



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



In the matter of:)
)
-----) ISCR Case No. 08-04062
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: John B. Glendon, Esquire, Department Counsel
Tovah Minster, Esquire, Department Counsel
For Applicant: Sheldon I. Cohen, Esquire

September 23, 2009

Decision

HARVEY, Mark, Administrative Judge:

From November 2006 to April 2007, Applicant submitted false time cards to his employer. He was caught and resigned to avoid termination. He misled two investigators and falsified his Security Clearance Application (SF-86) about leaving his employment under adverse circumstances. Personal conduct concerns are not mitigated. Clearance is denied.

Statement of the Case

On July 18, 2005, Applicant submitted an SF-86 (e-QIP version) (Government Exhibit (GE) 1). On October 24, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, alleging security concerns under Guideline E, Personal Conduct (GE 9). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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. The SOR 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 a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On December 3, 2008, Applicant responded to the SOR and requested a hearing before an administrative judge (GE 10). On March 24, 2009, DOHA issued an Amended SOR to Applicant adding two additional Guideline E allegations. On April 2, 2009, Applicant responded to the Amended SOR (Transcript (Tr.) 13-15; GE 13).

On March 25, 2009, Department Counsel was prepared to proceed. On April 2, 2009, the case was assigned to another administrative judge. On May 4, 2009, the case was transferred to me for caseload reasons. On May 8, 2009, DOHA issued a hearing notice setting the hearing for June 15, 2009 (GE 8). The hearing was held on June 15, 2009, as scheduled.

At the hearing, Department Counsel offered seven exhibits (GE 1-7) (Tr. 24-26), and Applicant offered 11 exhibits (Tr. 89-92; AE A-P). Applicant's counsel objected to the admissibility of the summaries of Applicant's interviews taken on February 21, 2008, and November 17, 2008. I overruled the objections, and I admitted GE 1-7 (Tr. 25-26, 54, 72, 74). Department Counsel objected to admissibility of documents relating to Applicant's sleep disorder because of lack of relevance to the SOR allegations; and because two Wikipedia articles (AE H, I) have low reliability (Tr. 92-93, 115). I overruled the objections and admitted AE A-P (Tr. 93, 115). Additionally, I admitted the hearing notice, SOR, response to the SOR, designation of attorney, and entry of appearance (GE 8-12). I also admitted the SOR amendment and Applicant's response to amendment of the SOR (GE 13). On June 23, 2009, I received the hearing transcript.

Findings of Fact¹

Applicant admitted in his SOR response that he mischarged the hours on his timecard, and he resigned in April 2007 prior to administration of disciplinary action (SOR ¶ 1.a; GE 10). He denied the remainder of the SOR allegations (GE 10). His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is a 27-year-old test and evaluation engineer employed by a defense contractor (Tr. 141-142). His primary responsibility is software integration testing (Tr. 142). He started working for his current employer (N) in October 2007 (Tr. 143, 158).

Applicant received the Eagle Scout award when he was 13 years old (Tr. 144; AE B). In February 2005, he graduated from one of the top engineering universities in

¹Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

the United States (Tr. 145; AE A). He received an award from a university for an aircraft design (Tr. 145-146; AE C). In college, Applicant had problems with oversleeping and missing class as well as falling asleep during class (Tr. 146-147). In July 2005, he began his first employment after college with R, a large defense contractor (Tr. 148).

Falsification of time cards and resignation from employment (SOR ¶ 1.a)

Applicant had difficulty getting to work on time (Tr. 149). Sometimes he could not wake up until 3:00 pm (Tr. 149). Self-help strategies, such as multiple alarm clocks, special pillows, a special mattress, and vitamin supplements, were not successful in Applicant awakening and getting to work on time (Tr. 149-150). In January 2007, O, his administrative supervisor at R, placed Applicant on a performance improvement plan (PIP) (Tr. 151-152). Failure to improve under the PIP was possible grounds for termination (Tr. 196). He told O he was having trouble sleeping (Tr. 152-153). He was required to be at work by 9:00 am (Tr. 152).

