



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 11-05217

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel

For Applicant: *Pro se*

05/31/2012

Remand Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant does not mitigate personal conduct concerns. Eligibility for access to classified information is denied.

Statement of Case

On July 28, 2011, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive and the Adjudicative Guidelines (AGs) that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on August 11, 2011, and requested a hearing. The case was assigned to me on January 18, 2012, and was scheduled for hearing on January 27, 2012. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant,

continue, or deny Applicant's application for a security clearance. At hearing, the Government's case consisted of three exhibits. (GEs 1-3) Applicant testified and offered three exhibits. The transcript (Tr.) was received on February 8, 2012.

Remand Order

On May 4, 2012, the Appeal Board remanded the case for further consideration of Applicant's explanations included in the SOR response. The remand order noted the Administrative Judge's failure to credit Applicant's explanations to the allegations in the SOR that he admitted. The Board concluded that Applicant had rebutted the presumption that the Judge considered all of the record evidence. (Appeal Board Decision, May 4, 2012)

Procedural Issues

Before the closing of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with additional endorsements. For good cause shown, Applicant was granted 14 days to supplement the record. Department counsel was afforded three days to respond. Within the time permitted, Applicant furnished additional character references, which were admitted as AE D.

Summary of Pleadings

Under Guideline E, Applicant allegedly (a) falsified his security clearance application (e-QIP) of September 2005 by misstating the living status of his father; (b) falsified his August 2008 e-QIP by misstating his father's living status; (c) committed time card fraud between November 2002 and February 2003 while employed by a former employer; (d) committed time card fraud between January 2005 and February 2005 while employed by his current employer; (e) falsified his September 2005 e-QIP by failing to disclose his termination by a previous employer for alleged fraudulent conduct; and (f) denied falsifying his time cards in his October 2008 interview with an investigator from the Office of Personnel Management (OPM).

In his response to the SOR, Applicant admitted each of the allegations in the certified response he submitted. Applicant added an attachment to his formal response in which he provided detailed explanations of his admissions and the circumstances that prompted him to deliberately falsify his 2005 SF-86 by misstating the living status of his father and failing to disclose his termination by a previous employer for alleged fraudulent conduct as the reasons for his leaving his previous job. He provided detailed explanations, too, of the circumstances that prompted him to commit time card fraud with his former employer (between November 2002 and February 2003), and with his current employer (between January 2005 and February 2005). And he provided detailed explanations of his misstating his father's living status when completing an e-QIP in August 2008.

Applicant's response explanations were summarized in the OPM summaries received in evidence and in his hearing testimony. Fully considered, his response explanations provide some extenuation and mitigation, but they are not sufficient to contradict or negate his SOR admissions. I have fully considered the statement attached to Applicant's SOR response, and incorporated it into my decision as warranted.

Findings of Fact

Applicant is a 33-year-old manufacturing manager for a defense contractor who seeks to retain his security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married his wife in July 2001 and has two children from this marriage. (GEs 1 and 2) He earned a bachelors degree in technical management in October 2000 (GEs 1 and 2; Tr. 27) and has no military service.

Applicant's parents separated when Applicant was only five years of age. He did not see his father very often when growing up. (AE 3; Tr. 31) In 1994, his mother told him his father had fled the U.S., was living in Mexico, and was possibly wanted by law enforcement authorities due to his involvement in illegal drug activities. (GE 3; Tr. 31-32) Applicant's last contact with his father (now 51 years of age) was in June 2010 (Tr. 45-46), and he still does not know why his father left the U.S. (GE 3) To the best of Applicant's knowledge, his father still resides in Mexico and works as an auto mechanic. (GE 3; Tr. 30) Applicant last had face-to-face contact with his father in 1994 (just before his father departed the U.S.), and he maintains telephonic contact with him annually. (GE 3)

