



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



In the matter of:	)	
	)	
XXXXXXXXXXXX, XXXXX	)	ISCR Case No. 14-01859
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Braden M. Murphy, Esq., Department Counsel  
For Applicant: *Pro se*

03/31/2015

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guidelines K (handling protected information) and E (personal conduct). Clearance is denied.

**Statement of the Case**

On August 29, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.<sup>1</sup>

The SOR alleged security concerns under Guidelines K and E. The SOR detailed reasons why DOD CAF was unable to find that it is clearly consistent with the national interest to grant a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

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<sup>1</sup>This case originated as a result of an Incident Report filed in the DOD Joint Personnel Adjudication System by Applicant's employer on August 19, 2013. (Item 7.)

Applicant answered the SOR on September 11, 2014. He elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM), dated January 23, 2015, was provided to him by letter dated January 26, 2015. Applicant received the FORM on February 2, 2015. He was given 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant timely submitted additional information to which Department Counsel posed no objections. The case was assigned to me on March 12, 2015.

### **Findings of Fact**

Applicant admitted SOR ¶¶ 1.a, 1.b, 1.c with explanations, 2.a, and admitted in part and denied in part 2.b with explanations. After a thorough review of the record, I make the following findings of fact.

### **Background Information**

Applicant is a 55-year-old software engineer, who has worked for his current employer since September 1995. He worked for his company's two predecessor companies and has accumulated over 35 years of employment with defense contractors. Applicant seeks to retain his top secret security clearance and access to sensitive compartmented information (TS/SCI). (Item 4, Response to FORM.)

Applicant graduated from high school in 1978. (Item 8.) He was awarded a bachelor's degree in computer science and mathematics in 1982, and a master's degree in computer science in 2013. (Response to FORM.) Applicant married in April 1984. He has two adult children, a son and a daughter. Applicant did not serve in the armed forces. (Item 4.)

### **Handling Protected Information/Personal Conduct**

This case originated following an incident report filed by Applicant's employer in August 2013, relating to a security violation involving the Applicant. (Item 7.) On August 9, 2013, Applicant's was found to be in possession of a thumb drive during a random security inspection when leaving a Sensitive Compartmented Information Facility (SCIF). The thumb drive was confiscated and secured by security personnel. At the time, Applicant stated that he did not know the thumb drive was in his pocket and that he needed a document that was on the disk. (Item 5.)

Applicant later admitted to placing a personal thumb drive into a classified computer system that was located at an off-site location and downloading unclassified files onto the thumb drive for transfer to an unclassified system. Applicant also admitted to using the same thumb drive in two company laptops and a personal computer before and after it was used in the classified computer system. (SOR ¶¶ 1.a, 1.b; SOR answer; Items 5, 6, 7, 8.)

After conducting an investigation, Applicant's employer concluded that he was culpable of the unauthorized use of a personal thumb drive in a classified system as well as mishandling classified material. His employer further determined that Applicant had deliberately violated security requirements and was grossly negligent in the handling of classified material. On August 21, 2014, Applicant's clearance and SCI access was suspended and he was assigned to work on unclassified programs only. He was also suspended for five days without pay, and debriefed from classified access. (SOR ¶ 1.c; Items 5, 6, 7, 8.) Applicant acknowledged to company security personnel that he had completed information assurance training and was aware that he was not authorized to use a thumb drive on a Government computer. (Item 5.)

The SOR alleged that on August 9, 2013, Applicant made a false statement to company security personnel when he stated that he had not placed the thumb drive into any machine at the facility. He later explained that he was being responsive to questions asked at the time; however, he had placed the thumb drive into a classified computer at an off-site location and also two unclassified company laptops. (SOR ¶ 2.b; Items 5, 6, 7, 8.) Applicant provided clarification that he did not make a false statement to company security personnel when questioned about the thumb drive.

As an explanation and not as an excuse, Applicant explained that he was under pressure to meet a customer deadline and acknowledged it was wrong to disregard proper security procedures to meet that deadline. He added that he had recently been informed that his father-in-law was being moved to an Alzheimer's facility and that his mother was diagnosed with leukemia and was to start immediate treatments. In retrospect, he realizes the proper thing to do was a trusted download and that he should have followed established procedures. He did not think he had enough time to properly complete the job and acknowledges that he was wrong. (Item 3.)

