DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 21-02735
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: Bradley Moss, Esq.

06/24/2024

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Decision

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MASON, Paul J., Administrative Judge:

After a careful evaluation of the facts and circumstances in this case, I find the Government has not established a prima facie case under Guideline E (Personal Conduct). Eligibility for classified information is granted.

Statement of Case

On June 24, 2019, Applicant certified and signed an Electronic Questionnaires for Investigations Processing (e-QIP) to obtain a security clearance required for employment with a defense contractor. After examining the background investigation, the Defense Counterintelligence Security Agency (DCSA) Consolidated Adjudication Services (CAS) could not make the affirmative findings necessary to issue a security clearance. On May 5, 2022, DCSA CAS issued a Statement of Reasons (SOR) to Applicant detailing security concerns under personal conduct (Guideline E). The DCSA CAS issued the SOR pursuant to DOD Directive 5220.6, *Defense Industrial Security Clearance Review Program* (January 2, 1992), and the adjudicative guidelines (AG)

publicized in Security Executive Agent Directive 4, establishing in Appendix A the National Security Adjudicative Guidelines (AGs) for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position, made effective in the DOD on June 8, 2017.

On June 24, 2022, Applicant provided an answer to the SOR. I was assigned the case on March 24, 2023. On August 21, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing for September 22, 2023. Except for GE 4C, the Government's six exhibits (GE) 1 through6 and Applicant's five exhibits (AE) A-E were entered into the record without objection. The record in this case closed when the transcript (Tr.) was received on October 3, 2023.

Rulings on Evidence

This issue arose after Applicant's termination from Company A (his former employer) in January 2019 and during his DCSA CAS security clearance investigation when he was directed by the United States (U.S.) Department of Justice (DOJ) to respond to a grand jury subpoena regarding business interactions with private companies and public agencies subsequent to his termination from Company A. In an email dated September 20, 2023, addressed to all parties and the DOHA administrative judge, the Assistant United States Attorney (AUSA) reiterated the Department of Justice position that under Rule 6(e) of the Federal Rules of Criminal Procedure (FRCP), Applicant was free to testify about the existence of a grand jury subpoena (AE C, 23-1/22gi1891/23-2440, July 11, 2023). This email and the response by Applicant's attorney the same day, appears in Hearing Exhibit (HE 1). In his response, Applicant's attorney requested clarification from the AUSA on whether Applicant could also testify at the security clearance hearing about the contents of the subpoena. At the September 22, 2023 hearing, I decided that Applicant could only testify about the existence of the subpoena. (Tr. 15) His attorney then requested that the record be kept open to permit additional testimony by Applicant regarding his personal knowledge of federal agency A's list of contracts described in the subpoena. (Tr. 15, 167)

In an email dated September 22, 2023 (after the hearing), Applicant's attorney reiterated his request for further clarification from the AUSA about whether Applicant could testify about his personal knowledge of the contents of matters identified within the grand jury subpoena. (HE 2) In an email response dated September 25, 2023 (HE 2), the AUSA responded to the September 22, 2023 email indicating that he agreed that that Rule 6(e) of the FRCP allowed Applicant to testify about: (1) the substance of his interview with Agency A's investigators that occurred in June 2023 before they issued a subpoena to him: (2) the types of records he turned over to the AUSA; and, (3) his knowledge of two Agency A contracts identified in the subpoena, including personal knowledge he has about contract improprieties. I have evaluated Appellant's request to keep the record open in this case and the AUSA's response However, I conclude that the evidence will not change my decision in this case.

Summary of Allegations and Responses

Applicant admitted his termination from Company A (Applicant's employer from 2008 to 2019) in January 2019 as alleged in the first sentence of SOR ¶ 1.a. He denied the second sentence of SOR ¶ 1.a that after his termination, it was discovered by Company A that he used unauthorized software on his corporate laptop, and he violated Non-Compete and Confidentiality Agreements. He denied SOR ¶ 1.b alleging that he owes an outstanding balance of $3,300 to Company A from an advance (loan) the company disbursed to Applicant in December 2012.

