

KEYWORD: Personal Conduct

DIGEST: Applicant is a forty-three year old male employed as a plant protection officer by a defense contractor. From 1985 until 2000, he served as a state correctional peace officer. In 1999, he was accused of unprofessional and unethical conduct. After comparing the transcript of a secretly taped conversation between Applicant and an inmate with Applicant's report on that same conversation, an internal affairs investigation proceeded. It found that Applicant intentionally had disclosed confidential information, filed reports containing false statements, introduced contraband into the institution, was involved in personal transactions with inmates, and refused to participate in the administrative inquiry. He has offered nothing to dispute or explain any pertinent facts other than to cite to his reliance on the advice of his counsel. Clearance is denied.

CASENO: 02-30561.h1

DATE: 03/21/2005

DATE: March 21, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-30561

DECISION OF ADMINISTRATIVE JUDGE

ARTHUR E. MARSHALL, JR.

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a forty-three year old male employed as a plant protection officer by a defense contractor. From 1985 until 2000, he served as a state correctional peace officer. In 1999, he was accused of unprofessional and unethical conduct. After comparing the transcript of a secretly taped conversation between Applicant and an inmate with Applicant's report on that same conversation, an internal affairs investigation proceeded. It found that Applicant intentionally had disclosed confidential information, filed reports containing false statements, introduced contraband into the institution, was involved in personal transactions with inmates, and refused to participate in the administrative inquiry. He has offered nothing to dispute or explain any pertinent facts other than to cite to his reliance on the advice of his counsel. Clearance is denied.

STATEMENT OF THE CASE

On July 27, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) detailing why, pursuant to Guideline E-Personal Conduct, it 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. Consequentially, DOHA recommended that the matter be referred to an Administrative Judge to determine whether a clearance should be granted.

In a written statement dated August 17, 2004, Applicant denied six of the SOR allegations and admitted, with explanation, two of the allegations. Additionally, Applicant requested an administrative determination based on the submissions. The Government's case was submitted on November 22, 2004, and a complete copy of the file of relevant material (FORM) [\(U\)](#) was provided to Applicant. Applicant was afforded the opportunity to file objections and submit evidence in refutation, extenuation, or mitigation. Applicant received a copy of the FORM on November 30, 2004, but did not submit any additional material. I received this case on January 31, 2005.

FINDINGS OF FACT

I have thoroughly reviewed the entire record and make the following additional findings of fact:

Applicant is a forty-three-year-old male who has been employed as a plant protection officer by a defense contractor since August 2000. His prior employment, from 1985 to 2000, was as a correctional peace officer for a state department of corrections. On advice of counsel, he resigned from that position following allegations of unprofessional and unethical conduct and an adverse internal affairs investigation.

The state department's office of internal affairs commenced its investigation on March 12, 1999, following its receipt of information from an inmate (Informant) regarding Applicant's conduct. The investigation was initially convened to determine the validity of the Informant's claims and to confirm whether Applicant had provided the Informant with contraband, falsified a confidential report, provided the Informant with confidential information which jeopardized the safety of both staff and inmates, and discern whether Applicant earlier had given the Informant information regarding suspected gang links that helped lead to the 1998 stabbing of another inmate (Inmate #3).

On or about April 2 and April 6, 1999, Applicant disclosed confidential information to an inmate. The Informant was interviewed and provided supporting evidence with regard to this disclosure. Specifically, he supported his claim that Applicant had given him a copy of a confidential report Applicant had written about Inmate #1 and which, in turn, the Informant had shared with other inmates. On March 25, 1999, the Informant was instructed to solicit from Applicant a different page from the same report on Inmate #1 that would indicate plans for assault on staff. After meeting with Applicant on April 3, 1999, the Informant emerged with a draft of the report in question and a handwritten note by the Applicant requesting that the Informant check the status of certain inmates with regard to possible gang affiliation.

The Informant met with Applicant on April 6, 1999, and secretly taped their conversation on a recorder provided by an investigator. Later that day, Applicant was asked to file a report detailing that conversation. Applicant's report failed to note pertinent information regarding outstanding threats to personal safety, Informant's comment regarding an incoming drug delivery, and discussion as to how to get some prison artwork out of the institution. It also contained much information not evidenced by the taped version of that conversation. The discrepancy between the taped conversation and Applicant's report was included in the internal affairs investigative report as but one of seven verified cases of Applicant reports containing false information. [\(2\)](#)

On April 7, 1999, Applicant's work space, vehicle, and residence were searched pursuant to a search warrant. That search produced more than twenty binders containing confidential reports and memoranda written by persons other than Applicant, "mug shots" of Inmate #3 with gang affiliation notations, and an original inkjet printout of the page of the

confidential report given to Informant, (3) as well as several items of prison generated artwork. (4)

On June 11, 1999, Applicant was interviewed by an internal affairs agent as part of an administrative inquiry. Applicant appeared with counsel. He was read his Federal Miranda Rights, as well as a state warning based on a legal ruling embracing the concept that a public employee has no absolute right to refuse to answer potentially incriminating questions posed by his employer. (5) As required, Applicant was advised that while he had the right to remain silent, his silence could be deemed insubordination, leading to administrative discipline, and any statement made under the threat of such discipline could not be used against him in any subsequent proceeding. On advice of counsel, Applicant refused to participate answering questions.

