



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-07638
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: *Pro Se*

April 2, 2008

Decision

HARVEY, Mark W., Administrative Judge:

Applicant failed to mitigate security concerns arising under Guideline E (Personal Conduct). Clearance is denied.

Statement of the Case

On November 18, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him,¹ pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised.² The SOR alleges security concerns under

¹Item 1 (Statement of Reasons (SOR), dated Nov. 18, 2007). Item I is the source for the facts in the remainder of this paragraph unless stated otherwise.

²On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made

Guideline E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue his security clearance, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations on November 21, 2007, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated February 12, 2008, was provided to him on February 26, 2008, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.³ Applicant's response was due on March 29, 2008. Applicant responded to the FORM on March 21, 2008. Department Counsel did not object to my consideration of Applicant's response to the FORM. The case was assigned to me on March 31, 2008.

Findings of Fact⁴

Applicant admitted in his response to the SOR all of the SOR's allegations with explanations. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 50 years old.⁵ He attended one year of college in 1994. He married his first spouse in 1978, and divorced in 1980. He married his current spouse in 1980. He has three children, who were born in 1981, 1983, and 1984. He served on active duty in the Air Force from 1978 to 1998. When he completed his security clearance application (Item 4) on August 26, 2006, he described problems he had with his employer concerning an improper fee-splitting arrangement for referral of new employees. He concluded his explanation stating:

In retrospect, I made an incredibly bad decision accepting the referral money from [my employer] for people I did not directly refer to the company; and I truly regret that decision. [My company] has asked me to

under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant's case.

³Defense Office of Hearings and Appeals (DOHA) transmittal letter, is dated Feb. 19, 2008; however, Applicant's receipt is signed and dated Feb. 26, 200[8]. The DOHA transmittal letter informed Applicant that he had 30 days after Applicant's receipt of the FORM to submit information.

⁴Item 2 (Applicant's response to the SOR, dated Dec. 10, 2007) is the source for the facts in this section, unless stated otherwise.

⁵Item 4 (Questionnaire for National Security Positions, Standard Form 86, dated Aug. 25, 2006) is the source for the facts in this paragraph, unless otherwise stated.

reimburse them for the invalid referrals, I have agreed to do so, and [my company] and I are currently finalizing the details of my repayment plan.

The improper fee-splitting arrangement is the source of the security concern in Applicant's case. Applicant's employer had a program in which some employees received a fee or bonus for referring potential new employees that the contractor subsequently hired. Some managers, including Applicant's supervisor S, were not eligible to receive these referral fees. S referred ten potential new employees to the contractor for employment; however, Applicant, who was eligible to receive the referral fees, received the credit and remuneration for the referrals. If two referrals were made within a 90 day period, then the contractor paid an additional bonus. Some referrals were timed to maximize the bonus. After Applicant paid taxes on the bonuses he received, he split the remainder of the referral fees with S.

In April 2006, allegations of improper fee-splitting arrangements surfaced and S resigned. On April 17, 2006, an investigator questioned Applicant about the fee-splitting arrangement, and Applicant lied about his culpability. On April 24, 2006, after being confronted with proof of the fee-splitting arrangement, Applicant admitted his involvement and resigned. He admitted that he initially lied because he "panicked." See FORM and Applicant's Response to FORM at 2.

Applicant and the contractor have been in negotiations for more than a year about repayment of the approximately \$46,000 he improperly accepted for referrals he did not make. Applicant provided his first payment on March 12, 2008. See Applicant's Response to FORM at 2.

Applicant said he accepted full responsibility for his involvement in the fee-splitting scheme. However, his acceptance of responsibility was equivocal. He said that S told him that management did not object to transfer of credit for referrals from one employee to another. Applicant also provided several examples where an employee received credit for referring new employees even though that employee did not actually refer the new employee to the contractor. It is unclear whether corporate management was aware of these referrals. In response to interrogatories, he explained that he was skeptical about S' claim that management did not object to the fee-splitting arrangement stating:

I exercised extremely poor judgment in this matter and truly regret my decisions. I had enough reservations at the time to question my ex-supervisor about the propriety of what we were doing. This alone should have told me that it wasn't the right thing to do. However, I chose to hear what I wanted to hear and to believe that something that seemed to be too good to be true, was in fact true. Reassurances from my ex-supervisor, along with the fact that the money was being paid from Corporate without anyone saying anything, further reinforced my belief that it was OK. After reflecting at length about this, I realized that what seemed to be harmless—I was told that Corporate put that money aside for recruiting,

and so it didn't affect the Company's profit—was actually more akin to taking something to which I was not entitled.

