KEYWORD: Personal Conduct

DIGEST: Applicant is 43 years old, possesses a doctorate degree in chemistry, and is married with two children. He now works for a defense contractor. From 1997 to 1999, he worked for a chemical manufacturer. While seeking other employment, he spoke with a competitor of his employer, who reported Applicant as having offered proprietary information in exchange for job consideration. Applicant mitigated the personal conduct security concern. Clearance is granted.

CASENO: 02-30642.h1

DATE: 05/24/2007

DATE: May 24, 2007

In re:	)	
	)	
----------------------	)	ISCR Case No. 02-30642
SSN: -----------	)	
	)	
Applicant for Security Clearance	)	

DECISION OF ADMINISTRATIVE JUDGE
PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT
D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT
Geoffrey P. Damon, Esq.

SYNOPSIS

Applicant is 43 years old, possesses a doctorate degree in chemistry, and is married with two children. He now works for a defense contractor. From 1997 to 1999, he worked for a chemical manufacturer. While seeking other employment, he spoke with a competitor of his employer, who reported Applicant as having offered proprietary information in exchange for job consideration. Applicant mitigated the personal conduct security concern. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On August 3, 2004, DOHA issued a Statement of Reasons[1] (SOR) detailing the basis for its decision–security concerns raised under Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on August 19, 2004, and elected to have a hearing before an administrative judge. The case was assigned to me on February 27, 2007. On April 5, 2007, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. DOHA received the hearing transcript (Tr.) on April 19, 2007.

FINDINGS OF FACT

Applicant denied the first two allegations in the SOR, and admitted the last allegation. The admission is incorporated here as a finding of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 43 years old, married and has two children. He has a doctorate degree in chemistry. When the incidents at issue arose, he was working for a small chemical company, having started on February 4, 1997, as the laboratory manager. He worked there until September 8, 1999. He did not have a security clearance then because Applicant had no need for a clearance. He now works for a defense contractor and needs a security clearance. (Tr. 13, 14; Exhibits 2, A)

In 1999, while working for the chemical company, Applicant became aware of a possibility of future layoffs because of overstaffing in the laboratory. Also, Applicant wanted to market other products to increase company revenues, but the company president did not seem interested in taking that type of marketing action. Furthermore, Applicant was unhappy with his salary. So he would be happier working some where else, and decided to seek other employment outside of the printing industry. Attempting to build a network for job-seeking opportunities, he contacted a former employee of his then employer in August 1999, a name he heard mentioned around the company. He did not know that person because their employment terms did not overlap. Before starting his own company, that person also had previously worked for a large company which had offices near Applicant's boyhood home. Applicant was interested in finding work near his boyhood home. Applicant thought that person might be sympathetic to Applicant's search for a job in a larger publicly-owned company. This person's company had some products in the printing industry that made it a competitor of Applicant's employer. Their discussion, during which Applicant discussed his duties with the chemical company, revealed to Applicant that this person would provide him with little or no help in his job search. After the meeting on August 7, 1999, that person notified Applicant's employer that Applicant had spoken to him and offered him proprietary information.

[1]Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).

There was no further contact between Applicant and that person after the August 7th meeting. (Tr. 18, 20-27, 41, 47; Exhibits 2, 3, A)

Applicant did not offer proprietary information. Applicant did not want to work in the printing industry again. Applicant claims he did not sign a confidentiality agreement with his employer, and thought he only had a verbal confidentiality agreement. He thought he did not have a non-compete agreement with his employer. When asked by the person with whom he was discussing his job search, he told that person what his understanding was of these two types of agreements between him and his present employer. Applicant worked for his chemical company employer only until September 1999, when the company terminated him. Applicant was unemployed for two months after leaving his employer, underemployed for five more months, and was on contract as an engineer for 19 months after that, until obtaining his present position with a defense contractor in October 2001. No further incidents involving Applicant and any employer have occurred in the past eight years. (Tr. 18, 20-27, 30, 34, 41, 47; Exhibits 2, A)

Prior to being terminated, Applicant's employer sued him on September 2, 1999, in state court for breach of contract, and misappropriation of trade secrets. The employer sought monetary damages, injunctive relief, attorney's fees, and other just and proper relief. The complaint contained the first page of a company confidentiality agreement, a confidentiality memorandum signed by Applicant on February 4, 1997, and a reaffirmation of secrecy agreement signed by Applicant on February 4, 1997. No evidence was taken at any hearing, nor was there any finding by the state court that Applicant committed any civil wrongdoing. The parties agreed to settle the case. An agreed permanent injunction against disclosure of any confidential and proprietary business information or trade secrets by Applicant to anyone was negotiated by the parties. The judge signed the agreed order on December 14, 1999. That same date the parties signed a settlement agreement and mutual release. That agreement prevented Applicant from working for specific companies listed in the agreement for a two year period , and from working in the ink and screen printing industry. The agreement contains other terms, conditions, and requirements. Included as an attachment to the agreement is a confidentiality agreement and non-compete agreement signed by Applicant on February 4, 1997, consisting of five pages, including the signature page. Applicant has fully complied with this settlement agreement. However, Applicant claims he had a verbal confidentiality agreement with the company owner, but did not have a non-compete agreement with the company when he started employment there. He disputes the first four pages of the employment agreement attached to the settlement agreement, claiming they are not the pages of the agreement he signed on February 4, 1997. Applicant does not have a copy of the 1997 agreement he claims to have signed. (Tr. 28, 30, 31, 44, 46, 49; Exhibit B)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry*