On September 16, 1999, an internal affairs investigation report was issued. Based on its investigation, it was found that: Applicant had intentionally disclosed confidential information to the Informant on April 2 and April 6, 1999; Applicant had intentionally disclosed confidential information to the Informant and Inmate #1 regarding Inmate #3 which jeopardized Inmate #3's safety; Applicant had filed seven reports containing false statements; Applicant was involved in personal transactions with inmates; Applicant routinely introduced contraband into the institution, and Applicant refused direct orders to answer questions during the administrative inquiry of June 11, 1999. All such findings were made using a "preponderance of the evidence" standard. One other finding was not sustained for lack of sufficient evidence.

On June 24, 2002, Applicant made a statement to a special agent of the Defense Security Service in which he generally denied disclosing confidential information, and explained that although prison art and inmate files were found during the search of his premises, that he had received permission to remove such files in order to prepare his own reports. Applicant admitted that he "often and frequently mislead prisoners with false information, as this method was often productive in terms of gaining information from them, or simply to keep them 'off balance.'" (6)

On or about October 9, 2003, a complaint under the Civil Rights Act was initiated against Applicant by Inmate #3, alleging that Applicant had knowledge of pending harm against Inmate #3 and that Applicant disregarded the risk to Inmate #3's life until Inmate #3 was stabbed in June 1998. On Applicant's motion in 2004, that action was dismissed without prejudice for a failure to exhaust administrative remedies.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, these adjudicative guidelines are subdivided into those that may be considered in deciding whether to deny or revoke one's eligibility for access to classified

information (Disqualifying Conditions) and those that may be considered in deciding whether to determine one could still be eligible for access to classified information (Mitigating Conditions).

In application, an Administrative Judge is not strictly bound to the adjudicative guidelines. As guidelines, they are but part of an amalgam of elements for the Administrative Judge to consider in assessing an applicant in light of the circumstances giving rise to the SOR, as well as in assessing the applicant as a whole. The concept of the "whole person"⁽⁷⁾ means that all available, reliable information about the person - whether it is good or bad, present or past - should be considered in making a fair, impartial, and meaningful decision as to his or her suitability to hold a security clearance. To that end, Enclosure 2 also sets forth factors to be considered during this part of the adjudicative process, including: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Guideline E-Personal Conduct: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.⁽⁸⁾

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to this adjudicative guideline are set forth and discussed in the Conclusions section below.

After a full and thorough examination, however, the final assessment must comport with the considerable gravity of the final decision. There is no right to a security clearance⁽⁹⁾ and one seeking access to classified information must be prepared to enter into a fiduciary relationship with the United States Government that is inherently predicated on trust and confidence. Therefore, when the facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has the heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. Moreover, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾

Finally, Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance 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." Therefore, nothing in this

Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all legal precepts, factors, and conditions, including those described briefly above, I find the following with respect to the allegations set forth in the SOR:

With respect to Guideline E, the Government has established its case. The Informant's testimony and the secret taping of their conversation demonstrate that Applicant discussed or confirmed confidential information and submitted a false and misleading document. The facts also indicate other disclosures and falsified reports. Furthermore, a subsequent search revealed that he had possession of numerous confidential files, evidence corroborating the origin of a page of a confidential report that Informant claimed he had received from Applicant, and prison art, the origin of which has not been otherwise explained.

Taken as a whole, such conduct raises serious issues regarding Applicant's judgment, as well as his trustworthiness, candor, and honesty. Under Guideline E, a Personal Conduct Disqualifying Condition (PC DC) may be raised in the presence of *(p)ersonal conduct or concealment of information that increase an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*, pursuant to PC DC E2.A5.1.2.4., and when there appears to be *"(a) pattern of dishonesty or rule violations,"* as set forth at PC DC E2.A5.1.2.5.

Applicant admits two of the allegations set forth in the SOR, but states in mitigation that his actions were based on advice of counsel. The fact that he resigned from his employment with the state corrections department months after the conclusion of the internal affairs investigation does not raise a disqualifying condition. Therefore, I find for Applicant with regard to the SOR allegation at subparagraph 1.a. Similarly, his refusal to answer, on advice of counsel, questions about the performance of his duties during an administrative inquiry does not necessarily rise to the level of disqualification; under state law, he retained his rights, under Miranda, to not incriminate himself, and, under state law, did so with the understanding that his silence could be deemed insubordination leading to administrative discipline. While I cannot state this does much to endorse his candor, it was certainly within his right. Therefore, I find for Applicant with regard to the SOR allegation at subparagraph 1.g.

Finally, although his response is termed as a denial, Applicant provides evidence that the formerly pending Civil Rights action against him was dismissed. That action has little bearing on the instant matter and does not raise a disqualifying condition. I, therefore, additionally find subparagraph 1.h. for Applicant.

Applicant, however, bears the ultimate burden of proving that it is clearly consistent with the national interest to grant him a security clearance. It is his obligation to come forward with evidence in rebuttal, explanation, or mitigation sufficient to overcome the Government's case. He has chosen, however, to only enter blanket denials with regard to the remaining allegations in the SOR.

Many of the facts alleged boil down to a "he says/he says" scenario, but much is substantiated. In particular, the comparison between Applicant's report on his conversation with the Informant and the transcript of that secretly recorded conversation demonstrate solid substantiation with regard to raising questions as to Applicant's trustworthiness and reliability. Similarly, evidence found during the search warrant corroborates the genesis of the confidential disclosure Informant first brought to the attention of prison authorities and bolsters the inference that Applicant had improperly conducted transactions with inmates. Finally, some of the statements from the Informant and Inmate #3 regarding Applicant's actions corroborate each other.⁽¹¹⁾ As such, mitigation cannot be found under Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.1. (*The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability*).

The activities and reports involved occurred between 1997 and 1999. Therefore, the conduct does not demonstrate recent activity. At the same time, however, those activities and reports are clearly multiple in number and there is no indication that the falsifications were ever corrected, supplemented or explained in an appropriate manner. Therefore, PC MC E2.A5.1.3.2. (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*), PC MC E2.A5.1.3.3. (*The individual made prompt, good faith efforts to correct the falsification before being confronted with the facts*) and PC MC E2.A5.1.3.4. (*Omission of material facts was caused or significantly contributed to by improper or inadequate advice of unauthorized personnel, and the previously omitted information was promptly and fully provided*) are inapplicable.

Because Applicant's refusal to cooperate on the advice of counsel was not as part of a security process, but during an internal affairs administrative inquiry, there is no application of PC MC E2.A5.1.3.5. (*A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information*).

The fact that Applicant no longer works as a corrections officer - a position in which he often and frequently mislead prisoners with false information" in order to gain information or keep them "off balance"⁽¹²⁾ - may do much with regard to his conduct and practices. It is hard to imagine such manipulation, practiced to this degree, would not quickly lead to reprisal, exploitation, or legal action in any other supervisory environment. Standing by itself and without additional evidence or explanation, and in light of the facts before me, however, I do not find that his resignation gives rise to PC MC E2.A5.1.3.4. (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*) or necessarily forms a basis to find application of PC C E2.A5.1.3.7. (*Association with persons involved in criminal activities has ceased*).

I have considered the whole person concept with relation to Applicant. He is a mature man with 15 creditable years of service with his state's department of corrections. The evidence introduced indicates that the brunt of the negative factors giving rise to, or emerging during the process of, the internal affairs investigation, occurred during his final two of those years. During that employment, he resorted to practices of a dubious nature. While this may be accepted practice with regard to inmates and prison supervision - and television would certainly prepare one to think so - I do not believe that it is accepted practice to divulge confidential information to prisoners, withhold information from or falsify documents to one's institutional chain of command, or decline to offer exculpatory or explanatory insight into matters concerning issues of safety and security.

At best, the un rebutted evidence portrays Applicant as having questionable judgment, candor, reliability, trustworthiness, and/or an unwillingness to comply with rules. At worst, it demonstrates a lack of honesty. Regardless, I am unpersuaded that Applicant presently demonstrates the degree of trust and confidence so inherent to the fiduciary relationship that arises upon the granting of a security clearance. Given the un rebutted evidence on the record, I find that reason exists to believe that Applicant is at risk for mishandling classified information and that he does not demonstrate the high degree of judgment, reliability or trustworthiness required of those to whom the Government would grant access to classified information.⁽¹³⁾ Accordingly, I find against Applicant as to SOR subparagraphs 1.b. through 1.f. Clearance is denied.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.2.5 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline E AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.g.: For the Applicant

Subparagraph 1.h.: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly not consistent with the national interest to grant or continue a security clearance for Appellant. Clearance is denied.

Arthur E. Marshall, Jr.

Administrative Judge

1. ⁰ The government submitted 8 items in support of its case.
2. Exhibit 6 (Internal Affairs Investigative Report, dated September 16, 1999), at 40-42.
3. *Id.*, at 13.
4. *Id.*, at 42.
5. Under that ruling, self-incrimination rights are deemed adequately protected by precluding any use of such statements at a subsequent criminal proceeding.
6. Exhibit 5 (Applicant Statement of June 24, 2002), at 2.
7. ⁰ Directive, at 2-1.
8. ⁰ Directive, Enclosure 2, Attachment 5, Guideline E, ¶ E2.A5.1.1.
9. ⁰ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
10. ⁰ *Id.*, at 531
11. *Id.*, footnote 2, *supra*, at 34-37, 39.
12. *Id.*, footnote 5, *supra*.
13. *See, e.g.*, . ISCR Case No. 97-0314 (5/19/98).