



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



In the matter of: )  
)  
) ISCR Case No. 07-07270  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Francisco Mendez, Esquire, Department Counsel  
For Applicant: Eric A. Eisen, Esquire

March 31, 2008

**Decision**

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HOGAN, Erin C., Administrative Judge:

Applicant submitted an electronic questionnaire for investigations processing (e-QIP) on October 6, 2006. On October 31, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E, Personal Conduct, and Guideline J, Criminal Conduct, for Applicant. 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

On November 23, 2007, Applicant answered the SOR and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on December 11, 2007. The case was assigned to another administrative judge on December 20, 2007. On December 28, 2007, DOHA issued a notice of hearing scheduling the hearing for February 12, 2008. The case was transferred to me on January 28, 2008. I convened the hearing as scheduled on February 12, 2008. The government offered Exhibits (Gov Ex) 1 through 4, which were admitted without

objection. Applicant's counsel called Applicant and submitted one exhibit which was marked as AE A and admitted without objection. DOHA received the transcript of the hearing (Tr) on February 21, 2008. The record closed on that date. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

### **Procedural Issue**

During preliminary matters, the Government formally withdrew the Guideline J, Criminal Conduct allegations. (Tr at 6.)

### **Findings of Fact**

In his Answer to the SOR, dated August 30, 2007, with respect to ¶ 1.a, Applicant admitted that an investigation took place but denies being aware of owing the US government \$795.56. He admits to the factual allegations in ¶ 1.b with explanation.

Applicant is a 61-year-old senior project manager employed by a Department of Defense contractor seeking to maintain a security clearance. He has worked for his current employer since August 2006. From 1964 to 1968, he served on active duty in the United States Navy. In 1969, he was hired as a civilian employee with a Department of Defense agency. He has held a security clearance since 1969. He is married and has two adult sons. (Tr at 15-18, 61-62; Gov 1.)

In July/August 1998, Applicant was investigated for allegedly filing false local travel claims. The investigation revealed that Applicant was filing local travel claims for travel to and from his work site to various contractor sites. It was believed that Applicant was actually traveling to the contractor sites from his home. This was not reflected on his travel claims. The distance from his home to the contractor sites is less than his normal commute. Because the distance was less than his normal commute he could not claim mileage. (Gov 3.)

A security badge is required in order to get into Applicant's office. A review of the badge swipe records for August, September and October 1997, revealed Applicant was not at the office on the dates he claimed to travel to and from the office to other contractor sites. Between November 18, 1996 to October 18, 1997, Applicant filed 13 local travel claims. The total amount claimed was \$6,041.51. Of that amount, only \$767.90 was allowable. Applicant received \$5,273.61 that he was not entitled to receive. (Gov 3.)

Applicant claims that his actual travel was from a contractor site facility that was about a half mile from his office. When he filed the travel claim, he used his office as reference as opposed to the contractor site. He had no documentation to verify this. He also was advised in 1992 or 1993 by an employee who processed travel claims in his former office that he could claim for local travel. (Tr at 35-36, 47-48; Gov 3 at 4.) His old office merged with his new office as a result of the base realignment and closure

process. (Tr at 27.) He was not aware that his filing for local travel claims was erroneous until he received guidance from the new office in conjunction with the 1998 investigation.

Initially, Applicant wanted to fight the allegations but his division chief told him to make restitution on the amount he was not authorized to receive and the matter would be handled administratively. He repaid the amount of the travel claim he was not authorized to receive. (Tr at 34-36.)

In November 2003, an anonymous hotline complaint was filed alleging Applicant was arriving to work late and leaving early. Physical surveillance of Applicant's arrival and departure from work was conducted between November 30, 2003, and December 20, 2003. Applicant's time cards were reviewed during that same period. It was discovered that Applicant was absent from work 19 hours or 22% of his reported work time. The investigation concluded that Applicant needed to repay the amount he was paid for hours not worked in the amount of \$795.96. On January 9, 2004, Applicant was interviewed. The report indicates that Applicant admitted that he was abusing his work time by arriving late and leaving early or not bothering to come in at all. The investigation report does not include a signed, sworn statement from the Applicant. (Gov 4.)

In January 2004, Applicant retired. Although he was aware of the investigation, he was never told that he owed the federal government \$795. There is no evidence that attempts were made to collect the debt. Applicant claims that although he was not in the office for the full amount of the time claimed on his time cards, part of the time he was telecommuting from home. He would begin his day checking and responding to e-mail traffic prior to leaving his home because he had a long commute. On one day, he called his secretary to tell her that he would not be in the next day due to the weather but she never processed the leave request. He claims that he had permission to telecommute from his supervisor. (Tr at 52-58.) Applicant never admitted to abusing his work hours as mentioned in the investigative report. He claims the statement in the investigative report claiming he admitted to arriving late and leaving early was the investigator's statement. He claims he made no such admission. (Tr at 59.)

Applicant has worked for his current employer since August 2006. In November 2006, he received a promotion. (AE E at 8.) He received an outstanding rating in his 2007 performance report. His manager states that Applicant is a valuable asset to the company and to the customer. The customer has contacted him several times to tell him what a great job Applicant has been doing. (AE A at 1-4.) Applicant has also received several awards in the past as well for his work performance. (AE A at 5-7.)

### **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.

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 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).

## **Analysis**

### **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 personal conduct guideline lists several disqualifying conditions. Two Personal Conduct Disqualifying Conditions (PC DC) potentially apply in Applicant's case. They are:

PC DC ¶ 16(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.)

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

Security concerns are raised due to Applicant filing local travel claims for travel not authorized to be reimbursed. He also allegedly submitted false time cards over a three week period in December 2003, one month before he retired. Both of these instances consist of a pattern of rule violations. Both also infer an abuse of government time and resources.

The personal conduct security concerns can be mitigated. I find that Personal Conduct Mitigating Condition ¶ 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 individual's reliability, trustworthiness, or good judgment) applies. The allegations related to the false local travel claims occurred in 1998. There was some confusion about what expenses were proper when filing of local travel claims in Applicant's previous office. Once the proper procedures were pointed out to Applicant, he reimbursed the federal government for the total amount overpaid on the local travel claims. One cannot

conclude with certainty that he intended to file false travel claims. The time and attendance abuse allegations arose in November/December 2003. Although the hotline report concluded that Applicant abused his time and attendance by coming in late and leaving early, no further action was taken to collect the money the investigator concluded that Applicant owed. The investigative report contains no signed, sworn statements pertaining to the specific allegations. Although the investigating officer concluded that Applicant owed the government \$795, there is no evidence that indicates Applicant was notified of this debt and given the opportunity to respond. The government took no formal action to collect the debt.

Although both of the allegations raised security concerns, more than four years have passed since the last incident. Applicant's current employer states that Applicant has done an outstanding job. I conclude that at the present time, Applicant is not a security risk. Applicant mitigated the concerns raised under personal conduct.

### **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 common sense 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. I considered Applicant's favorable work history with his current employer, his 42 years of experience as a Department of Defense civilian employee, and that more than four years have passed with no subsequent issues. For all these reasons, I conclude Applicant mitigated the security concerns arising under personal conduct.

### **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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline J:	WITHDRAWN
Subparagraph 2.a:	Withdrawn

**Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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ERIN C. HOGAN  
Administrative Judge