Findings of Fact

Individual, company, and federal agency names have been cited generically to protect Applicant's privacy. The transcript and exhibits contain unredacted information regarding this case.

Applicant is 48 years old. He received a community college certificate in June 2000, and an associate degree in architectural technology in August 2009. He has been living at his current address since October 2009. He earned some college credits between September 2011 and December 2012, but received no degree. He has six professional certifications and is considered a subject matter expert in the audio-visual field. (GE 1 at 10-11; Tr. 136)

Applicant married in November 2011, and has two sons. One is eight years old and one is six years old. His investigation and clearance record includes three public trust positions in 2010, 2011, and 2017, and a current interim security clearance in May 2018. (GE 1 at 47; Tr. 17-23, 138-139)

Applicant has been working as a senior project manager for his current employer (Company B) since January 2019. From December 2007 to January 2019, he was director of Audio Visual (AV) Implementation for Company A, a defense contractor located in State X. From 2000 to November 2007, he was a computer aided design drafter of drawings and blueprints. (GE 1 at 11-14)

SOR ¶ 1.a – Applicant was terminated by Company A on January 11, 2019. There are no documents that chronicle the events preceding his termination, including the reasons for his termination. (Tr. 142) Rather, the first document addressing his termination is dated January 14, 2019, explaining that his last date of employment was January 11, 2019. The letter advised him not to use Company A property and not to interact with company clients and partners. He was directed to return the company's property. He was advised to continue to comply with all provisions of the Non-Disclosure Agreement (NDA) and the Non-Compete Agreement (NCA) of Company A, and to disclose the terms of his NDA and NCA to his new employer. (GE 4D) *See also*, GE 5 at 8-9

On January 15, 2019, an email generated by the president of Company A summarized two separate conversations that supposedly occurred January 11, 2019, involving Company A's CEO, the president (the CEO's wife), the vice president, Applicant, and Witness 2 (former employee of Company A whose employment was terminated about the same time as Applicant). Though the president stated that the reasons for the termination were explained at the meetings, those explanations do not appear in this email. In addition, the president explained that the termination would be delayed until January 18, 2019, where Applicant and Witness 2 would each be offered an extra $15,000 payout in addition to their salary. Because neither Applicant nor Witness 2 responded to the modified offer from Company A within a designated time period, their termination became retroactive to January 11, 2019. (GE 4E) Not mentioned in this exhibit was a second NCA that Company also wanted Applicant to sign precluding him from working anywhere in the metropolitan region for a year. He did not sign the second NCA. (GE 3 at 6; Tr. 142)

The next exhibit was a letter from Company A's law firm dated February 15, 2019, to Applicant containing a barrage of allegations (apparently based on hearsay from an unidentified informant who may have been employed by Company A) concerning violations of Company A's policies. The allegations also claim that as an employee of Company B (Applicant's current employer since January 2019), he diverted current and prospective business away from Company A in violation of his contractual obligations to Company A. Other allegations include Applicant's breach of his contractual obligations to Company A by steering current and potential business away from Company A, and violating his position of trust by utilizing Company A's pricing information, and employing his knowledge of Company A's proprietary technical and pricing information in violation of his contractual obligations to Company A. (GE 4F)

GE 4F then addresses four provisions of Company A's employment, confidentiality and NDA agreement which Applicant allegedly violated. Next, the exhibit cited various state and federal laws that were supposedly broken, as well as tortious interference of contract. What is missing from the exhibit is direct evidence substantiating any violation of Applicant's obligations to Company A. Finally, Company A's law firm demanded that Applicant cease and desist all alleged contractual violations to Company A and submit an affidavit documenting actions to rectify his misconduct.

In his March 2019 letter to Company A's law firm (AE A), Applicant's attorney (who also represented Witness 2) addressed several inaccuracies in Company A's February 2019 letter (GE 4F): (1) when Applicant joined Company B, the company was not a client of Company A, and had not been for about a year; (2) though Company A's NDA prevents Applicant from performing work for Company B that services a former client of Company A, Applicant was not performing the same work for a Company B client that he had been performing for a Company A client; and, (3) when Applicant joined Company B, though he had provided minimal input on certain private proposal,

Company B had already been working on that proposal before he joined Company B. He never misused any Company A information regarding bids or labor rates.

