



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



In the matter of:)
)
) ISCR Case No. 20-02720
)
)
Applicant for Security Clearance)

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: *Pro se*

September 13, 2021

Decision

CEFOLA, Richard A., Administrative Judge:

Statement of the Case

On February 1, 2021, in accordance with DoD Directive 5220.6, as amended (Directive), the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guidelines K, and E. The SOR further informed Applicant that, based on information available to the government, DoD adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant’s security clearance.

Applicant answered the SOR soon thereafter, and requested a hearing before an administrative judge. (Answer.) The case was assigned to me on April 30, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 24, 2021, scheduling the hearing for August 2, 2021. The hearing was convened as scheduled. The Government offered Exhibits (GX) 1 through 4, which were admitted without objection. Applicant testified on his own behalf. Applicant offered two packets of documents, which I marked Applicant’s Exhibits (AppXs) A and B, and admitted into evidence. DOHA received the transcript of the hearing (TR) on August 11, 2021.

Findings of Fact

Applicant admitted to the allegations in SOR ¶¶ 1.a, through 1.c. It is unclear if Applicant admitted or denied the allegation in SOR allegation ¶ 2.a., which makes reference to and subsumes SOR ¶¶ 1.a, through 1.c. I consider it a denial. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 49-year-old employee of a defense contractor. (TR at page 14 line 23 to page 19 line 9, and GX 1 at page 5.) He has been employed with defense contractors since 2004. He has held a security clearance since March of 2005. (TR at page 14 line 23 to page 19 line 9, and GX 1 at pages 12~17, and 43.) He is married, and has one adopted child, age 13. (GX 1 at pages 23 and 29.)

Guideline K - Handling Protected Information & Guideline E - Personal Conduct

1.c. and 2.a. Applicant admits that in 2008, while working for a different employer from his current employer, he “cut corners” and sent an email containing classified information to co-workers on an unclassified network. Applicant received a written warning as a result of this security clearance violation. (TR at page 19 line 10 to page 22 line 20, and at page 49 lines 13~17.) I find his actions to be deliberate.

1.b. and 2.a. Applicant admits that in 2013, while working for his current employer, he again sent an email containing classified information to co-workers on an unclassified network. Applicant sent unclassified information that, when combined with other unclassified information he sent, became classified. Applicant received a verbal reprimand as a result of this security clearance violation. (TR at page 26 line 23 to page 35 line 10, and at page 49 line 18 to page 50 line 4, and GX 3.) I find his actions to be negligent.

1.a. and 2.a. Applicant admits that in 2017, while working for his current employer, he sent a third email containing classified information to co-workers on an unclassified network. Applicant avers this to be a systemic problem with his employer’s system for handling classified information. Applicant received a verbal and written warning as a result of this security clearance violation. (TR at page 35 line 11 to page 44 line 4, and at page 50 line 5 to page 51 line 1, and GX 4.) I find his actions to be inadvertent.

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the 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, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 adverse 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 *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline K - Handling Protected Information

The security concern relating to the guideline for Handling Protected Information is set out in AG ¶ 33:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 34. Three are potentially applicable in this case:

(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;

(g) any failure to comply with rules for the protection of classified or sensitive information; and

(h) negligence or lax security practices that persist despite counseling by management.

Applicant, over a period of about ten years, on three separate occasions sent emails containing classified information on unclassified networks. This resulted in three security clearance violations.

AG ¶ 35 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 35 including:

(a) so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities;

(c) the security violations were due to improper or inadequate training or unclear instructions; and

(d) the violation was inadvertent, it was promptly reported, there is no evidence of compromise, and it does not suggest a pattern.

None of these apply. Although Applicant's most recent security clearance violation may have been inadvertent; there appears to also be a negligent pattern here. Such a pattern cannot be condoned when handling classified information. Handling Protected Information is found against Applicant.

Guideline E - 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 or sensitive information.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. One is potentially applicable in this case:

(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:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;
- (2) any disruptive, violent, or other inappropriate behavior;
- (3) a pattern of dishonesty or rule violations; and
- (4) evidence of significant misuse of Government or other employer's time or resources.

Applicant's actions are a clear manifestation of a pattern of rule violations. The evidence is sufficient to raise these disqualifying conditions.

AG ¶ 17 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 17 including:

- (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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

None of these apply. It cannot be said that a similar security clearance violation is unlikely to occur. Personal Conduct is found against Applicant.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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 national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Applicant is well respected in the workplace. (AppX B.)

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Handling Protected Information, and Personal Conduct security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline K:	AGAINST APPLICANT
Subparagraphs 1.a~1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

Richard A. Cefola
Administrative Judge