DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
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	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Candace Garcia, Esq., Department Counsel
For Applicant: *Pro se*

10/24/2013

Decision

WESLEY, Roger C., Administrative Judge:

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

Statement of the Case

On April 17, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing reasons why the DOD could not make the preliminary affirmative determination of eligibility for granting a security clearance, and DOD recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. 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 (Directive); and the Adjudicative Guidelines (AGs) implemented by the Department of Defense on September 1, 2006.

Applicant responded to the SOR on May 3, 2013, and requested a hearing. The case was assigned to me on July 25, 2013, and was scheduled for hearing on August 15, 2013, by video teleconference. The hearing was convened on that date. At hearing, the Government's case consisted of five exhibits (GEs 1-5). Applicant relied on one witness (himself) and eight exhibits. (AEs A-H) The transcript (Tr.) was received on August 22, 2013.

Procedural Issues

Before the close of the hearing, Department Counsel moved to amend (a) subparagraph 1.a of the SOR to add an additional termination date of July 16, 2009, and (b) subparagraph 1.b of the SOR to substitute inclusive dates of employment of January 2009 to July 2009 in place of January 2008 through May 2009 to conform with the evidence. For good cause shown, the Government's amendment requests were granted. Presented with an opportunity to replead to the amended allegations, Applicant continued to deny the allegations as amended.

Summary of Pleadings

Under Guideline E, Applicant allegedly (a) was terminated from Company B in May 2009 (since amended) due to unauthorized travel and attempt to cover up the travel; (b) falsified his September 2010 electronic questionnaire for investigations processing (e-QIP) by failing to list his Company B employment from approximately January 2008 through May 2009 (since amended) and failing to disclose he was terminated from Company B; (c) misrepresented that he had never been terminated from Company B in a September 2011 interview with an investigator from the Office of Personnel Management (OPM); and (d) falsified a February 2012 letter he submitted to DOD CAF as part of his response to interrogatories executed under oath in January 2013, in which he claimed he voluntarily resigned from Company B in July 2009.

In his response to the SOR, Applicant denied all of the allegations. He claimed he had never been terminated from Company B or any other DOD affiliate and worked for Company B between February 2009 and July 2009. He claimed he resigned from Company B to accept a tentative offer from a Federal government quality assurance organization in July 2009.

Applicant further claimed he submitted a two-week resignation notice to Company B in July 2009, which the company accepted and advised a two-week notice was not necessary. Applicant claimed that Company B falsely flagged his termination with the Joint Personnel Adjudication System (JPAS) and other official sites and caused him to lose his newly offered Federal employment.

Findings of Fact

Applicant is a 41-year-old field engineer for a defense contractor who seeks a security clearance. Additional findings follow.

Background

Applicant married his first spouse in April 1991 and divorced her in January 1999. (GE 1) He has no children from this marriage. (GE 5) He married his current spouse in February 1999 and has two children from this marriage. (GEs 2 and 5)

Applicant enlisted in the Army in August 1989 and served eight years of active duty. (GEs 1, 2, and 5 and AE H) While on active duty, he held numerous security clearances. He received an honorable discharge in January 1997 with the rank of Army staff sergeant. (GE 1) Applicant earned one year of college credits between August 2000 and October 2001. (GE 2)

Employment issues

Between October 2005 and March 2009, Applicant was employed by Company A. (GE 1) In March 2009, Applicant resigned from Company A and continued working for Company B, which employed him as a quality auditor on a part-time basis in January 2009. (GEs 1 and 5) Company B offered him the opportunity to return home every 90 days to see his wife and family. (Tr. 68-70) He held this part-time job with Company B from January 2009 to July 2009. (GE 5 and AE B; Tr. 68-70, 76-79, and 101-102) Between March 2009 and August 2010, Applicant supplemented his Company B work assignments with his owner-operator trucking business. (GE 1)

