



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



In the matter of:)	
)	
[Name Redacted])	ISCR Case No. 14-06221
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Andre Gregorian, Esquire, Department Counsel
For Applicant: *Pro se*

08/09/2016

Decision

HOGAN, Erin C., Administrative Judge:

On February 20, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct. 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 within DOD on September 1, 2006.

On March 31, 2015, Applicant answered the SOR and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On January 4, 2016, Department Counsel was ready to proceed. On March 3, 2016, the case was assigned to another administrative judge who issued a Notice of Hearing scheduling the hearing on May 4, 2016. Applicant did not appear at this hearing. Applicant was granted another opportunity to schedule a hearing as a result of a scheduling misunderstanding between Applicant and his previously retained counsel. The case was transferred to me and a Notice of Hearing was issued on June 9, 2016, scheduling the hearing for June 22, 2016. The hearing was held on that date. DOHA received the transcript on June 29, 2016. Based upon a review of the case file,

pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

Applicant is a 44-year-old employee of a DOD contractor. He has worked for the DOD contractor since December 2014. He has held a security clearance since 1995. For over 20 years, he has worked for various contractors supporting several government agencies. He is a high school graduate and has some college credits. He is married and has a son, age 22. (Tr. 19, Gov 1; Gov 3) Applicant denies the allegations in the SOR. (Answer to SOR)

Applicant worked full-time for Contractor A since 2007. His hours were Monday through Friday from 3pm-11pm. (Tr. 20-22). In September 2012, Applicant obtained a second full-time job with Contractor B. His goal was to buy a home. His work hours at Contractor B were from 6:30 am to 2:30 pm from Monday through Friday. The locations of Contractor A and Contractor B were about 20 minutes from each other. Applicant testified that he did not get much sleep, but he had a specific goal in mind. In July 2013, Applicant and his wife purchased a home. (Tr. 22-23, 26-31)

In September 2013, Contractor A discovered Applicant falsified his time cards. Specifically, Applicant went out of town for a long weekend. He left town without completing his time report. He was contacted by management on a Friday and advised to complete his time report. He proceeded to complete the time report using the internet-based system that his company used. Applicant claims that he completed the time card in a rush and indicated that he worked a full week. He did not annotate that he was on leave two days, August 28-29, 2013. (Gov 2, Tr. 31-33)

On September 9, 2013, Contractor C, a company who subcontracted with Contractor A, sent Contractor A notice that Applicant had over-reported hours on the contract and requested Applicant's immediate removal. Contractor C had compared the number of hours Applicant actually worked as recorded by the shift leads to the hours recorded by Applicant in the internet-reporting program. They discovered Applicant billed for hours he did not work. Contractor C requested Contractor A to review and confirm the data and to reimburse Contractor C for hours billed, but not worked under the subcontract. Contractor C also informed Contractor A that Applicant's last day in support of the program would be September 12, 2013. (Gov 2 at 2-3)

On September 12, 2013, one of Applicant's managers from Contractor A confronted Applicant with the fact that he claimed he worked full days on August 28-29, 2013, but he did not show up for work. Applicant said that both entries were a mistake and asked if he could change both entries. The manager confronted Applicant with three more dates that Applicant had claimed he worked, but did not show up for work, July 17, 2013, August 9, 2013, and August 20, 2013. Applicant claimed that these dates were inputted incorrectly as well. Between May 14, 2013, to August 31, 2013, Contractor A management discovered 23 issues with Applicant's time card entries. He

charged for 58.5 hours that he did not work. Applicant claims that his computation was incorrect, and that it must have been a mistake. (Gov 2)

On September 19, 2013, Contractor A filed an incident report in the Joint Personnel Adjudication System (JPAS) indicating Applicant was released from his position due to timecard misconduct. (Gov 4) On September 24, 2013, the facility security officer for Contractor B logged into JPAS. She discovered the incident report that Contractor A had filed about Applicant. She informed the owners of Contractor B about the incident report. The owner contacted Applicant. Applicant informed them there had been an issue about his timekeeping when he worked for Contractor A. He said he was fired for a timekeeping issue and that his time was off by "30 minutes here or there." Applicant was asked when this happened. Applicant said that he had been working for Contractor A before being hired by Contractor B. He took the position with Contractor B so he could save money for a house he recently purchased. Applicant was advised by upper management that it is against company policy to work for another contractor while working for Contractor B and that being fired from a job was a reportable offense. Applicant told them he was not aware of these requirements. (Gov 3 at 2)

