

KEYWORD: Personal Conduct

DIGEST: Over a period of six months, Applicant falsified his pay records in order to receive overtime to which he was not entitled based on company policy. Appellant's conduct raised questions about his integrity and he has failed to provide sufficient evidence to mitigate the personal conduct concern. Clearance is denied.

CASENO: 05-02823.h1

DATE: 02/22/2006

DATE: February 22, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No.05-02823

DECISION OF ADMINISTRATIVE JUDGE

ERIN C. HOGAN

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Over a period of six months, Applicant falsified his pay records in order to receive overtime to which he was not entitled based on company policy. Appellant's conduct raised questions about his integrity and he has failed to provide sufficient evidence to mitigate the personal conduct concern. Clearance is denied.

STATEMENT OF CASE

On July 27, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline E, Personal Conduct.

In a sworn statement dated August 25, 2005, Applicant responded to the SOR allegations. Applicant elected to have his case decided on the written record. Department Counsel submitted the government's file of relevant material (FORM) on September 19, 2005. The FORM was mailed to Applicant on October 31, 2005, and received on November 11, 2005. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant responded on December 6, 2005. The case was assigned to me on December 19, 2005.

FINDINGS OF FACT

Applicant is a 56-year-old employee of a defense contractor. He submitted a security clearance application on August

21, 2003. ⁽²⁾ In response to question 20, Your Employment Record, he indicated that in August 2002, he left a job with another defense contractor following allegations of misconduct. In the remarks section, he put "Reallocated overtime hours on an electronic time card. Total hours worked for the pay period were correct, but the overtime hours on specific days were not necessarily recorded correctly." ⁽³⁾

His former employer sent a letter to the Defense Industrial Security Clearance Office on September 5, 2002, stating Applicant was allowed to resign after an investigation revealed that he had fraudulently charged labor and falsified company documents for at least eight weeks. ⁽⁴⁾

Applicant indicated in a signed, sworn, statement provided to the Defense Security Service that he had been employed since 1988 with his former employer. He was a salaried employee the entire time. His former employer had a policy that salaried personnel could only record their overtime hours in excess of two hours on a regular work day. ⁽⁵⁾ He stated:

If you didn't work the minimum two hours overtime each day, then you couldn't record any of it or get paid for it. I thought it was unfair because hourly employees were paid for all their overtime. In January or February 2002, I decided that I would ensure that I would get paid for overtime hours that I had worked. I did this, not by faking any hours that I had not actually worked, but just by moving around the hours I had worked from one day to another so that I would meet the two-hour overtime requirement. I repeat, I never recorded hours that I did not actually work. ⁽⁶⁾

Applicant followed this practice numerous times over a six-month period. ⁽⁷⁾ Applicant was aware that he was violating company rules by moving the hours around in the timekeeping system. He did not think there would be a problem as long as he claimed overtime for the number of hours he actually worked. He understands now that what he did was wrong. "It was unethical because I did not follow [my employer's] established guidelines, but I do not think it was dishonest because I only recorded the hours I had actually worked. I have learned my lesson and will never deviate from company policy again." ⁽⁸⁾ He agreed to take a voluntary resignation in lieu of termination in order to receive state unemployment benefits. ⁽⁹⁾

In his response to the SOR, Applicant denied that he fraudulently charged for labor that was not performed. He states he never charged his employer for time that he did not work. He admits to reallocating overtime hours and falsifying his electronic time card in order to be paid overtime. He admits his actions were a lack of good judgment. He states that this was the only time he lacked good judgment during the 13 years he worked for the employer in question. He states that he has progressed in his current job and is a trustworthy individual who will follow company policy, rules and regulations. ⁽¹⁰⁾

Outside of his job, Applicant has been actively involved with the local Little Leagues. He is the District Administrator

for 18 Little Leagues and provides over 400 hours of community service. He believes that his community service provides a better picture of his true nature rather than the single incident at his former employer. [\(11\)](#)

In his response to the FORM, Applicant states that he has learned his lesson and will not repeat the same mistake. He has progressed in his current job and has received pay raises and incentive bonuses based on his performance and attention to detail. Aside from this one incident, he has obtained and maintained a security clearance for over 37 years. [\(12\)](#)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline F, pertaining to financial considerations, and Guideline E, person conduct, with their respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. [\(13\)](#) The government has the burden of proving controverted facts. [\(14\)](#) The burden of proof is something less than a preponderance of evidence. [\(15\)](#) Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him. [\(16\)](#) Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. [\(17\)](#)

The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials. Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. [\(18\)](#) The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. [\(19\)](#) It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of all the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in 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 a person may not properly safeguard classified information.

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

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a prima facie case for disqualification under Guideline E.

Over a six-month period, Applicant circumvented the overtime policy of his former employer by claiming overtime hours on days he did not work the overtime. Although Applicant claims that he did not fraudulently account for hours that he did not work, he deliberately violated company policy which he clearly understood to mean that he could not claim for overtime if he worked less than two hours of overtime on a work day since he was a salaried employee.

The following Personal Conduct Disqualifying Conditions (PC DC) apply to Applicant's case. PC DC E2.A5.1.2.1: (*Reliable, unfavorable information provided by associates, employers, coworkers, neighbors and other acquaintances*) applies. Applicant was asked to resign his position in lieu of being fired for misconduct. His former employer reported this information to the Defense Industrial Security Clearance Office shortly after his resignation in August 2002. DC 1 applies since Applicant's employer provided this reliable, unfavorable information during his security clearance investigation.

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*) applies. Applicant violated his employer's overtime policy on

numerous occasions over a period of six months. He knew what the rules were but chose to circumvent those rules by falsifying his time cards. His main reason for circumventing these rules is because he thought it was unfair. Applicant rationalizes his actions by claiming he did not claim overtime for hours he did not work within a pay period. Yet the company policy was that salaried employees would only be paid overtime on the days that they worked over two hours of overtime. Contrary to his assertions, Applicant fraudulently claimed and was paid for overtime on days he was not authorized to be paid overtime based on company policy.

The personal conduct concern can be mitigated. Only 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)* has the potential to apply to Applicant's case. I find that it does not apply. Although Applicant claims he has learned his lesson, his past actions reflect poorly on his judgment, trustworthiness, and reliability. What Applicant describes as one incident actually occurred on numerous occasions during a six-month period. He repeatedly violated his employer's overtime policy. His actions raise questions about his integrity. Aside from his own statements, he has provided insufficient evidence to mitigate the personal conduct concern. I find against the Appellant under Guideline E.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I considered all the evidence provided and also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I find Applicant has failed to mitigate the security concerns raised by the personal conduct concern. Therefore, I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guideline E is decided against Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1 Guideline E: AGAINST APPLICANT

Subparagraph 1.a. Against 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. Clearance is denied..

Erin C. Hogan

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Item 4.
3. Item 4, question 20.
4. Item 5.
5. Item 6 at 3.
6. *Id.*
7. Item 7, p. 2.
8. Item 6 at p.4.
9. *Id.*
10. Item 3.
11. *Id.*
12. Response to Form, dated December 6, 2005.
13. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
14. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.

15. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
16. ISCR Case No. 94-1075 (August 10, 1995) at pp.3-4; Directive, Enclosure 3, ¶ E3.1.15.
17. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15
18. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
19. Executive Order 10865 § 7.