



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



In the matter of: )  
 )  
 )  
----- )  
SSN: ----- ) ISCR Case No. 07-06073  
 )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: D. Michael Lyles, Esquire, Department Counsel  
For Applicant: Gary L. Rigney, Esquire

May 30, 2008

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on November 1, 2007. The SOR is equivalent to an administrative complaint and it details the factual basis for the action. The issues in this case fall under Guideline E for personal conduct and Guideline M for misuse of information technology systems. For the reasons discussed below, this case is decided against Applicant.

In addition to the Executive Order and Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective

---

<sup>1</sup> Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive).

September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.<sup>2</sup> The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

Applicant's Answer to the SOR was received on November 16, 2007, and he requested a hearing. The case was assigned to me on January 3, 2008. The hearing took place as scheduled on April 15, 2008. The transcript (Tr.) was received on April 23, 2008.

### **Findings of Fact**

Under Guideline E, the SOR alleges: (1) two incidents of workplace misconduct; (2) two incidents of termination from employment; and (3) two incidents of falsifying material facts on a security-clearance application by failing to disclose the complete reasons for his terminations. Under Guideline M, the SOR alleges he violated company policy by accessing and maintaining sexually explicit material on his workplace computer. Applicant's Answer to the SOR was mixed. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 41-year-old employee of a federal contractor. He has worked for his current employer since September 2003. His current position or job title is communications engineer. He is seeking to retain an industrial security clearance that he has held for several years.

Applicant has been married and divorced three times. He served on active duty in the U.S. Marine Corps during the period 1987–1998, and he received an honorable discharge. He held a security clearance for some of time he was on active duty. His educational background includes a bachelor's degree in computer networking awarded in 2000. In addition to his current job, his postgraduate employment history is as follows:

- March 2000–April 2001: other employment as an engineer.
- April 2001–July 2001: employment with a federal contractor as an engineer.
- July 2001–August 2002: employment with a federal contractor as an engineer.
- October 2002–February 2003: employment with a federal contractor (Employer A) as an information systems security manager (ISSM), which ended in his termination.
- February 2003–August 2003: employment with a federal contractor (Employer B) as an engineer, which ended in his termination.

---

<sup>2</sup> See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

Applicant was terminated from his job as an ISSM with Employer A in February 2003. His termination was based on a combination of unsatisfactory performance and violation of company policy by having material on his computer (e-mail) that could be considered obscene and offensive (Exhibits 2 and 4). Applicant was on the receiving end of e-mails that contained the material. The evidence does not establish that Applicant sought out such material by accessing Web sites. In addition, it appears Applicant had a personality conflict with his supervisor as his last day ended in a heated meeting when Applicant stated he quit and the supervisor stated Applicant was fired (Tr. 42).

When he left this job, Applicant already had another job offer, which he accepted with Employer B. The job was located on a military installation at a remote site. Applicant was then dating his third wife and they decided to marry so she would be allowed to accompany him. They married in February 2003, Applicant arrived at the remote site on March 1, 2003, and his wife followed the next month. The marriage and relocation to the remote site proved to be a mistake, as the marriage was full of conflict. It reached the point where Applicant requested that Employer B send his wife and her son home. After her departure from the remote site, she harassed Applicant via e-mail, which included sending e-mails to his superiors. Her harassment extended to one of Applicant's sisters who eventually took action by bringing criminal charges against his wife that resulted in a misdemeanor conviction (Tr. 137-162).

Applicant was terminated from his job as an engineer with Employer B in August 2003. His termination was based on an investigation that concluded that Applicant had unauthorized government property in his government quarters (Exhibit 5). It appears the investigation was commenced based on an e-mail from his wife. In addition, it appears that a factor in the termination was that Applicant's superiors at the remote location had tired of dealing with his ongoing domestic problem.

Applicant completed a security-clearance application in 2006 (Exhibit 1). Concerning his employment history, Question 22 asked him to answer the following question:

Has any of the following happened to you in the last 7 years?

1. Fired from a job.
2. Quit a job after being told you'd be fired.
3. Left a job by mutual agreement following allegations on misconduct.
4. Left a job by mutual agreement following allegations of unsatisfactory performance.
5. Left a job for other reasons under unfavorable circumstances.

He reported that he quit his job with Employer A after being told he would be fired. He explained that he had accepted another job and that he and his supervisor were in a dispute over job responsibilities. He did not disclose that his termination was based on unsatisfactory performance or the e-mail issue. For Employer B, he reported that he had been fired from his job due to misbehavior of family members on a military installation.

He did not disclose that his termination was based on the unauthorized government property issue.

## Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, no one has a right to a security clearance.<sup>3</sup> As noted by the Supreme Court in 1988 in the case of *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>4</sup> A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>5</sup> An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any level.<sup>6</sup> 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.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>7</sup> The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>8</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>9</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>10</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>11</sup> The agency appellate authority has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.<sup>12</sup>

---

<sup>3</sup> *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 (10<sup>th</sup> Cir. 2002) (“It is likewise plain that there is no ‘right’ to a security clearance, so that full-scale due process standards do not apply to cases such as Duane’s.”).

<sup>4</sup> *Egan*, 484 U.S. at 531.

<sup>5</sup> Directive, ¶ 3.2.

<sup>6</sup> Directive, ¶ 3.2.

<sup>7</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>8</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>9</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>10</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>11</sup> *Egan*, 484 U.S. at 531.

<sup>12</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.<sup>13</sup> Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

### **Analysis**

Personal conduct under Guideline E<sup>14</sup> includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. In particular, a security concern may arise due to:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] 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.<sup>15</sup>

A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

The gravamen of the SOR is the truthfulness of Applicant's answer to Question 22 in his security-clearance application. He denies that his responses to Question 22 were intentionally false. For Employer A, he contends that he resigned amid a clash of personalities with his supervisor. For Employer B, he contends that the real reason or motivation for his termination was his unacceptable ongoing domestic problem.

---

<sup>13</sup> Executive Order 10865, § 7.

<sup>14</sup> Revised Guidelines at 10–12 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>15</sup> Revised Guidelines at 10.

His contentions and explanations are not credible. Although his job with Employer A ended in an “I quit – You’re fired” meeting, his listed reason on the security-clearance application was incomplete, misleading, and false because it omitted any mention of the unsatisfactory performance and for having material on his computer (e-mail) that could be considered obscene and offensive. Given the documentary evidence (Exhibits 2 and 4), it is misleading to characterize his departure from Employer A as resigning or quitting based on a dispute with a supervisor.

Likewise, for Employer B, his listed reason for the termination was incomplete, misleading, and false because it omitted any mention of the unauthorized government property issue. Whatever the company’s motivation, he knew the company’s official reason for the termination because he had received the termination letter (Exhibit 5) or had seen the letter before he departed the remote site or both (Tr. 20–26, 55, 58, 70). Despite that knowledge, he did not report that information about his termination.

Given his age, military experience, and experience as an employee in the defense industry, he had to know that two job terminations in the same year for these reasons might be a problem for his security clearance. An applicant for a security clearance is not allowed to pick and choose the details to disclose, but instead is obliged to give a complete accounting even if that means disclosing derogatory information. Applicant gave reasons for his terminations in the light most favorable to him. He did not give a complete accounting, and in doing so he deliberately omitted, concealed, or falsified material facts about the reasons for his terminations.<sup>16</sup> In other words, his answer to Question 22 was at best a half-truth—it was not a full, frank, and truthful answer.<sup>17</sup>

In addition to the falsification issues, the evidence of Applicant’s workplace misconduct and terminations raise security concerns under Guideline E.<sup>18</sup> For example, his termination for having inappropriate material on his e-mail violated written company policy.<sup>19</sup>

All of the MC under Guideline E have been reviewed and none apply in Applicant’s favor. Making false statements to the federal government during the

---

<sup>16</sup> DC 1 is the “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.”

<sup>17</sup> See Directive, ¶ 6.2 (“An applicant is require to give, and to authorize others to give, full, frank, and truthful answers to relevant and material questions needed by DOHA to reach a clearance decision and to otherwise comply with procedures authorized by this Directive.”).

<sup>18</sup> See DC 3 and DC 4.

<sup>19</sup> DC 7 is the “violation of a written or recorded commitment made by the individual to the employer as a condition of employment.”

security-clearance process is serious misconduct, and it is not easily explained away, extenuated, or mitigated. Accordingly, Guideline E is decided against Applicant.

The SOR allegation under Guideline M<sup>20</sup> is, in substance, redundant with and repetitive of the facts alleged in SOR ¶¶ 1.a and 1.b. It is unnecessary to address the Guideline M matters because the security concerns are adequately addressed under Guideline E. In addition, it will make no difference in the ultimate outcome of the case and the law does not require a futile or pointless act.

To conclude, Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the falsification of the security-clearance application was given great weight, and the case would have been decided against Applicant on this basis alone. Likewise, the whole-person concept (including his honorable military service, his problems with his third wife, and his favorable character evidence) was given due consideration and that analysis does not support a favorable decision. This case is decided against Applicant.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	Against Applicant
Subparagraphs 1.a–1.f:	Against Applicant

### **Conclusion**

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

Michael H. Leonard  
Administrative Judge

---

<sup>20</sup> Revised Guidelines at 26–27 (setting forth the security concern and the disqualifying and mitigating conditions).