When Applicant was hired by Contractor B, he was required to read the Employee Handbook. He signed a document acknowledging receipt of the employee handbook on September 17, 2012. In the acknowledgement, Applicant agreed to read the entire handbook during his "first three days of employment or within three days of receiving it." The Employee Handbook states that an employee cannot work for another company that is a competitor of the company. Specifically:

You were hired and continue in [Contractor B's] employ with the understanding that [Contractor B] is your primary employer and that other employment or commercial involvement, which is in conflict with the business interests of [Contractor B] is prohibited. Simultaneous employment of any kind with a competitor or customer of [Contractor B] is expressly prohibited.

If you wish to obtain employment outside of [Contractor B] in an area that does not conflict with the company's business interests, you must obtain written acknowledgement from a Company Officer prior to engaging such employment. To request this acknowledgement, please submit a written request to your [Contractor B] Manager for an acknowledgement of outside employment. Your request should state the position you anticipate having, your anticipated work schedule, the name and address of the prospective employer, the reason for seeking the outside employment, and the basis for concluding that the prospective employment will not present a conflict of interest. Once your [Contractor B] Manager has approved the request, it will then be submitted to the President for approval.

(Gov 3 at 5-10)

On September 30, 2013, Applicant was fired by Contractor B for violating company policy of being simultaneously employed by one of Contractor B's competitors. (Gov 5) Applicant did not mention that he worked for Contractor A when he applied for his position with Contractor B.

Applicant maintains that his incorrect timecard inputs at Contractor A were a mistake. He had the vacation available, but Contractor A would not allow him to change his time sheets to indicate vacation hours. He also offered to make up the time. During his over 20 years of contracting, he never purposefully made a mistake of that magnitude. He never had issues with timecard entries before. (Gov 3 at 11-12; Gov 5)

Applicant states he had no intent to enter his time fraudulently. It was a mistake. When the mistake was brought to his attention, Contractor A had already submitted the time to Company C, the prime contractor. It was too late for him to correct the error. Applicant claims that he had listed his scheduled days off on a calendar shared with all employees. Applicant claims he listed the time off on those dates. He also sent out calendar reminders to his co-workers that he would not be in the office. Applicant regrets this incident occurred and claims it was an isolated incident and will not recur in the future. (Response to SOR)

With regard to the allegation in SOR ¶ 1.b, Applicant claims that he was unaware of Contractor B's policy prohibiting their employees from working for their competitors. He claims that he has never read or signed any documents that made him aware of this policy. He was not aware that Contractor A was a competitor of Contractor B. Each company's contracts were for different jobs on different contracts for different federal agencies. From April 2008 to April 2009, Applicant worked for two different contractors in the same building. He was never questioned about it and never thought working on contracts for two different agencies would be an issue. He worked two jobs to support his family. (Response to SOR)

In past contracting positions, Applicant worked in Afghanistan. He worked in Kenya and Tanzania shortly after the bombings of the U.S. embassies, and he worked in Yemen after the bombing of the U.S.S. Cole. He voluntarily went places that a lot of people did not want to go because the job needed to get done. He unintentionally made some mistakes, but he was never given the opportunity to fix anything. He has never had a security incident during his over 20 years of possessing a security clearance. (Tr. 60-61)

Whole-person Factors

Applicant provided several awards and certificates to show that he is a valued employee. (AE B) In May 2014, he received a special award in recognition of outstanding performance to his company. This was the company that hired him after his termination. (AE B at 3-5) He provided a copy of his performance evaluation from 2010-2011 with Contractor A. He received the highest ratings in his evaluation. (AE C)

