



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



In the matter of:)
)
-----) ISCR Case No. 11-10988
)
Applicant for Security Clearance)

Appearances

For Government: Raashid S. Williams, Esquire, Department Counsel
For Applicant: *Pro se*

06/27/2012

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding personal conduct. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On April 1, 2003, Applicant applied for a security clearance and submitted a Security Clearance Application (SF 86).¹ On February 23, 2007, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing version of a Security Clearance Application (e-QIP).² On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to the interrogatories on December 12, 2011.³ DOHA issued a Statement of Reasons (SOR) to him on February 24, 2012, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February

¹ Government Exhibit 1 ((SF 86), dated April 1, 2003).

² Government Exhibit 2 ((e-QIP), dated February 23, 2007).

³ Government Exhibit 3 (Applicant's Answers to Interrogatories, dated December 12, 2011).

20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline E (Personal Conduct), and detailed reasons why DOHA was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on March 12, 2012. In a sworn statement, dated March 29, 2012, Applicant requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on May 15, 2012, and the case was assigned to me on May 18, 2012. A Notice of Hearing was issued on May 25, 2012, and I convened the hearing by video teleconference, as scheduled, on June 13, 2012.

During the hearing, 9 Government exhibits (GE 1 through 9) and 17 Applicant exhibits (AE A through Q) were admitted into evidence without objection. Applicant testified. The transcript (Tr.) was received on June 21, 2012.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with explanations, one portion of a factual allegation (§ 1.a.) pertaining to personal conduct of the SOR. He denied the remaining portion thereof as well as the remaining allegation. Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 44-year-old employee of a defense contractor who, from May 2011, has served as a project manager.⁴ He was previously employed in a variety of positions including programmer/analyst, software project engineer, software engineer, systems engineer, consultant, technical project engineer, electrical designer, and principal systems engineer.⁵ Applicant served as a Private (E-2) in the U.S. Army Inactive Reserve from December 1987 until February 2002.⁶ He received a secret security clearance in April 1988, and again in October 2004.⁷ He does not currently have a security clearance.⁸

⁴ Tr. at 45; Government Exhibit 3, *supra* note 3, at 1.

⁵ Government Exhibit 1, *supra* note 1, at 86-88; Government Exhibit 2, *supra* note 2, at 11-17; Tr. at 45-46, 48.

⁶ Government Exhibit 1, *supra* note 1, at 90; Government Exhibit 2, *supra* note 2, at 27.

⁷ Government Exhibit 1, *supra* note 1, at 95; Government Exhibit 2, *supra* note 2, at 34-35.

Applicant was married in December 1998, separated in December 2000,⁹ and divorced about two years ago.¹⁰ Although Applicant was not legally divorced until about two years ago, for many years, and at least as recently as June 2007, Applicant led his family to believe he was divorced.¹¹ He and his wife have a son, born in November 1999.¹² Applicant has been in a spouse-like relationship with a woman since at least June 2007,¹³ and he and his girlfriend have a son, born in September 2004. A 1984 high school graduate,¹⁴ Applicant attended a university from January 1994 until May 1996, withdrew for a period, reenrolled in September 1996 and attended the school until December 1997, withdrew again, and reenrolled again and attended school from January 1998 until May 1998.¹⁵ He never received a degree.¹⁶ Applicant attended another university from January 2002 until October 2002, and in November 2002, after completing nine units,¹⁷ he received a Master's Certificate in Information Technology Project Management.¹⁸ The certificate is not the same as a master's degree.¹⁹

Personal Conduct

On April 1, 2003, Applicant completed and submitted his SF 86. The SOR alleges Applicant falsified material facts when he falsely stated that he had received a bachelor's degree on May 20, 1996 (SOR ¶ 1.b.).²⁰ In fact, as noted above, he never received such a degree.²¹ In June 2007, when he was interviewed by an investigator from the U.S. Office of Personnel Management (OPM), Applicant told the investigator that he had obtained his bachelor of science degree in computer science in May 1996.²²

⁸ Tr. at 7.

⁹ Government Exhibit 2, *supra* note 2, at 18-19.

¹⁰ Tr. at 96.

¹¹ Government Exhibit 3 (Personal Subject Interview, dated June 11, 2007), at 3.

¹² Government Exhibit 2, *supra* note 2, at 22-23.

¹³ Government Exhibit 3 (Personal Subject Interview), *supra* note 11, at 4; Government Exhibit 2, *supra* note 2, at 22.