While employed for a previous employer, Applicant overstated his reported hours on several occasions between November 2002 and February 2003. (GE 3; Tr. 36-37) Over a one-to-two month period he reported on his time cards that he was working more hours than he actually logged. While he does not recall the actual hours overstated, he reported more than he earned to make more money for his family. (GE 3) Applicant knew what he was doing was wrong when he overstated his hours. When detected by his employer, he was confronted with his time card overcharges and terminated from his employment for cause. (GE 3)

Applicant joined his current employer in October 2004. (GEs 1 through 3) Between January 2005 and February 2005, Applicant inflated his time cards on approximately 20 separate occasions. (GE 3; Tr. 39-40) He inflated his time cards to earn additional money and did not advise his employer of his actions. (GE 3) In April 2009, his employer's facility security officer (FSO) called him into her office and advised him his security clearance was being revoked. (GE 3) A short time later, Applicant received a letter from DoD informing him that his security clearance had been revoked.

Applicant acknowledges falsifying his time cards with his current employer. (GE 3; Tr. 37-38)

Despite his loss of a security clearance and access to sensitive compartmented information (SCI) in May 2009 over his e-QIP misstatements, Applicant's current employer did not take any disciplinary action against him. (GE 3) Applicant is still employed by this employer. (Tr. 38)

When completing a security application for his current employer in September 2005, Applicant listed his father as deceased. (GE 1) He admitted to intentionally misstating his father's living status and attributed his misstatement at the time to primary concerns over his father's safety. (Tr. 33-34). Applicant also worried that his father's suspected involvement in drugs could adversely affect his security clearance application. (GE 3; Tr. 33-34, 44-45) His stated reasons are not justifiable ones for avoiding inferences of falsification of his 2005 e-QIP.

In answering question 22 of his 2005 e-QIP, Applicant left blank the box inquiring if he was ever fired from a job and checked another box that he left a job for other reasons under unfavorable circumstances. (GE 2) He explained that he was accused of charging incorrectly on his time card, was sent home by his manager, and subsequently received a phone call from his human resources department. (GE 2) In this telephone call, he explained that he wanted to quit and was told that he did not have a job anymore. (GE 2) He provided no details, however, as to why the job was unavailable to him.

While Applicant's statement of being accused of time card fraud and not having an available job anymore might be technically true, his statements taken together are unreconcilable with his omission of his being fired from a job and his subsequent admissions to being terminated by his prior employer for time card fraud. By reciting he was told he does not have a job anymore in the remark section of question 22, Applicant provided the Government with notice of time card charges against him and the lack of job availability to him, but no admissions of time card fraud or reasons for the elimination of his job.

Applicant's termination for time fraud and his motives for wanting to keep his termination concealed from his current employer were all covered in his pre-polygraph statement (*see infra*), and make his answers to question 22 deliberately false and misleading when considered contextually. (GEs 2 and 3) Applicant admitted his question 22 remarks were untrue when asked about them at hearing. (Tr. 39) He rationalized that it was easier for him "just to not state anything, just to put that I left the company." (Tr. 39) Not knowing how thorough his answers would be reviewed, he thought it would be better not to admit that he was terminated. (GE 3; Tr. 39) Weighing and evaluating all of the circumstances associated with Applicant's answers to question 22, his pre-polygraph statement, his pleading admissions, and his hearing testimony, his answers to question 22 are insufficient to avert inferences that he falsified his answers to the question in completing his September 2005 e-QIP.

Completing an e-QIP in August 2008, Applicant reiterated his prior misstatements about his father's living status. Applicant attributed his continuing misstatements to his concerns about keeping his story straight. (GE 3; Tr. 35-36) He reasoned that once he lied about his father's living status, "you are kind of stuck with it." (Tr. 35)

In October 2008, an OPM investigator came to interview Applicant. (GE 3; Tr. 36) At the outset of the interview, the investigator did not ask Applicant about his father's living status, and Applicant never volunteered any information. (Tr. 36) Asked whether he ever falsified his time cards, Applicant assured he had not. He told the investigator that he had never falsified or altered his time cards with his employer. (Tr. 47-48)