Applicant emphasized that he has learned from his mistake, and has held a clearance for more than 20 years with no other incidents. Because the personnel close to him are aware of the incident, it could not be used to coerce or improperly influence him.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised 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 over-arching adjudicative goal is a fair, impartial and common sense 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"⁶ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant]

⁶See Directive ¶ E3.1.14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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).

has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).⁷

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 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* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶¶ 16(b), 16(c) and 16(d) describe three conditions that could raise a security concern and may be disqualifying in this case:

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

⁷The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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;

(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: . . . (3) a pattern of dishonesty or rule violations; and, (4) evidence of significant misuse of Government or other employer's time or resources.

Applicant submitted false information about his role in referring employees to his employer and fraudulently obtained \$46,000 from his employer. See SOR ¶ 1.a. Applicant deliberately lied on April 17, 2006 to his employer's investigator about his involvement in the improper fee-splitting scheme. See SOR ¶ 1.b. AG ¶ 16(b) applies to both situations. However AG ¶ 16(b) does not apply to SOR ¶ 1.c because his failure to make restitution does not involve making false statements to his employer.⁸

AG ¶¶ 16(c) and 16(d) do not apply because Applicant's conduct is already covered under Guideline J (Criminal Conduct),⁹ and there is no need to resort to the catch-all provisions of Guideline E. Alabama Criminal Code §13A-8-2(2) is the statute Applicant violated. He committed a theft when he knowingly obtained by deception control over the property of his employer, with the intent to deprive the owner of his or her property. Applicant knew he had done nothing to warrant payment of the fees, yet he affirmatively participated in obtaining the fees and then split the money with his co-conspirator, S. The crime was repeated each time that he submitted a false statement or document to obtain the fee. As such, there is sufficient information "for an adverse determination" under Guideline J.

⁸In the decretal paragraph of this decision, I find "For Applicant" with respect to SOR ¶ 1.c. This finding does not suggest or imply that Applicant should not pay restitution or return the stolen funds. I do not condone his continued wrongful withholding of his employer's funds.

⁹AG ¶ 31 includes two conditions that could raise a security concern under Guideline J and may be disqualifying in this case. AG ¶ 31(a), "a single serious crime," and AG ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted" both clearly apply to Applicant's conduct.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (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;
- (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;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;
- (f) the information was unsubstantiated or from a source of questionable reliability; and,
- (g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions in AG ¶ 17 apply. Applicant made a false statement to his employer each time he submitted a false claim for payment of a referral fee, knowing he was not entitled to it. The theft was completed when he received the funds because he intended to permanently deprive his employer of the employer's money. He lied to the corporate investigator in April 2006 when first confronted about the thefts. He continues to deprive his employer of the funds even after being caught in April 2006. His misconduct is recent.¹⁰ He did not promptly inform the government of the falsifications. He attempted to mislead his employer's investigation. He did not receive

¹⁰ The falsifications cannot be considered in isolation or piecemeal. An administrative judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of his conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When all the falsifications are considered, the personal conduct cannot be mitigated under AG ¶ 17(c).

counseling designed to improve his conduct. Applicant's attempt to convince security officials that he believed S when S told him management would not object to the fee-splitting scheme is not credible. No one advised him to lie to the investigator. He admitted the false statements at issue, and the falsification allegations are all substantiated. His statement that he has learned from his mistakes does not convince me that similar misbehavior is unlikely to recur. His falsifications cast doubt on his current reliability, trustworthiness, and good judgment. Security concerns pertaining to his personal conduct are not mitigated.

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) 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.

Applicant served honorably on active duty from 1978 to 1998. The contractor subsequently employed him until 2006, and there is no evidence of malfeasance beyond that alleged in the SOR. His record of good employment and military service (aside from the SOR allegations) weighs in his favor. This shows some responsibility and mitigation.

The evidence against mitigating Applicant's misconduct is more substantial, and is thoroughly discussed under Guideline E, *supra*. Applicant's decisions to steal from his employer and lie to the investigator were deliberate, intentional, knowledgeable, voluntary, and not isolated. He was sufficiently mature to be fully responsible for his conduct. He did not receive counseling or therapy, and may not have a clear understanding about how to avoid problematic situations and why he engaged in the misconduct. He has not made restitution, which reflects poorly on his rehabilitation. By its very nature, his misconduct calls into question his ability or willingness to comply with laws, rules and regulations. I have persistent and serious doubts about his judgment, reliability, and trustworthiness. He has not met his burden of establishing that his misconduct will not recur.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to personal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors” and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government’s case. For the reasons stated, I conclude he is not eligible for access to 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 1, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant

Conclusion

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 eligibility for a security clearance for Applicant. Clearance is denied.

Mark W. Harvey
Administrative Judge