Company A's law firm sent a second letter to Applicant dated June 7, 2019 (GE 4H), reiterating the same allegations from GE 4F, and an additional allegation involving another customer or prospective client, where Applicant allegedly violated his NCA with Company A by disclosing labor category rates to Company B or other clients. However, as with GE 4F, there is no independent evidence in support of the company's allegations or the alleged adverse information discovered in a forensic analysis of Applicant's laptop showing installation of unauthorized software, or deliberate destruction of Company A's property which purportedly breached the company's NDA and NCA, and applicable law.

After discovering that Applicant's attorney was no longer representing him, Company A's law firm sent Applicant a third letter on July 2, 2019 (GE 4I), and enclosed a copy of the GE 4H letter. The attorney demanded that if Applicant did not respond by July 10, 2019, Company A's law firm would disclose to various government agencies Applicant's unsubstantiated misconduct in deleting or concealing information from his laptop before he was terminated from Company A. Company A's law firm threatened legal action against Applicant for breach of his contractual obligations to Company A. (GE 4I)

Applicant stated in his June 2019 e-QIP, and August 2019 personal subject interviews (PSIs) that Company A told him they could no longer keep him employed in January 2019 because of a Government shutdown. (GE 1 at 13; GE 3 at 6; Tr. 140) Applicant signed and notarized summaries of his August 6, 2019 and August 19, 2019 PSIs (GE 3 at 6-8), but he did not include a date next to his signature. He certified both PSIs were accurate, *See* GE 3 at 3. In those PSIs, Applicant denied the allegations lodged in GE 4F, 4H, and 4I, regarding the use of unauthorized software to delete Company A's data and violations Company A's NDA and Confidentiality Agreements. He also noted that his attorney had responded to Company A law firm's February 2019 letter. (GE 4F) Applicant adopted the responses made by his attorney (who was also the attorney for Witness 2) in two letters to Company A's law firm. (GE 3 at 6-8; Tr. 147-148 AE A; AE C)

In his July 2019 follow-up letter (AE B) to the letters dated June 7, 2019 (GE 4H), and July 2, 2019 (GE 4I), from Company A's law firm, Applicant's attorney again asserted that Applicant had done nothing to violate his legal obligations to Company A and did not possess any confidential information of Company A. His removal of personal information from his laptop was chronicled in a letter which he left on top of his laptop desk. After Applicant's departure, Company A's confidential and proprietary information was found to be stored in its usual location in Company A's cloud server. Applicant used a commercially available laptop cleaner to guard against discovery of his personal information. He would have no motive to misappropriate Company A's information, and continued to deny that he pilfered the company's confidential or proprietary information, and Company A had no proof to the contrary. (Tr. 159-166)

Applicant testified that after receiving three letters from Company A's law firm in February, June, and July 2019 (GE 4F; GE 4H, GE 4I), Company A took no further action relating to the alleged violations of Company A's NDA. No civil suit was filed against him. (Tr. 154-155, 168)

When Applicant was hired at Company A in 2007, he had administrative access authority over the laptops distributed by Company A. He maintained this access for the entire time he was employed by Company A. He had no formal training for the position except training on the job. He was aware that that Company A used a cloud server. In addition to business purposes, he used the company laptop for personal reasons like banking, research, and email. He took the laptop home at various times. (Tr. 155-158, 198-199)

In October or November 2018, just before Applicant was terminated in January 2019, he deleted his personal information from the laptop using a cleaner application and two other applications. He needed no additional authorization to install the cleaner application because of his administrative access. Also, prior to his departure from Company A, he retrieved his personal articles from his desk and left his company laptop on his desk. He deleted no data belonging to Company A from his company laptop before his departure. During his entire career, he has never been accused of professional misconduct except for Company A's accusations. (Tr. 159-166)

