



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



In the matter of:)
)
) ISCR Case No. 18-00496
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

07/24/2019

Decision

RIVERA, Juan J., Administrative Judge:

Applicant was terminated from his employment for gross negligence after he manipulated program performance test data. His evidence is insufficient to establish that his family is aware of his misconduct and his termination. He deliberately failed to inform his current employer of his 2016 termination. He is still vulnerable to exploitation, manipulation, or duress. He failed to demonstrate his reliability, trustworthiness, ability to comply with the law, rules and regulations, and his ability to protect classified information. Personal conduct security concerns are not mitigated. Clearance denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 9, 2017. After reviewing the SCA and the information gathered during the background investigation, the Department of Defense (DOD) issued a Statement of Reasons (SOR) on April 10, 2018, explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information. Security concerns were raised under Guideline E for personal conduct. Applicant denied the sole SOR allegation, submitted 13 pages in mitigation and extenuation, and requested a decision based on the record in lieu of a hearing.

A copy of the Government's file of relevant material (FORM), submitting the evidence supporting the security concerns, was provided to Applicant by letter dated February 4, 2019. Applicant received the FORM on February 13, 2019. He was allowed 30 days to submit any objections to the FORM and to provide material to refute, extenuate, and mitigate the concerns. Applicant responded to the FORM with a six page document that I made part of the record. He raised no objections. The case was assigned to me on April 12, 2019. I admitted and considered the Government's proposed evidence and Applicant's submissions.

Findings of Fact

The SOR alleges that Applicant was terminated from his employment with a federal contractor for gross negligence in September 2016, after his employer's internal investigation determined that he intentionally and knowingly manipulated program performance test data. Applicant admitted that he was terminated from his employment for gross negligence, but denied any misconduct or that he intentionally or knowingly manipulated the data.

After a thorough review of the record evidence, I make the following findings of fact:

Applicant is a 62-year-old design engineer working for a federal contractor. He became a naturalized U.S. citizen in 1983. He earned a master's degree in 1985, and received a doctorate degree (Ph.D.) in 2017, both from U.S. universities. He married in 1982, and has two adult children.

Between 2000 and 2010, Applicant worked for federal contractor "1." He worked for federal contractor "2" from 2010 until he was terminated in September 2016 for gross negligence and intentionally and knowingly manipulating program performance test data. An adverse incident report was submitted by contractor "2" to the Defense Industrial Security Clearance Office shortly after Applicant's termination in September 2016. He has held a clearance since about 2007.

Applicant was unemployed between September 2016 and January 2017. He was hired and has been working for his current employer and security sponsor, federal contractor "3," since January 2017.

In his response to Section 13A (Employment Activities) of his March 2017 SCA, Applicant disclosed that he was terminated by contractor "2" after some data anomaly was discovered accidentally in September 2016 and he was blamed for it. He stated he did not remember exactly what happened three years ago, but that he was terminated for gross negligence.

Applicant admitted to committing gross negligence in an email to a supervisor and others, dated May 5, 2016. (Applicant's Memo 1-1) In that same email, he explains how data could have been deleted and the wrong data overwritten. He stated:

I usually create working directory, and copy the results to the main directory, but in this case, it looks like the working directory I processed has been deleted so it is possible that this working directory got deleted inadvertently before data had been captured I think it is a strong possibility that I must have entered the wrong numbers to produce wrong results But, I tried to reproduce the results I got from the scratch since I could not find the control files I think it is a strong possibility that I must have entered the wrong numbers to produce wrong results I feel immense shame that this represents a gross negligence on record keeping on my part.

Applicant also admitted to his program manager that he intentionally substituted data from another test into his test data. To substitute the data, Applicant had to manually overwrite the test data results. A folder with data was erased from contractor's "2" network. The overwriting and erasing of the data was established through the computer logs. When questioned by a second coworker about the data substitution, Applicant stated that he wanted to "come clean" and asked the coworker to pray for him.

In his response to the FORM, Applicant stated that he had no recollection of knowingly and intentionally manipulating the test data. He also did not remember using the words "come clean," but stated that if he used them, it must have been in reference to different data or in a different context.

Concerning his admission of gross negligence in his email to his supervisor (Memo 1-1), Applicant believes that his statement was misunderstood by contractor "2" as an admission of wrongdoing and gross negligence. He stated that the gross negligence he expressed was a reference to his own standard of not keeping the personal record, but avers that the personal record keeping was not a contractual requirement.

Applicant also noted that there were at least three engineers with access to the same computer and data, and any of the three could have done what he was accused of doing. He believes that he was singled out by contractor "2" as a scapegoat for the contractor's negligence in up keeping and maintaining its test equipment.

