DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 09-00266
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel
For Applicant: Roderic G. Steakley, Esq.

October 26, 2011

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline E (Personal Conduct). Clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on March 6, 2008. On July 7, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline E. DOHA acted under Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program,* dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on 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 Applicant's security clearance. On August 23, 2010, Applicant answered the SOR and requested a hearing. The case was assigned to me on August 9, 2011. DOHA issued a notice of hearing on August 24, 2011, and the hearing was convened as scheduled on September 14, 2011. At the hearing, the Government offered exhibits (GE) 1 through 7. GE 1, 2, and 3 were admitted into evidence without objection. GE 5 was admitted into evidence over Applicant's objection. I deferred ruling on Applicant's objections to GE 4, 6, and 7 until issuance of this Decision. Applicant testified and offered exhibit (AE) A. Department Counsel objected to AE A and I deferred ruling on that objection until issuance of this Decision. DOHA received the hearing transcript (Tr.) on September 21, 2011.

Evidentiary Ruling

As noted above, rulings on certain evidentiary objections were deferred until issuance of this Decision. Those rulings are as follows:

GE 4. This is an email string that Applicant initiated. The names of the senders and recipients of the subsequent emails as well as other information have been redacted. In general, the subsequent emails address Applicant's work performance at Company B. Applicant's Counsel objected to this exhibit essentially claiming it was hearsay and not relevant. He also indicated that its admission would be inappropriate because he did not have an opportunity to cross-examine the senders of the emails. The objection to GE 4 is sustained. GE 4 is excluded from evidence based on lack of relevance, hearsay, and ¶ E3.1.22 of the Directive.[1]

GE 6. This is an email string from employees of Company A discussing whether Applicant was resigning from his job. Applicant's Counsel objected to this document for the same reasons he objected to GE 4. Department Counsel also indicated that it was being offered to show that Applicant was not candid during his resignation and for the

[1] Tr. 18-24. Applicant's email at the bottom of the email string is admissible as an admission, but it is not relevant to the issues in this case. The Appeal Board has held that ¶ E3.1.22 does not require exclusion of statements that are admissible under ¶ E3.1.20 or as exceptions to the hearsay rules under the Federal Rules of Evidence. *See* ISCR Case No. 06-06496 at 3-4 (App. Bd. Jun 25, 2009) and ISCR Case No. 08-06997 (App. Bd. Mar 1, 2011). Emails between employees are not *per se* business records. *See* Keneally, White Collar Crime: *E-mails Sent During The Business Day May Not Be Admissible As Business Records*, 28 Champion 42 (2004). "The business record exception to the proscription against hearsay set out in Rule 803(6) requires a showing that 'it was the regular practice of that business activity to make' the document proposed for admission into evidence, and that the document was 'kept in the course of a regularly conducted business activity.' Several courts have found that e-mails often do not meet these tests." *Id.* at 42. *See also Westfed Holdings, Inc. v. United States*, 55 Fed. Cl. 544, 566, U.S. Claims LEXIS at *48 (Ct. of Fed. Claims 2003); *New York v. Microsoft Corp*, 2002 U.S. Dist. LEXIS, at *9 (D.D.C. April 12, 2002). In this case, it is unknown whether the emails in question were generated as a regular practice of the business.

whole-person concept. The objection to GE 5 is sustained. GE 5 is excluded from evidence based on lack of relevance, hearsay, and ¶ E3.1.22 of the Directive.[2]

GE 7. This is an email string from employees of Company A discussing Applicant's resignation from that company. It also indicated that an investigation was initiated into ZIP files found that apparently belonged to Applicant. Applicant's Counsel objected to this exhibit for the same reasons he objected to GE 4. The objection to GE 7 is sustained. GE 7 is excluded from evidence based on hearsay and ¶ E3.1.22 of the Directive.[3]

AE A. This exhibit is two pages of the Office of Personnel Management (OPM) report of investigation (ROI) into Applicant's security clearance eligibility. It reflects that Applicant was involuntarily terminated from Company B due to no billable work matching his skills and also indicates that no other documents pertaining to Applicant's termination were located. Department Counsel objected to this exhibit based on ¶ E3.1.20 of the Directive. Under ¶ E3.1.20, an ROI may be received into evidence with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence. Nothing on the face of the ROI or in its contents suggest that it was not an official OPM investigative report or that it was prepared and maintained other than in the regular course of OPM business. In making his objection, Department Counsel basically conceded that this document was a ROI. Its authenticity is not an issue. Department Counsel's objection is overruled. AE A is admitted into evidence.[4]

