



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



In the matter of:

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ISCR Case No. 09-04013

Applicant for Security Clearance

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel

For Applicant: *Pro se*

July 9, 2010

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guideline for personal conduct. Accordingly, his request for a security clearance is denied.

Statement of the Case

Applicant applied for a security clearance by submitting an Electronic Questionnaire for Investigations Processing (e-QIP) on May 1, 2007. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of

Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

On January 12, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) that specified the basis for its decision: security concerns addressed in the Directive under Guideline E (Personal Conduct) of the Adjudicative Guidelines (AG).

Applicant signed his notarized Answer on January 28, 2010, in which he admitted allegations 1.a. through 1.d. and denied allegation 1.e. Applicant requested a hearing before an administrative judge. Department Counsel was prepared to proceed on May 6, 2010, and the case was assigned to me on May 11, 2010. DOHA issued a Notice of Hearing on May 20, 2010. I convened the hearing as scheduled on June 10, 2010. The Government offered nine exhibits, marked as Government Exhibits (GE) 1 through 9, which were admitted without objection. Applicant testified on his own behalf and presented two witnesses. He also offered three exhibits, marked as Applicant Exhibit (AE) A through C, which were admitted without objection. DOHA received the transcript on June 18, 2010.

Procedural Matters

Department Counsel moved to amend the SOR by striking subparagraph 1.e. I granted the motion. The amended SOR contains four allegations under Guideline E.

Findings of Fact

Applicant's admissions in response to the SOR are incorporated as findings of fact. After a thorough review of the pleadings, Applicant's response to the Statement of Reasons, and the record evidence, I make the following additional findings of fact.

Applicant is 36 years old, and married with three children. He completed some college credits but did not earn a degree. He served on active duty in the Army signal corps from 1992 to 2003. He held a security clearance from approximately 1993 to 1994. It was revoked for approximately one year, and reinstated in about 1995. Applicant works as a technician in the computer field, and has worked for his current defense-contractor employer for three years. He testified that he currently holds a security clearance. (GE 1; AE A; Tr. 21-25; 66)

In August 1994, when Applicant was 19 years old, he went to the Post Exchange to buy an amplifier for his car. He testified that he took several amplifiers out of their boxes, and then put the "wrong amp in the wrong box." He also testified that when he was waiting to pay for it, he realized he had put a more expensive amplifier in a box marked with a lower price. He decided to see if he could "get away with this." (Tr. 27-28)

¹ See Executive Order 10865 and DoD Directive 5220.6. Adjudication of this case is controlled by the Adjudicative Guidelines implemented by the Department of Defense on September 1, 2006.

The police report at the time indicates that Applicant “admitted to placing the more expensive amplifier in the cheaper priced amplifier box, and purchasing the merchandise having knowledge he paid a lesser incorrect amount.” (GE 4) In his sworn statement of March 2002, he stated, “I admit to taking a more expensive amplifier and placing it in the box of a less expensive amplifier in an attempt to save money.” (GE 3) During his subject interview in 2007, he said that the amplifier was in the wrong box already, but he knowingly purchased it anyway in order to pay the lower price. (GE 9)

Applicant was arrested outside the exchange. He was charged under the Uniform Code of Military Justice (UCMJ) with Larceny of Non-Appropriated Funds Property, Article 121. He received non-judicial punishment (Article 15), and was sentenced to forfeit one month’s pay, serve 14 days extra duty, and reduced from E-4 to E-3. (GE 2) His security clearance and access to sensitive compartmented information (SCI) were revoked in October 1994 as a result of the larceny. The revocation memorandum describes Applicant’s actions as, “...you removed a price tag of \$285.00 from an amplifier and replaced it with a price tag of \$149.00. You then paid for the amplifier and exited the store.” (GE 6) In November 1994, Applicant submitted a written request for reinstatement of his clearance and access. In that request, he stated, “When I got up to the counter, I realized I had the wrong amp in the box. While in line I decided to try to pay the lower price instead of changing the boxes again. Because the clerk didn’t check the amp, I thought, I got away with it.” (GE 5) In November 1994, Applicant’s supervisor recommended reinstatement of the security clearance. In his letter, the supervisor stated that throughout the Article 15 proceedings, Applicant maintained his innocence. When questioned by Department Counsel, Applicant reiterated that at the time, he did not know he had placed wrong amplifier in the wrong box until he was at the counter, and denied that his statements were inconsistent. (GE 3, 5; Tr. 31-32)

