**DEPARTMENT OF DEFENSE**
**DEFENSE OFFICE OF HEARINGS AND APPEALS**

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| In the matter of: | ) | |
| | ) | |
| ---------- | ) | ISCR Case No. 07-04151 |
| SSN: ---------- | ) | |
| | ) | |
| Applicant for Security Clearance | ) | |

## Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: Daniel S. Alderman, Esquire

August 25, 2009

## Decision

MOGUL, Martin H., Administrative Judge:

On December 31, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant replied to the SOR (RSOR) in writing on February 18, 2009, and requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on April 9, 2009. DOHA issued a notice of hearing on April 21, 2009, and I convened the hearing as scheduled on May 26, 2009. The Government offered Government Exhibits 1 through 9, which were received and admitted. Applicant testified on his own behalf and submitted Applicant Exhibits A through E, which were also received and admitted. DOHA received the transcript of the hearing (Tr) on June 4,

2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

## Findings of Fact

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 61 years old. He is married, and he has no children. He received a Ph.D. in Mechanical Engineering and Material Science.

Applicant was employed by a defense contractor, and he seeks a DoD security clearance in connection with future employment in the defense sector.

## Paragraph 1 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he engaged in conduct that exhibited questionable judgement, lack of candor, dishonesty or unwillingness to comply with rules and regulations.

1.a. It is alleged in the SOR that Applicant was terminated by his employer (Company A), for which he had worked from 1997 to 2001, in September 2001, for misconduct.

In his RSOR, Applicant denied this allegation. At the hearing, Applicant testified that his termination was not because of misconduct. His testimony was that Company A wanted him to patent technology that he had created for them, but he insisted that he could not have it patented, since it was based on another concept, which was already patented (Tr at 44-45). He averred that he was not actually terminated, but the company gave him the option of patenting this technology or leaving the company, and since he felt it would not be proper to have the technology patented, he chose to leave the company.

At a later date, Applicant attempted to collect unemployment compensation, as a result of his employment at Company A. The company disputed his claim, arguing that he had been terminated for misconduct. Applicant appealed Company A's decision, and the Unemployment Insurance Appeal Board ruled that Applicant was not terminated for misconduct, and he could receive unemployment compensation (Exhibit 3). Ultimately, he was rehired by Company A in 2004.

Based on Applicant's explanation of the situation, the fact that it was determined by the Unemployment Insurance Appeal Board that he could collect unemployment compensation because he was not terminated for misconduct, and that he was rehired by Company A, the facts indicate that Applicant was not terminated for misconduct from Company A.

1.b. It is alleged in the SOR that Applicant was terminated from a second employer (Company B), for which he had worked from September 2003 to January 2004, for unsatisfactory behavior and performance, and that he is not eligible for rehire.

In his RSOR, Applicant denied this allegation. At the hearing, Applicant testified that when he was hired by Company B it was an upper level position that would utilize his knowledge and experience. However, the position was not available by the time he became employed, and thus he was offered a far less demanding and prestigious position that did not fully utilize his skills, and in fact it was not a position for which he was trained (Tr at 52-54). He accepted this position, but he was informed that something more appropriate would become available.

I find that Applicant was terminated from this position. Exhibit 2 includes the Termination of Employment letter, dated January 30, 2004, from Company B to Applicant. It stated that Applicant failed to complete three tasks that had been assigned to him, and they were unable to find another assignment for him. This letter does not address whether Applicant would be available for rehire. However, a follow up letter from the human resources manager, dated March 5, 2004, makes it clear that Applicant is not eligible for rehire (Exhibit 2).

1.c. It is alleged in the SOR that Applicant contacted several managers from Company B in February 2004 in an effort to resume his employment with Company B, which was contrary to his ineligibility status.

Applicant testified that he was never informed that he was not to contact individuals at Company B regarding re-employment or that he was not eligible for rehire (Tr at 61-62). Additionally, while he was working in his previous position, he met the vice president of Engineering, and he forwarded to him his then current resume, asking if there was a position in the company more suited to his experience. Exhibit 3, page 24, has the email from the vice president in which he stated, "there should be a large number of opportunities here for someone like yourself." Applicant believed that, based on that email, there would be other positions more appropriate to his skill level, and he believed it was not inappropriate to attempt to obtain another position within the company. Applicant stated that the individuals, whom he contacted, indicated to him that they would be interested in discussing with him potential positions with the company.

1.d. Applicant completed a Security Clearance Application (SCA) which he caused to be electronically submitted on or about July 2, 2004 (Exhibit 1). Question #20 of the SCA asked whether during the last seven years, Applicant had ever been terminated from a job, or lost his job under other than favorable circumstances. Applicant replied "Yes" to that question and furnished the Government with information about his separation from Company A, as discussed in subparagraph 1.a., above. However, Applicant failed to supply the information about his employment separation from Company B, as discussed in subparagraph 1.b., above, alleged. The SOR alleges that Applicant was not truthful because he failed to include his termination from Company B, as discussed in 1. b., above.

