

DATE: September 22, 2004

In Re:

Applicant for Security Clearance

ISCR Case No. 03-20103

ECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 35-year-old engineer was terminated by three employers between June 2001 and December 9, 2002 for failing to conform to written company policies and work requirements. In addition, he lied about his educational achievements in a resume submitted to obtain one of the jobs, and he also failed to report two of the terminations on his security clearance application. No mitigation has been established. Clearance is denied.

STATEMENT OF THE CASE

On March 15, 2004, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On March 24, 2004, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing by a DOHA Administrative Judge. The matter was assigned to me for resolution on April 7, 2004. A Notice of Hearing was issued on May 27, 2004, and the hearing was conducted on June 8, 2004. At the hearing, the Government did not call any witnesses but submitted six documents, which were marked for identification as Government's Exhibits (GX) 1 - 6. Applicant testified, called one witness, and offered three exhibits, which were marked as Applicant's Exhibit (AX) A - C. A fourth, post-hearing exhibit, AX D, was timely received. The transcript was received at DOHA on June 17, 2004.

FINDINGS OF FACT

Applicant is a 39-year-old engineer for a defense contractor who is seeking a security clearance for Applicant in connection with his employment. The SOR contains five allegations under Guideline E (Personal Conduct). In his response to the SOR, Applicant denies several of the allegations and explains others, without stating whether he is admitting or denying them. In this context, I am unable to find that Applicant has expressly admitted any allegations. I

therefore consider all answers as denials.

After considering the totality of the evidence in the case file, I make the following additional FINDINGS OF FACT as to the status, past and present, of each SOR allegation:

Guideline E (Personal Conduct)

As alleged in the March 15, 2004 SOR:

1.a. - Applicant's employment with Corporation A was terminated on or about December 9, 2002, because his employer concluded he had violated their Code of Business Ethics and Conduct Policy. Applicant had been a paid employee of a company that was his employer's competitor at the same time. In addition, records supplied by Applicant show that in August 2002, while still employed by Corporation A, he had signed a contract with three other individuals to start their own company (AX D at pages 2 - 6).

Applicant also attended a "new employee orientation" program at his present employer on December 9, 2002, while he was still employed by Corporation A, causing "a violation of [Corporation A's] Corporation Code of Business Ethics" (AX D at page 26).

1.b. - Applicant's employment with Corporation B was terminated on or about March 13, 2002, because the company had concluded that Applicant had violated the company's Non-Disclosure Agreement by compromising proprietary information and providing it to a competitor.

1.c. - Applicant's employment with Corporation C was terminated in June 2001, because the company concluded that Applicant had not met his deadlines.

1.d. - Applicant falsified material and relevant facts on a resume submitted by him to Corporation B, above, on January 10, 2003, when he stated he had received a Master's of Science degree from University X in 1993, when he knew and sought to conceal that he had never received a Masters of Science degree or even attended University X. He received a "BS in Electrical Engineering" from University Y in 1987 (GX 1 at question 5). He later admitted to an agent of the Defense Security Service (DSS) that he had not attended University X (AX D at page 1)

1.e. - Applicant falsified material facts on a security clearance application (SF 86), dated January 10, 2003 (GX 1) when, in response to Question 20 - Your Employment Record, "Has any of the following happened to you I the past ten years? - Fired from a job - Quit a job after being told you'd be fired - Left a job by mutual agreement following allegations of misconduct - Left a job by mutual agreement following allegations of unsatisfactory job performance - Left a job for other reason under unfavorable circumstances," Applicant listed only an employment termination from Corporation A, in 1.a., above. He omitted mention of the terminations in 1.b. and 1.c., although those terminations also resulted from misconduct and/or violations as set forth in those allegations.

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing 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 for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable financial judgment and conduct.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private life or connected to work, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

A person seeking access to classified information enters into a fiduciary relationship with the

Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended,

at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Guideline E (Personal Conduct) - The concerns expressed in the Directive's guidelines for personal conduct are essentially that personal misconduct may raise questions about the judgment, reliability, and trustworthiness of someone seeking access to the nation's secrets.

According to his SF 86 of January 10, 2003, Applicant has been employed by Corporation D since December 12, 2002. Before that he worked for Corporation C from 10/22/2002 to 12/09/2002; before that he worked for another company from 03/03/2002 to 10/22/2002; before that he worked for Corporation B from 01/15/2001 to 03/03/2002; and before that he worked for Corporation C from 03/28/2000 to 03/01/2001 (GX 1 at question 6).

1.a. - Applicant's explanation for his termination from Corporation A is that there was a "conflict of interest" (GX 2). The records showing the Company's concerns (GX 6) support the SOR allegations. Neither his response at the time (GX 6 at page 1) nor his hearing testimony documents or supports his version of what happened at the company leading up to his termination.