SOR ¶ 1.b – Applicant denied that the $25,000 bonus he received in December 2012 was actually a loan of which he owes a $3,300 balance. At a performance evaluation meeting that month with the CEO and a co-owner in attendance, Applicant was awarded a $25,000 bonus. He was provided with no loan agreement or contract, and was never asked to sign a loan agreement while at Company A. (GE 2 at 2-3; Tr. 168-169, 171)

Between December 2012 (when the money transfer was labeled a bonus) and February 12, 2013 (when the CEO identified the money transfer as a loan), Applicant had a discussion with the chief financial officer (CFO) of Company A who told him that he would have to repay the bonus to the company. Applicant was stunned by the CFO's message because he had already used the entire $25,000 bonus to pay for a home refinance. (Tr. 171-174, 184, 187)

On February 12 2013, Applicant informed the CEO of Company A, by email, that he finally completed the closing of the refinancing of his home. He asked the CEO for information on a potential monthly repayment schedule. He received an email response less than a half hour later from the CEO indicating that the loan (which was the bonus he received in December 2012) would be logged into the employee assistance program to be dealt with later. (Tr. 168-170; GE 6A)

Even though Applicant initially considered the money a bonus, he changed his view based on his discussion with the CFO and the email response from the CEO in February 2013. He felt obligated to reimburse Company A. He was not in a position to repay the entire amount all at once, and he did not want create friction with Company A. Company A withdrew $100 automatically from Applicant's pay check on a bi-monthly basis for about six years in repayment of the loan. In September 2018, Applicant informed the CFO, the CEO, and the co-owner of Company A that he would have difficulty paying the $10,500 loan balance that the company wanted by the end of 2018 to close out the account, because his wife was having surgery and he was raising two young children on one salary. (Tr. 191-192) The last two payments, which were dated after his termination on January 11, 2019, extinguished about 99% of Applicant's pay. Because of the size of the last two payments totaling $5,600, he assumed that he had completed the repayment schedule of payments. (GE 2 at 3; GE 5 at 12-18; GE 6D; Tr. 171-174, 178, 191)

Witness 1 worked as a web designer and a systems engineer for Company A from 2012 to 2018. He did not believe that Applicant had administrative access to the laptops that would permit him to install and remove software. The cleaning application was a tool used to remove personal data from a Company A laptop before leaving the company. The tool also could be used to clean registry keys, or unused documents, or cached data. The tool was also used to improve the performance of the laptop. Company A had a cloud server system to back up company data on company laptops. Deleting data from the laptop would not delete that information from the cloud server. (Tr. 28-49)

Witness 2 was employed as an implementation manager at Company A from January 2013 to January 2019. He is aware that the money Applicant received during his employment was a bonus and not a loan. Witness 2 never saw any loan contract between Applicant and Company A. He adopted the factual responses in his attorney's two letters (the attorney representing both Witness 2 and Applicant) to Company A in March 2019 and July 2019. *See* AE A and AE B. Before he concluded his hearing testimony, Witness 2 read the third paragraph of page four of the July 2019 letter from Applicant's attorney to Company A. (AE B at 4) Witness 2 agreed that Applicant removed only his personal information from the laptop and Company A's confidential or proprietary information was left in Company A's cloud server where it always had been. Applicant did not take any information from Company A. (Tr. 52-89)

Witness 3, who has held several public trust positions and clearances for several years, joined Company A as co-owner in 2004 because the CEO was not a United States citizen at the time. He left the company in 2018 over a dispute with the CEO. He interviewed and hired Applicant in 2008. He supervised Applicant during most of his employment tenure at Company A. (Tr. 91-105, 123)

Witness 3 recalled that Applicant received several bonuses while employed at Company A. He recalled that he was present when the CEO awarded a $25,000 bonus

in 2012; although he did not know what bonus related to. He indicated the bonus was not tied to a loan agreement. He did not know that the CEO and CFO were making Applicant repay the bonus. (Tr. 106-111)

In Witness 3's opinion, Applicant never misused his laptop, or misappropriated Company A's data, or installed unauthorized software. Though he was not specifically sure whether he talked with Applicant about Company A's NDA, based on his working relationship with Applicant over the years with two different employers, Company A and Company B, Witness 3 did not believe Applicant would breach Company A's NDA. (Tr. 119-133)

