



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 12-12001
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: David P. Price, Esq.

10/31/2013

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant mitigated the security concerns arising from the unintended breach of his employment agreement with his former employer. This single lapse in judgment occurred over 18 months ago and is wholly uncharacteristic of Applicant's over 17 years of service to the nation. Clearance is granted.

Statement of the Case

On July 3, 2013, the Department of Defense (DoD), in accordance with DoD Directive 5220.6, as amended (Directive), issued Applicant a Statement of Reasons (SOR), alleging security concerns under Guideline E (Personal Conduct). Applicant answered the SOR and requested a hearing to establish his eligibility for a security clearance (Answer).

On September 5, 2013, I was assigned Applicant's case. After coordinating with the parties, I scheduled the hearing for October 23, 2013. At hearing, Government Exhibits (Gx.) 1 through 9 and Applicant's Exhibits (Ax.) A through E were admitted into evidence without objection. Applicant testified and called several character references as witnesses. The hearing transcript (Tr.) was received on October 29, 2013.

Findings of Fact

Applicant, 43, is married, and has two children. He was raised in a military family and was in the Reserved Officers' Training Corps (ROTC) throughout college. He graduated from college in 1992, and was commissioned as an officer in the U.S. Navy. He served in the Navy from 1992 to 2000. During his eight years in the Navy, Applicant was deployed to sea for 55 months and was selected for a prestigious assignment in support of the Office of the President. This later assignment resulted in Applicant being investigated for and granted a Top Secret clearance. Applicant's military fitness reports reflect favorably on his duty performance. Upon voluntarily resigning his commission, Applicant received an honorable discharge. In 2004, he was hired by his former employer, Company A, a large DoD contractor. (Tr. at 54-58, 97; Gx. 1; Ax. C)

Applicant worked for Company A from November 2004 to April 2012. (Tr. at 94, 98; Gx. 9) Prior to starting his job with Company A, Applicant signed an employment agreement, wherein he agreed to certain fiduciary duties, "including, the duty to place the interests of Company A and its shareholders above [his] own personal interest in any case where they might conflict." (Gx. 2 at 2). The agreement also included a non-compete provision, which provided, in pertinent part, that Applicant would "not directly or indirectly sell, market or otherwise provide goods or services to any [Company A] Clients in competition with [Company A]." (Gx. 2 at 3) Company A reinforced these agreements through internal corporate policies and yearly refresher training. (Tr. at 107-108; Gx. 3 – 4)

In May 2011, Applicant was promoted by Company A and was part of a two-person office overseeing an information technology (IT) systems support services contract for Agency X (original contract). This original contract was set to expire on September 30, 2012, and the Government requested bids from contractors for a replacement contract. The replacement contract would include providing IT systems support services to Agency X and Agency Y, starting June 1, 2013. Even though the original and replacement contract would have overlapping performance periods, Company A was unable to bid on the replacement contract outright because it had been set aside for a small business. Company A teamed with another company to win the replacement contract. (Tr. at 58-67, 72-76, 97-99)

In about January 2012, the Government selected Company A and two other contractors as finalist for the replacement contract. In approximately March 2012, one of the other finalists, Company B, reached out to Applicant and offered him a job. The job was contingent upon Company B winning the replacement contract. Applicant accepted the contingent employment offer with Company B. He did not provide Company B any information or help it in its efforts to win the replacement contract. He did not inform Company A that he had accepted the contingent employment offer with Company B, as required by Company A's internal corporate policies and procedures. (Tr. at 66-72, 101-104; Gx. 4)

Applicant continued working for Company A and was fully committed to its efforts to win the replacement contract. Applicant explained that he wanted to stay with Company A, because he had spent several years with the company and had accumulated a substantial amount of benefits that he would forfeit if he had to switch employers. Also, he had made several professional contacts within the company and its large size held out the prospect for future job opportunities. (Tr. at 101-104) Applicant was also in line to receive a “high level, lead position” if Company A’s bid was selected by the Government. (Ax. E.3)