Administrative Notice

During the hearing, Department Counsel requested that I take administrative notice of which day of the week was September 12, 2005. The request was granted. September 12, 2005, was a Monday.[5]

Findings of Fact

Applicant is a 50-year-old employee of a defense contractor. He has a bachelor's and a master's degree in electrical engineering from a major university and, except for the dissertation, has completed the requirements for a doctorate degree. He has never been married and has no children. He has worked in the defense industry for about 20 years and, for most of that employment, he has held a security clearance without committing any security violations. He testified that he was familiar with the security

[2] Tr. 26-32. *See also* note 1 above.

[3] Tr. 33-37. *See also* note 1 above.

[4] Tr. 37-40.

[5] Tr. 73-74. *See* http//www.timeanddate.com/calendar/?year=2005.

clearance application process and was aware that prior employers are contacted during security clearance investigations.[6]

The SOR alleged that Applicant falsified material facts in responding to Section 22 of his e-QIP. In his Answer, Applicant denied that allegation.

Applicant worked for Company A from June 2003 to June 2005. In that job, he worked in a Special Access Program. After resigning from that job, he began working for Company B in September 2005. While working for Company B, he became the subject of a Federal Bureau of Investigation (FBI) investigation. In his Answer, he stated:

> In February 2006 I had been employed by [Company B] for only a number of months. I received a visit at my home by representatives from the FBI who were investigating claims made by a former employer [Company A] that I had taken certain confidential, proprietary and trade secret information with me upon my resignation from that former employer. The same work day after the visit from the FBI, I advised my manager at [Company B] that I had been visited by the FBI regarding allegations made by a previous employer. I remember being placed on administrative leave at that time, and believe that I received a letter indicating that [Company B] and I should "go our separate ways" shortly thereafter. I received this letter while the FBI investigation was ongoing. I was eventually exonerated of any wrongdoing related to that investigation.[7]

At the hearing, Applicant testified that Company B immediately placed him on administrative leave for a couple of days after he notified that company of the FBI investigation. He indicated his supervisor consulted with corporate counsel before he was placed on administrative leave. Immediately following the administrative leave, he was presented with an employment termination letter. He never returned to his job at Company B after he notified that employer of the FBI investigation.[8]

The termination letter from Company B is dated February 3, 2006. The first paragraph of the letter states:

> We appreciate your contributions and service during the time you have spent with [Company B]. Confirming your discussion with [your supervisor], your employment with the firm is being terminated due to lack

[6] Tr. 42; 44-47, 49, 51, 55-56, 60-63; GE 1, 2.

[7] Tr. 47-54, 73-86; Applicant's Answer to the SOR; GE 2, 5.

[8] Tr. 76-87, 100-102; GE 2, 3.

> of appropriate work matching your skills and abilities. We regret that we are unable to avoid this result.[9]

In that letter, Applicant was informed that his last day of employment was February 17, 2006. He was paid until the last day of his employment, but did not work during that two-week period. He was required to surrender his building badge and allowed to obtain personal items from his office. He did not recall if he was escorted to and from his office when he went to pick up his personal items. The OPM ROI indicates that Applicant's employment with Company B was terminated because there was no billable work and was not the result of any problems or issues related to Applicant.[10]

Before receiving the termination letter, Applicant testified that his supervisor advised him the reason for his termination was the same as that stated in the termination letter, *i.e.*, a lack of appropriate work matching his skills and ability. Applicant specifically stated that he was never informed that he was being terminated because of the ongoing FBI investigation. From April 2006 to March 2008, he was self-employed doing part-time consulting work, but primarily lived off of his savings and investments.[11]

In his e-QIP signed on March 6, 2008, Applicant listed his employment with Company B in **Section 11: Your Employment Activities** and submitted the following "Additional Comments:"

> I joined [Company B] in summer of 2005 to work on the GMD [ground missile defense] program. I left this position by Apr 2006 for personal reasons. My departure was by mutual agreement with the company.[12]

In **Section 22: Your Employment Record** of the e-QIP, he was asked the following question:

> 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 by mutual agreement following allegations of unsatisfactory performance.
> 5. Left a job for other reasons under unfavorable circumstances.[13]

[9] Tr. 51-54; GE 3.