1.b. - Corporations B's business records show Applicant filing of his W-9 (Tax Form) on February 21, 2001; his signing of a Non-Disclosure Form on August 13, 2001, and his termination on March 13, 2002. The attached documents indicate that Applicant was seeking to begin a new business, even while still employed by Corporation B, using proprietary information to help him attract some of Corporation B's customers for his new business (GX 5). A letter from Corporation B's lawyers, dated *January 31, 2003*, advised Applicant that information had been received indicating that Applicant was continuing to seek to attract Corporation B's customers using proprietary information as an attraction. The letter also advises Applicant that this practice remains a violation of his Non-Disclosure Agreement.

In his post hearing submission, Applicant again denies that he violated the Non-Disclosure Agreement and gives a reason he hadn't expressed before (AX D at page 27). In context, the company's records are much more compelling as evidence. I conclude that it is much more likely than not that Applicant did substantially what the company records and SOR 1.b. allege that he did.

1.c. - The employer's extensive description of Applicant's problems as an employee of Corporation C from January to June 2001 are both detailed and explicit (GX 4). The number and positions of the people who either complained about him or who noted Applicant's problematic conduct is significant and is both internally and externally consistent.

In addition, I conclude that the company was being generous in its official rationale for his termination; i.e., that he did not meet company deadlines. His written explanations and testimony do not come anywhere near refuting the adverse evidence established by the overall record.

1.d. - Applicant's resume (GX 3), as submitted to Corporation B (sometime in the first half of 2001), listed the following under education:

1991 to 1993 - College of Engineering at University X - Recipient of Master of Science degree in Electrical Engineering with emphasis in communications systems. College career GPA [taken in context to mean grade point average] of 3.1 out of 4.0.

1988 to 1991 - College of Engineering and Applied Science at University Y - Recipient of B.S. in Electrical Engineering with emphasis in communications systems and computers. College career GPA of 3.3.out of 4.0

1983 to 1987 - College of Arts and Sciences - Computer Science at University of Z. Recipient of B.S. in Computer Science. Cumulative GPA of 3.5. on a 4.0 scale.

In his SF 86 of January 10, 2003 (GX 1), Applicant list under Item 5 (Education in last ten years, i.e., back as far as January 1993) only the B.S. degree he earned from University Y from 1987 to 1991. In other words, he mentioned only the degree that he was not require to report. His explanation for the omission of the degrees he claims he received before and after the one from University Y is troubling. During his interview with the agent from the Defense Security Service (DSS), Applicant admitted he had not attended University X. In his post hearing submission (AX D at page 28, 29), Applicant concedes that the claim is erroneous and should not have been in the resume he submitted to Corporation B.

His only defense is that it was a mistake and he does not know how it got into his resume or why he didn't notice it earlier (Id.). After considering the above and his hearing testimony, I conclude his explanations lack credibility. An analysis of the education claims suggests deliberation and continuity, e.g., the changes in the GPA claimed and a lack of any explanation as to who could have done it and why. In context, I conclude it was more likely than not an attempt by Applicant to get what he wanted at the time, regardless of the truth.

Applicant is clearly a highly intelligent person, but he has caused many of his own problems. He appears to have problems working for and taking orders from someone else and in dealing with customers and employees. Applicant's excuses for all of the proven conduct suggest character flaws, including an inability to accept his own shortcomings and a mental state of denial. As he seems to see what happed on each occasion, he was always misunderstood or unfairly treated, but there is no support for such a belief in the overall record.

I have carefully considered all of the evidence of record, including Applicant's various explanations for his conduct and the problems leading to his employment difficulties. The following Disqualifying Conditions (DC) are applicable: DC 1 - reliable unfavorable information provided by associates, . . . neighbors, and other acquaintances; DC 2 - the deliberate omission, concealment, or falsification of relevant and material information from any personnel security questionnaire; and DC 5 - a pattern of dishonesty or rule violations. The record does not establish that any of the parallel Mitigating Conditions (MC) are applicable, particularly since the falsifications are still "recent" (MC 2), and the correct information was provided only after being confronted by the DSS agent (MC 3).

I have considered Applicant's statements and all other evidence. The nature and scope of Applicant's business related misconduct is unusual but significant. He has shown a pattern of being unable or unwilling to follow his past employers'

business rules and regulations. While his present employer is free to accept him as he is, DoD does not have that luxury. Holding a security clearance is a privilege and anyone seeking access to the nation's secrets must conform to DoD requirements. In this context, the record compels the conclusion that too much personal misconduct has occurred over too long a period of time and too recently to allow a finding of current eligibility. Viewing the totality of the evidence, I cannot conclude Applicant has demonstrated the integrity, good judgment, reliability, and trustworthiness required of anyone seeking access to the nation's secrets.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline E (Personal Conduct) Against the Applicant

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

DECISION

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

Barry M. Sax

Administrative Judge