



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



In the matter of:	)	
	)	
	)	ISCR Case No. 11-02813
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Stephanie Hess, Esq., Department Counsel  
For Applicant: Christopher Graham, Esq.

01/18/2013

**Decision**

LYNCH, Noreen, A., Administrative Judge:

The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns arising under Guideline E (Personal Conduct). The SOR was dated May 3, 2012. 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) implemented in September 2006.

Applicant timely answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on November 9, 2012. A notice of hearing was issued on December 4, 2012, scheduling the hearing for December 18, 2012. Government Exhibits (GX) 1 through 4 were admitted into evidence without objection. Applicant testified and presented Applicant Exhibits (AX) 1 and 2. I received the transcript (Tr.) December 28, 2012. Based on a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is granted.

## Findings of Fact

In his answer to the SOR, Applicant admitted four of the five factual allegations under Guideline E (Personal Conduct) with explanations concerning billing for work that he completed. He denied SOR ¶ 1.d.

Applicant is a 42-year-old engineer who is currently self-employed. He obtained his undergraduate degree in January 1996. He is working on his master's degree. (Tr. 18) He is married and has one daughter. During his professional career, he has worked as a contractor and a consultant for the Department of Defense (DoD). He believes he has never held a security clearance. (Tr. 19)

The SOR alleges that Applicant either while self-employed as a government contractor or employed by a government contractor for the U.S. Army, from 2001 until 2007 regularly and intentionally rounded up work hours by 5% to 10%, resulting in being paid for work that Applicant did not perform. (SOR ¶¶ 1.a, 1.b) Additionally, the SOR alleges that from 2006 until 2011, Applicant intentionally rounded up his hours by 5% to 7%, resulting in an overpayment of \$20,000 per year for time not actually worked. (SOR ¶ 1.c) The SOR alleges that Applicant did not intend to change his billing practices. (SOR ¶1.d) Finally, the SOR alleges that in January 2008, as a result of the allegations in 1.a through 1.d that another governmental agency denied Applicant's application for a security clearance. (SOR ¶ 1.e)

Applicant was sponsored for access to sensitive compartmented information (SCI) in November 2006 by his employer. During February, May, and November 2007 interviews, Applicant was questioned about his accounting practice for his time keeping. The report notes that Applicant acknowledged that he did not record hours regularly, and that he was "sloppy" with his bookkeeping. Applicant does not agree with the report that states he completed time cards by guessing the number of hours worked and rounds up the numbers so that he defrauds the government. According to the summary report, Applicant overestimated his weekly time by 5% to 10%. The summary further notes that Applicant, by that account, was overpaid by approximately \$20,000. Applicant denies that he ever billed for work that he did not perform. Applicant is quoted as saying that he would continue with the same reporting practices in the future, unless given different guidelines from his employer.

Since 2006, Applicant was employed as a government contractor. He worked for a small company that did not have a procedure for reporting time worked. He claimed that the owner told him to record hours as "best he can." (GX 2) Based on that advice, Applicant calculated time for phone calls, emails and other administrative tasks on a given contract as a fixed percentage of the engineering time. (Tr. 21)

In 2008, Applicant was denied a clearance by another agency. He appealed the decision because "much of the information and important details were not correct or omitted." (GX 3) The appeal was denied based on Applicant's "overestimated billing practices." (GX 4)

In a March 2008 letter in which Applicant appealed the January 2008 Clearance Decision Statement, he was very specific concerning his disagreement with the decision. Applicant noted that important details that would help explain his conduct were ignored. He wrote that the decision statement “appears to suggest that I have been chronically skimming on my timecard, which was not at all what I believed I had conveyed in my interviews.” Applicant acknowledged that he had not been concerned with a strict minute-by-minute accounting but he reported fairly and did not commit fraud. Applicant’s hours varied each week. He was self-employed for five years and any timecard policy was at his discretion. He was never given a detailed policy or procedure for reporting hours. He agrees that he would round up but compensate for that by not reporting smaller or less productive time periods. Applicant did not have a specific percentage on daily rounding but does not agree with the interviewer’s insistence that he provide specific numbers on daily rounding. (GX 3) Applicant has followed any given procedures or reporting policies that were in place with any company that had one. He maintains that he has not broken any company guidelines regarding timekeeping, and has not committed fraud.