In January 2009, Applicant was scheduled for a polygraph examination. Before sitting for his polygraph examination, Applicant volunteered nothing to the polygrapher about his father's living status or his inflating his time cards. (AE 3; Tr. 43) Only after he sat for the polygraph examination did he agree to disclose his prior misstatements about his father's living status, his time cards, and his termination for cause. (Tr. 43, 49-50) In his pre-polygraph statement to the polygrapher, Applicant admitted to falsifying his time cards by deliberately adding one to two hours on his daily time cards over a three-month period spanning November 2002 and February 2003. He admitted to first being suspended by his prior employer for time card fraud and to being terminated for cause three days later for the same offense (with no mention of his offering first to quit his job). (GE 3) Applicant admitted, too, to inflating his time cards from January to February 2005 by adding an extra hour to his time cards, and to not wanting his current employer to know he had been terminated for time card fraud. (GE 3) Finally, Applicant admitted to falsely listing his father as deceased in his prior e-QIPs. (GE 3)

Because of the high sensitivity of the SCI covered by Applicant's e-QIP application, Applicant was denied access to SCI by the Air Force in April 2009. (GE 3) Both in his answer and at hearing, Applicant acknowledged his misstating the living status of his father, his falsifying his time cards with his employers between 2002 and 2005, and his termination for cause. (GE 3).

Endorsements

Applicant documents excellent performance reviews and promotions for 2009 and 2010. (AE B). He is highly regarded by his co-workers, lab manager, and subordinates he supervises. (AEs A and D) They uniformly characterize Applicant as honest, reliable and trustworthy. (AEs A and D) Applicant has received achievement awards recognizing his contributions to his employer's missions. (AE C)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to

protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in reaching a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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.

Burden of Proof

By virtue of the tenets framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in

large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons; and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation of the Government's case. Because Executive Order 10865 requires that all security clearances be clearly consistent with the national interest, "security-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Security concerns over Applicant's judgment, reliability and trustworthiness are raised under Guideline E as the result of (a) his knowing and wilful inflating of his time cards with different employers in 2002-2003 and 2005; (b) his misstatements of his father's living status and termination for time card fraud in the 2005 and 2008 e-QIPs he completed, and (c) his misstatements about his recurrent time card fraud in his 2008 OPM interview. By misstating his father's living status, his termination for cause, and his time worked with two of his employers, Applicant failed to furnish materially important background information about his parents and employment history that was needed for the Government to properly process and evaluate his prior security clearance applications.

To be sure, Applicant did alert the Government of his potential problems with time card fraud and job elimination when he included statements in his remarks to his question 22 answers about his prior employers time fraud accusations, his brief suspension, and his employer's advising him that his job was no longer available. But the Appeal Board has consistently counseled against piecemeal decision-making when individual conduct is being assessed contextually as part of an overall applicant design. Cf. ISCR Case No. 00-0628 at 4 (Ap. Bd. Feb. 24, 2003); ISCR Case No. 99-0601 at 6-7 (Ap. Bd. Jan. 30, 2001). Unlike the narrow tailoring that is afforded conduct covered by criminal statutes, behavior pertinent to trustworthiness evaluations by necessity must take account of applicant designs and actions associated with the totality of the information covered in the pleadings to ascertain if there is a recurring pattern of questionable judgment or irresponsibility. See AG ¶ 2(a) and ISCR Case No. 00-0628,

supra. And in Applicant's case, he fully admits to concealing the truth about his being terminated for time card fraud, and not for something else, by his previous employer.

Applicant attributed his recurrent inflation of his time cards with two employers to his monetary needs. He cited somewhat different reasons for his repeated misstatements in his e-QIPs and OPM interview about his father's living status and his termination by his prior employer for time card fraud: embarrassment and concerns over providing adverse information that could impact negatively on his job status with his current employer and his eligibility to hold a security clearance. Separately and collectively, his misstatements reflect his conscious and manifest decisions to omit and mislead when answering questions concerning his father's living status, his falsifying his time cards, and his employment history.