Character Evidence

While employed at Company A from 2008 to January 2019, Applicant received several positive performance evaluations, bonuses, awards, and letters of recognition. He could not retrieve most of the corroborating documents because they were in storage or in his Company A email which he no longer had access to. (GE 3 at 4)

Witnesses 1 described Applicant as an honorable and dependable person who warrants a position of trust with Government. (Tr. 35, 38) Witness 2 was aware of no instance when Applicant mishandled Company A's data or equipment. (Tr. 56-57) In the time that he supervised Applicant, Witness 3 considered him to be an outstanding employee who had never been accused of personal or professional misconduct. No one from the information technology (IT) department of Company A had advised Witness 3 that Applicant was misusing the company laptop or installing unauthorized software on the laptop. (Tr. 98,101-102)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines, which should be applied with common sense and the general factors of the whole-person concept. All available, reliable information about the person, past and present, favorable and unfavorable, should be carefully reviewed before rendering a decision. The protection of the national security is the paramount consideration. AG ¶ 2(d) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." 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 in seeking a favorable security decision.

Analysis

Personal Conduct

AG ¶ 15 sets forth the security concerns related 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

AG ¶ 16. Conditions that could raise security concerns and may be disqualifying include:

> (c) credible adverse information in several adjudicative 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 she may not properly safeguard classified or sensitive information; and
>
> (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, unwilling 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; and
> >
> > (3) a pattern of dishonesty or rule violations; and…"

The Government has the burden of proving controverted allegations. Hence, except for the Applicant's admission that he was terminated in January 2019, the Government must establish a prima facie case by substantial evidence that the factual allegations in the SOR occurred and there is a rational connection between the established facts and legitimate security concerns. *See* ISCR Case No. 07-19525 at 4 (App. Bd. Feb, 18, 2009), (concurring and dissenting, in part)(citations omitted). *See also*, ISCR Case No. 08-06605 at 3 (App. Bd. Feb.4, 2010).

Having weighed all the disqualifying evidence with the favorable evidence, I conclude that the Government has failed to make a prima facie case by substantial evidence. There is no evidence to support the second sentence of SOR ¶ 1.a. That portion of SOR ¶ 1.a rests on hearsay accusations, insinuations and innuendo in Company A's law firm letters, and unsupported by independent evidence from documentary or witness sources. No outside evidence was presented to support Applicant's alleged violations of Company A's NDA or NCA. No outside evidence was presented to confirm that a forensic analysis was conducted of Applicant's laptop after he was terminated from employment. Lastly, Company A took no legal action against Applicant. In sum, the uncorroborated allegations within the second sentence of SOR ¶ 1.a are not credible.

Regarding SOR ¶ 1.b, I conclude that the $25,000 disbursed to Applicant in December 2012 was a bonus. Company A's claim that the bonus was a loan, is not credible. The Government produced no documentation that confirms the money was a loan and not a bonus. Applicant acquiesced to Company A's change of position because he did not have the money to repay the loan in early 2013. His wife was about to have surgery and he was raising two young children on one salary. Of equal importance to the conclusion that the money Applicant received, was a bonus and not a loan, is the fact that Witness 3 and the CEO of Company A presented the $25,000 bonus to Applicant in 2012.

AG ¶ 17. Since there are no disqualifying conditions applicable to the circumstances of this case, it is not necessary to discuss the mitigating conditions.

Whole-Person Concept

I have examined the evidence under the guideline for drug involvement and substance misuse, and personal conduct in the context of the nine general factors of the whole-person concept 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 eligibility for access to classified information must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole-person concept.

Judging by the totality of the evidence, particularly the Government's failure to establish a prima facie case in support of the SOR allegations, and the favorable character evidence from Witnesses 1, 2, 3, and Applicant, he has overcome the security concerns raised by the personal conduct guideline.

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
Subparagraphs 1.a, 1.b:	For Applicant

Conclusion

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

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Paul J. Mason
Administrative Judge