

DATE: March 31, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-09180

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Deputy Chief Department Counsel

FOR APPLICANT

Rod Tanner, Esq.

SYNOPSIS

Applicant has maintained a generally praiseworthy civilian career with his employer of over 30 years. Contrasted against this meritorious performance record is a series of actions reflecting judgment lapses. Two involved misuse of company parking passes between 1993 and 1995, for which he received a company reprimand for the second incident. The most serious allegations made against Applicant involved his investigated actions about violating company work accountability policy, for which he was disciplined and suspended for three days without pay. These allegations are for the most part unsubstantiated upon further review of the proofs provided by Applicant. Judgment lapses associated with the covered incidents are unsubstantiated in part, isolated and mitigated by the passage of time without further incident. Clearance is granted.

STATEMENT OF THE CASE

On July 10, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on August 5, 2003, and requested a hearing. The case was assigned to me on November 17, 2003, and was scheduled for hearing on December 18, 2003. A hearing was convened on December 18, 2003, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of 5 exhibits; Applicant relied on three witnesses (including himself) and 10 exhibits. The transcript (R.T.) was received on January 2, 2004.

SUMMARY OF PLEADINGS

Under Guideline E, Applicant is alleged to have (a) attempted to use a bogus parking pass at his workplace in March 1995, (b) been caught with a counterfeit parking pass at his workplace in April 1998, for which he was given a reprimand and a 3-day suspension, and (c) received disciplinary action from his employer (two weeks off of work without pay) in July 2000 as the result of his being found to have violated company charging policy between January and February 2000.

For his answer to the SOR, Applicant admitted most of the allegations, but denied he violated company charging policy for which disciplinary action was taken against him by his employer.

FINDINGS OF FACT

Applicant is a 56-year-old senior engineering specialist for a defense contractor who seeks to retain a security clearance he has held since 1982. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Following his military service which included a tour of duty in Vietnam where he served as an assistant platoon leader over a helicopter medivac evacuation command, Applicant joined his current employer (in 1973). Upon his joining a subsidiary of his current company in 1973, he was assigned responsibility for developing a training center for training Iranian pilots. Applicant spent about nine years working for this subsidiary before transferring to the parent (in 1982). With his current employer he has concentrated on projects with his electronics warfare group. As a project engineer with this group he has consistently required a clearance.

In March 1995, Applicant was caught using a bogus parking pass at his work place. As a pilot he had always had a parking pass and continued using it after he was transferred to his company's engineering staff. The pass he possessed didn't permit parking in the particular lot he was used to parking in. So, he unilaterally assigned a phony permit number to it (using the old sequence of numbers used) and continued using his old pass (*compare ex. 5 with R.T., at 69, 122-23*). Applicant's recollection of his using his old expired pilot's pass confuses and mistakes similar actions in 1998. One morning as he was attempting to use the pass to enter the same parking lot he had continuously frequented, the parking guard confiscated it (R.T., at 69-70). No disciplinary action was taken against Applicant as the result of his continued use of the unsuitable parking pass.

In April 1998, Applicant was caught with a counterfeit parking pass at his workplace. He used a version of the same altered pass that was confiscated from him in 1995 to attempt to gain entrance to the lot outside his door (R.T., at 70-71). The same guard checking his parking pass in the past checked the counterfeit parking pass Applicant was attempting to use to enter a restricted parking lot. Applicant was impressed at the time with secretaries being able to park in this restricted lot, and figured he was just as entitled. When confronted by the guard he freely admitted his use of a counterfeit pass to gain entry to the restricted parking lot. Previously, he had never told his security manager he had made up a phony parking pass (R.T., at 123). Applicant was subsequently given a reprimand by his company, as well as a 3-day suspension without pay. Since accepting this reprimand, Applicant has never again tried to park in his company's executive parking lot.

Between 1995 and 1998, Applicant regularly received merit raises and promotions. Company time criteria emphasized the 40-hour work week. A company investigation was initiated against Applicant around July 2000, however, based on reports from another employee that he had mischarged his time from January 2000 through February 2000. According to a July 2000 security memo from his employer's security manager, Applicant and a colleague (Ms. A) overstated the hours they worked for the January 3 to February 28, 2000 period based on checked labor screens of Applicant's gate swipes with his badge, labor reports for the period, and failure to list any hours for the week of February 14 to account for a business trip he took with Ms. A (*see ex. 3*). In his interview with investigators, Applicant disputed suggestions he mischarged his labor hours and assured that he often worked more than the 40-hour work week. He also assured he had put in enough time during this time period under review to more than cover for any unaccounted for absences. He took issue with turnstile reports reflecting delayed returns on offsite trips and trips to other plants in the facility: He attributed discrepancies to his failures to wand in on his returns.

After comparing their few known inconsistencies with non-recorded turnstile data and comments from Applicant and

others covering the eight weeks under investigation, the company's investigation team could not conclude with any degree of accuracy how many hours either Applicant or Ms. A mischarged. However, the investigating team did note unaccounted absences from their facilities and recommended additional training for both Applicant and Ms. A on the subject of labor charging and the ramifications to them of improper charges. The investigating team also recommended further review of their investigation results (*see ex. 3*). Each of these recommendations were made without any tangible evidence in the record of affording Applicant the opportunity to confront the evidence gathered by the investigating team and respond to them appropriately.

As a result of the company's investigative findings both Ms. A and Applicant received disciplinary action for violating company labor charging procedures. Applicant's disciplinary action consisted of two weeks off work without pay. Unlike Applicant, Ms. A (who since left the company's employ and married Applicant in November 2000) was afforded an opportunity to demonstrate she worked at least 40 hours per week during the period of January and February 2000 (*see ex. I*). Some of the work she normally would do at the office she performed at home where she would experience fewer disruptions. Her supervisor credited her with working the required number of hours during the period in question.