While Applicant's reasons offered in his response and hearing for providing false information in his security clearance applications and OPM interviews are understandable, they are not sufficient to qualify his admissions or mitigate his multiple omissions and misstatements. An administrative judge is not required to accept the applicant's reasons just because they were not rebutted. *Cf.* ISCR Case No. 99-0005, p. 3 (App. Bd. April 19, 2000). For acceptance of an applicant's mitigation claims, they must be based on a reasonable interpretation of the record evidence as a whole. *See, e.g.,* ISCR Case No. 99-0710, p. 4 (App. Bd. March 19, 2001). Applicant's reasons detailed in the attachment to his answer, in his OPM interview responses, and in his hearing testimony, while considered, are not enough avert drawn inferences and conclusions of falsification.

By anticipating a polygraph and providing corrected answers to the interviewer, Applicant is imputed to have provided his answers under the threat of a polygraph. While considered, Applicant's explanations are not sufficient to mitigate the deliberate omissions. *See* ISCR Case No. 02-23073, p. 4 (App. Bd. March 30, 2004); ISCR Case No. 01-19278, p. 3 (App. Bd. April 22, 2006).

Applicant's recurrent time card fraud, his misstatements about his father's living status and termination for time card fraud in his 2005 and 2008 e-QIPs, and his misstatements about his inflating of his time cards in his 2008 OPM interview invite application of several disqualifying conditions under the personal conduct guideline: DC ¶ 16(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," DC ¶ 16(b), "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other government representative," and DC ¶ 16(d), "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, trustworthiness, 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: DC ¶ 16(d)(3), “a pattern of dishonesty or rule violations.”

While Applicant assures he promptly and voluntarily disclosed his father’s living status, time card misstatements, and his termination from his prior employer for cause, his disclosures were prompted by his confrontation by an OPM polygrapher before submitting to a polygraph examination. As such, Applicant’s disclosures cannot be considered voluntary and unprompted. Applicant’s explanations of his father’s living status and his recurrent inflation of his time cards followed specific questions asked of him by the polygrapher and cannot, as such, be considered voluntary.

Applicant’s answers were not sufficiently prompt, or voluntary to apply MC ¶ 17(a), “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” Applicant’s corrections were prompted by his impending polygraph examination and, as such, were not true voluntary disclosures. While manifestly forthcoming, his pre-polygraph admissions do not meet either the prompt or good-faith prongs of MC ¶ 17(a), as these terms are generally understood. Overall, Applicant’s misstatement explanations relative to his time cards, e-QIPs, and OPM interview are not persuasive enough to warrant conclusions that the falsification allegations relative to his e-QIP/OPM omissions of his father’s living status, his termination for time card fraud, and his inflating his time cards are mitigated by prompt, voluntary corrections.

From a whole-person perspective, Applicant has established independent probative evidence of his overall honesty with his co-workers, lab manager, and subordinates he supervises and has received solid performance reviews, achievement awards, and promotions. Still of concern, though, are Applicant’s multiple misstatements about the living status of his father in Mexico, his inflating his time cards, and his termination for cause. Because motivation is never easy to objectively establish, the placement of reasonable time lines on clearance applicants to test and absolve themselves of recurrence risks makes safe and practical sense when balancing the interests of protecting national security with the interests of those who seek access to the nation’s secrets.

Considering the record as a whole, at this time there is too little probative evidence of Applicant’s mitigation efforts to avert foreseeable risks of making material misstatements on security clearance applications and other forms designed to facilitate Government background investigations. It is still too early to make safe predictions about his ability to restore his honesty and trustworthiness sufficient to justify his eligibility to hold a security clearance.

Taking into account all of the facts and circumstances surrounding Applicant’s judgment and trust lapses, Applicant fails to mitigate security concerns related to his

personal conduct issues. Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.f of Guideline E.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE E: (PERSONAL CONDUCT): AGAINST APPLICANT

Subparas. 1.a through 1.f: Against Applicant

Conclusions

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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