## **Character Evidence**

Although Applicant did not submit any documentary character evidence, he stated that he has worked proudly for his company and two predecessor companies. He acknowledged his mistakes and regrets that "this security violation has left a blemish on what has otherwise been a stellar career of performance, service, and dedication to [his] company for the past 35 years." (Response to FORM.)

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is

clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk 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. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication 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 may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue her security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## Analysis

### Handling Protected Information<sup>2</sup>

AG ¶ 33 articulates the security concern pertaining to handling protected information:

Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

AG ¶ 34 describes nine handling protected information that could raise a security concern and may be disqualifying. Two of those disqualifying conditions are applicable in this case: "(c) loading, drafting, editing, modifying, storing, transmitting, or otherwise handling classified reports, data, or other information on any unapproved equipment including but not limited to any typewriter, word processor, or computer hardware, software, drive, system, gameboard, handheld, "palm" or pocket device or other adjunct equipment;" and "(g) any failure to comply with rules for the protection of classified or other sensitive information." The Government established these conditions through Applicant's admissions and evidence presented.

AG ¶ 35 provides for three potentially applicable handling protected information mitigating conditions:

(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; and

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<sup>2</sup>The DOHA Appeal board has stated: "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. 04-04264 at 3 (App. Bd. Sept. 8, 2006) (citing ISCR Case No. 97-0435 at 3-4 (App. Bd. July 14, 1998)). Once it is established that Applicant has committed a security violation, he has "a very heavy burden of demonstrating that [he] should be entrusted with classified information. Because security violations strike at the very heart of the industrial security program, an Administrative Judge must give any claims of reform and rehabilitation strict scrutiny." ISCR Case No. 0030 at 7 (App. Bd. Sept. 20, 2001). In many security clearance cases, applicants are denied a clearance for having an indicator of a risk that they might commit a security violation (e.g. alcohol abuse, delinquent debts or drug use)." ISCR Case No. 04-04264 at 3 (App. Bd. Sept. 8, 2006). In this case the Judge found more than an indicator or risk. Here the Judge found Applicant negligently disregarded in-place security procedures . . . . ISCR Case No. 03-26888 at 2 (App. Bd. Oct. 5, 2006).

(c) the security violations were due to improper or inadequate training.

None of the handling protected information mitigating conditions are applicable. Applicant's unauthorized use of a thumb drive in a classified system and mishandling of classified information is recent and serious. While Applicant acknowledges his mistake, I am at somewhat of a disadvantage in assessing his rehabilitation based on his written assertions. Apart from his SOR answer and Response to FORM, he did not produce any corroborating evidence of rehabilitation.

## **Personal Conduct**

AG ¶ 15 articulates the security concern pertaining 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 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.

AG ¶ 16 describes seven personal conduct concerns that could raise a security concern and may be disqualifying. One of those disqualifying conditions is applicable in this case: "(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing...." The Government established this condition through Applicant's admissions and the evidence presented.

AG ¶ 17 provides seven potential conditions that could mitigate security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

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

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant's security violation is cross-alleged under Guideline E. None of the mitigating conditions under this concern are applicable for the reasons discussed under Guideline K. Applicant provided clarification that he did not make a false statement to company security personnel when questioned about the thumb drive. Also, Department Counsel noted in the FORM that Applicant had rebutted this falsification and recommended that SOR ¶ 2.b be resolved in Applicant's favor. I concur with Department Counsel's conclusion and recommendation and I find in his favor on SOR ¶ 2.b.

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

(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.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c). My comments in the Analysis section are incorporated in the whole-person discussion.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for his 35 years of employment as a defense contractor. Apart from his statements of remorse, he provided no evidence corroborating rehabilitation. If other favorable evidence exists, Applicant did not provide it. A security breach of this nature is inconsistent with the standards required of those entrusted with holding a security clearance.

Lastly, in requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances. By failing to provide such information, and in relying on only several uncorroborated paragraphs of explanations, security concerns remain.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's concerns. For the reasons stated, I conclude he is not eligible for access to classified information.

### **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 K: Subparagraphs 1.a – 1.c:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline E: Subparagraph 1.a: Subparagraph 1.b:	AGAINST APPLICANT Against Applicant For Applicant

### **Conclusion**

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

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ROBERT J. TUIDER  
Administrative Judge