[10] Tr. 112-113; GE 3; AE A.

[11] Tr. 52-54, 67, 78, 90-91, 101-104; GE 1, 3.

[12] Tr. 57-60, 67, 85-87; GE 1.

Applicant answered "No" to that question and submitted the following "Additional Comments:"

> I left (resigned) [Company A] in 2005 to start work with [Company B]. I left [Company B] in 2006 (by mutual agreement) for personal reasons. None of the above apply.[14]

In signing the e-QIP, Applicant attested,

> My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful statement on this form can be punished by fine or imprisonment or both (See section 1001 of title 18, United States Code).[15]

At the hearing, Applicant testified that he responded "No" to Section 22 because none of the five situations in that question applied to him. Specifically, he interpreted the word "fired" to have a negative connotation. He indicated that he thought an employee had to do something wrong or inappropriate to be fired. He did not believe he was fired. He also testified that, in retrospect, he should have indicated that he was fired because he was terminated from his job. He also stated that he did not leave his job with Company B for personal reasons or as a result of a mutual agreement. He indicated his "additional comments" in Section 11 were not stated well. He also indicated that his "additional comments" in Section 22 about leaving Company B by mutual agreement for personal reason was a misstatement.[16]

Overall, I found that Applicant was not a credible witness. During his testimony, he was asked if he thought the termination of his employment with Company B was because the FBI was investigating him. In asking that question, it was first pointed out to him that he was placed on administrative leave for a couple of days immediately following his report of the investigation and was terminated immediately following the administrative leave. Nonetheless, he testified that he did not believe these events were connected. I did not find his testimony on that issue to be believable. Furthermore, Applicant's claim that he did not believe there was a connection between these events is also contradicted by statements he made in responding to interrogatories and in his Answer to the SOR. In responding to the interrogatories, he stated:

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[13] Tr. 57-60, 85-90; GE 1.

[14] GE 1.

[15] *Id*.

[16] Tr. 52-53, 58-60, 85-90, 99-100; GE 3. In Webster's New World Dictionary 3rd College Edition (1988), the word "fire" is defined as "to dismiss from a position; discharge."

> I still believe (now 2010) that it was fundamentally unfair to terminate my employment while I volunteered all information and no one had any information at that time regarding the FBI investigation.
>
> * * *
>
> [Company B] should have let me continue to work normally pending the outcome of the FBI inspecting my computer system/media.[17]

In his Answer, he stated, "It is my understanding that [Company B] and I were simply going our separate ways based on allegations which I believed to be at the time and which were ultimately proved to be baseless." Such statements show that he believed there was a connection between the FBI investigation and his termination.[18]

Applicant testified that, in the summer of 2009, the FBI returned the property it seized from his house. At that time, the FBI also informed him there was no indication that he engaged in any impropriety.[19]

Applicant's performance appraisal from Company A in 2005 reflected that he received the grade of "far exceeds expectation" in the category of "Act with integrity in all we do." The comments provided in that section stated, "His integrity is a fundamental characteristic that is important in his life." In 2009, he received a performance evaluation from his current company that indicated he was performing at the "exceptional" or "exceeds expectations" levels.[20]

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no

[17] GE 2 at I-13.

[18] Tr. 81-95, 101-104; GE 2, 3. Additionally, Applicant indicated in the interrogatories that ". . . I would not resign, therefore, I was terminated." When questioned about that comment at the hearing, he stated that Company B never asked him to resign. However, it does not make sense why he would make that comment if he was never asked to resign. This is another inconsistency that raises questions about his credibility. See Tr. 78-88, 100-101.

[19] Tr. 95-96; GE 2, 3.

[20] Tr. 63-66; GE 2.

one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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 unfavourable, to reach his decision.

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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 applicant concerned." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 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

Personal Conduct

Under Guideline E, the concern is that 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 ¶ 15.)