¹⁴ Tr. at 96.

¹⁵ Government Exhibit 9 (University Enrollment & Degree Verification, dated March 7, 2011).

¹⁶ Government Exhibit 9, *supra* note 15; Tr. at 49-50.

¹⁷ Government Exhibit 3 (Personal Subject Interview), *supra* note 11, at 10.

¹⁸ Government Exhibit 2, *supra* note 2, at 10.

¹⁹ Government Exhibit 3 (Personal Subject Interview), *supra* note 11, at 10; Tr. at 100.

²⁰ Government Exhibit 1, *supra* note 1, at 86.

²¹ Government Exhibit 9, *supra* note 15.

²² Government Exhibit 3 (Personal Subject Interview), *supra* note 11, at 10.

That statement was false. Applicant denied the SF 86 response was deliberate or an attempt to falsify the material facts, and attributed his response not to imply receipt of a degree, “but to support the timeline of [his] having left the University on a full-time basis and [his] reentering the workforce.”²³ He also testified that his response in the SF 86 was “my belief was that I’m identifying I’m going to school, identify a period of time and I identify the degree that I’m pursuing, not that I had completed the degree.”²⁴

On January 27, 2009, Applicant was terminated from his employment for “mischarging.”²⁵ A number of e-mails were sent between Applicant’s supervisor and Applicant, and there were meetings and telephone calls involving the Director, Systems Engineering, the Director, Human Resources, and Applicant, over the period from December 19, 2008, to January 27, 2009, regarding Applicant’s work activities during an 88 hour period.²⁶ Although Applicant contended he had performed company-related work during those hours, he was unable to provide proof of his activities as he had misplaced his thumb drive.²⁷ Applicant eventually furnished some materials which he contended he worked on, but senior management determined it was old work and not sufficient to justify the hours Applicant claimed.²⁸ Applicant was terminated “for violating company policy regarding accurate charging of labor hours.”²⁹ He subsequently found his thumb drive and printed out some of the work product, but did not notify his former employer that he had done so.³⁰

Applicant filed a claim with the state office of unemployment insurance which determined his conduct.³¹

²³ Applicant’s Answer to the SOR, dated March 29, 2012, at 1.

²⁴ Tr. at 53.

²⁵ Government Exhibit 5 (Letter from employer, dated January 27, 2009); Government Exhibit 4 (Affidavit, dated May 25, 2011), at 1.

²⁶ Government Exhibit 5, *supra* note 25; Government Exhibit 7 (Interoffice Memo, dated January 28, 2009).

²⁷ Government Exhibit 5, *supra* note 25; Government Exhibit 7, *supra* note 26; Government Exhibit 4, *supra* note 25, at 3.

²⁸ Government Exhibit 7, *supra* note 26, at 2.

²⁹ Government Exhibit 7, *supra* note 26, at 2.

³⁰ Government Exhibit 4, *supra* note 25, at 5. During the hearing into Applicant’s security clearance eligibility, Applicant furnished several documents which he contended were his work product for the period in issue. The documents were mostly reprints of materials that were dated before the period in issue (Applicant Exhibit L, dated November 24, 2008; Applicant Exhibit O, dated May/June 2005; Applicant Exhibit P, dated February 1997; and Applicant Exhibit Q, dated October 7-8, 2004); or generic undated documents (Applicant Exhibit M and Applicant Exhibit N). He also provided a computer printout that reflected documents he supposedly created or modified during the period in issue (Applicant Exhibit K), but only two such documents were listed (at 4, 6).

³¹ Government Exhibit 6 (State Office of Unemployment Insurance, Fact Finding Report, dated April 8, 2009), at 3.

was either a deliberate and willful disregard of the standards of behavior which the employer has a right to expect or a series of repeated violations of employment rules proving a wanton disregard of his/her obligations to the employer. Under [the state's] unemployment insurance law, this constitutes gross misconduct in connection with the work.

Applicant appealed the decision. The decision of the state Appeals Division was that the employer failed to establish a written company holiday work policy; Applicant's testimony or documentary evidence was not credible; and Applicant had "engaged in conduct that demonstrated a deliberate and willful disregard of standards that an employer has a right to expect. . . ." ³²

Work Performance

Applicant's performance reviews indicate that his job performance is generally the second level from the top, or "exceeds expectations." The quality of his work is generally the same or one level below – "meets expectations." The quantity of his work has fluctuated from the second lowest level – "sometimes meets expectations" – to the second highest level. Nevertheless, in 2006 and 2007, Applicant was periodically promoted or given an increased salary for his contributions to the success and growth of his employer. ³³

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."³⁴ As Commander in Chief, the President 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."³⁵

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating

³² Applicant Exhibit A (Unemployment Insurance Appeals Decision, dated June 9, 2009), at 2-3.