The Department of the Air Force Office of Special Investigations submitted a report of investigation (ROI) in September 2017. The report titled Applicant for fraud offenses (false pretenses/swindle/confidence game).

During his September 2017 background interview with a government investigator, Applicant stated that he had not disclosed his termination to any member of his family or friends. He lied to his spouse about his termination and told her that he had retired early. When asked why, he stated that his native country's culture does not allow for the head of a household to be disgraced in the eyes of his family. He reiterated that if this become an issue he would retire.

Applicant did not disclose his termination to his current employer, contractor "3." Applicant told the investigator that this was a big trauma in his life. He is very embarrassed and has a difficult time talking about his termination. Applicant stated that the incident cannot be used to blackmail him. He further stated that if his current employer (contractor "3") discovered the termination and fired him, he would retire.

In his answer to DOHA interrogatories, Applicant adopted the summary of his three 2017 interviews. In his response, he indicated that when he was terminated, he hired an attorney to contest his termination and requested an administrative officer review to be performed by contractor "2." He did not follow up on the appeal of his termination because the legal fees were too expensive and he had moved out of state to take the job with contractor "3." He also stated that after his interviews in 2017, he had a chat with his wife about his termination and she was now aware of it.

Applicant noted in his answer to the FORM that he had not disclosed his termination for gross negligence to his current employer, contractor "3." He explained it was very difficult for him to voluntarily disclose his termination after contractor "3" identified him as a valuable asset and had spent more than \$50,000 for his relocation.

Policies

The SOR was issued under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Eligibility for access to classified information may be granted "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, § 2. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline E: Personal Conduct

AG ¶ 15 sets forth the security concern as follows:

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 or sensitive information

Applicant intentionally and knowingly manipulated program performance test data, resulting in his termination from his employment with a federal contractor for gross negligence in September 2016. Applicant admitted that he was terminated from his employment for gross negligence, but denied any misconduct or that he intentionally or knowingly manipulated the data.

Applicant's emails and memoranda establish that he, apparently inadvertently, deleted his working directory before the data had been captured and that he then knowingly entered the wrong numbers to produce the anomalies later discovered by employer "2." In his then correspondence, Applicant expressed immense shame highlighting that this actions represented a gross negligence on record keeping on his part.

Applicant's behavior raises the following disqualifying conditions under AG ¶ 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 individual may not properly safeguard classified or sensitive 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 individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of . . . (3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing

AG ¶ 17 lists two conditions that are partially raised by the facts in this case and could potentially mitigate the personal conduct security concerns:

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant's behavior was serious and not a minor offense, particularly considering that he was hired for his expertise and scientific abilities to monitor, conduct, and record test data from experiments. Applicant manipulated the data and failed to disclose his misconduct and gross negligence for several years until the mistakes were discovered because the data recorded could not be reproduced. His actions are disturbing for a person of his education and work experience. They show that he cannot be trusted to apply his knowledge and expertise, to do his job, or to disclose problems to his employer when they occur. Under the circumstances,

Applicant's behavior currently cast doubt on his reliability, trustworthiness, or good judgment.

Applicant has not admitted his misconduct and continues to perpetuate his false statements to present. Furthermore, he has taken no positive steps to reduce or eliminate his vulnerability to exploitation, manipulation, or duress. He deliberately and knowingly failed to inform his new employer (contractor "3") that he was terminated from his prior employment for gross negligence and misconduct. Moreover, although he claimed that he had "a chat with his wife," his statement alone, in light of his other misrepresentations, is insufficient to establish that she and his family know about his misconduct. Thus, he is still susceptible to blackmail, influence, or duress.

None of personal conduct mitigating conditions are supported by the facts and they do not mitigate the SOR allegation, which continues to raise concerns under AG ¶¶ 16(c), (d), and (e). Guideline E security concerns are not mitigated.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. SEAD 4, App. A, ¶¶ 2(a) and 2(d). I have incorporated my comments under Guideline E in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant is a 62-year-old design engineer working for a federal contractor. He attended a U.S. university and achieved a Ph.D. He has worked for federal contractors since at least 2000, and held a clearance since about 2007. He was terminated from his employment for gross negligence after he intentionally and knowingly manipulated program performance test data. Applicant disclosed his termination in his 2017 SCA.

Notwithstanding, his evidence is insufficient to establish that his family is aware of his misconduct and his termination. He has deliberately failed to inform his current employer of his 2016 termination. He is still vulnerable to exploitation, manipulation, or duress. Applicant's lack of judgment and his unwillingness to comply with rules and regulations continue to raise questions about his current reliability, trustworthiness, and ability to protect classified or sensitive information. The personal conduct security concerns are not mitigated.

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 H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for a security clearance. Clearance is denied.

JUAN J. RIVERA
Administrative Judge