At the hearing, Applicant explained that this was a misunderstanding of his billing practices. He was adamant that he never billed for time that he did not work. He elaborated that no one ever complained about his billing practice. He was adamant that he never charged for hours that he did not work. He has been consistent in his responses made in his appeal and his answer to the SOR. Although he now uses language that refers to “administrative” time versus “engineering” time, he was credible in his explanation that during his work day he often switched from contact to contract when using the phone or sending correspondence. He stated that it was not feasible to record actual time spent on each contract. He estimated the overhead required to handle the program management function from each contract as a fixed ratio of the engineering required on each contract. Also, when Applicant was self-employed, he set his own timekeeping policy so it was not a question of whether he was following company procedure. (GX 2)

Applicant acknowledged that he told the interviewer after the 2007 polygraph that he did not do a good job of keeping track of his time and that he would complete a time card and round up the numbers by five to ten percent. (Tr. 29) However, he was trying to convey the idea that he did not list any hours for which he did not work.

Applicant produced a spreadsheet to explain his current method of reporting hours he has worked. (AX B) He lists the contracts and the number of hours that he spends each day on each contract.

Applicant explained that he has a contract that describes the scope of his work as engineering services. He understands that he can bill for all functions performed as billable work, including administrative details, such as phone calls, and emails. (Tr. 28) He has never been questioned about his billing by any employer.

## Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information. The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant's character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

## Analysis

### Guideline E, Personal Conduct

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

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information.

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

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

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

(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;

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

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

(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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

As alleged above, Applicant used a method of recording his engineering work hours in a way that did not comply with standard government procedure. The evidence for this "fraud" is noted in summary reports from a 2007 security investigation. Applicant admitted that he was sloppy with his bookkeeping; but he insisted that he did not list hours that he did not work. He was denied a clearance by another agency in 2007. AG ¶¶ 16(b) and 16(d) apply.

AG ¶ 17 provides conditions that could mitigate security concerns:

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

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

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

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

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

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

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

Applicant admitted that he did not follow any specific government accounting procedure when completing his billing invoices. However, he explained the procedure he used, and he was adamant that he did not defraud the government on any contracts. He appealed the 2008 decision to revoke his security decision and tried to explain on numerous occasions that parts of what he said were quoted out of context. There is no evidence of overpayment other than the alleged admissions about inflating his hours 5 to 10%. He had no specific rules about reporting administrative hours to follow when he was a contractor or self-employed. He never received complaints about his accounting. He intends to follow whatever procedure is required. He acknowledged that a new way of reporting would be better and he presented the evidence in a chart at the hearing. I have no doubts about his judgment, trustworthiness, and reliability. After considering the mitigating conditions outlined in AG ¶ 17, I conclude Applicant has mitigated the security concern under personal conduct. AG ¶¶ 17 (c), (d), (e), and (f) apply..

### **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 an 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is a 42-year-old professional who is educated and has worked in the engineering field for many years. He has contracted with various government agencies. He was trying to explain his timekeeping procedures in 2007 when interviewed as part of a security clearance process with another agency. His clearance was denied because of a belief that he defrauded the government through inflating the hours worked on his time cards.

I find Applicant credible in his explanation concerning his timekeeping and his conviction that he did not defraud the government. The interviews took information he provided out of context. When he prepared time cards, he estimated the hours worked and failed to keep good records of hours worked on a daily basis. There were no specific rules about timely recording of hours worked. The alleged admissions from the three interviews were refuted. Applicant has met his burden in this case. He has mitigated the security concerns about personal conduct. Clearance is granted.

### **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:	FOR APPLICANT
Subparagraphs 1.a- 1.e:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Clearance is granted.

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NOREEN A. LYNCH.  
Administrative Judge