At the hearing, Applicant conceded that he should have included the termination from Company B (Tr at 51-52). He testified that Exhibit 1 was the first SCA that he had ever completed. He stated that he was told the sooner he completed the application, the sooner he could begin working for the company, and therefore he rushed to complete it on a computer, completing it all in one night, and he was not as careful as he should have been (Tr at 39-42, 111). He received an interim clearance in 10 days. In 2007 he sent another copy of the same SCA, after being informed that the DoD did not have a copy of it. He was not made aware of the problems with his responses to the 2004 SCA until 2008.

While it is clear that Applicant should have reported his employment situation with Company B on the SCA, I find his explanation credible that his failure to include his Company B termination was due to inadvertence and not an attempt to mislead the Government.

1.e. On the July 2004 SCA, Question #6 requested that all employment activities, without breaks, be listed from the last 7 years before the SCA was completed. The exception was that all Federal civilian employment was to be listed whether or not it occurred within the last 7 years. Applicant listed that he has been employed as a consultant for Company C from 1994 to 1997. It is alleged in the SOR that Applicant deliberately failed to list that he was also a consultant for Company C from about January 2004 to June 2004.

Applicant testified that during the period from January 2004 to June 2004 that he consulted for Company C, which was his own company, he did not earn any income, so he believed that it was not correct to include this period for Question #6 (Tr at 63-64).

It does appears that Applicant had a reasonable, if not correct, assumption that he was only to list periods of employment when he earned an income. Applicant did list nine different employment positions on his SCA. I do not find that he was attempting to mislead the Government with this omission.

1.f. On the July 2004 SCA, in response to Question #6, Applicant listed that he had been employed as a consultant for Company D from 2001 to June 2004. It is alleged in the SOR that Applicant deliberately failed to list that he was unemployed for about four months in 2002 and 2003, during which time he received unemployment benefits (Tr at 65-67).

Applicant testified that the unemployment compensation that he earned for the period in 2002 and 2003 resulted from when he had been employed by Company A, as reviewed in 1.a., above. He stated that he continued to consult for Company D, but for a period of time he was not receiving any income, and thus he applied for unemployment compensation, which he ultimately received after the challenge before the Unemployment Insurance Appeal Board.

In reviewing Applicant's affidavit, signed by him on January 11, 2008, (Exhibit 4), Applicant explained what he again reiterated at the hearing, specifically that he did not

understand that periods of time when he collected unemployment should be listed under the request for employment activities. He stated that he was not attempting to mislead the Government, and in fact when he was interviewed by a Government investigator, he volunteered that he had received unemployment compensation, as the investigator was not aware of it.

I find that Applicant again had a reasonable, if not correct, assumption that he was only to list periods of employment, not periods when he collected unemployment. I do not find that he was attempting to mislead the Government with this omission.

## Mitigation

Applicant submitted 15 character letters from many individuals with high level positions, including a President/CEO of a company and several Ph.Ds. These individuals all wrote in extremely laudatory terms of Applicant's technical abilities, his character, reliability, and integrity (Exhibit C).

There were also submitted a number of awards received by Applicant and newspaper articles written about him, confirming his significant scientific expertise (Exhibit D).

## Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is

responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the 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, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that 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." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## Analysis

### Guideline E, Personal Conduct

With respect to Guideline E, the evidence establishes that Applicant furnished to the Government incomplete answers on an SCA that he executed on July 2, 2004.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. If such an individual intentionally falsifies material facts or fails to furnish relevant information to a Government investigator, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance.

In reviewing the Disqualifying Conditions (DC) under Guideline E, DC 16. (a) could be argued to be applicable if it is determined that Applicant's omission of relevant facts from a personnel security questionnaire, which was used to determine security clearance eligibility, were deliberate. However, after reviewing all of the evidence, particularly the testimony of Applicant and his affidavit ((Exhibit 4), I find his explanation credible that the errors were inadvertent, rather than deliberate.

Regarding his loss of employment, as alleged in 1.a., and 1.b., above, no evidence was introduced to establish that these resulted from questionable judgement, or an unwillingness to comply with rules and regulations.

I find that Applicant's conduct, considered as a whole, does not exhibit questionable judgement, unreliability, or a lack of candor. I resolve Paragraph 1, Guideline E, for Applicant.

## Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(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 extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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." Under AG ¶ 2 (c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Based on all of the reasons cited above as to why no disqualifying condition applies in this case, together with the extremely laudatory character letters and the awards and news articles admitted into evidence, I find that the record evidence leaves me with no significant questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole person concept. For all these reasons, I conclude Applicant has mitigated the security concerns.

## 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:

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| Paragraph 1, Guideline E: | FOR APPLICANT |
| Subparagraph 1.a: | For Applicant |
| Subparagraph 1.b: | For Applicant |
| Subparagraph 1.c: | For Applicant |
| Subparagraph 1.d: | For Applicant |
| Subparagraph 1.e: | For Applicant |
| Subparagraph 1.f: | For Applicant |

## Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Martin H. Mogul
Administrative Judge