Applicant provided several reference letters. All attest to Applicants' knowledge, work ethic, and commitment to excellence. One senior government official states, "He is one of the most technically skilled IT professionals I have worked with in 30 years with the [Government Agency]." He goes on to say, "I would trust [Applicant] with any position of trust or responsibility in my organization and would hire him for any job within my purview." (AE D at 1) One of Applicant's former supervisors at Contractor A described Applicant as "...one of my star employees who served as a subject matter expert and possessed "above and beyond" customer service/support." He would not hesitate to work with Applicant in any capacity and says that the revocation of Applicant's security clearance would be a great blow to the DOD community." (AE D at 4)

Policies

When evaluating an applicant's suitability for a security clearance, the 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, which are useful in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing 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. According to AG ¶ 2(c), 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 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the 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 applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

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. 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 that the applicant may deliberately or inadvertently fail to protect or 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.

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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

The Government’s substantial evidence and Applicant’s own admissions raise security concerns under Guideline H, Drug Involvement. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

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 following disqualifying conditions potentially apply to Applicant’s case:

AG ¶ 16(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;

(4) Evidence of significant misuse of Government or other employer's time or resources; and

AG ¶ 16(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

AG ¶ 16(d)(3) applies because Applicant's conduct consisted of a pattern of dishonesty and rules violations. Time card fraud is a serious offense which raises questions about an individual's integrity. Applicant's claim that his failure to indicate that he was on leave on his time card report was an unintentional mistake is not plausible. Initially, Applicant's explanation as to why he did not take leave on August 28 and August 29 when he was out of town, seemed plausible. However, it does not explain Applicant's absence on the other three days (July 17, 2013, August 9, 2013, and August 20, 2013) when Applicant did not show for work, but claimed that he worked the full days. It also does not explain the days he left early without reporting leave. Between May 14, 2013, and August 31, 2013, Applicant claimed 58.5 hours for work that he did not do. He has been a government contractor for over 20 years. He is aware that employees must provide accurate records of the number of hours worked.

AG ¶ 16(d)(3) and ¶ 16(f) apply with respect to Applicant's failure to inform Contractor B about his employment with Contractor A. Contractor B's Employee Handbook clearly states that its employees are prohibited from working with a competitor. In addition, Contractor B requires approval for any additional employment. Applicant was provided a copy of the Employee Handbook when he was first hired and agreed to read the handbook in three days. Applicant testified that he was unaware that Contractor A was a competitor of Contractor B. Admittedly this could be true, regardless, he had a duty to tell Contractor B that he was employed by Contractor A and he did not do so. Applicant's failure to read Contractor B's Employee Handbook raises further concerns about Applicant's ability to follow rules and regulations and ultimately protect classified information. For example, if Applicant claimed he did not read the requirements and procedures for protecting classified information, it would not excuse a security violation.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline E, Personal Conduct. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

The following mitigating conditions have the potential to apply under personal conduct:

AG ¶ 16(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique

circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 16(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.

None of the mitigating conditions apply. Falsifying time cards is a serious offense that raises questions about an individual's integrity. Over a three-month period, Applicant claimed 58 hours that he did not work. He has not accepted responsibility for his actions, claiming it was a mistake. His claims that he was unaware of Contractor B's policies about having second jobs because he never read the Employee Handbook raise further questions about Applicant's ability to follow security policies and procedures. Even if Applicant's conduct was not intentional, his inaccurate time-keeping and failure to request permission to have a second job, indicates an inattention to detail which raises concerns about his ability to protect classified information.

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 relevant 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is highly respected by current and former co-workers. He is a family man who decided to work two full-time jobs to provide for his family in order to purchase a dream home. He did not disclose his full-time job with Contractor A to Contractor B when he was hired and did not read the Employee Handbook even though he agreed to read it within three days. Working

two full-time jobs took a toll on Applicant eventually causing him to miss work. Where he went wrong is that he did not take these hours as leave, but completed his time cards indicating he worked a full eight-hour day. Questions remain about Applicant's judgment and ability to protect classified information.

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 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.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.

ERIN C. HOGAN
Administrative Judge