

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant, an employee of a federal contractor, was unable to mitigate the personal conduct and criminal conduct security concerns based on his false answers on two security clearance questionnaires/applications, a false answer to a DSS agent on the sworn statement arising from that interview, and the underlying violations of 18 United States Code § 1001. Clearance is denied

CASENO: 03-07906.h1

DATE: 01/30/2006

DATE: January 30, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-07906

**DECISION OF ADMINISTRATIVE JUDGE**

**CHRISTOPHER GRAHAM**

**APPEARANCES**

**FOR GOVERNMENT**

Ray T. Blank, Esq., Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant, an employee of a federal contractor, was unable to mitigate the personal conduct and criminal conduct security concerns based on his false answers on two security clearance questionnaires/applications, a false answer to a DSS agent on the sworn statement arising from that interview, and the underlying violations of 18 United States Code § 1001. Clearance is denied.

### **STATEMENT OF THE CASE**

On December 30, 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) to Applicant. The SOR alleged facts under Guidelines E (personal conduct) and J (criminal conduct) detailing 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 Applicant's security clearance.

In a written statement, dated January 31, 2005, Applicant responded to the allegations in the SOR, and requested a hearing. The case was assigned to me on April 4, 2005. Notice of the hearing was issued May 4, 2005, scheduling the hearing for May 25, 2005. The hearing was held as scheduled. The transcript was received June 3, 2005.

### **FINDINGS OF FACT**

Applicant denied the allegations in the SOR that he falsely answered questions on a security clearance application in 2002, a security clearance questionnaire in 1997, a sworn statement in 2002, and that he committed felony offenses by making these false statements. After a thorough review of the record as a whole, I make the following additional findings of fact:

Applicant is a married, 32-year-old employee of a federal contractor.<sup>(1)</sup> He and his wife have three children.<sup>(2)</sup> Beginning in November 1991, through December 17, 2001, Applicant held 13 different jobs.<sup>(3)</sup> He had applied for a security clearance in 1998, but terminated the employment and the clearance was never granted.<sup>(4)</sup> Since December 18, 2001, he has been employed by a contractor working with information technology.<sup>(5)</sup> On two security clearance questionnaires/applications (SF 86), questions 22 and 20 respectively, he was asked,

**"YOUR EMPLOYMENT RECORD** Has any of the following happened to you **in the last 7 years?** If 'Yes,' begin with the most recent occurrence and go backward, providing the date fired, quit, or left, and other information requested. Use the following codes and explain the reason your employment was ended: 1 - Fired from a job 2 - Quit a job after being told you'd be fired 3 - Left a job by mutual agreement following allegations of misconduct 4 - Left a job by mutual agreement following allegations of unsatisfactory performance 5 - Left a job for other reasons under unfavorable circumstances."

Applicant answered "No" on the 1997 SF 86 when in fact he quit a job in November 1994, after receiving a seven-day letter of poor performance<sup>(6)</sup>, and he was fired from a job in March 1995, because he changed his work schedule without authorization.<sup>(7)</sup> On the 2002 SF 86, he omitted the 1995 termination and also failed to mention termination from a law firm.<sup>(8)</sup> He did list a February 1998 job termination.<sup>(9)</sup> The law firm did provide clarification as to the mutual agreement for Applicant to leave employment.<sup>(10)</sup> He was placed on probation by the law firm because of tardiness to work, excessive absences, and poor performance.<sup>(11)</sup>

Applicant also made a false statement to a DSS investigator and signed a sworn statement making a material omission because he failed to mention his termination from the law firm to the investigator and in his sworn statement.<sup>(12)</sup>

Applicant has not been charged with any violations pursuant to 18 United States Code §1001.<sup>(13)</sup>

## POLICIES

"[No] one has a 'right' to a security clearance."<sup>(14)</sup> 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

occupy a position that will give that person access to such information."<sup>(15)</sup> The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential coercion, and willingness and ability to abide by regulations governing use, handling, and protection of classified information."<sup>(16)</sup> Eligibility for a security clearance may be adjudicated using the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative factors listed in ¶ 6.3 of the Directive: nature and seriousness of the conduct and surrounding circumstances; frequency and recency of the conduct; age of the Applicant; motivation of the applicant, and the extent to which the conduct was negligent, wilful, voluntary, or undertaken with knowledge of the consequences involved; absence or presence of rehabilitation; and probability that the circumstances or conduct will continue or recur in the future.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information.<sup>(17)</sup> The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability.<sup>(18)</sup>

Once the Government establishes a disqualifying condition, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.<sup>(19)</sup> An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."<sup>(20)</sup> A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. The Government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or his own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the Government.<sup>(21)</sup> Decisions under this Directive include, by necessity, consideration of the possible risk an 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, not actual, risk of compromise of classified information.

Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security 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." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism.

Having considered the evidence as a whole, I find the following guidelines most pertinent to an evaluation of the facts of this case: Guideline E: *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, and Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.*

## CONCLUSIONS

**Personal Conduct.** Under Guideline E, a security concern arises where it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information. Personal Conduct Disqualifying Conditions (PC DC) include PC DC 2, E2.A5.1.2.2. *The deliberate omission, concealment, or falsification of relevant material 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;* and PC DC 3, E2. A5.1.2.3. *Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.*

Here, the government questions Applicant's trustworthiness because it appears he has deliberately omitted from two SF 86s adverse employment terminations (SOR 1.a (1)(2)) and 1.b (1)(2)). The government also alleges Applicant deliberately made false statements during a DSS interview and in a signed, sworn statement attendant to that interview. (SOR 1.c). Through Applicant's Answer, his testimony at hearing, and eight documentary exhibits, the government has established a *prima facie* case for disqualification under Guideline E. At hearing, Applicant claimed his answers were false because he did not remember. Poor memory is not a reasonable excuse. The dates of the ending employment were within the seven prior years. In the 1997 SF 86, for example, it is within about two to three years. Termination from or leaving a job under unfavorable circumstances is not something that a person is likely to forget. Poor past performance is a material factor in determining an individual's reliability for employment and trustworthiness for a security clearance. I find to be willful the failure to list these events in his responses. He did not present sufficient evidence to support any of the Guideline E mitigating conditions. Accordingly, I conclude the SOR allegations under Guideline E against the Applicant.

**Criminal Conduct.** The security concern under Guideline J (criminal conduct) is that someone who willingly disregards the law may also disregard rules and procedures intended to safeguard classified information. Applicant's deliberate falsification of his SF 86 and his false statements to DSS constitute violations of 18 U.S.C. §1001. Because the government has established Applicant intended to deceive or mislead the government, it has also established a *prima facie* case for disqualification for criminal conduct. Guideline J, CC DC 1, E2.A10.1.2.1. *Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.* Applicant has not presented information sufficient to support application of any of the listed mitigating conditions. The conduct was recent in that it is part of the current investigation and adjudication of Applicant's request for clearance; each falsification was a separate criminal act, so his criminal conduct cannot be deemed isolated; and Applicant did not engage in the conduct in question unwillingly or under duress. Lastly, Applicant's continued use of the "I forgot" excuse does not suffice to show clear evidence of rehabilitation. On balance, I conclude Guideline J against the Applicant.

I have carefully weighed all of the available evidence, and I have applied the appropriate disqualifying and mitigating conditions. Further, I have tried to make a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. This record raises reasonable and persistent doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Absent substantial information to mitigate these doubts, which Applicant failed to provide, I cannot conclude he has overcome the government's case.

## **FORMAL FINDINGS**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by E3.1.25 of Enclosure 3 of the Directive, are:

### **Paragraph 1. Guideline B: AGAINST THE APPLICANT**

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

### **Paragraph 2. Guideline J: AGAINST THE APPLICANT**

Subparagraph 1.a. 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 Applicant's security clearance. Clearance is denied.

**Christopher Graham**

**Administrative Judge**

1. Government Exhibit 1 (Standard Form 86 (SF 86) *Security Clearance Application*, signed February 25, 2002) at 1, 6.
2. *Id.* at 7; Tr. at 44; Government Exhibit 4 (*Applicant's Sworn Statement dated August 12, 2002,*) at 2.
3. *Id.* at 2-5.
4. Government Exhibit 1, *supra*, at 11.
5. *Id.* at 3.
6. Tr. at 31-32.
7. Tr. at 34.
8. Tr. at 34, 41-47.
9. Tr. at 38-41.
10. Applicant's Exhibits A and B, (*Letters from a Law Firm* dated January 25, 2005 and April 19, 2005.)
11. Tr. at 42-44.
12. Government Exhibit 4 (*Sworn Statement* dated August 12, 2002) at 2.
13. Tr. 1-67.
14. See *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1998).
15. *Id.* at 527.
16. Exec. Or. 12968, *Access to Classified Information*, § 3.1(b) (Aug. 4, 1995).
17. *Egan, supra*, at 531.
18. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).
19. See ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

20. *Id.*, at 3.

21. *See Egan*; Directive ¶ E2.2.2.