

DATE: April 27, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-07340

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 48-year-old retired Navy petty officer who has been employed by defense contractors as a LAN maintenance technician since October 1996. Upon his discharge from the Navy, Applicant packed a file box with various training manuals and other documents he had been issued and stored it in his attic. He discovered the box while cleaning the attic in 1999, and relocated it to his workplace with the intent to shred the documents. The file box was discovered by a co-worker who reported it to authorities. Examination of the contents disclosed it contained three documents classified as *Confidential*. Applicant has mitigated the security concern caused by his inadvertent mishandling of classified material. Clearance is granted.

STATEMENT OF THE CASE

On April 3, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline K, pertaining to security violations, and Guideline E, pertaining to personal conduct, based upon Applicant's mishandling three classified documents. Applicant submitted an answer to the SOR dated May 28, 2003, admitted all allegations contained in the SOR, and requested a hearing.

The case was assigned to me on January 6, 2004. A notice of hearing was issued on January 7, 2004, scheduling the hearing for February 12, 2004. The hearing was conducted as scheduled. The government submitted five documentary exhibits at the hearing that were marked as Government Exhibits (GE) 1-5. GE 1 & 2 were admitted into the record without an objection. Administrative notice was taken of GE 3-5. Applicant testified at the hearing, called two witnesses to testify on his behalf, and submitted eight documentary exhibits that were marked as Applicant Exhibits (AE) 1-8, and admitted into the record without an objection. The transcript was received February 20, 2004.

PROCEDURAL MATTERS

Prior to the hearing, neither Applicant nor Department Counsel had seen the three documents found in the file box that form the basis of the SOR

allegations, and, they of course were not submitted for admission into the record. Further, there is no indication in any report admitted into the record that the documents contain any notation on their face that they were classified. Accordingly, I asked Department Counsel to ascertain whether the documents were still in existence in order that I might view them to make that determination. Department Counsel sent me an e-mail, which Applicant was copied on, dated February 20, 2004, indicating the documents were no longer available. A copy of that e-mail was marked as GE 6.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 48 years old, has been married since December 1978, and is the father of two adult children and one adult stepchild. He enlisted in the U.S. Navy in June 1974, and served on active duty until his retirement in October 1994, having attained the rank of Petty Officer First Class (paygrade E-6). The Enlisted Performance Evaluation Reports included in the record disclose his sustained outstanding performance of duty during his Naval career. His decorations include the Southwest Asia Service Medal, Navy Expeditionary Medal, Sea Service Deployment Ribbon, National Defense Service Medal (2 awards), Good Conduct Medal (4 awards), Navy "E" Award (2 awards), Meritorious Unit Commendation, Navy Unit Commendation, and Navy Achievement Medal (2 awards).

Applicant possessed a security clearance for most of the time he was in the Navy, including periodically a top secret clearance. He served aboard both fast attack and ballistic missile submarines as an interior communications technician, thus providing him routine access to classified material. No complaints were ever made alleging he mishandled classified material during any of those periods, and no action was ever taken to revoke or downgrade his clearance for other than routine administrative reasons.

Following his discharge from the Navy, Applicant worked as a manager at two fast food restaurants until he was hired by a defense contractor in October 1996 as a LAN maintenance technician. He completed his college education in May 1999, and was awarded a bachelor of science degree in education. He has continued to work in the same position for defense contractors since his initial hiring, although the actual employers have changed because of the sale of the company.

Applicant submitted numerous letters of recommendation, certificates of achievement and commendation, and civilian employment performance evaluations, in addition to the enlisted evaluations mentioned earlier, that were admitted into the record. Those documents attest to his long-standing reputation, both in the military and in the civilian world, for being dedicated, dependable, hard-working, and completely trustworthy.

Applicant offered the testimony of a Navy captain who has observed Applicant closely in his work environment since 2000. The captain opined that Applicant is trustworthy, not a security risk, and that the incident herein under consideration was an aberrational occurrence in an otherwise stellar career. Likewise, Applicant's immediate supervisor testified that Applicant is trustworthy, dependable, not a security risk, and he follows rules and regulations.

Applicant was serving aboard a ballistic missile submarine while preparing for his retirement from the Navy in 1994. Tasked with a major electronics conversion project aboard the ship, he was required to routinely work 12-hour shifts, in addition to standing 24-hour duty every three days until approximately five days before his retirement. When it finally came time for him to depart the ship for the last time, he packed the technical manuals, notes, blueprints, and other school material that had been issued to him during his career into a file box and stored it in his attic. Unbeknownst to him, included in the material were the following three documents that were classified *Confidential*:

- Three stapled DASO team notes (used for chief of the watch study material);
- SSP OD 56515 Vol 2 Chapter 5 (used for studying for diving officer of the watch); and
- NAVMSG 081630Z Feb 94 from COMSUBRON 20 to squadron SSBNS (used for studying material for diving officer of the watch).⁽²⁾

The box remained in Applicant's attic until sometime in 1999 when he discovered it while cleaning the attic. Still unaware there was classified material in the box, and not wanting to discard the manuals and blueprints in the trash, he chose to take it to his workplace where he had access to a shredder. While he was working in a foreign country, he stored the box in a locked electrical closet for safekeeping. However, a co-worker found the box and notified officials who discovered the three classified documents.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline K, pertaining to security violations, and Guideline E,

pertaining to personal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁵⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹²⁾

CONCLUSIONS

Under Guideline K, noncompliance with security regulations raises doubt about an individual's trustworthiness, willingness, and ability to safeguard classified information. Applicant unknowingly removed three documents from his ship that were classified as *Confidential* when he went ashore for the last time. He improperly stored those documents in his attic, a non-secure facility, until he removed them to his workplace, again a non-secure facility, with the intent of destroying them. Disqualifying Condition (DC) 2: *Violations that are . . . due to negligence* applies in this case.

There is no indication the material was ever disclosed to anyone, either intentionally or inadvertently, including the co-worker who discovered the box and notified authorities. Further, the evidence overwhelming establishes the classified documents were issued to Applicant for his watch-standing study needs, stored with his other study materials, and removed and stored by him without knowledge of their presence. His exemplary military service and civilian work history clearly establish he is overall a trustworthy individual and, as the Navy captain testified, that this incident was a singular incident in a stellar career.

Mitigating Conditions (MC) 1: *(actions that) Were inadvertent*; MC 2: *(actions that) Were isolated of infrequent*; and MC 4: *(actions that) Demonstrate a positive attitude towards the discharge of security responsibilities* apply in this case. In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. After considering the evidence of record in this case, and weighing the disqualifying condition against the mitigating conditions, I find Applicant has mitigated the security concern caused by his security violation. Guideline K is decided for Applicant.

Under Guideline E, personal conduct is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Applicant's unknowing removal of classified material from his ship and its improper storage, again without his awareness, does not raise a security concern about his personal conduct. I do not find any Guideline E disqualifying condition applicable to his actions in this case. Guideline E is decided for Applicant.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find that Applicant has overcome the case against him and satisfied his ultimate burden of persuasion. It is clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

SOR ¶ 1-Guideline K: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

SOR ¶ 1-Guideline E: For the Applicant

Subparagraph a: For the Applicant

DECISION

In light of all 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.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. GE 2. The government exhibit does not provide clarification of the acronyms or indicate the material was marked as classified.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id* at 531.
12. *Egan*, Executive Order 10865, and the Directive.