AG ¶ 16 describes a condition that could raise security concerns 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.

The Government has the burden of proving a controverted falsification allegation. Evidence that incorrect information was submitted on a security clearance application, standing alone, does not prove a falsification. For a finding of falsification to be sustainable, an applicant must have had a culpable state of mind at the time the information was submitted. A falsification must be made deliberately -- knowingly and willfully. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence that an applicant had a culpable state of mind at the time of the submission.[21]

In February 2006, Company B informed Applicant that he was being terminated due to lack of appropriate work matching his skills and abilities. There is no evidence in the record that he was provided any other reason for that termination.

[21] The 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.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)). *See also* ISCR Case No. 05-03472 at 5 (App. Bd. Mar. 12, 2007), ISCR Case No. 03-09483 at 4 (App. Bd. Nov 17, 2004).

Applicant indicated that, when he was completing Section 22 of the e-QIP, he did not believe any of the five situations set forth in that question applied to him. Specifically, he believed he was not "fired" because his termination was not based on any wrongdoing or misconduct on his part. Essentially, Company B informed him that he was being laid off. Based on the circumstances surrounding his termination, Applicant's interpretation of the question in Section 22 and its subparts was not unreasonable. Given the expressed reason provided by Company B for his termination, he could have answered "No" to the question in Section 22 without falsifying that application. He did not need to speculate about the employer's motive for terminating his employment. I find that Applicant did not deliberately falsify his e-QIP by checking the "No" block in Section 22.

However, in responding to Section 22, Applicant did more than check the "No" block. He provided "additional comments" that he "left [Company B] in 2006 (by mutual agreement) for personal reasons." Those additional comments were false and misleading. He did not leave his employment with Company B by mutual agreement or for personal reasons. When he made those "additional comments," he knew that Company B terminated his employment and that he had no input in that decision. He provided those false statements in both Section 22 and Section 11. I find that he deliberately made those false statements.

Sufficient circumstantial evidence exists to establish that Applicant believed Company B terminated his employment, in whole or in part, because the FBI was investigating whether he took proprietary and trade secret information from a former employer. Immediately following his report to Company B of the FBI investigation, he was placed on administrative leave for a couple of days and immediately thereafter was terminated. He never returned to work at Company B after informing it of the FBI investigation. I did not find credible Applicant's statements that he did not believe there was a connection between his reporting of the FBI investigation and his termination.

When Applicant submitted his e-QIP in March 2008, the FBI investigation against him was still ongoing. At that time, he knew that his previous employment was terminated almost immediately after reporting that he was being investigated by the FBI for allegedly taking proprietary information and trade secret from a former employer. To avoid a similar recurrence, he provided false and misleading statements in the e-QIP about the circumstances surrounding his departure from Company B. These false statements were "material" because they were intended to mislead and had the potential effect of influencing decision-makers to which they were addressed.[22] I find

[22] Deliberate and materially false answers on a security clearance application violate 18 U.S.C. § 1001. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995): as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." *See also United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004). Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum sentence includes confinement for five years and a $10,000 fine).

that AG ¶ 16(a) applies to Applicant's deliberate false statements in the "additional comments" to Section 22 of his e-QIP.

Six personal conduct mitigation conditions under AG ¶ 17 are potentially applicable:

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

In his e-QIP, Applicant deliberately provided false information about the circumstances surrounding his departure from Company B's employment. When applicants intentionally provide false information on their e-QIPs, they seriously undermine the entire security clearance investigation process. Throughout the security clearance adjudicative process, Applicant denied that he falsified his e-QIP. He has not accepted responsibility for his misconduct. I find that none of the mitigating conditions apply to the security concerns arising under AG ¶ 16(a).

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 relevant 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).

The comments in the Analysis section of this decision are incorporated in the whole-person concept analysis. Applicant has worked in the defense industry for about 20 years and held a security clearance for most of that time. Neverthess, his deliberate false statements on his e-QIP are serious, recent, and not mitigated. As such, I have concerns about his current ability or willingness to comply with laws, rules, and regulations. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person concept, I conclude he has not mitigated personal conduct security concerns.

Formal Findings

Formal findings 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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
James F. Duffy
Administrative Judge