DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----	)	ISCR Case No. 14-01086
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Richard A. Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

11/24/2015

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Decision

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GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding personal conduct issues. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On November 22, 2012, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.[1] On December 16, 2013, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued him a set of interrogatories. He responded to the interrogatories on January 14, 2014.[2] On May 1, 2014, the DOD CAF issued a Statement of Reasons (SOR) to him, under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information*

[1] GE 1 (e-QIP, dated November 22, 2012).

[2] GE 2 (Applicant's Answers to Interrogatories, dated January 14, 2014).

(December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline E (Personal Conduct), and it detailed reasons why the DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

It is unclear when Applicant received the SOR as there is no receipt in the case file. In a sworn statement, dated September 16, 2014, Applicant responded to the SOR and requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on June 3, 2015. The case was assigned to me on June 5, 2015. A Notice of Hearing was issued on June 8, 2015, and I convened the hearing, as scheduled, on June 24, 2015.[3]

During the hearing, two Government exhibits (GE 1 and GE 2) and two Applicant exhibits (AE A and AE B) were admitted into evidence without objection.[4] Applicant and one witness testified. The transcript (Tr.) was received on July 1, 2015. I kept the record open to enable Applicant to supplement it. Applicant took advantage of that opportunity, and he submitted an additional exhibit (AE C) that was admitted into evidence without objection.[5] The record closed on July 16, 2015.

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[3] The Notice of Hearing was issued 15 days before the scheduled date for the hearing, but Applicant and Department Counsel previously had telephone discussions regarding the time and possible location of the hearing. Accordingly, when specifically questioned regarding any objection to the period of actual notice, Applicant waived any objection he might have to the period specified in the Directive (§ E3.1.8). *See* Transcript (Tr.) at 11-12.

[4] In his Answer to the SOR, at 1, Applicant offered the following comments:

> After reviewing your narrative report, I am deeply and immensely affronted by the testimony given and the clear embellishment of the truth. The report is very unnerving not only because it is riddled with untruths, but also due to the fact that these falsehoods are so basic and simple in nature that any rational human being can reason that the testimony is dishonest in nature. I therefore stand on the testimony given before.

Although Applicant did not object to GE 2 at the time it was offered and admitted into evidence, he subsequently submitted a request that little weight should be given to some facts established in GE 2, which he referred to as "testimony," because those facts were derived from business entities that were no longer in operation and the actual sources of the facts submitted were not identified by the investigator. When Applicant received the interrogatories from the DOD CAF, he was asked, in question 3 thereof, if the attached report of investigation (ROI) was accurate and if not, to explain how it was not correct. Applicant chose not to add any comment to the question "at this moment." In question 5 thereof, he was asked if he agreed with, and adopted, the investigator's summary as accurately reflecting the facts. Applicant answered "yes." The proper time to make the objections would have been during the hearing when the exhibit was being offered to me and before it was admitted by me. Nevertheless, considering Applicant's position as *pro se*, I am willing to give him some procedural latitude on the issue and revisit it. While it is somewhat troubling that the investigator never identified sources of the allegations of conduct and misconduct, or obtained documentation to support the allegations, thereby essentially denying Applicant the ability to confront possible bias and inaccuracies, he was able to fully address the allegations themselves. Having permitted some procedural latitude, I have chosen to reject Applicant's request. Accordingly, the request is denied.

[5] While Department Counsel did not object to AE C, he did suggest that the contents thereof be given little weight because the author of the document, while commenting on Applicant's work performance when the author was Applicant's manager, neglected to state when she was in the position and failed to address the facts and circumstances of Applicant's termination from his employment. Because the author seemingly limited her comments to Applicant's interactions with customers and supervisory staff, including herself, and an initial issue of

Procedural Issues

During the hearing, Department Counsel moved to amend the SOR to conform to the evidence presented. The motion was to add or delete certain words, phrases, or complete sentences in SOR ¶¶ 1.a., through 1.d., as well as to withdraw SOR ¶¶ 1.e. and 1.f. in their entirety. After substantial discussion, the motion was granted without objection, and the amendments were made.[6]

Findings of Fact

In his Answers to the SOR, Applicant denied all of the factual allegations pertaining to personal conduct (¶¶ 1.a. through 1.h.). 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 a 35-year-old former and prospective employee of a defense contractor who was hired as a consultant in November 2012. Because he did not have a security clearance, he was laid off about two years ago pending receipt of a security clearance.[7] While awaiting the resolution of his security clearance issues, Applicant secured a position with employer Charlie as a consultant. That position lasted until May or June 2015, and as of the date of the hearing, he had been unemployed for about a month.[8] He has never served with the U.S. military.[9] Applicant attended high school overseas, but did not receive a diploma because of discrepancies regarding the credits he had earned. Instead, in 1999 or 2000, he received a General Educational Development **(**GED**)** diploma.[10] Applicant obtained an associate's degree in March 2003, and while he continued his pursuit of a bachelor's degree, he has not completed the requirements for one.[11] He was married in May 2006 and divorced in September 2011.[12] Applicant has one daughter born in 2005.[13]

"insubordination" was withdrawn from the SOR, as described below, I have chosen to reject Department Counsel's request. Accordingly, the request is denied.

[6] Tr. at 99-107. The specifics of the motion and the amendments, while not detailed in this decision, appear in the transcript, as indicated.

[7] GE 1, *supra* note 1, at 15; Tr. at 51-53; GE 2 (Personal Subject Interview, dated January 16, 2013), at 4.

[8] AE A (Character Reference, dated June 10, 2015); Tr. at 53-54.

[9] GE 1, *supra* note 1, at 25.

[10] Tr. at 28; GE 2 (January Personal Subject Interview), *supra* note 7, at 3-4.

[11] GE 2 (January Personal Subject Interview), *supra* note 7, at 3; GE 1, *supra* note 1, at 14-15; Tr. at 28-29.

[12] GE 1, *supra* note 1, at 27.

[13] GE 1, *supra* note 1, at 32.

Personal Conduct

Applicant has an unusual employment history. (SOR ¶¶ 1.a., 1.c., and 1.h.): He served as systems support for employer Alpha from May 2003 until August 2005.[14] In his e-QIP, Applicant stated that he left the position because he "got a better job."[15] During his initial interview with an investigator from the U.S. Office of Personnel Management (OPM) in January 2013, he acknowledged having been reprimanded on approximately two occasions for tardiness, but contended he received no other punishment other than the two written warnings, and that he left the job for a better opportunity and would be eligible for rehire.[16] In a subsequent interview with the OPM investigator, upon being confronted with new information which contradicted his earlier description of events, Applicant acknowledged that he was "let go" by someone in human resources for failure to create a case number or ticket number related to an incoming call that he had worked on (characterized as a failure to comply with quality processes dictated by management). He did not previously disclose that he was let go because he believed he was eligible for rehire. When the investigator advised him that he was not eligible for rehire, Applicant stated that he was unaware of that fact.[17] During the hearing, Applicant initially explained his "better job" response by first contending that he was extremely nervous at the time he completed the e-QIP, and then said he had not remembered it.[18] He was, in fact, fired for performance reasons.[19]

(SOR ¶ 1.b., 1.d., and 1.g.): Applicant served as systems support consultant for employer Bravo from August 2005 until April 2007.[20] In his e-QIP, Applicant stated that he left the position because the "contact (sic) ended."[21] During his initial OPM interview in January 2013, he noted that the company was out of business and he was unable to provide any information regarding his employment record. He stated he "had no problems of any type at this employment." He added that he left because the company's contract ended, and he would be eligible for rehire. He contended he was not fired and that he did not quit because he was to be fired, and he "did not leave by mutual agreement following misconduct or performance problems, and did not leave under unfavorable circumstances."[22] In a subsequent interview with the OPM investigator,

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[14] GE 1, *supra* note 1, at 23. It is interesting to note that Applicant listed his brother as his supervisor at the company because they both worked for the company and Applicant could not recall his actual supervisor's last name. *See* GE 2 (January Personal Subject Interview), *supra* note 7, at 5.

[15] GE 1, *supra* note 1, at 24; Tr. at 32.

[16] GE 2 (January Personal Subject Interview), *supra* note 7, at 5.

[17] GE 2 (Personal Subject Interview, dated March 4, 2013), at 3-4; Tr. at 29-31.

[18] Tr. at 32-33.

[19] Tr. at 55-56.

[20] GE 1, *supra* note 1, at 22.

[21] GE 1, *supra* note 1, at 23; Tr. at 36-37.

