). He is described as a person of high moral character who demonstrates trustworthiness and honesty. He takes his professional and personal duties seriously (AE C). His actions have never been rash or impulsive (AE F). He is a thoughtful, careful, and painfully honest analyst offering his well thought out and truthful views in a respectful but brutally honest manner (AE G). A colleague who has known Applicant for five years wrote that “Applicant can be trusted to protect the national security interests of the U.S. and should be granted a clearance” (AE L).

Policies

When evaluating an Applicant’s suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense 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 protect or

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 E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining 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.

AG ¶ 16 describes 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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(c) 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 indicting that the person may not properly safeguard protected information is another disqualifying condition; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such

as (1) engaging in activities which, if known, may affect the person's professional, or community standing.

Applicant completed his 2004 security clearance application. He answered "no" to Question 20 concerning his employment record, which asked about leaving prior employment for various reasons, including, after being told he was fired or under unfavorable circumstances. I find that he deliberately falsified a material fact with that response.

The Government established by substantial evidence that Applicant's supervisor told him in November 2003 that he would be terminated for inappropriate behavior despite that Applicant maintained that he never received a notice of termination. Applicant by his own acknowledgment stated that there were allegations of illegal drug use by his supervisor. He could not recall a meeting but did not dispute it. He stated that he resigned after that and listed personal reasons on the SF 52. It is not credible that Applicant did not see the agency finding on the SF 52 when he signed it and even corrected his address. He is a seasoned professional and sophisticated man.

Applicant's testimony did not refute the allegations despite his denials. He could not recall or remember and did not want to say too much. Applicant's own testimony hearing that he believed by presenting the negative drug screen- the "situation is over" acknowledges that there were some unfavorable circumstances or allegations. The fact that the allegations may not have been true concerning illegal drug use is not relevant for an honest answer to Question 20. Thus, AG ¶16(a) applies in this case.

Applicant's 2006 and 2007 interviews with two agents are not as clear concerning a deliberate falsification due to the nature of the questioning in the interviews. I find for Applicant as to allegation 1.b. Thus, AG ¶ 16(b) does not apply.

Under AG ¶ 17, the following conditions could mitigate the government's security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(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 is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) 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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

I find that Applicant has not mitigated the security concerns. Applicant has consistently denied all allegations but he has not been forthright and open. He was not credible in his non-recollections at the hearing. Although the incident occurred in 2003 and the questionnaire was completed in 2004, Applicant has not mitigated the falsification of his security clearance application. He was not credible in his explanations concerning the termination and resignation.

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. Applicant has served his country admirably for 35 years. He was a cadet at a military academy and was an officer in the military until 1999. He retired as an officer. He obtained his Ph.D. in computer science and worked in various research capacities for the military from 1999 until the present. He held a top secret clearance during his military and civilian career. He had no problems with handling classified information.

Applicant falsified his 2004 security clearance application when he responded "no" to Question 20 concerning prior employment. He omitted the fact that he had resigned before a termination or at least that he left under unfavorable circumstances. The fact that Applicant admitted that there were allegations of illegal drug use supports the fact that his resignation for "personal reasons" was not the entire truth. Even if allegations were not true, an honest answer would require that Applicant list the incident and explain the situation. Applicant's reliance on the fact that he did not have the notice of termination in his paperwork or the fact that he did not recall being told he would be fired is not credible, or sufficient to rebut the Government's case.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility, judgment, and suitability for a security clearance. For all these

reasons, I conclude Applicant has not mitigated the security concerns arising from 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, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied .

NOREEN A. LYNCH
Administrative Judge