On April 18, 2007, O told Applicant that R's badge reader was inconsistent with the time he provided on his time cards (Tr. 153, 198; GE 3). He admitted that the hours he reported on his time cards were not the hours he actually worked (Tr. 153; GE 3). He claimed on his time cards that he worked 40 hours a week; however, he did not actually work 40 hours (Tr. 197). He claimed he worked eight hours each day; however, in reality he worked less (Tr. 197). He provided false time cards to conceal that he was coming in late for work, and he did not want to be terminated from his employment (Tr. 154).

O told Applicant that based on his past good performance he would be permitted to resign before they pursued termination (Tr. 154). Applicant chose to resign and he left employment with R at the end of the week (Tr. 199, 201). His technical supervisors at R described his work in positive terms (Tr. 155-157). O said the circumstances of his departure would remain confidential within R (Tr. 155, 200). No other employees at R were supposed to know about his true reasons for leaving employment at R (Tr. 158). Applicant resigned from R effective April 20, 2007 (Tr. 206-207; GE 3). If not for the time-card fraud, he would not have resigned from R on April 20, 2007 (Tr. 207).

Applicant's sleep disorder

A highly-qualified medical doctor (M), who is board certified in internal medicine and sleep disorders medicine, examined Applicant and diagnosed him as suffering from delayed-sleep phase syndrome (Tr. 94-98, 172; AE E, F).² Applicant has had this medical problem for many years, and it contributed to his excessive daytime sleepiness (Tr. 98). Applicant had great difficulty falling asleep at night and then he would oversleep the next morning (Tr. 98-99). M thoroughly described the testing process and methods, including drug therapy and sleeping/light strategies, to reduce the impact of the symptoms of delayed-sleep phase syndrome (Tr. 99-121; AE D, G, I, J). Applicant is

² I accepted a stipulation that Applicant suffers from this disorder (Tr. 173-174).

now able to get to work around 11:00 am, and then he works for the next eight hours (Tr. 160). He has never submitted false time cards at his current employment (Tr. 160).

Allegation of providing false information to an investigator (SOR ¶ 1.b)

On May 7, 2007, R made a JPAS entry indicating that on April 19, 2007, Applicant admitted falsifying his time cards to O (Tr. 215; GE 4). On February 21, 2008, an Office of Personnel Management (OPM) Issue Resolution (IR) Investigator received a tasking from her office to interview Applicant (Tr. 39, 47-48). The purpose of her interview was to determine the reason Applicant left his employment with R (Tr. 39). She believed that she asked Applicant why he was terminated from his employment with R (Tr. 47-48).³ She did not know the actual reason he was terminated from his employment with R (Tr. 48). The OPM IR investigator interviewed Applicant for about 30 minutes (Tr. 27-53; SOR ¶ 1.b; GE 2, 10). During her interview, the OPM IR investigator took notes and then used the notes to generate a summary of the interview (Tr. 42).⁴ The notes were destroyed 90 days after the interview (Tr. 42). The OPM IR investigator prepared and transmitted her report the next day (Tr. 32). Applicant told the OPM IR investigator that he left his employment with the defense contractor on good terms (SOR ¶ 1.b; GE 10). The OPM IR investigator only had a vague recollection of the interview because it was about 18 months previously, and she conducts 30 interviews per month (Tr. 29).

Applicant objected to the OPM IR investigator's authentication of her report because she could not recall the interview or preparing her report. I overruled the objection because she recognized a code she used to submit the report (which required her password). More importantly, in his response to DOHA interrogatories, Applicant reviewed and adopted the OPM IR investigator's summary of interview. This adoption is admissible because it constitutes a party admission. See *Generally* Federal Rule of Evidence 801(d)(2)(B) (stating, "a statement of which the party has manifested an adoption or belief in its truth"). Applicant provided written corrections concerning dates, spellings of names, and some other facts in the summary of his interview (GE 2). Applicant concluded, aside from his corrections, "all other information is correct" (GE

³ She did not have a copy of her tasking, and could not specifically remember what it said. She assumed the contents of the tasking from her interview summary (Tr. 50). The interview summary begins, "Subject was interviewed in person on February 21, 2008, to discuss termination of employment" (GE 2). The material information from the summary is that she asked Applicant why he left employment from R, and he did not tell her anything about committing time-card fraud and he failed to explain that he resigned after being threatened with termination.

⁴ The OPM IR investigator erroneously stated her handwritten notes were "word-for-word" as opposed to a summary; however, she does not take shorthand and did not provide any other convincing information to support her claim of being able to make such comprehensive notes of her interview (Tr. 43, 48). The OPM IR investigator also said Applicant "swore that he was telling the truth" (Tr. 43). She also said she starts the interview by advising the interviewee that the statement is an "unsworn declaration," the importance that the interview be truthful, and about the applicability of 18 U.S.C. § 1001 (Tr. 44, 52-53). The summary of interview indicates it is an "unsworn declaration" (GE 2). Later, she corrected her statement at the hearing to indicate it was an unsworn interview (Tr. 45).

2).⁵ I accepted all of Applicant's corrections as information he provided to the investigator.

Applicant claimed that he did not willfully provide false information to the OPM IR investigator (Tr. 176). He said he thought he left on good terms because his task leaders were happy with his work, and the true reason for his departure would remain confidential (Tr. 176, 179). In his August 1, 2008, response to DOHA interrogatories, he included O's name as his supervisor for administrative purposes and cited other employees as his day-to-day supervisors (Tr. 177; GE 2).

Allegation of providing false information on his SF-86 (SOR ¶ 1.c)

On September 30, 2008, Applicant completed an SF-86, which includes the following question:

Question 22. **Your Employment Record** Has any of the following happened to you in the last 7 years?

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 for other reasons under unfavorable circumstances.

Applicant answered, "No." At his hearing, he denied that he willfully provided false information in response to question 22 (Tr. 179-180). He said he thought he left R on good terms, and R would record his departure as a resignation (Tr. 180). He thought R would not inform the government about why he left employment with R (Tr. 203). It was Applicant's intention to inform the government that he left employment with R on good terms (Tr. 204).

Allegation of providing false information to an investigator (SOR ¶ 1.d)

On November 17, 2008, a DoD investigator interviewed Applicant for about an hour (SOR ¶ 1.d; Tr. 60-72, 74; GE 6).⁶ The interview summary encompassed seven

⁵ In ISCR Case No. 06-06496 at 3-4 (App. Bd. June 25, 2009) the Appeal Board discussed the right to confront witnesses under the Directive in connection with police investigative reports. *See also* ISCR Case No. 07-14939 at 3 (App. Bd. Mar. 11, 2009) (citing authentication of Applicant's interview using a DOHA interrogatory); ISCR Case No. 07-10804 at 3 (App. Bd. June 19, 2008) (same).

⁶The investigator made notes during Applicant's interview and then generated a summary of interview 24 to 48 hours later (Tr. 66-67). She did not have any independent recollection of the content of the interview and relied on her standard interview practices (Tr. 67-69). Applicant objected to admissibility of the interview (Tr. 66-72). I overruled the objection (Tr. 72). The interviewer's lack of recollection of the specific interview goes to the weight given the summary and not its admissibility.

typed pages (Tr. 76; GE 6). She did not focus the interview on why Applicant left his previous employment (Tr. 71). She asked standard questions about leaving employment (Tr. 71). Applicant told the investigator that he resigned under favorable conditions from employment with the defense contractor; he is eligible for rehire; and his resignation was for personal reasons relating to his desire to relocate to the same location where his girlfriend resides (SOR ¶ 1.d). He did not disclose that he resigned after admitting mischarging hours on his timecard (SOR ¶ 1.d).

On November 18, 2008, Applicant telephoned the investigator (J), who interviewed him the previous day (Tr. 77, 184, 212; GE 7). Applicant told J that a security guard employed by contractor N informed Applicant that he left R's employment under unfavorable conditions (Tr. 79).⁷ Applicant disclosed that O,⁸ one of his supervisors at R, gave him the option of voluntary resignation or the R would terminate him because Applicant made a mistake on his timecard, which O considered fraud (Tr. 79).⁹ R's employment record would reflect his voluntary resignation, and the reasons for his termination would be kept confidential and private (Tr. 79). Applicant said it was his understanding that he was not required to disclose the reasons for his termination (Tr. 80). He called the investigator because he felt it was his duty to disclose all of the relevant information once he realized R had provided the unfavorable circumstances surrounding his resignation (Tr. 188).

On December 30, 2008, J conducted a follow-up interview of Applicant (Tr. 81-87; GE 7). Applicant disclosed his sleeping disorder, and that he was placed on a performance plan because of his tardiness (Tr. 86-87). Applicant admitted he "inaccurately reported the hours he worked" on his time card at R, and then he agreed with J that it was time-card fraud (Tr. 82-85; GE 7).

Character recommendations and performance evaluations

Applicant's immediate supervisor (S) at N since October 2007 does not evaluate Applicant's work performance (Tr. 125, 126, 139). Applicant and S occasionally socialize outside the workplace (Tr. 135, 136). They work very closely together on information technology problems, services, and support (Tr. 126-127). Applicant has an unusual work schedule, as a work-place accommodation because of his sleep disorder (Tr. 128-129). He is allowed to arrive late for work and to work late (Tr. 128-131). Applicant said

⁷ On November 18, 2008, Applicant received the SOR from his security officer at N (Tr. 183, 212-213). Applicant immediately called the investigator to correct his statement at his interview (Tr. 184).

⁸ When Applicant applied for employment with N, he provided as references the names of several former supervisors at R that were aware of his technical expertise and that were all satisfied with his work (Tr. 210-211, 218). However, he did not provide O's name (Tr. 159). O was in charge of time cards, leave, and other administrative matters at R (Tr. 210-211). The first time Applicant disclosed that O was one of his supervisors at R was after he received the SOR (Tr. 192). He did not believe the other points of contact he provided at R were aware of the reasons (time-card fraud and the threat to initiate termination) that he left employment at R (Tr. 190-192).

⁹ Applicant agreed with the accuracy of the summary of interview, except he said he falsified the time cards as opposed to merely making a mistake on his time cards (Tr. 187).

he left employment with R because he had problems with his time card; however, he also said he left on good terms when he resigned from R (Tr. 133). Applicant told S that he thought the time-card related reasons he left employment with R were to remain confidential (Tr. 134). Applicant is a trustworthy, top-notch professional (Tr. 130, 135). Applicant is a great employee and team player (Tr. 136).

Applicant's performance evaluation at N for 2007 to 2008 notes he has had difficulty with arriving to work on time (Tr. 162; AE N). His performance evaluation at N for 2008 to 2009 has all favorable comments and does not cite a problem with tardiness (Tr. 163-164; AE O). Applicant worked with great diligence and dedication, sometimes around the clock, to support customers (Tr. 165). He received a \$2,000 award from N for meeting a particularly difficult deadline (Tr. 167-168; AE K). He also received pay increases (Tr. 168-169; AE L, M). He informed his supervisors at N about why he left employment at R (Tr. 170).

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the Applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned." See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance,

loyalty, or patriotism. It is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the Applicant that may disqualify the Applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an Applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An Applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

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 relevant security concern is under Guideline E (personal conduct) with respect to the allegations set forth in the SOR.

Personal Conduct (Guideline E)

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes three conditions that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant 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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations.

Applicant's employer, R, placed him on a PIP because of his tardiness. Applicant suffered from delayed-sleep phase syndrome, which often caused him to oversleep and to be late for work. From November 2006 to April 2007, Applicant submitted false time cards to R to conceal his tardiness. His submissions constituted fraud, as he claimed and was paid for more hours than he actually worked. O, his supervisor at R, confronted Applicant with the evidence of his fraudulent activity, and offered to let Applicant resign in lieu of termination. Applicant accepted this offer. His multiple submissions of false time cards establish AG ¶ 16(d)(3).

On February 21, 2008, and November 17, 2008, Applicant told government investigators conducting security-related investigations that he left employment with R on positive or favorable terms. He did not disclose the true reasons he left employment with R. On September 30, 2008, Applicant answered, "No" to the questions on his SF-86 about whether he "[q]uit a job after being told [he would] be fired," and "[l]eft a job by mutual agreement following allegations of misconduct." He intentionally provided false information to security investigators and on his SF-86. AG ¶¶ 16(a) and 16(b) both apply.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions fully apply. Applicant made statements on February 21, 2008, and November 17, 2008, to government investigators conducting security-related investigations, and on September 30, 2008, he signed his SF-86. He admitted he told the investigators he left employment with R on good terms, and he did not disclose to the investigators and on his SF-86 that he resigned in lieu of termination for time-card fraud. He said he did not provide the true reasons for leaving employment with R because O told him the time-card fraud would be kept confidential.¹⁰ I found his statement at the hearing about his reasons for providing false information to be credible. He honestly thought R would keep his misconduct confidential. However, immediately upon receipt of the SOR, he realized R had not kept the time-card fraud information

¹⁰The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)). "When an applicant claims that a false answer to a [SF-86] question is not deliberate, the Judge should address explicitly any contrary evidence in the record." ISCR Case No. 08-07998 at 2 (App. Bd. Aug. 12, 2009) (citing ISCR Case No. 07-03307 at 5 (App. Bd. Sep. 26, 2008)).

confidential. After he received the SOR, he called an investigator and truthfully disclosed the real reasons for leaving employment with R.

AG ¶¶ 17(c), 17(d), and 17(e) all partially apply. Applicant suffers from delayed-sleep phase syndrome, and being extremely tired affected his judgment. His medical problem provides some important extenuation. He has recently received medical treatment for delayed-sleep phase syndrome. He is now able to better accommodate his lifestyle and employment to address his medical problem. He understands the importance of honesty and integrity in his government-related employment. He has acknowledged the misconduct and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior. His disclosure of his misconduct, and medical assistance for delayed-sleep phase syndrome are important “positive steps to reduce or eliminate vulnerability to exploitation, manipulation, [and] duress.”

In conclusion, however, Applicant’s conduct cannot be fully mitigated under Guideline E because the fraudulent activity to conceal his tardiness and subsequent falsification to conceal his time-card misconduct continue to cast doubt on his reliability, trustworthiness, and good judgment. His most recent falsification was on November 17, 2008, and it is simply too serious to mitigate at this time.

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.

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. AG ¶ 2(c). I have incorporated my comments under Guideline E in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

The whole person factors supporting reinstatement of Applicant’s clearance are significant; however, they are insufficient to warrant approval of Applicant’s security clearance at this time. Applicant graduated from one of the top United States technical

universities. His supervisors noted Applicant's excellent performance. He received financial awards and substantial pay raises from his current employer. He admitted his time-card fraud, and that he failed to provide information about resigning in lieu of termination to investigators and on his SF-86. He has delayed-sleep phase syndrome, which affected his employment at R. Being exceptionally tired affected his judgment, and I do not believe he would make such poor decisions now that he has identified his medical problem and is receiving treatment. He is now able to better accommodate his lifestyle and employment to address his medical problem. Now that the government is well-aware of his time-card fraud, and subsequent falsifications, his motive to conceal these particular acts of misconduct and vulnerability to exploitation, manipulation and duress have been eliminated. Applicant is an intelligent, capable, reliable, dedicated, and trustworthy employee.

The evidence against approval of Applicant's clearance is more substantial. Applicant submitted false time cards from November 2006 to April 2007. He was paid for hours he did not work. There is no evidence he reimbursed his employer. He resigned in lieu of termination and received a promise of confidentiality. He provided false information to two investigators conducting security-related investigations, and he falsified his SF-86. The promise of confidentiality facilitated his scheme to conceal his misconduct. His misconduct cannot be mitigated at this time. The falsifications were knowledgeable, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. Falsification of a security clearance application shows a lack of trustworthiness and poor judgment. Such conduct goes to the heart of the clearance process, and a security clearance is not warranted at this time.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors,"¹¹ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not currently eligible for access to classified information.

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:
Subparagraphs 1.a to 1.d:

AGAINST APPLICANT
Against Applicant

¹¹See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge