



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



In the matter of:	)	
	)	
XXXXXXXXXX, XXXXX	)	ISCR Case No. 09-07910
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Eric Borgstrom, Esq., Department Counsel  
For Applicant: Debra A. D'Agostino, Esq.

April 20, 2011  
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**Decision**  
\_\_\_\_\_

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate Guideline E (personal conduct) security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On August 4, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP).<sup>1</sup> On May 14, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline E (personal conduct). 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 adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on June 6, and DOHA received his answer on June 9, 2010. Department Counsel was prepared to proceed on July 1, 2010. The case was

<sup>1</sup> Applicant had previously submitted an e-QIP on January 17, 2006. (GE 2.)

previously assigned to another administrative judge on July 6, 2010, and was reassigned to me on September 8, 2010. DOHA issued a notice of hearing on August 10, 2010, scheduling the case for September 14, 2010. The hearing was convened as scheduled.

The Government offered Government Exhibits (GE) 1 through 5, which were received without objection. Applicant offered Applicant Exhibits (AE) A through C, which were received without objection, and he testified on his own behalf. I held the record open until September 30, 2010, to afford Applicant the opportunity to submit additional evidence. Applicant timely submitted AE D, which was received without objection. DOHA received the hearing transcript (Tr.) on September 23, 2010. The record closed on September 30, 2010.

### **Findings of Fact**

Applicant admitted all of the allegations alleged in the SOR. His admissions are accepted as findings of fact.

### **Background Information**

Applicant is a 58-year-old chief engineer for navigation, who has been employed by a defense contractor since March 1977. He has accumulated 34 years of seniority through a “string of legacy companies.” Applicant has continuously held a secret security clearance for most of the past 34 years. In 2009, and at the request of company management, he applied for a top secret security clearance. It was during the background investigation for a clearance upgrade that Department of Defense (DoD) officials discovered that Applicant did not have a college degree, discussed *infra*. Maintaining a security clearance is a condition of his employment. (GE 1, Tr. 15-18, 21-24, 29, 48.)

Applicant married in March 1977. He and his wife have two adult daughters, who are employed as teachers. Applicant and his wife have been legally separated since January 2009. (GE 1, Tr. 47.)

Applicant graduated from high school in 1971. After high school, he went to community college “for a couple of years” and worked as a technician “for about a year.” (Tr. 18.) He then transferred to a four-year college, which he attended from September 1974 to January 1977. He did not graduate from college nor does he have a college degree, discussed *infra*. (GE 1, GE 5, Tr. 19-20.)

### **Personal Conduct**

The SOR alleges three separate falsification allegations all stemming from Applicant misrepresenting that he had a college degree when, in fact, he did not. Summarized, they are:

- (1) When Applicant completed his August 2009 e-QIP, he falsely indicated that he had been awarded a bachelor's degree from a college in January 1977;
- (2) When Applicant was interviewed by a DoD investigator in September 2009, he falsely stated that he had been awarded a bachelor's degree in electrical engineering from a college in January 1977; and
- (3) When Applicant completed his January 2006 e-QIP, he falsely indicated that he has been awarded a bachelor's degree from a college in January 1977.

When Applicant submitted his January 2006 and August 2009 e-QIPs, he signed the signature forms certifying that his answers were true, complete, and correct to the best of his knowledge. (GE 1, GE 2, Tr. 38-39.)

Applicant described how the deception of having a college degree began. In January or February 1977, he was engaged and looking for a job. His fiancée's grandmother, who was "an institution" and worked in a local coffee shop, arranged for Applicant to meet with a representative of his then company. The representative met with Applicant and after reviewing his resume informed him that he "would have a better chance if [he] had a degree, (and) gave [his] resume back" and made a follow-up appointment for Applicant to return in "a week or two." When Applicant returned, he met with a different representative and brought a revised resume. This time his resume indicated that he had a college degree. Applicant was hired at age 23 and to date has had a successful career for the last 34 years. (Tr. 19-21, 35-36.) Applicant had periodic renewals of his secret clearance, but none that involved the level of scrutiny that his 2009 application for a top secret clearance required. (Tr. 22, 34-35.)

When Applicant was queried why he did not provide truthful information about his degree on his e-QIP, he responded that some of the fields on the electronic form were "not editable" such as the education block. (Tr. 23.) He added that his company was in the middle of competing for a lucrative contract, and as chief engineer, he did not want to lose his clearance during the competition. (Tr. 24-25.) As it turned out, Applicant did not need a top secret clearance because the contract award required that a new position be created at a higher level than Applicant. (Tr. 25-26.)

