



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 19-00184 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
 For Applicant: Phoenix S. Ayotte, Esq.
 02/06/2020

Decision

Curry, Marc E., Administrative Judge:

Applicant’s 2016 disclosure of sensitive personnel information to another employee generates security concerns under the guidelines governing the handling of protected information and personal conduct, which he failed to mitigate. Clearance is denied.

Statement of the Case

On February 8, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline K, handling protected information, and Guideline E, personal conduct, explaining why it was unable to find it clearly consistent with the national interest to grant security clearance eligibility. The DOD CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; and DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive) and the National Security Adjudicative Guidelines (AG), effective June 8, 2017.

On May 9, 2019, Applicant answered the SOR, admitting the allegation set forth and cross-alleged in subparagraph 1.a and 2.b, and admitting, in part, and denying, in part, the

allegation set forth in subparagraph 2.a. He requested a hearing and the case was assigned to me on August 2, 2019. On September 24, 2019, the Defense Office of Hearings and Appeals issued a notice of hearing, scheduling Applicant's case for November 7, 2019. The hearing was held as scheduled. I received five Government exhibits (GE 1 – GE 5), together with five Applicant's exhibits (AE A – AE E), and a copy of the discovery letter from Department Counsel to Applicant, dated June 20, 2019. (HE I) Also, I considered the testimony of Applicant and a character witness. At the close of the hearing, I left the record open, upon Applicant's counsel's request, to allow him the opportunity to submit an additional exhibit. Within the time allotted, Applicant's counsel submitted a reference letter, which I incorporated into the record as AE F. On November 19, 2019, I e-mailed the parties, expressing my intention to issue a summary disposition in favor of Applicant. (HE II) Upon reconsideration, I have decided to forego issuing a summary disposition, and have concluded that it is not clearly consistent with the national interest to grant Applicant a security clearance. The transcript (Tr.) was received on November 19, 2019.

Findings of Fact

Applicant is a 31-year-old single man. After finishing high school in 2008, he worked as a painter, performing temporary jobs for various employers including his uncle. Later, he returned to school, earning an associate's degree in 2012, and a bachelor's degree in 2015. He majored in the field of network security. (GE 1 at 11-12) Since finishing college in 2015, he has worked for four successive companies in the information technology field. Currently, he is a technician who conducts vulnerability scans on his company's computers. (Tr. 30)

Applicant has been working for his current employer since 2018. He is highly respected on the job. According to his team lead, he is an "honest, trustworthy, professional, determined, and responsible individual" who has produced exceptional results. (AE E) While on the job, he has always handled sensitive information responsibly. (AE C)

Applicant worked for the employer immediately preceding his current employer from September 2016 to November 2018. According to his supervisor, he "approached every situation, including numerous ones involving sensitive work and/or difficult clients, with a positive attitude and very sound judgment." (Answer, Attachment (Att.) 1 at 1) Moreover, Applicant's work was particularly integral to national security because the systems on which he was working "have been directly responsible for saving . . . [the] lives of law enforcement officers and apprehending criminals . . ." (Answer, Att. A at 1)

Applicant's tenure at the job that he began in January 2016 was troubled and led to his termination in August 2016, as alleged in the SOR. Specifically, he made a number of errors leading to "system failures, work stoppages, additional hours of labor of the [information technology] team, and [loss of] company money," (GE 5 at 1) including, improperly configuring a system firewall, "not paying attention to detail when ordering hard drives," and "failing to power on a server, causing [the staff] to waste an hour of time

troubleshooting why [they] couldn't connect to it." (GE 5 at 1) His most serious oversight led to the infection and disablement of the company's network by a crypto-virus -- a problem his supervisor, shortly after the episode, characterized as an "epidemic," with significant, ongoing negative repercussions. (*Id.*) After a comprehensive network scan, the information technology team discovered that the source of the crypto-virus was an attachment that Applicant had received on his computer. When asked whether he opened the attachment, Applicant admitted previewing the message, acknowledging that this was the same as opening the file. (GE 5 at 1) When asked why he did not inform his supervisor of this problem when it initially occurred, he responded that he was busy working on multiple tasks and "just didn't think anything of it." (GE 5 at 1)

Applicant was consequently placed on a three-month probation for poor work performance. (GE 5) Applicant's supervisor, in a letter dated August 11, 2016, placing him on probation, characterized Applicant as "a very loyal and hard worker" whose performance had deteriorated over the three to four months before the crypto-virus episode." (GE 5 at 1)

While on probation, Applicant inappropriately disclosed sensitive personnel information of company employees, including salary and benefit information, upon the request of another employee. (GE 3) Disgruntled because she suspected that she did not receive as high of a raise as some coworkers, this employee, in mid-July of 2016, began asking Applicant to provide her with access to her coworkers' personnel files so that she could compare her raise with their raises. Applicant initially refused. (Tr. 54) She subsequently asked him for this information multiple times over the following two weeks. (Tr. 40) He typically responded by either ignoring or deflecting her requests. (GE 4 at 4) Approximately the last week of August, Applicant relented and provided this information as requested. (Tr. 39) A few days later, Applicant's supervisor discovered e-mail correspondence between Applicant and the disgruntled employee, leading him to suspect Applicant's misconduct. Subsequently, he confronted Applicant, who admitted the misconduct, leading to his termination a few days later. (GE 2 at 2)

Applicant admits that his work quality had begun deteriorating, as noted in the memo from his supervisor. The deterioration of his work performance coincided with the pressure of caring for his elderly grandparents, the severe illness of his 93-year-old grandfather, whom Applicant was living with, in addition to caring for, and the unexpected death of his brother in June 2016, almost two years to the date of his mother's death in June 2014. (Tr. 31, 54; AE A) After his brother's death Applicant did not "think straight." (Tr. 31) He suffered from insomnia, cried every night, and did not eat for days at a time. (Tr. 32) Applicant was further distracted because, as the next of kin, he was responsible for handling the funeral arrangements and disposing of his brother's estate. (Tr. 15-16)

Applicant was still in a depressed state of mind when the coworker began pressuring him to disclose the sensitive information. He recognizes that he should have reported this pressure, and that he should not have provided her with the requested information, but failed to do so because his judgment was clouded by his depression. Applicant attributes his significantly better work performance on successive jobs since the termination to his

gradual recovery from the shock of his brother's death and the pressure of caring for his grandfather.

Applicant's former supervisor at the job, from which Applicant was fired, wrote two character reference letters for him. (AE A, AE F) He was aware of the issues in Applicant's life that were causing him to be stressed and distracted at work. (AE A) In the former supervisor's initial reference letter, he characterized Applicant as "stress[ed] and depressed to the point where he was acting on impulse rather than logic." (AE A)

Applicant's former supervisor submitted his second character reference, in his personal capacity, after the hearing and before the close of the record. (AE F) He characterized Applicant as "a victim of a plot masterminded by a vindictive and manipulative employee . . . upset about her performance review and raise." Moreover, this disgruntled employee was aware that Applicant was at a particularly vulnerable stage in his life and took advantage of his "kindhearted ways and easygoing personality" to "specifically target him to achieve her mischievous plot." (AE F)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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 together with the factors listed in the adjudicative process. The administrative judge's overall adjudicative goal is a fair, impartial, and commonsense 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 national security eligibility will be resolved in favor of the 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 to obtain 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 that 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. 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).

Under the whole-person concept, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). They are as follows:

- (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.

Analysis

Guideline K: Handling Protected Information

The security concerns about handing protected information are set forth in AG ¶ 13:

Deliberate or negligent failure to comply with rules and regulations for handling protected information – which includes classified and other sensitive government information, and proprietary information – raises doubt about an individual’s trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

Applicant’s intentional, inappropriate disclosure of sensitive personnel information to another employee triggers the application of AG ¶ 34(a), “deliberate or negligent disclosure of protected information to unauthorized persons, including, but not limited to, personal or business contacts, the media, or persons present at seminars, meetings, or conferences.” The serious nature of Applicant’s security violation was compounded by the fact that he

was on probation for poor work performance which, among other things, led to the disablement of the network system and costs incurred by the company, when the episode occurred. Applicant's error which led to the disablement of the network system by a crypto-virus was particularly egregious because he did not inform his supervisor of his error until confronted.

Approximately three and a half years have elapsed since the misconduct. Applicant has excelled at both jobs where he worked since his termination. He characterizes his poor performance and his intentional, unauthorized disclosure of sensitive information as an anomaly triggered by depression related to the unexpected loss of his brother and the stress of caring for elderly grandparents.

"Security violations are one of the strongest possible reasons for denying or revoking access to classified information, as they raise very serious questions about an applicant's suitability for access to classified information." (ISCR Case No. 97-0435 at 3-4 (App. Bd. July 14, 1998) As such, the court must apply a strict scrutiny standard of review, and indicators of a risk that an applicant might commit a security violation, alone, are disqualifying. (ISCR Case No. 00-0030 at 7 (App. Bd. September 20, 2001)) Here, Applicant not only committed a security violation by divulging sensitive information; he did so while on probation for previous network security lapses. Consequently, the nature and seriousness of the security violation is extremely high. When Applicant was pressured into divulging sensitive information, he was in a vulnerable state of mind because of his depression related to various family crises. However, absent any clinical evidence supporting his contention that he was depressed, or any clinical evidence addressing whether he may become similarly careless if faced with future personal crises, any mitigation generated by the surrounding circumstances, the presence of rehabilitation, and the passage of time since the security violation occurred, is insufficient to overcome the nature and seriousness of the conduct, given the higher standard of review.

Guideline E, Personal Conduct

Under this guideline, "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." (AG ¶ 15) Although Applicant opened an email attachment containing a crypto-virus, as alleged in subparagraph 1.a, and he did not tell his supervisor until confronted, there is no record evidence that he deliberately sought to conceal his actions from his supervisor. I resolve subparagraph 2.a in Applicant's favor.

Applicant's unauthorized release of sensitive information, as alleged in subparagraph 1.a and subparagraph 2.b, constitutes evidence sufficient to disqualify him under the guideline governing handling protected information. Because the potentially applicable disqualifying conditions under the personal conduct guideline are predicated upon conduct that either is not sufficiently covered under another guideline, or conduct that is not sufficient for an adverse decision under any other guideline, no further discussion is

necessary under the personal conduct guideline. Subparagraph 2.b is disqualifying for the same reasons as it is disqualifying as cross-alleged in subparagraph 1.a.

Whole-Person Concept

I considered the whole-person factors in my consideration of the disqualifying and mitigating conditions set forth under Guidelines K and E. They do not warrant a favorable conclusion.

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:

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| Paragraph 1, Guideline K: | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant |
| Paragraph 2, Guideline E: | AGAINST APPLICANT |
| Subparagraph 2.a: | For Applicant |
| Subparagraph 2.b: | Against Applicant |

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge