

KEYWORD: Personal Conduct

DIGEST: Security concerns persist over personal conduct of Applicant, who has a history of nine separate employment terminations or departures under unfavorable circumstances between July 1995 and June 2002. He has not mitigated concerns over his reliability, trustworthiness, and willingness to comply with rules and regulations. Clearance is denied.

CASENO: 04-01986.h1

DATE: 05/11/2005

DATE: May 11, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-01986

DECISION OF ADMINISTRATIVE JUDGE

CHRISTOPHER GRAHAM

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Security concerns persist over personal conduct of Applicant, who has a history of nine separate employment terminations or departures under unfavorable circumstances between July 1995 and June 2002. He has not mitigated concerns over his reliability, trustworthiness, and willingness to comply with rules and regulations. Clearance is denied.

STATEMENT OF THE CASE

On August 3, 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 Guideline E (personal conduct) 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 Applicant's security clearance, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied or revoked.

In a sworn written statement, dated August 23, 2004, Applicant responded to the allegations in the SOR. Department Counsel submitted a file of relevant material (FORM) in support of the Government's preliminary decision, a copy of which was received by Applicant on January 24, 2005. Applicant was afforded the opportunity to file objections and submit material in refutation, extenuation, or mitigation by February 23, 2005. Applicant submitted a response to the FORM on March 15, 2005. By memorandum dated April 4, 2005, Department Counsel did not object to the materials Applicant submitted. The case was assigned to me on April 7, 2005.

FINDINGS OF FACT

Applicant has admitted to the SOR allegations in subparagraphs 1.d. and 1.i. pertaining to personal conduct under Guideline E (subparagraphs 1.a. through 1.i.). Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact:

Applicant is a married 52-year-old employee of a federal contractor seeking to obtain a security clearance.⁽¹⁾ He was employed by this contractor in July 2001.⁽²⁾ He is a retired 20-year veteran with an 80% service connected disability rating.⁽³⁾ Applicant had nine job terminations or resignations from July 1995 to June 2002.

Findings of fact with respect to each SOR allegation are set out in table format as follows:

SOR ¶	Findings of Fact for Each Allegation
1.a.	Applicant was terminated for sleeping on the job. ⁽⁴⁾
1.b.	Applicant was terminated for substandard performance of duties. ⁽⁵⁾
1.c.	Applicant was terminated due to inability to perform the job, which was a result of Applicant's 80% service connected disability. ⁽⁶⁾
1.d.	Applicant was terminated for grossly inefficient job performance, as he hit a parked car damaging his employer's property. ⁽⁷⁾ Further, Applicant admitted this allegation. ⁽⁸⁾
1.e.	Applicant resigned as part of a settlement agreement. Therefore, there are no adverse conclusions associated with his resignation as the record is devoid of negative facts against Applicant. ⁽⁹⁾
1.f.	There is no evidence associating Applicant with the employer mentioned in this subparagraph, and therefore, no evidence of termination due to poor attendance. ⁽¹⁰⁾
1.g.	Applicant was terminated for negligently damaging a company vehicle. ⁽¹¹⁾ There is some evidence of an attempt by Applicant to cover up the incident. ⁽¹²⁾
1.h.	There is no evidence indicating any adverse information about Applicant. His leaving employment due to inability to work when needed is attributable to his disability. ⁽¹³⁾
1.i.	Applicant received a written warning giving him one last opportunity to comply with work attendance and punctuality rules. Continued violations of these policies resulted in termination. ⁽¹⁴⁾ Applicant admitted this allegation. ⁽¹⁵⁾

In examining Attachments A - I to Applicant's Answer, Applicant frequently points out what he believes to be

deficiencies in other personnel/managers or in company policies. He argues he has been discriminated against because of his disability. What other employees may or may not have done is not a persuasive defense. The facts demonstrate that Applicant did not comply with company policies of 5 of 9 employers. He caused damage to company property by careless driving at 2 different employers. In the first instance, he was patrolling a perimeter fence, received a call to return to the office, made a sharp turn causing an open soda can and weapons which were on the seat beside him to start sliding onto the floor. He let go of the wheel to grab the weapons and can causing the car to hit three parked cars. His employer categorized it as "grossly inefficient job performance."⁽¹⁶⁾ In the other, he hit a fence post which he did not report, and there were allegations of missing government property (the fence post) and some circumstantial evidence of an attempt to cover up the accident. However, this is rendered moot as Applicant admitted the accident.⁽¹⁷⁾

POLICIES

"[No] one has a 'right' to a security clearance."⁽¹⁸⁾ 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."⁽¹⁹⁾ 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."⁽²⁰⁾ 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.⁽²¹⁾ 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.⁽²²⁾

Once the Government establishes a disqualifying condition, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.⁽²³⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."⁽²⁴⁾ 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. ⁽²⁵⁾ 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 degree of legally permissible calculation as to potential, rather than 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 SOR allegations and having reviewed the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are those conditions listed under Guideline E (personal conduct) (PC), Directive, ¶ E2.A5.1.1. *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.*

CONCLUSIONS

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

The Government has established its case under Guideline E. Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.5. *A pattern of dishonesty or rule violations including violation of any written or recorded agreement made between the individual and the agency*). Applicant's job terminations involved violations of attendance policies, or reporting procedures, or in one instance, an attempt to cover up an accident. His rebuttal evidence tended to cast fault with other employees or with company policies, rather than taking responsibility for his own failures to follow company policies. What another employee may or may not have done does not mitigate or absolve Applicant from his responsibility to follow his employers' rules and policies. For those allegations that I have concluded against Applicant, my reasons relate to his negligent conduct or failure to follow rules, and further conclude that they were not as a result of his disability. Those employers had established rules that required an employee to call in if he/she was going to be late. Working security, especially in penal institutions, requires that employees be on the job at the appointed time. If an employee is habitually late to work, it creates a major staffing problem for that institution. The accidents speak for themselves.

I conclude there are no mitigating conditions that are applicable. Applicant has a pattern of adverse personnel actions with numerous employers which raise concerns about his trustworthiness, unwillingness or inability to follow rules, and judgment.

Because there was no substantial evidence in the record or because inability to perform a job was due to Applicant's disability, I conclude SOR allegations 1.c., e., f., and h. for the Applicant. I conclude SOR allegations 1.a., b., d., g., and i. against the Applicant.

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 E: AGAINST THE APPLICANT

Subparagraphs 1a. Against the Applicant

Subparagraphs 1b. Against the Applicant

Subparagraphs 1c. For the Applicant

Subparagraphs 1d. Against the Applicant

Subparagraphs 1e. For the Applicant

Subparagraphs 1f. For the Applicant

Subparagraphs 1g. Against the Applicant

Subparagraphs 1h. For the Applicant

Subparagraphs 1i. 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. Item 4 (*Applicant's Application for National Security Clearance SF86 July 24, 2001*) at 1 and 4; Item 5 (*Applicant's Application for National Security Clearance SF86 September 25, 1995*) at 1 and 2.
2. *Id.* at 2.
3. Item 3 (*Applicant's Answer to the SOR, dated August 23, 2004*) at 2.
 4. Item 3, *supra*, Attachment A, at 1-3.
 5. Item 3, *supra*, Attachment B, at 1-4.
 6. Item 3, *supra*, Attachment C, at 1-8.
7. Item 3, *supra*, Attachment D, at 1-11; Item 6 (*Documents relating to Applicant's termination from the North Carolina Department of Corrections dated August 19, 1999*) at 1-21.
 8. Item 3, *supra*, Attachment D, at 1.
 9. Item 3, *supra*, Attachment E, at 1-6.
 10. Item 3, *supra*, Attachment F, at 1-2.
11. Item 3, *supra*, Attachment G, at 1-7; Item 7 (*Documents relating to Applicant's employment at Triple P Services, dated March 15, 1996*) at 1-29.
 12. Item 7, *supra*, at 19 and 23..
 13. Item 3, *supra*, Attachment H, at 1-4.
 14. Item 3, *supra*, Attachment I, at 3.
 15. Item 3, *supra*, Attachment I, at 1.
16. Item 6 (*Documents relating to Applicant's Termination from Employment dated August 19, 1999*) at 1-2.
17. Item 3, *supra*, Attachment G, at 2.

18. See *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1998).

19. *Id.*, at 527.

20. Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995).

21. *Egan*, *supra*, at 531.

22. See *ISCR Case No. 95-0611* at 2 (App. Bd. May 2, 1996).

23. See *ISCR Case No. 01-20700* at 3 (App. Bd. Dec. 19, 2002).

24. *Id.*, at 3.

25. See *Egan*; Directive ¶ E2.2.2.