After being notified of his disciplinary action and ensuing suspension, Applicant gathered up information that he believed would exonerate him, but was denied any opportunity to refute the drawn conclusions of the company's investigating team (*compare exs. E through H with R.T., at 74-75*). His September 2000 e-mail to his company supervisor outlining his points in defense was never responded to (*see exs. 2 and J; R.T., at 105*). His records, though, do support at least his questioned business trip on February 14 showing a hotel that matches the one in the company report, only by a different name (*R.T., at 83-84*). Other records produced by Applicant reflect his appearance at outside sites during the period in question; while others appear to cover the hourly gaps in work hours produced by the company investigation. The company's investigation report contains no verification data to document the company's investigators ever tried to verify Applicant's claimed offsite time. Company investigators appeared to have placed most of their drawn conclusions on the computer generated turnstile record (*ex. H*), which did not reflect the spread sheet data developed by Applicant three months later (*compare exs. G and H with R.T., at 89-94*). Applicant assures that never on any of the days questioned did he materially mischarge time. While there were days when he charged 8 hours for 9 and 9 hours for 8, he always tallied at least 40 hours in each of the weeks reviewed (*see exs. G, H and J; R.T., at 95, 105-06*).

From the testimony and documentary support supplied by Applicant, he persuades that he, too, worked at least 40 hours a week during the weeks in January and February 2000 under review. Applicant is highly regarded by his supervisors: They credit Applicant in his 2002 and 2003 performance reviews with solid performance achievements. Noted achievements include meeting goals, complying with laws and regulations, and reporting all labor changes truthfully (*see exs. C and D*).

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Personal Conduct

Basis: conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Disqualifying Conditions:

DC 1 Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances.

DC 5 A pattern of dishonesty or rule violations

Mitigating conditions:

MC 1 The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability.

MC 5 The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a

security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his

Government's case.

CONCLUSIONS

Applicant has a praiseworthy military and civilian record, but over the course of the past ten years has been involved in a series of incidents over misuse of company issued parking passes and mischarging of labor hours, for which he was disciplined by his employer in two of the incidents. These incidents raise security concerns over whether he possesses the requisite judgment, reliability and trustworthiness for eligibility to access classified information.

Over the course of a seven year period Applicant misused parking privileges extended by his employer by altering parking passes on two occasions (in 1995 and again in 1998) and more recently (January through February 2000) failed to clearly and accurately swipe his gate pass through the turnstiles so as to document his working the 40 hours a week for which he was being compensated for. Few of the determined inconsistencies in Applicant's time records for the period under investigation could be translated into net labor mischarges. Certain 8-hour time blocs could not be reconciled and were assumed to represent unaccounted for work hours by Applicant. Based on the reviewed turnstile records, non-recorded turnstile data, and comments developed by the company's investigators covering the eight weeks under investigation, the investigation team made the recommendations which served as the basis for taking disciplinary action against Applicant.

While Applicant's acknowledged parking pass abuses standing alone might not be material enough to raise security

concerns their consideration in conjunction with any judgment lapses associated with his deficient accounting of work hours during the January-February 2000 time frame creates a potential pattern of dishonesty and rule violations cognizable under DC 1 (pattern dishonesty and rule violations) of the Adjudicative Guidelines for personal conduct.

However, Applicant's characterized work mischarges remain in large part unsubstantiated. The data and records provided by Applicant in this proceeding support his working over 40 hours a week for each of the weeks covered in the investigation. This accepted premise enabled his counterpart (Ms. A) to win acknowledgment of compliance with the company's 40 hour-a-week policy. Applicant, too, by his testimony and records, probatively establishes actual off-site work venues visited on the days not fully accounted for in the company's turnstile records. His claims of working at least 40 hours in each of the weeks reviewed are accepted and enable Applicant to essentially refute much of the basis for his reprimand (using the company's criteria for exonerating Ms. A from any material breaches of company work policy). So, at least as to the allegations covered by sub-paragraph 1.c of the SOR, these allegations are mostly unsubstantiated. Those found inconsistencies in his work records that he is not able to fully reconcile with his own claims do not detract from his essential claim that he consistently performed at least 40 hours a week for his employer during the weeks under review. In this respect, he complies with a principal work policy of the company.

Except for isolated instances of mistaken judgment in exiting his facility without swiping his time card and fully documenting his whereabouts contemporaneously with his offsite and long distance trips, Applicant establishes a praiseworthy history for good judgment, reliability and trustworthiness in meeting his tasked mission requirements over a civilian career that spans over 30 years with his current employer. He is credited in his most recent performance evaluations with compliance with laws and regulations, and reporting all labor changes truthfully.

For the brief judgment lapses Applicant exhibited in misusing his company parking passes and failing to accurately document his work hours and whereabouts during the period under review he has expressed considerable remorse and commitments to avert such mistakes in the future. To date, he has consistently avoided any repeat judgment lapses. For his efforts, Applicant may invoke two mitigating conditions (MC) of the Adjudicative Guidelines for personal conduct: MC 1 (the information was unsubstantiated) and MC 5 (the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress).

With over three years now of reformed professional practices in his dealing with company rules and regulations (including parking passes and logging professional time), Applicant successfully overcomes adverse security concerns attributable to his past mistakes with company parking pass and charging policy. Favorable conclusions warrant with respect to the allegations covered by Guideline E.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE E (PERSONAL CONDUCT): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance.

Roger C. Wesley
Administrative Judge