In a July 2009 incident history report, JPAS confirmed that Applicant failed to make an official air movement and disappeared from his job location for five days in a combat area of operations in direct violation of regulations. (GE 3) The incident history report confirmed that the individual was removed from the country and initially terminated before he was ultimately restored. (GE 3) Within 16 days of his return to his foreign duty station, Applicant was found to have left his job location again without permission in a combat environment violating company policies about movement within the area of operations. (GE 3) Applicant was cited for frequent disregard for regulations and substandard performance that permit his company's contract in jeopardy. (GE 3)

In January 2009, while still employed for Company A, Applicant was asked to complete an e-QIP. (GE 2) In this e-QIP, Applicant answered "no" to question 13A, which asked him to list his employment activities over the previous seven years, and question 13C. Question 13C inquired whether he was ever fired from a job, quit after being told he would be fired, left a job by mutual agreement following charges of misconduct or notice of unsatisfactory performance, left a job for other reasons under unfavorable circumstances, or was laid off from a job. (GE 2) Whether he was employed with Company B when he completed this questionnaire is uncertain.

Asked to complete a similar e-QIP in July 2010 (GE 1), Applicant omitted his employment with Company B and answered "no" to questions 13A and 13C, which (like his 2009 e-QIP) inquired about his past employment relationships. (GE 1; Tr. 79-80) He provided no explanations of his Company B employment and separation in the

comments section of his 2010 e-QIP. He attributed his Company B employment omission (covered by question 13A) to mistake, and his 13C termination negative answers to his belief that he had never been terminated from Company B or any other employer. (GE 5; Tr. 80-81, 103-105)

In a September 2011 interview with an investigator from the Office of Personnel Management (OPM), Applicant told the OPM investigator that he was never terminated or issued any written reprimands by Company B. (GE 5 and Applicant's SOR response; Tr. 84-86) He told the investigator that he resigned his part-time position with Company B in July 2009 on approved short notice after accepting a position with a Government agency. (GE 5) Applicant described his acceptance of part-time assignments on an as needed basis with Company B between January 2008 (sic) and July 2009. (GE 5) He assured the investigator that his supervisor dispensed with the customary two-week written notice requirement. (Tr. 91) Applicant's ensuing email exchanges with Company B officials provide some corroboration for his claims he asked the company for his release from the "SPOT" system to facilitate his being added to his new employer's contract. (AE G; Tr. 91-92)

When asked by the OPM investigator who interviewed him in September 2011 why he never listed the oral reprimands he received from AP and GT in his e-QIP, Applicant indicated he did not list them "because he was never given a written letter of reprimand." (GE 5) Applicant assured that (a) no punitive measures were ever taken against him by his Company B employer; (b) he maintained good relations with AP during his employment; and (c) his Company B employer accepted his resignation. (GE 5; Tr. 79-81)

Elaborating on his Company B employment in an updated February 2012 letter attached to his interrogatory responses (GE 5), Applicant indicated that he was directed by his supervisor in May 2009 to travel to a military site in a combat region and conduct a series of quality audits on an airline contractor's security services. (GE 5) During his trip to this forward site, he encountered flight issues on his designated military return flight and utilized an alternative flight to a nearby air base while staying in touch with AP. Acknowledging he was verbally reprimanded and briefed on his company's travel policy by AP and GT for violation of company travel procedures, Applicant insisted he never received a written reprimand and was never terminated. (GE 5 and AEs B and D; Tr. 84-86) He indicated he continued to receive auditing assignments from Company B until he resigned in July 2009 without a customary two-week notice. (GE 5; Tr. 85)

By Applicant's accounts, he returned to the United States in May 2009 for 30 days of leave that was approved by Company B prior to May 18, 2009. (Tr. 90, 95-98) Email communications from AP provide some corroboration of Applicant's account. (AE D) Following his return to his overseas-duty station in June 2009, he continued to receive requests for activity reports from his Company B superiors and replied to activity update requests during the same month. (AE D)

Email records reveal that Applicant received inquiries of his whereabouts from his Company B employer throughout May 2009. (GEs 4 and 5) During the week of May 14, 2009, Applicant maintained contact with his Company B supervisors while planning his return trip to his Company B employer's base headquarters in anticipation of his taking his approved leave. In a May 17, 2009 email to AP, he entreated AP to "help me keep my job man." (AE A; Tr. 87-89) Applicant's email exchanges with Company B officials reflect an abundance of concerns over his company's reactions to his disputed movements while awaiting flight instructions.

