



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



In the matter of:)
)
-----) ISCR Case No. 14-04152
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel
For Applicant: *Pro se*

09/25/2015

Decision

HARVEY, Mark, Administrative Judge:

In April 2011, Applicant’s employer fired him for providing his employer false timecard information. He falsely denied that he was terminated from employment in the previous seven years on his November 22, 2013 Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86) (Item 1). On January 13, 2014, he falsely stated to an Office of Personnel Management (OPM) investigator that he was released from employment as part of his employer’s reduction in force (RIF). Personal conduct concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On November 22, 2013, Applicant submitted an SF 86. (Item 4) On April 10, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline E (personal conduct). (Item 1) The SOR detailed reasons why the DOD CAF was unable to find that it is clearly

consistent with the national interest to grant or continue Applicant's access to classified information and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (Item 1)

On May 8, 2015, Applicant responded to the SOR allegations and waived his right to a hearing. (Item 2) A complete copy of the file of relevant material (FORM), dated July 22, 2015, was provided to him on July 30, 2015.¹ Applicant did not respond to the FORM. The case was assigned to me on September 21, 2015.

Findings of Fact²

In Applicant's SOR response, he admitted the allegations in SOR ¶¶ 1.a through 1.c. He did not provide extenuating and mitigating information as part of his SOR response. Applicant's admissions are accepted as findings of fact.

Applicant is a 52-year-old information technology engineer, who has been working as a consultant since April 2011.³ He worked for large DOD contractors from November 1994 to April 2011, and he held a security clearance in 2011. (Items 4, 5) In 1987, he received a bachelor's degree from a university, and in 1995, he received a master's degree. In 1994, he married, and in 2005, his twin children were born. He has never served in the military. There is no evidence of security violations, abuse of alcohol, criminal convictions, or use of illegal drugs.

Personal Conduct

SOR ¶ 1.a alleges that on or about April 8, 2011, Applicant was fired from employment with a large DOD contractor for "[f]alsification of entries on any form of time reporting, including charging time worked to an incorrect account, misrepresenting actual time worked or otherwise intentional compromising the accuracy of [his employer's] labor and attendance records." His employer in April 2011 wrote that Applicant was fired for "[f]alsification of entries on any form of time reporting, including charging time worked to an incorrect account, misrepresenting actual time worked or otherwise intentional compromising the accuracy of [his employer's] labor and attendance records." (Item 5) Applicant admitted that he committed this misconduct in his SOR response. (Item 2)

¹The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated July 27, 2015, and Applicant's receipt is dated July 30, 2015. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

²Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

³Unless stated otherwise, Applicant's November 22, 2013 Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86) is the source for the facts in this paragraph and the next paragraph. (Item 4)

In his November 22, 2013 SF 86, Applicant stated he was employed as an engineer for a large DOD contractor from April 2009 to April 2011. (Item 4) He said he left employment with the DOD contractor because of a RIF. (Item 4) His SF 86 asked:

For this employment have any of the following happened to you in the last seven (7) years?

- Fired
- Quit after being told you would be fired
- Left by mutual agreement following charges or allegations of misconduct
- Left by mutual agreement following notice of unsatisfactory performance

Applicant responded, “No” on his SF 86 to these questions about why he left his employment.

On January 13, 2014, an OPM investigator interviewed Applicant, and Applicant reaffirmed the accuracy of his answers on his SF 86, including the statement that he left employment with the DOD contractor in April 2011 because of a RIF. (Item 6) He denied that anyone at this employment would question his conduct or behavior. (Item 6) In his SOR response, he admitted that he lied to the OPM investigator in his personal subject interview (PSI) concerning why he left his employment in April 2011.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and

endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). 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). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

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 describes three conditions that could raise a security concern and may be disqualifying in this case:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, . . . determine security clearance eligibility or trustworthiness. . . . ;
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and
- (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.

In April 2011, Applicant's DOD contractor-employer fired him for providing his employer false timecard information. He falsely denied that he was terminated from employment in the previous seven years on his November 22, 2013 SF 86. On January 13, 2014, he falsely reaffirmed the employment termination information on his November 22, 2013 SF 86, and he falsely stated to an OPM investigator that he was released from employment as part of his employer's RIF. AG ¶¶ 16(a) through 16(c) apply.

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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the mitigating conditions apply to Applicant's intentional false statements and efforts to conceal the reason he left employment from a large government contractor and falsification of timecards in April 2011. His false statement on January 13, 2014, to an OPM investigator is relatively recent and serious. The DOD must be able rely on security clearance holders to self-report information of security significance, even when that information reflects negatively on the security clearance holder. He failed to meet his burden of mitigating his false statements. He is credited with admitting his false statements in his SOR response; however, more time must pass without Applicant's involvement in conduct of security concern before he will be eligible for access to classified information.

Whole-Person Analysis

In all adjudications, the protection of our national security is the paramount concern. The adjudicative process is a careful weighing of a number of variables in considering the whole-person concept. It recognizes that we should view a person by the totality of his or her acts, omissions, and motivations as well as various other

variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances and applying sound judgment, mature thinking, and careful analysis. Under the whole-person concept, 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 a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant has achieved important employment goals, demonstrating some self-discipline, responsibility, and dedication. Applicant is a 52-year-old information technology engineer, who has been working as a consultant since April 2011. He worked for large DOD contractors from November 1994 to April 2011. He has been awarded bachelor's and master's degrees. He is credited with admitting in his SOR response that he was fired for falsifying his timecard and making false statements on his SF 86 and to an OPM investigator. There is no evidence of security violations, abuse of alcohol, criminal convictions, or use of illegal drugs.

The reasons for revoking Applicant's access to classified information are more persuasive than the reasons for continuing his access to classified information. In April 2011, Applicant's large DOD contractor-employer fired him for providing his employer false timecard information. He falsely denied that he was terminated from employment during the previous seven years on his November 22, 2013 SF 86. On January 13, 2014, he falsely stated to an OPM investigator that he was released from employment as part of his employer's RIF.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 12968, the Regulation, the AGs, and other cited references to the facts and circumstances in the context of the whole person. For the reasons stated, I conclude Applicant has failed to mitigate personal conduct security concerns.