Applicant’s security clearance was reinstated and he maintained it until 2003, when he was honorably discharged. He believes that he learned a great deal from the events of 1994, and that he became a better soldier and mentor to younger soldiers. He testified that he became Soldier of the Month, Soldier of the Quarter, and Soldier of the Year at various times in his military career. (Tr. 35)

In 2000, Applicant was a non-commissioned officer (NCO) and held a top secret security clearance. (Tr. 36) Applicant participated in football. He provided his coach with some of his own prescribed drug, Percoset, so that the coach could provide it to players who were hurt. He testified that he did not consider this as an illegal use of drugs at the time, but now realizes that he should not have shared a prescription drug with people for whom it had not been prescribed. (Tr. 36-41)

From April 2004 to January 2007, Applicant worked for company A as a systems administrator. (GE 1) In April 2004, company A assigned him to provide information technology support to computer networks for federal agency B. (GE 7) Agency B granted Applicant a top secret security clearance; he also held SCI access. (Tr. 43) Applicant worked at the site of a customer of agency B. Most work was performed as

night-time shift work. (GE 7) Applicant's performance evaluations of 2005 and 2006 show consistent ratings of 4 (exceeds expectations), with some ratings of 5 (superior). (AE B) However, questions arose related to whether Applicant had worked the hours he charged on his time cards. Company A conducted an investigation.

The security system at the facility where Applicant worked used employee badges to track their entry into and exit from the facility. It was the only facility where Applicant worked, and he had no reason to work in another location. Company A reviewed badge records for the period January 2005 to January 2007, and compared them to Applicant's time sheets. It concluded that, of the 4,808 hours Applicant claimed during that time period, he mischarged a total of 687 hours. When company A interviewed Applicant about the discrepancy, he admitted he did not work all the hours he claimed on his time sheets. He said he sometimes worked from home on "inventory work." The company A manager noted that there was no requirement for him to work at home. (GE 7, 8)

At the hearing, Applicant disputed that he told the interviewers that he worked from home. He stated he told them he sometimes offered to help other workers who had problems by answering questions by telephone, even if he was at home. He believes the interviewers mistakenly construed this response as a claim that he worked from home. He also testified that he told the interviewer he listed different days on his time card than the ones he actually worked; however, the company does not report this version in the record of company A's investigation. (Tr. 55) Company A concluded that Applicant committed time-card fraud. In January 2007, company A terminated Applicant based on his admission to mischarging time. He is not eligible for re-hire. His top secret security clearance was revoked on January 11, 2007. During his subject interview in June 2007, Applicant stated that he left company A voluntarily, and that although he signed documents when he left company A agreeing that he violated time-card rules, he felt that the statement did not apply to him. (GE 7, 8, 9)

In May 2007, the Office of the Inspector General (OIG) of agency B conducted a joint investigation with company A into the charge that Applicant falsely claimed 687 hours. The investigation found that the hours Applicant claimed were not related to agency business; that there were no errors or deficiencies in the badge records; and that Applicant had no authorization to work from home.

Agency B's investigative summary shows that in March 2007, the OIG contacted Applicant to offer him an opportunity to discuss the issue. Applicant declined at the time, and said he would contact the OIG later to arrange a time. After OIG made several attempts to reach him, Applicant contacted the OIG in June 2007, stating he was unsure if he wished to be interviewed. Ultimately, he declined. At the hearing, Applicant disputed that he was contacted in March 2007, claiming that agency B contacted him in about November 2007, not March 2007. He admitted that he did not attend an interview with agency B. (GE 7; Tr. 47-50)

Company A and the OIG calculated that the 687 mischarged hours amounted to \$42,439 in false claims. Company A agreed to reimburse agency B the full amount. As Applicant's false claims violated a federal statute, the OIG reported the case to the Assistant United States Attorney (AUSA) of the Department of Justice. The AUSA declined to prosecute, in part, because company A agreed to pay the mischarged amount. The OIG considers the case closed. (GE 7)

At the hearing, Applicant stated that the time discrepancies occurred because of his participation in a football league. He stated that he switched days with a coworker to accommodate his football schedule. This practice would have been acceptable if he had received permission to swap his days, but because he did it so often, he did not ask permission. He wrote on his time card the days he was scheduled to work instead of the days he actually worked. He sometimes worked for three consecutive days. Applicant testified he loved his job and he did it well. He testified, "I believe I defrauded the Government in the sense of not working when I was supposed to work." He believes he was terminated because he did not actually work the days he listed on his time card, not because he charged for hours that he did not work. (Tr. 51-53, 65)

In 2009, agency C considered Applicant for access to sensitive compartmented information (SCI). He participated in four agency C interviews and three polygraphs. (Tr. 93) During his June 5, 2008 interview, Applicant stated that he was terminated by company A because it found that he charged 36 hours that he could not account for between 2004 and 2007. He also reported that he and others were tasked to conduct an inventory of a building, in addition to their usual duties. They claimed regular work hours, and added the time spent on inventory as additional hours of work, even though these work hours were concurrent with their regular work hours. In his September 25, 2008 agency C interview, Applicant stated that his overtime supervisor authorized the inventory work as overtime hours. Charging in this manner resulted in Applicant receiving both regular pay and overtime pay for the same hours. He admitted during the interview, and at the hearing, that he did "double-bill" for hours when he was working on inventory, and that he was aware that charging concurrent hours did not comply with company A's policy. However, he stated in the interview that he continued to do it because "it was working for him." (GE 8, 9; Tr. 57-58)

Agency C stated in its report that Applicant believed he mischarged only 36 hours. Applicant disputes this characterization. However, he testified, "I've always stated that I couldn't account for 36 of those 600 hours." Additionally, in his interrogatory response, he stated, "I felt I always made up my time. I always thought I didn't make up about 36 hours of time." (GE 8, 9; Tr. 56- 57)

During the September 2008 agency C interview, Applicant explained that his work schedule at company A was three days per week, with one 12-hour shift per day. However, at the hearing Applicant testified that his work schedule was three days on and three days off, which totaled five shifts per week. (Tr. 45) At the time, Applicant belonged to a semi-professional football league, whose practice and game times

conflicted with his work schedule. To arrive at his games timely, each week Applicant worked one 12-hour shift, and two consecutive shifts amounting to 24 straight hours. Applicant denied at the hearing that he actually worked 24 hours straight, stating that he worked 18 hours, and then slept, but was present in the building 24 hours. His supervisors were aware that he would sleep in the building. Applicant believed this was efficient because he could avoid driving his long commute more often than necessary. (Tr. 59-60) However, on his time card, Applicant reported three 12-hour shifts, instead of one 12-hour shift and one 24-hour shift, because company A rules did not allow employees to work more than 18 continuous hours in one shift. Applicant stated during the interview that he sometimes came to work late or left early because of his football games, but did not report this missed time on his time cards. In February 2009, agency C concluded that Applicant engaged in time card fraud between 2005 and 2007, while holding a security clearance, and did not admit the full extent of his fraud. Agency C declined to grant Applicant's request for access to SCI. (GE 8, Tr. 61)

Applicant's current supervisor testified. She talks by phone to him once or twice per week, and in person about quarterly. She stated that he is a good worker and has received very high ratings from his managers. He has been going to school for a number of years, while working. He mentored a younger staff member who was having work problems. Most of Applicant's performance reviews for 2007 through 2009 show above average ratings. Part of the witness's responsibilities is to sign the time cards submitted to the government by Applicant's company. She testified that if her company were in a situation where time-card fraud was charged, it would do a thorough investigation before it would re-pay the government for mischarged hours. (AE C; Tr. 74-86)

Applicant's second witness is a friend of 18 years. They served in the military together, and the witness describes him as an exemplary soldier, and a good leader who was well-respected. The witness said Applicant contributes to his community, and is dependable and reliable. (Tr. 87-93) Applicant also submitted his company A performance evaluations during 2005 and 2006, which showed he received ratings of 4 (exceeds expectations) in most categories, and 5 (superior) in some categories. (AE B)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.² Decisions must also reflect consideration of the "whole-person" factors listed in ¶ 2(a) of the Guidelines.

The presence or absence of a disqualifying or mitigating condition is not

² Directive at §6.3.

determinative of a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline E (Personal Conduct).

A security clearance decision is intended only to resolve the questions of whether it is clearly consistent with the national interest³ for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁴ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or his own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.⁵

Analysis

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern about 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.

The Guideline E allegations implicate the following disqualifying condition under AG ¶ 16:

³ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁴ See *Egan*, 484 U.S. at 528, 531.

⁵ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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.

AG ¶ 16(c) is relevant to Applicant's larceny in 1994, which involved a deliberate attempt to pay less than the legitimate cost of an item. It also applies to his distribution of a controlled drug to teammates who did not have a prescription for it. Both instances demonstrate willingness to disregard rules. Applicant's most recent and most egregious failure to abide by the law occurred in 2007, when he charged the government for time that he did not work. He knew that he was required to enter the days and hours he actually worked, but chose to charge for time that he was not present at his work-site. There is no record evidence supporting Applicant's statement that he actually worked all the time he charged, but for 36 hours. However, there is evidence that Applicant charged for hours he did not work. The badge system at company A's work-site tracked employees' entries and exits. Company A and agency B reviewed these badge records and concluded that Applicant had charged the government for hours when he was not in the building. Upon review of the record, government agency C also concluded that Applicant engaged in time-card fraud. Applicant's falsified time cards caused the government to pay more than \$40,000 for time when he was not working. He repeatedly disregarded his employer's rules and repeatedly defrauded the government over a two-year period. AG ¶ 16(c) applies.

Under AG ¶ 17, the following mitigating condition is relevant:

(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.

Applicant's actions were not minor. He knowingly and unjustly received compensation for hours he did not work, at the expense of the government. His employer, agency B, and agency C all concluded that he mischarged 687 hours of time, valued at more than \$40,000, a significant misuse of government resources. Nor were his actions infrequent, occurring repeatedly over a two-year period. If Applicant's behavior consisted only of the theft in 1994 and the distribution of a prescription drug in 2000, they might be mitigated by time and found unlikely to recur. However, Applicant's time-card fraud is more recent. His decision to again engage in untrustworthy conduct from 2005 to 2007 demonstrates a pattern of dishonesty and rule violations that are much closer to the present time, and raises serious questions as to his willingness to adhere to rules, and ultimately about his judgment and trustworthiness. AG ¶ 17(c) cannot be applied.

Whole-Person Analysis

Under the whole-person concept, an administrative judge must evaluate the Applicant's security eligibility by considering the totality of the Applicant's conduct and all the circumstances. An 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Although Applicant's actions in 1994 and 2000 conduct were not recent, they are consistent with the untrustworthy behavior demonstrated more recently from 2005 to 2007. Applicant mischarged the government for hundreds of hours of work time. He fraudulently charged the government for time he did not work, requiring his employer to repay the government more than \$40,000. Despite his denials, it is unlikely a company would pay the government tens of thousands of dollars unless it had confirmed that Applicant acted fraudulently. His conduct was criminal in nature, and he could have been prosecuted. Applicant engaged in this conduct repeatedly over a period of at least two years. The information he provided during his interviews and at the hearing was inconsistent and therefore, not credible. Moreover, Applicant's continued denial that he mischarged any more than 36 hours, in the face of strong evidence to the contrary, indicates that he has not accepted responsibility for his actions. He engaged in fraudulent conduct while he held a security clearance, violating the trust that the government places in those to whom it grants clearances. Finally, Applicant cannot claim ignorance of the obligations of a security clearance holder, as he held one for more ten years while in the military.

Overall, Applicant's conduct raises serious doubts about his suitability for access to classified information. The record evidence fails to satisfy these doubts, which must be resolved in favor of the national security. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guideline.

Formal Findings

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|----------------------------|-------------------|
| Paragraph 1, Guideline E | AGAINST APPLICANT |
| Subparagraphs 1.a. – 1.d.: | Against Applicant |
| Subparagraph 1.e.: | Withdrawn |

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge