



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



In the matter of: )  
)  
) ISCR Case No. 10-03886  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Philip Katauskas, Esquire, Department Counsel  
For Applicant: *Pro se*

January 27, 2012

**Decision**

---

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, testimony, and exhibits, I conclude that Applicant has mitigated the security concern related to personal conduct. Accordingly, his request for a security clearance is granted.

**Statement of the Case**

On August 15, 2011, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) that detailed security concerns under Guideline E (Personal Conduct). This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992) as amended; and the Adjudicative Guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant signed his notarized response to the SOR (Answer) on September 9, 2011. He admitted the single allegation under Guideline E, Personal Conduct. Department Counsel was prepared to proceed on October 13, 2011, and the case was assigned to me on October 24, 2011. DOHA issued a Notice of Hearing on November 15, 2011, and I convened the hearing as scheduled on November 30 2011. The Government offered three exhibits, which I admitted into evidence as Government Exhibits (GE) 1 through 3. Applicant testified, presented the testimony of two witnesses, and offered eight exhibits, which I admitted as Applicant Exhibits (AE) A through H. DOHA received the transcript (Tr.) on December 6, 2011.

### **Findings of Fact**

Applicant's admission in response to the SOR is incorporated as a finding of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings of fact.

Applicant is 47 years old, married, and has one 25-year-old son. (GE 1) He holds an associate's degree. He served in the Navy from 1986 until his honorable discharge in 1995. Applicant held a security clearance without incident while he served in the Navy, and since then in his positions working for federal defense contractors. He currently works as an engineering technician, investigating and correcting electromagnetic interference with military aircraft. (GE 1; Tr. 39)

In a previous position, where Applicant worked from 2001 to 2008, he was assigned to work on three contracts. His primary supervisor was not pleased about being required to share Applicant's work time, and demanded he work most of his hours for the supervisor. In late 2008, Applicant's primary supervisor called Applicant at his work location on three occasions, and Applicant was not there. The supervisor concluded that Applicant had left work. When Applicant charged hours to the contract for the instances when the supervisor believed he was not there, the supervisor accused him of time card fraud. (GE 2; Tr. 39-46)

Applicant contends that he worked on the supervisor's contract until it was time to report to another duty station to work on one of his other assigned contracts. Applicant had witnesses at the time who could testify that he was working on the appropriate contracts at the times when the supervisor claimed he was not at work. Applicant provided the names and contact information for those witnesses in his response to DOHA interrogatories. One of the witnesses who could verify Applicant's account was the company facility security officer (FSO). Applicant was not informed about his supervisor's charges, or counseled by Human Resources (HR). Despite having previously received outstanding evaluations and raises based on his performance, he was terminated in December 2008 for time card fraud. Applicant contacted an attorney to discuss pursuing a wrongful termination suit, but was told it was not advisable because he worked in an "at-will" employment state. (GE 2; Tr. 46-50)

Applicant completed a security clearance application in October 2009 to update his security clearance. Question 13c asked whether he had been fired from a job in the previous seven years. Applicant believed the term “fired” did not accurately portray what had occurred because he was wrongfully terminated based on false allegations, and he responded that he had been laid off. He testified that he now realizes he should have used the explanatory area on the application to describe the circumstances of the event. (GE 1; Tr. 31-33, 37)

When Applicant met with a security investigator in February 2010, he did not tell her that he was terminated. After the interview, he realized he had made a “terrible mistake.” He tried several times to reach her by telephone to set up an interview, and left her voicemail messages. He also sent her an email, but she did not respond. Applicant discussed his failure to disclose with his current supervisor, who contacted the company FSO. Both of them thought it was acceptable to wait to explain the problem until Applicant was contacted for a second interview. He did not hear from the agent for some time. When she called, he told her he had been trying to reach her to set up another interview. She stated that she traveled frequently and did not always have access to her email and work phone. During his second interview, Applicant fully explained the circumstances of his termination, and told her that he had disclosed the events to his program manager, team leads, and coworkers. (GE 2; AE A; Tr. 55-60)

Applicant's current supervisor also sought the FSO's advice about answering the security clearance application question regarding the termination. He told Applicant that the FSO advised Applicant not to address the event unless the information was specifically requested. The FSO provided a letter elaborating on his discussion with Applicant's supervisor. The FSO advised that each question must be read carefully and answered appropriately. The FSO and the supervisor discussed the difference between being fired and being laid off. Finally, the FSO noted that an applicant need not say he was fired if he was, in fact, laid off. At no time did either Applicant's supervisor or his FSO recommend that Applicant provide false information to the agent. Applicant's current program manager, current FSO, the FSO at his previous company, and several of the employees there, are all aware of these events. (GE 2, 3; AE B)

Applicant testified that he now realizes that he should have understood “the need to answer the questions carefully without my personal thoughts and emotions interfering with the simple facts.” He acted, in his own words, out of “ignorance and fear.” He was ignorant about the effect that disclosing a termination would have on his eligibility to continue his clearance. He thought he would immediately lose the clearance. He was supporting his unemployed son, and caring for his live-in mother-in-law, who suffers from advanced Alzheimer's disease. He feared the devastating consequences his family would suffer if he lost his job. He knows that his ignorance “is no excuse for the poor decisions that I made during the investigating process.” He also stated, “I'm very sorry for the mistakes that I've made and take complete responsibility for my actions.” (AE A; Tr. 23, 27-28)