[22] GE 2 (January Personal Subject Interview), *supra* note 7, at 5.

upon being confronted with new information which contradicted his earlier description of events, Applicant acknowledged that he was "terminated" after being placed "under the microscope" for various reasons including problems with a new hire and other performance issues. He did not previously disclose that he was terminated because he did not think about it.[23] During the hearing, Applicant explained his "contract ended" response, by clarifying that he meant that his employment contract ended with his termination, not that the contract his employer had with the government had ended.[24] He was, in fact, fired.[25]

Work Performance and Character References

Applicant's former supervisor at employer Alpha stated that Applicant conducted himself with the utmost level of professionalism in always going above and beyond the call of duty to assist customers and managing staff. She also noted his integrity.[26] Applicant's lead project manager with employer Charlie characterized Applicant as reliable, trustworthy, very personable, and a very competent worker and great team player.[27] A friend of ten years has known Applicant since they met at a church retreat. Because of their age difference, the friend is more of a mentor, counselor, or advisor. He characterized Applicant in glowing terms as having good integrity and judgment, along with reliability, integrity, and ethics.[28]

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."[29] 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 have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."[30]

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[23] GE 2 (March Personal Subject Interview), *supra* note17, at 1-3.

[24] Tr. at 37-38, 47.

[25] Tr. at 57-58.

[26] AE C (Character Reference, dated June 20, 2015); AE B (Character Reference, dated June 20, 2015). AE B is the unsigned version of AE C, and is otherwise identical to AE C; Tr. at 34.

[27] AE A (Character Reference, dated June 10, 2015).

[28] Tr. at 90-95.

[29] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

[30] Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

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

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."[31] The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.[32]

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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. Furthermore, "security clearance determinations should err, if they must, on the side of denials."[33]

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."[34] Thus, nothing

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[31] "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "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).

[32] *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

[33] *Egan*, 484 U.S. at 531

[34] *See* Exec. Or. 10865 § 7.

in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

Analysis

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

> 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 guideline notes several conditions that could raise security concerns. Under AG ¶ 16(a), it is potentially disqualifying if there is:

> 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.

"Deliberately providing false or misleading information concerning relevant facts to an . . . investigator, security official, . . . or other official government representative " is potentially disqualifying under AG ¶ 16(b).

It is also potentially disqualifying under AG ¶ 16(d), if there is:

> 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.

As noted above, in early 2005 and 2007, Applicant was terminated from employment by employers. The initial termination resulted from his failure to comply with quality processes dictated by management and his tardiness – personal conduct issues. The subsequent termination was for performance reasons – not necessarily personal conduct issues. On several occasions thereafter, Applicant obfuscated, intentionally omitted, concealed, or falsified the true facts associated with both terminations. The various inquiries merely sought the truth: how or why he left his employment with employers Alpha and Bravo. Instead of responding truthfully, completely, and accurately, Applicant offered fanciful renditions of false scenarios. The truthful answer should have been "terminated," but Applicant chose something different: "getting a better job" or "the contract ended." Both responses were false. Repeated inquiries finally obtained more truthful responses, still tainted by false comments. The evidence reveals unreliable behavior and a pattern of dishonesty or rule violations. AG ¶¶ 16(a), 16(b), and 16(d) have been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct, but none of those mitigating conditions apply. His conduct shows a lack of honesty and integrity. It is also continuous, recent, and serious.

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. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.[35]

There is some evidence in favor of mitigating Applicant's conduct. A former supervisor at employer Alpha and a former lead project manager at employer Charlie, as

[35] *See U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); *See also* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

well as a friend/mentor, refer to Applicant in glowing terms with special emphasis on his professionalism, reliability, and judgment.

The disqualifying evidence under the whole-person concept is more substantial. Applicant was terminated by two different employers. Yet, when he completed his e-QIP, was interviewed by an OPM investigator, completed answers to interrogatories, when he answered the SOR, and when he testified during the hearing, Applicant preferred to use word-games to conceal the truth of his ended employment relationships. He denied the responses were deliberate or an attempt to falsify the material facts. Instead, he attributed his actions to nervousness or his understanding that he was eligible for rehire. Applicant's actions were not isolated and his efforts to conceal the truth were repeated over several occasions and over several years. As such, his behavior was not aberrant. Instead, it became the standard of his unacceptable behavior. Applicant is an intelligent, talented, and experienced individual, but his explanations are unreasonable and not credible. Accordingly, I have concluded that he deliberately falsified his responses in an attempt to conceal the truth about his personal conduct. Overall, the evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the personal conduct security concerns. *See* AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Withdrawn
Subparagraph 1.f:	Withdrawn
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant

Conclusion

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

ROBERT ROBINSON GALES
Administrative Judge