Flight records tracked by AP report sharp conflicts in the expressed accounts of Applicant and AP covering the former's whereabouts while waiting for a scheduled flight. (GEs 4 and 5) Documented proof is lacking, however, as to whether the prepared termination letter of May 18, 2009 in evidence was ever emailed or otherwise transmitted to Applicant. Juxtaposed against the prepared Company B termination letter are Applicant's assurances that he never received the May 18 termination letter and was never verbally terminated. (Tr. 84-86) Without more documentary proof of Company B's notification of its termination of Applicant in May 2009, none can be presumed or inferred. (GE 4)

Applicant's assurances of voluntary separation from his Company B employment are probative but not fully reconcilable with the email exchanges, correspondence, and JPAS entries in evidence. His email exchanges reflect he received a tentative job offer from a Government agency but no transmission of the offer to his Company B supervisors and no evidence of his completing the application requirements. (AEs A and F) And his written resignation submission is unsigned and is addressed to himself. (AE E) Applicant assured he mailed his resignation letter with two-weeks notice to Company B on or around July 1, 2009. (AE E; Tr. 91) He assured, too, that he later talked to Company B officials, who advised him that "a two-weeks notice was not needed," and they would endeavor to get him "out on the first flight." (AE E; Tr. 91) Verification of Applicant's claims are not available. (GE 3; Tr. 92-99)

Still, the evidence remains disputed and unclear whether Applicant resigned from Company B on his own volition or was terminated either once or twice. Standing alone, the JPAS reports are insufficient to warrant drawn inferences that Applicant was terminated following his employer's completed review of Applicant's determined multiple breaches of his company's travel and accountability regulations. (GEs 3 and 5; Tr. 91-92)

E-QIP omissions

Different inferences are warranted, however, with respect to Applicant's omissions of his six-month employment with Company B in the e-QIP he completed in September 2010. Personally aware of the importance of the data he provided in the e-QIP to the Government's background checks into his clearance worthiness, Applicant, nonetheless, omitted his employment with Company B in responding to Question 13A of the questionnaire.

Applicant's concerns about keeping his job with the company are well-documented, and he had strong motives for wanting to avert any Government inquiry into his employment relationship with Company B. His holding of past security clearances, his disclosures of other less material trucking positions, and his demonstrated knowledge of the e-QIP process militate to make inadvertence a much less likely explanation for his omission of his Company B employment relationship.

Considering all of the circumstances in the record, inferences cannot be averted that Applicant omitted his past employment relationship with Company B in his September 2010 e-QIP out of concern that his disclosure of the employment could hamper his chances of employment and obtaining his security clearance. Conversely, his claims of inadvertent omission are not persuasive based on the totality of the proofs.

Endorsements

Applicant did not provide any endorsements from friends and co-workers who have worked with him and are familiar with his character makeup. Nor did he provide any performance evaluations, service records, or evidence of charitable and civic contributions to his community. Applicant did furnish his military service records. His service records included awards and citations. (AE H)

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." They must be considered before deciding whether or not a security clearance should be granted, continued, revoked, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at 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 AGs. AG ¶ 2(a) is 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 to be made 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 chances; (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 principles and policies 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. *See United States, v. Gaudin,* 515 U.S. 506, 509-511 (1995).

As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, 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 materiality showing, 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, the judge must consider and weigh the 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 evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or

mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility.

"[S]ecurity-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). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Analysis

Applicant is a field engineer who was once employed by a defense contractor (Company B) on a part-time basis contemporaneously with other employment. This employment with company B he failed to list in an e-QIP he completed in 2010. Consistently, in OPM interviews and interrogatory responses he claimed that Company B never terminated him or issued written reprimands covering violations of company travel guidelines.

