



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-04469

Appearances

For Government: Mary Margaret Foreman, Esq., Department Counsel

For Applicant: *Pro se*

03/10/2017

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for access to classified information. He admits that he allowed his spouse to use his identity from August 2012 through April 2014 to work as an independent contractor for an online-media company. He omitted this aspect of his employment history in his September 2013 security clearance application, but he voluntarily self-reported it during his November 2013 background investigation. He did not present sufficient evidence to explain, extenuate, or mitigate the security concern stemming from poor judgment and lack of integrity associated with the false or misleading information provided to an employer. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on September 18, 2013. This document is commonly known as a security clearance application. Thereafter, on February 24, 2016, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified

information.¹ The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guideline known as Guideline E for personal conduct. He answered the SOR on April 11, 2016, in a detailed 15-page memorandum that included several enclosures.

The case was assigned to an administrative judge on July 15, 2016, and then reassigned to me on August 16, 2016. The hearing was held as scheduled on November 10, 2016. Department Counsel offered Exhibits 1 and 2, and they were admitted. Applicant testified on his own behalf, and his 15-page answer to the SOR, along with the several enclosures, was admitted as Exhibit A. The transcript of hearing was received on November 17, 2016.

Findings of Fact

Applicant is a 41-year-old employee who has a security clearance for his job as a software engineer for a company doing business in the defense industry. He has worked for this company since 2007. Before that, he worked as a software engineer for another company in the defense industry during 2004-2007. He has held a security clearance with the Defense Department since 2005. His educational background includes a bachelor's degree in computer science engineering. He is married, and he and his wife have two young children.

The SOR alleged and Applicant admits that he allowed his spouse to use his identity from August 2012 through April 2014 to work as an independent contractor for an online-media company.² Beginning in 2011, his spouse had a part-time as an independent contractor for the same online-media company. The part-time job suited her because the work was infrequent and there were no set or expected hours. It was in addition to her full-time employment. When her contract expired in 2011 or 2012, she applied several times to renew the contract, but she was declined. Their second child was born in May 2012. In addition, Applicant learned in February 2012 that the program he was working on was likely to be cancelled and he could be laid off as a result.

At the time, Applicant and his spouse were concerned about the stability of his employment, they were concerned that she would not be able to maintain full-time employment and with two young children at home, they were relatively new parents with a three-year-child and a new infant, and they had a minimal support network in their state of residence. They decided to apply for a contract with the online-media company using his identity. The application process was online, it did not include submission of a resume, and it did not include an in-person interview. Applicant received a contract from

¹ This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006).

² Exhibit A.

the online-media company. By the end of 2012, the program he was working on was cancelled, but his employer moved him to work on other programs and he was never unemployed. His spouse performed the work for the online-media company using Applicant's identity from about August 2012 through April 2014. He estimates they earned about \$3,000 during this period, and they paid all required taxes on the earnings.³

Applicant was required to complete a security clearance application in September 2013 as part of a periodic reinvestigation.⁴ In doing so, he was required to list all of his employment activities, including self-employment, going back ten years. He did not list employment with the online-media company that began in 2012 and was then ongoing. About two months later in November 2013, he was interviewed during the course of his background investigation.⁵ During the interview, he voluntarily disclosed and explained the circumstances of employment with the online-media company. He disclosed the employment information because he wanted to provide a full and honest account of his activities as part of his commitment to national security. He also indicated in the interview that they planned to continue to have his spouse work for the online-media company under his name and would do so until they were told it cannot continue. Subsequently, he and his spouse decided to not renew the contract and the work ended in April 2014.⁶

Applicant apologized for his lack of judgment and expressed remorse for his actions. He recognized that he did give much thought to the consequences of his actions. He also expressed that his spouse appreciates the fact that they made a poor decision, and that she is in turmoil over this case. She described Applicant as an incredible husband and father, a model employee, and an honorable, ethical, trustworthy, and reliable person.⁷

In addition to full-time employment and parenting two young children, Applicant finds time for other activities. He and his family are members of a church, they have donated food and household goods to support church programs, and he has volunteered at the church. He and his spouse have volunteered to support their children's preschool and kindergarten. His family has also volunteered and supported charitable programs through his employer as well as supporting other charitable causes. He has an excellent financial history as reflected by a credit score of 809, which is considered quite high or exceptional.⁸ He has a good if not excellent employment

³ Tr. 24-25.

⁴ Exhibit 1.

⁵ Exhibit 2.

⁶ Tr. 40-41.

⁷ Exhibit A.

⁸ Exhibit A.

record, and his manager and coworkers hold him in high regard, describing him as a competent, professional, and trustworthy person.⁹

Law and Policies

It is well-established law that no one has a right to a security clearance.¹⁰ As noted by the Supreme Court in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹¹ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹² An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹³

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁴ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁵ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁶ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁷

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.¹⁸ The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.¹⁹

⁹ Exhibit A.

¹⁰ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (no right to a security clearance).

¹¹ 484 U.S. at 531.

¹² Directive, ¶ 3.2.

¹³ Directive, ¶ 3.2.

¹⁴ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁵ Directive, Enclosure 3, ¶ E3.1.14.

¹⁶ Directive, Enclosure 3, ¶ E3.1.15.

¹⁷ Directive, Enclosure 3, ¶ E3.1.15.

¹⁸ *Egan*, 484 U.S. at 531.

¹⁹ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

Discussion

Under Guideline E for personal conduct, the concern is that “conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about [a person’s] reliability, trustworthiness, and ability to protect classified information.”²⁰

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions or factors:

AG ¶ 16(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

AG ¶ 17(a) the [person] made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

AG ¶ 17(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 [person’s] reliability, trustworthiness, or good judgment; and

AG ¶ 17(d) the [person] has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that cause untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

I have considered Applicant’s case, which is a bit unusual, the circumstances surrounding the conduct, to include his knowledgeable and voluntary participation, his age and maturity at the time, to include the stressors he then felt, and that there was no unjust enrichment as the money was earned by his spouse’s labor. I also considered his good employment record, his constructive community involvement, and the passage of time since the conduct ended in August 2014. And I gave special consideration to his voluntary self-report of the information during the 2013 background investigation, and the fact that he has since been truthful and complete in responding to questions.

Nevertheless, the favorable matters do not outweigh and overcome the nature, extent, and seriousness of the conduct. Concerned about their financial situation, both Applicant and his spouse decided to provide false or misleading information to the online-media company to obtain employment. The misrepresentation was not a one-time, isolated, or infrequent event, because the course of conduct played out over nearly a two-year period. Although the \$3,000 was earned by the labor of his spouse, the money was obtained under false pretenses because the online-media company no

²⁰ AG ¶ 15.

doubt thought they had hired Applicant, not his spouse, to perform the work. This type of conduct has a connection or nexus to an applicant's security suitability. It does not take much to imagine a situation where a cleared employee in the defense industry is presented with a financial incentive or reason to bend, skirt, or break the rules concerning the proper handling and safeguard of classified information.

Applicant's poor judgment and lack of integrity associated with the false or misleading information provided to an employer create doubt about his reliability, trustworthiness, good judgment, and ability to protect classified information. The law requires that the doubt be resolved in favor of protecting national security. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also considered the whole-person concept. Accordingly, I conclude that he did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline E:	Against Applicant
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Subparagraph 1.a:	Against Applicant
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Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant access to classified information.

Michael H. Leonard
Administrative Judge