Applicant's falsification came to light when a DoD investigator met with him in October 2009 and advised him that he was having difficulty verifying that Applicant had a degree. Applicant then admitted to the investigator that he did not have a degree. Applicant informed the investigator that the only way he could get the electronic form (e-QIP) to move on to the next screen was to list that he had a bachelor's degree. He also wanted to remain consistent. Applicant further informed the investigator that he did not believe his not having a degree would affect his personal or professional reputation. It is not common knowledge that Applicant does not have a degree. Only some close friends and family know that Applicant does not have a bachelor's degree. Applicant does not believe that he can be coerced or blackmailed as a result of this issue. (GE 3, Tr. 27-28,

35.) During his hearing, Applicant testified that “[n]o one” at his company knew that he did not have a degree. (Tr. 42, 47.) Applicant concluded his direct examination:

[I]’m sincerely sorry about this whole, about the initial discretion, or transgression, or whatever it is called. It is an isolated incident.

I have lived an, otherwise, exemplary life, and lead an exemplary lifestyle. It was a one time incident, I don’t see how it could possibly happen again, and I’m sorry I had to bring everyone through this. (Tr. 33.)

Post-hearing, Applicant submitted a letter dated September 24, 2010. He stated that he contacted his company ethics officer and updated her regarding his security clearance situation and the fact that he did have a college degree despite having represented throughout his career that he had one. Upon learning that Applicant was represented by an attorney, the ethics officer advised him that she would have to refer the matter to the corporation attorney as well as senior company leadership “in deciding on a course of action.” (AE D.)

### **Character evidence**

Applicant submitted numerous reference letters, awards, and certificates of appreciation that amply document his 34 years of superb service as a defense contractor. (AE A.) He also submitted two signed, sworn reference letters that provide very favorable comments about Applicant, personally and professionally. (AE B, AE C.) The collective sense of these documents demonstrates that Applicant is an individual who has been a stellar performer at work as well as being a productive and contributing member of society.

Applicant called one witness to testify on his behalf. That witness is a childhood friend and is employed as a senior financial advisor with a prominent financial company. The two friends stayed in touch with each other after they finished school, got married, and raised their children. The witness always looked up to Applicant “because he is cautious, he is logical, he is well reserved. I consider him one of the most brilliant people I know.” The witness assumed that Applicant graduated from college, but the fact that he did not graduate from college does not change his overall opinion of the Applicant. He concluded “[a]nd I hope this hearing supports what this man (Applicant) has accomplished for the better part of three decades plus.” (Tr. 51-60.)

### **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 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 (4<sup>th</sup> 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).

## Conclusions

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are raised under Guidelines E (personal conduct) with respect to the allegations set forth in the SOR.

### 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 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 government representative; and
- (e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, . . . .

The SOR alleges that Applicant falsified his August 2009 and January 2006 e-QIPS by indicating that he was awarded a college degree when, in fact, that was not true. The SOR further alleges that Applicant lied to a DoD investigator during a September 2009 interview when he told him that he was awarded a college degree when, in fact, that was not true. The Government established through Applicant's admissions and evidence presented the disqualifying conditions AG ¶¶ 16(a), (b), and (e).

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.

A false statement must be made deliberately -- knowingly and willfully. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported. Here, Applicant knew he did not have a degree, yet chose to continue misrepresenting that he had one. Had Applicant's information been relied upon without verification, he may well have successfully vetted for a security clearance at a higher level. Regardless of the reason Applicant chose for not being forthcoming, the process does not allow for applicants to pick and choose which questions they will answer correctly. When applicants lie on their security clearance applications, they seriously undermine the process, as Applicant did in this case. I find that none of the mitigating conditions fully apply.<sup>2</sup>

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<sup>2</sup> 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. [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)).

## 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.

The comments in the Analysis section of this decision are incorporated in the whole-person concept. Applicant receives credit for 34 years of excellent service as a Government contractor. He has made substantial contributions to national defense. In his personal life, he has been a responsible family man and raised two daughters who are contributing members of society. Apart from the lie that Applicant has perpetuated and lived with for the past 34 years, I am unable to find fault with any other facet of his life.

Applicant's deliberate failure to disclose information on his security clearance application is serious, recent, and not mitigated. I do not accept his characterization of the concerns raised in this case as being an "isolated incident." Once Applicant made the fateful decision to lie about having a degree, he was faced with a dilemma that spanned his 34-year career each time the question of his degree came up. Most recently, he falsified his August 2009 and January 2006 e-QIPS and lied to a DoD investigator in September 2009. In spite of Applicant's otherwise stellar lifelong record, this conduct raises questions about Applicant's honesty and integrity. Accordingly, I have serious questions about his current ability or willingness to comply with laws, rules, and regulations. Applicant has not mitigated security concerns pertaining to personal conduct related to his three recent falsifications.

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" and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the guidelines. Applicant has failed to mitigate or overcome the Government's case. For the reasons stated, I conclude he is not 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:	AGAINST APPLICANT
Subparagraph 1a – 1c:	Against Applicant

## **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is denied.

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ROBERT J. TUIDER  
Administrative Judge