Applicant noted in his interrogatory response that, "To have my moral character and work ethics destroyed by one person's lies has been the hardest thing in my life to deal with so far." (Tr. 56) Applicant testified that his actions in not being forthright about the termination demonstrated poor reasoning:

I fully understand now that was some pretty bad reasoning and I should not have done that. And since being educated, I understand now that I would never do that again in the future. I would mark that I was fired, immediately disclose all the information surrounding that termination, so there would be no questions and no problems there. (GE 2)

Applicant's first witness, a co-worker and personal friend of many years, stated that Applicant's military and professional experience are an invaluable asset to the Navy program they support. He is aware of Applicant's problems with his previous supervisor. Applicant has told him he regrets failing to explain the circumstances of his job termination. Applicant's team lead describes Applicant as hard-working and trustworthy, and notes that Applicant is "especially diligent in handling classified information and follows DoD policy." He promptly informed her of his security clearance issue, showing an "open and honest attitude" and "great strength of character." She noted his regret about not explaining the circumstances of his job termination on his application, and believes that he has learned a hard lesson from these events. (AE C, E; Tr. 62-69)

The deputy program manager for the Navy program Applicant supports stated in his letter that he has observed Applicant handling classified information in a professional manner and in line with all applicable policies. He is aware of Applicant's conduct, but describes him as an exceptional employee who has "contributed directly to the preservation [of] lives of military members." A co-worker also described Applicant as displaying the highest level of integrity. Applicant's wife testified that, in their 25 years of marriage, Applicant never divulged information about the nature of his work. She also provided a letter describing Applicant's stress when he was accused of fraud and terminated. She notes that he does not take his errors lightly, has expressed remorse, and is striving to ensure that it will never happen in the future. (AE D, F, G; Tr. 73-85)

Applicant's program manager and immediate supervisor explained in his letter that Applicant has been open about his errors "with me, his company, other employees, and more particularly, with the government customers he supports..." His opinion is that Applicant did not intentionally deceive or lie about his employment situation, but felt strongly that he was wrongfully terminated from his last job. In his opinion, stating that he was 'fired' did not adequately explain the situation." He believes that Applicant's openness about events and willingness to receive further training are "positive attitude adjustments." (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.<sup>1</sup> Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the “whole-person” concept. The presence or absence of a disqualifying or mitigating condition does not determine 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.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest<sup>2</sup> 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.<sup>3</sup> 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 that each applicant possesses the judgment, reliability, and trustworthiness to protect the national interests as his or her 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.<sup>4</sup>

## Analysis

### Guideline E, Personal Conduct

The security concern under the personal conduct guideline is that

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions

---

<sup>1</sup> Directive. 6.3.

<sup>2</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>3</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>4</sup> See *Egan*; Adjudicative Guidelines, ¶ 2(b).

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)

I have considered all of the disqualifying conditions under Guideline E, AG ¶ 16, and in particular the following:

(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; and

When Applicant completed his security clearance application, he indicated that he was laid off from his previous employment, rather than terminated. He stated at the hearing that he had no intent to deceive, but also admitted that he was not forthcoming because of fear. Applicant feared that admitting a termination would place his security clearance in jeopardy, and threaten his livelihood and his family's well-being. I find that he consciously decided not to disclose the termination. His failure to disclose was deliberate, and AG ¶ 16(a) applies.

The following mitigating conditions under AG ¶ 17 are 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; and

(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.

Applicant's offense was infrequent. The record contains no evidence of failure to disclose facts in any previous investigation during 25 years of holding a security clearance. Numerous letters of recommendation attest to Applicant's character. This event, which occurred three years ago, does not cast doubt on his current trustworthiness or reliability. AG ¶ 17(c) applies.

Applicant was open and honest about the fact that he did not reveal his termination. He disclosed it to his wife, his coworkers, his team lead, his supervisor, and the FSOs in both companies. Following his first interview, he tried to reach the security investigator to disclose that he had not been forthcoming. He is now acutely aware of the gravity of his actions. Given his sincere remorse for his actions, and no evidence of

similar behavior since that time, I conclude that such behavior is unlikely to recur. AG 17(d) applies.

### **Whole-Person Concept**

Under the whole-person concept, an administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the relevant circumstances. I have evaluated the facts presented and have applied the appropriate adjudicative factors under the cited guidelines. I have also reviewed the record before me in the context of the following whole-person factors listed in 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 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.

Applicant failed to be forthright in answering a question on his security clearance application. He let his indignation about the unjust termination determine his response. He also worried about his family's welfare and believed that he would immediately lose his clearance if he disclosed a termination. All these factors led him to make a serious error in judgment. However, I considered the three years that have passed with no evidence of similar conduct or poor judgment; Applicant's openness with his supervisor, FSO, co-workers, and wife; and his 25-year-history of holding a security clearance without incident. I had the opportunity to closely observe Applicant's demeanor and assess his credibility during the hearing. I am convinced that he is genuinely remorseful for his conduct and, given the serious consequences of his acts, will not engage in such conduct in the future.

For all these reasons, I conclude Applicant has mitigated the cited security concern. A fair and commonsense assessment of the available information bearing on Applicant's suitability for a security clearance shows he has satisfied the doubts raised under the guideline for personal conduct.

### **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 as follows:

Paragraph 1, Guideline E: FOR APPLICANT

Subparagraph 1.a For Applicant

### **Conclusion**

In light of the foregoing, it is clearly consistent with the national interest to allow Applicant access to classified information. Applicant's request for a security clearance is granted.

---

RITA C. O'BRIEN  
Administrative Judge