§ 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the

national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Guideline E: Personal Conduct: *The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.* E2.A5.1.1

CONCLUSIONS

The Government established in its *prima facie* case that Applicant contacted a corporate competitor of his employer in 1999 to seek help finding new employment. Applicant mistakenly thought this competitor could help him network to find another job. The dispute in this case is whether Applicant disclosed and discussed with the competitor certain propriety chemical products manufactured and sold by Applicant's employer, in violation of a confidentiality agreement Applicant signed when he became employed in 1997. Applicant's credibility is a key factor in this case.

Personal Conduct Guideline E: The Disqualifying Conditions (DC) that apply are DC 1 (Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances. E2.A5.1.2.1), DC 4 (Personal conduct that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail. E2.A5.1.2.4), and DC 5 (A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency. E2.A5.1.2.5).

Applicant's employer concluded he was attempting to violate, or actually violated, his confidentiality agreement. The employer sued him for injunctive relief to enforce the confidentiality and non-compete provisions of his employment contract. That is reliable and unfavorable information under DC 1. Applicant's professional standing within the chemical industry would be adversely affected and render him vulnerable to coercion, duress, or exploitation if he had disclosed his employer's confidential and proprietary business information. Lastly, Applicant would have engaged in dishonest activity if he violated his employment agreement.

The essential question is whether Applicant did attempt to disclose confidential information to a competitor of his employer. The competitor's affidavit states Applicant denied having a confidentiality agreement, and that Applicant wanted "favorable consideration for a job" or "assistance with finding employment with another chemical company." The evidence convinces me that Applicant had an employment agreement from February 4, 1997, requiring confidentiality of proprietary information. He also had as part of that agreement a non-compete requirement for two years after leaving his employment. I conclude Applicant merely talked to his employer's competitor to network in finding a new job because that person had found other jobs, started his own business, and had some experience in getting jobs other than working for Applicant's employer. This person

accomplished the sort of job changes Applicant wanted to achieve. Neither Applicant nor the competitor stated or suggested anything of value was given or exchanged. I conclude the employer overreacted and moved to protect himself based on information the competitor gave him. The competitor may have misunderstood Applicant's motives and actions, but the competitor was not present at the hearing to be cross-examined, so I give less weight to his affidavit than to Applicant's personal testimony. I conclude there was no personal conduct that made Applicant vulnerable to coercion or exploitation, because no substantive violation of any agreement occurred. Nor was any proprietary information given by Applicant. There is no pattern of dishonesty or rule violations. This incident involved job seeking and misunderstanding occurred only once, did not involve dishonesty or violations of agreements Applicant thought he understood to require certain actions on his part, and has never been repeated in any form.

Eight years have now passed since the August 7, 1999, meeting between Applicant and the competitor. Applicant complied strictly and fully with the terms of the settlement agreement. Applicant was unemployed or underemployed seven months after leaving his employment with the chemical company. He did not find full-time employment until October 2001. He was adversely affected by his attempts to network with the competitor to seek other employment. He has little motive now to lie about what occurred in 1999.

I find his testimony very credible, and also find that his naivete about networking probably caused him most of the difficulty in this fumbled attempt to seek new employment in 1999. He did not want to continue working in the printing industry, so it is not persuasive that he would trade proprietary information for a job with a competitor in that same business. In addition, it would be too obvious a conflict of interest to jump from one company to another in the same competitive field. Applicant is well-educated, and he could not be that impractical to draw attention to himself by taking that type of action. What motives the competitor had for making the affidavit or calling Applicant's employer, or for even talking to Applicant, are not known.

The Mitigating Condition here applicable is MC 1 (The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability. E2.A5.1.3.1). Based on the evidence at this hearing, the entire incident appears to be a misunderstanding of Applicant by the other person to whom he spoke in his attempt to find help in getting another job. His expectations of what the competitor could do for him by giving him guidance in networking and job seeking were misplaced. He should have contacted an employment agency, or talked to a friend in the industry instead of talking to a competitor to seek other employment.

Whole Person Concept: This incident is a one-time long-ago conversation. It has not been repeated, and after what happened to Applicant will likely not be repeated. There is nothing in his ten year work history to indicate he is not trustworthy or not credible. This incident was an innocent attempt by Applicant to network to find himself a new job, and he made a mistake in whom he spoke to about employment. No information was given, and no benefit conferred. Applicant struck me at the hearing as the intellectual and professorial type of person who has little or no experience in finding employment outside his immediate circle of well-educated compatriots. He does not appear to be the shrewd and conniving plotter bent on stealing his employer's business secrets. Therefore, I conclude the "whole person" analysis for Applicant. I also conclude the personal conduct security concern for Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Philip S. Howe
Administrative Judge