³³ Applicant Exhibit D (Performance Review 2003, dated December 3, 2003); Applicant Exhibit E (Performance Review 2004, dated November 16, 2004); Applicant Exhibit F (Performance Review 2005, dated December 7, 2005); Applicant Exhibit G (Performance Review 2007, dated December 18, 2007); Applicant Exhibit H (Performance Review 2008, dated December 17, 2008); Applicant Exhibit I (Personnel File Memos, various dates).

³⁴ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

³⁵ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."³⁶ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.³⁷

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials."³⁸

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."³⁹ Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict

³⁶ "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

³⁷ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

³⁸ *Egan*, 484 U.S. at 531

³⁹ See Exec. Or. 10865 § 7.

guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

Analysis

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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 notes conditions that could raise security concerns. Under AG ¶ 16(a), security concerns may be raised when there is 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.

Similarly, “*deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative,*” is potentially disqualifying under AG ¶ 16(b). If there is:

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

security concerns may be raised under AG ¶ 16(d).

In April 2003, when Applicant completed and submitted his SF 86, he falsely stated that he had received a bachelor's degree in May 1996. In June 2007, when he was interviewed by an investigator from OPM, Applicant told the investigator that he had obtained his bachelor of science degree in computer science in May 1996. In fact, as noted above, he never received such a degree. AG ¶¶ 16(a) and 16(b) have been established.

In January 2009, Applicant was terminated from his employment for "mischarging," also referred to as "violating company policy regarding accurate charging of labor hours." His subsequent claim with the state office of unemployment insurance was unsuccessful. That office opined that Applicant's conduct "was either a deliberate and willful disregard of the standards of behavior which the employer has a right to expect or a series of repeated violations of employment rules. . . ." Applicant's overall conduct pertaining to both his misrepresentation as to his education and to his working hours support a conclusion that there is "a pattern of dishonesty or rule violations," and "evidence of significant misuse of Government or other employer's time or resources." AG ¶ 16(d) has been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct. AG ¶ 17(a) may apply if "*the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.*" Similarly, if "*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,*" AG ¶ 17(c) may apply.

As to Applicant's degree issue, he eventually acknowledged that he did not have a bachelor's degree, but only did so after falsely reporting it in his 2003 SF 86 and to the OPM investigator in 2007. It was not until he was confronted with the true facts in late 2011 that he acknowledged the true status of his degree, but attributed his response not to imply receipt of a degree, "but to support the timeline of [his] having left the University on a full-time basis and [his] reentering the workforce." As to Applicant's mischarging of labor hours, the proof he offered his employer, the state unemployment insurance office, and to me, was insufficient to support any conclusion other than that it was work that predated the claimed period of work and not sufficient to justify the hours Applicant claimed. AG ¶¶ 17(a) and 17(c) do not 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 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. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.⁴⁰

There is some evidence in favor of mitigating Applicant's conduct. With the exception of his 2009 termination from employment, he has generally been a good employee.

The disqualifying evidence under the whole-person concept is more substantial. Applicant's history includes several instances of dishonesty. Over a period of years, he continued to give his family the false impression that he was divorced when, in fact, he was not.⁴¹ He repeatedly lied to the Government in writing and during an OPM interview about having a degree when, in fact, he did not. And, he lied to his employer about his working hours. Applicant has offered explanations for his actions, and furnished documents in an effort to support his contentions that he did not lie about his work hours. However, as the state Appeals Division noted, Applicant's testimony or documentary evidence was not credible. Under the evidence presented, I have significant questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

⁴⁰ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

⁴¹ The SOR did not allege that Applicant failed to reveal to his family members that he was not actually divorced as he led them to believe. The SOR did not allege that he provided false information to the OPM investigator about his degree status. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility;
- (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances;
- (c) to consider whether an applicant has demonstrated successful rehabilitation;
- (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or
- (e) to provide evidence for whole person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). I have considered the non-SOR misconduct for the five above purposes, and not for any other purpose.

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 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant

Conclusion

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

ROBERT ROBINSON GALES
Administrative Judge