A former co-worker writes that Applicant worked “many nights and weekends over a three month period in an effort to shore up [Company A’s] bid.” (Ax. E.3) Applicant’s performance evaluations from Company A reflect that he was rated as either exceeding expectations or as a superior performer. (Ax. B.1 – B.8) Applicant’s “outstanding professional performance” and “valuable contributions” in support of DoD were recognized by Company A. (Ax. B.10)

Notwithstanding Applicant and his former co-workers best efforts, in April 2012, Company B was awarded the replacement contract by the Government. The day after Company B was awarded the replacement contract, Applicant was asked to attend a meeting with the Government as a Company B representative. The meeting involved the transition from Company A to Company B. Applicant agreed to go to the meeting, because he believed the two companies were no longer in competition, as Company B had been awarded the replacement contract. However, in order to avoid the Government being charged for his time at the meeting, Applicant took a day of leave from Company A. He clearly identified himself at the meeting as representative of Company B. He did not receive pay from Company B for his attendance at the meeting. Applicant’s supervisors at Company A became aware of his attendance at the meeting and immediately removed him from the original contract. Realizing that he would likely be terminated, Applicant submitted his resignation to Company A. (Tr. at 72, 79-83, 85, 99-100, 104-107; Gx. 9; Ax. A)

Applicant began working for Company B in May 2013. He started performing work in support of the replacement contract in June 2012. His work, however, was limited to providing IT systems support to Agency Y. He did not provide any IT systems support to Agency X until October 2012, after the original contract with Company A ended. He worked for Company B until January 2013, when he was laid off due to a reduction in force. (Tr. at 75-79, 87, 91-94)

In May 2012, Applicant received a letter from Company A’s deputy general counsel, claiming that his attendance at the April 2013 meeting on behalf of Company B was a violation of his employment contract with Company A. The letter states that “you violated both your fiduciary duty to put the interests of Company A above your personal interest as well as your obligation not to compete against [Company A] while an employee.” (Ax. B.12 at 1) The letter goes on to state that “it is the Company’s practice to enforce the narrowly-drafted restrictions contained” in the employment agreement. (Ax. B.12 at 2) Applicant, provided the letter and the employment agreement to a friend,

who is an attorney with over 15 years of civil law experience and was recently selected for a civil court judgeship. Applicant's friend reviewed the letter and employment agreement, and advised Applicant that he had not violated the non-compete agreement. Applicant's friend testified and maintained his opinion that there was no violation of the non-compete agreement. (Tr. at 31-43, 73, 109; Ax. E.2) Company A has not filed suit against Applicant for violation of any of the terms of the employment agreement. It did file an adverse information report, claiming that Applicant had committed a security violation, which led to the current action. (Tr. at 83-86, 109; Gx. 6)

Despite the unfavorable circumstances following his resignation from Company A, Applicant did not attempt to harm or besmirch his former employer. Instead, when asked by the Government whether Company A was entitled to payment for bills it was submitting for the work they had completed under the original contract, Applicant supported payment for the completed work. He takes full responsibility for his conduct that led to the current security clearance review. (Tr. at 88-96, 107)

Applicant began working for another federal contractor in about March 2013. He is currently working on an IT services contract not related to his prior work with either Company A or B. Applicant told his current employer of the situation involving Company A and the potential impact to his security clearance. (Tr. at 87-88, 94-95, 104, 106) Notwithstanding this adverse information, Applicant's current employer still hired him. His current employer states that Applicant candidly admits he "made a grave error in judgment by appearing as a representative of one company before he resigned from the other." (Ax. E.7) His current employer sees the incident "as an isolated aberration and the type of thing from which [Applicant] has learned and grown greatly." (Ax. E.7) Applicant's employer goes on to state "I have no concerns whatsoever that he [Applicant] would ever do anything of the sort in the future and strongly recommend that he retain his security clearance." (Ax. E.7; Tr. at 17-28) A number of current and former co-workers, as well as family and long-time friends, testified and submitted letters attesting to Applicant's honesty, reliability, and integrity, and recounted details of his extensive community involvement. (Ax. E.1 – E.6; Tr. at 17-52)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are only eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry*, § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant's eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a common sense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, 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.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.¹

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. 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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.²

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

Analysis

Guideline E, Personal Conduct

The personal conduct concern is set forth at 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

¹ See also ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (“Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.”) (citing *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991)).