Security concerns over Applicant's judgment, reliability and trustworthiness are raised under Guideline E as the result of his (a) alleged termination from Company B, (b) his omissions of his employment and involuntary separations from Company B in the e-QIP he completed in 2010; and (c) his concealment of his Company B terminations in his ensuing OPM interview and letter directed to DOHA reviewers. By omitting his Company B employment, Applicant failed to furnish potentially material background information about his relationship with a recent employer and circumstances of his separation that was needed for the Government to properly process and evaluate his security clearance application.

Both DC ¶ 16(a), "deliberate omission, concealment, or falsification of relevant facts to 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 DC ¶ 16(d)(3), "a pattern of dishonesty or rule violations," apply to Applicant's situation. Each of these disqualifying conditions may be considered in evaluating Applicant's employment omissions and disputed termination issues.

When first asked about his employment history in a follow-up interview with an OPM investigator tasked to investigate Applicant's employment history in a 2011 interview, Applicant disclosed his Company B employment, his claimed tenure, and the urged circumstances of his separation from his viewpoint. The OPM investigator never challenged his rendition of the facts. And Applicant never disclosed any concerns he harbored over his divulging all of the facts and circumstances surrounding his employment with Company B and exits.

Applicant's disclosures that resulted from questions asked of him in a 2011 OPM interview (over 12 months after he completed his e-QIP) do not meet the prompt, good-faith requirements of MC ¶ 17(a), "the individual made prompt, good-faith efforts to

correct the omission, concealment, or falsification before being confronted with the facts." His answers to employment-related questions posed by the OPM agent who interviewed him in September 2011 cannot be fully reconciled with the prompt, good-faith requirements of MC ¶ 17(a). And none of the other mitigating conditions covered by Guideline E apply to Applicant's situation.

In evaluating all of the circumstances surrounding Applicant's withholding of material information about his employment in the e-QIP he completed, the answers he provided in his ensuing OPM interview, interrogatory responses, and hearing testimony, his explanations, his e-QIP omissions, and the timing of his corrections are insufficient to convincingly refute or mitigate the deliberate falsification allegations. Questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, are each core policy concerns of the personal conduct guideline (AG ¶ 15). Considering all of the circumstances surrounding his omissions of his employment relationship with Company B in the 2010 e-QIP he completed, his imputed knowing and wilful omissions are neither refuted nor mitigated

Because of the uncertainty surrounding the circumstances of his separation from Company B, no adverse conclusions can be made regarding claims made in a May 2009 termination letter from Company B and subsequent JPAS entries of Applicant's being reprimanded, terminated, rehired, and terminated for a second time for misconduct associated with flight scheduling while employed by Company B in a combat zone. Applicant's proofs are sufficiently probative to raise reasonable doubts about whether he was issued written reprimands and terminated as alleged, or continued working for the company after being verbally reprimanded, and ultimately resigned on terms acceptable to the company. Based on the evidence produced, no hard and fast conclusions can be made about the material variances in the reported accounts of Applicant and his supervisors regarding his travel movements in May and June 2009 while in the employ of Company B.

From a whole-person standpoint, the evidence is insufficient to demonstrate that Applicant has mounted responsible, good-faith efforts to provide accurate background information to the Government in the 2010 e-QIP he completed. While military service is recognized and commended, it is not enough to meet security eligibility requirements. Applicant's omissions were material and precluded him from meeting the conditions of demonstrated trust and reliability necessary to satisfy minimum security eligibility requirements under Guideline E. Overall, Applicant's explanations are not persuasive enough to warrant conclusions that the falsification allegations relative to his completed 2010 e-QIP covering his employment with Company B are refuted or mitigated.

In making a whole-person assessment, careful consideration was given to the respective burdens of proof established in *Egan* (*supra*), the AGs, and the facts and circumstances of this case in the context of the whole person. Unfavorable conclusions warrant with respect to the allegations covered by subparagraph 1.b Favorable conclusions are warranted with respect to subparagraphs 1.a and 1.c through 1.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:	AGAINST APPLICANT
Subparagraphs 1.a and 1.c through 1.e:	For Applicant
Subparagraph 1.b:	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