² See generally *Kaplan v. Conyers, et al.*, 2013 U.S. App. LEXIS 17278 at ** 23-24, 40-51 (Fed. Cir. Aug. 20, 2013) (federal courts will generally defer to the predictive judgments made by executive branch officials responsible for determining the eligibility of an applicant for a security clearance).

Applicant breached his employment agreement with Company A by accepting the contingent employment offer and attending the April 2012 meeting. Applicant's conduct was, at a minimum, a violation of his fiduciary duties to Company A, which he agreed to in his employment agreement. Applicant compounded the situation by not informing his supervisors at Company A that he accepted the contingent employment offer from Company B. Applicant's lack of candor and then showing up at a meeting as a representative of the winning company just a day after the replacement contract was awarded, lead his former employer to suspect that Applicant may have undermined their ability to win the replacement contract.

Applicant's violation of his employment agreement with Company A took place at a tumultuous time, when the contract he had been working on for years was being rebid. Such a situation is a common scenario for many federal contractors who may work at the same job for several years, if not an entire career, but have several different employers. Yet, Applicant's conduct is not mitigated by the fluidity of his employment situation. The Government expects that individuals granted access to classified information will demonstrate good judgment and comply with rules and regulations, including during periods of instability. An individual's failure to do so raises the possibility that they may disregard rules and regulations regarding the proper handling of classified information or may exhibit poor judgment in safeguarding the same. Moreover, an individual who is willing to betray their employer's trust and confidence to benefit a competitor who has offered them a job may similarly betray the confidences of the United States. Thus, Applicant's conduct and the appearance of a conflict of interest raises the concern of Guideline E, and establishes the disqualifying conditions at AG ¶¶ 16(d)³ and 16(f).⁴

Applicant's lapse in judgment was a one-time event that occurred 18 months ago. He honestly did not believe his attendance at the April 2012 meeting constituted a breach of his employment agreement with Company A, because in his view they were no longer in competition for the replacement contract. He recognizes now that he should have either resigned form Company A before attending the meeting or simply declined to attend the meeting. He also acknowledges that he should have been upfront with his former employer about accepting the contingent employment offer from Company B.

In contrast to this one-time lapse in judgment, Applicant has a long history of responsible conduct, including over 17 years of properly handling and safeguarding classified information. Since this incident and despite the pressure associated with the present security clearance review, Applicant has exhibited the requisite judgment, reliability, and trustworthiness expected of those granted access to this nation's secrets.

³ 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 person may not properly safeguard protected information.

⁴ Violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

More importantly, the record evidence clearly established that Applicant did not betray his former employer's confidences or undermine their position to win the replacement contract. Applicant provided Company A an earnest effort in what turned out to be a failed attempt to win the replacement contract. Applicant established the mitigating condition at AG ¶ 17(c).⁵

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).⁶ I hereby incorporate the above analysis and highlight some additional whole-person factors. Applicant never intended to violate his employment agreement with Company A. He essentially hedged his bets by accepting the conditional employment offer from Company B. He represented Company B on his own personal time, and only after they were awarded the contract and his employment with Company A was essentially finished. However, his conduct constituted a breach of the fiduciary duties he voluntarily accepted when he signed his employment agreement with Company A. Furthermore, Applicant created the appearance of a conflict of interest. However, the evidence established that Applicant did not undermine Company A's position in the awarding of the replacement contract. Although Applicant's conduct was far from ideal, after examining his entire record, both in the military and as a federal contractor, I am firmly convinced that this was a one-time lapse in judgment that will not be repeated. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility for continued access to classified information.

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraph 1.a:	For Applicant

⁵ 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.

⁶ The non-exhaustive list of adjudicative factors are: (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.

Conclusion

In light of the record evidence and for the foregoing reasons, it is clearly consistent with the national interest to grant Applicant continued access to classified information. Applicant's request for a security clearance is granted.

Francisco Mendez
Administrative Judge