

KEYWORD: Personal Conduct

DIGEST: Applicant willfully and maliciously destroyed company and government documents after being informed she was being transferred. She failed to mitigate the security concern caused by her personal conduct. Clearance is denied.

CASENO: 03-20538.h1

DATE: 12/14/2005

DATE: December 14, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-20538

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant willfully and maliciously destroyed company and government documents after being informed she was being transferred. She failed to mitigate the security concern caused by her personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On June 9, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was 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 a security concern under Guideline E (personal conduct). Applicant submitted an answer to the SOR that was received by DOHA on July 22, 2004, denied the single SOR allegation, and requested a hearing.

The case was assigned to me on July 5, 2005. A notice of hearing was issued on October 3, 2005, scheduling the hearing for October 25, 2005. The hearing was conducted as scheduled. The government submitted nine documentary exhibits that were marked as Government Exhibits (GE) 1-9, and admitted into the record without objection. The Applicant testified, called one witness to testify on her behalf, and submitted 25 documentary exhibits that were marked as Applicant Exhibit (AE) 1-25, and admitted into the record without objection. The transcript was received on November 9, 2005.

AE2 made reference to Chapter 7 of Applicant's employer's Standard Practice and Procedures (SPP). Neither party offered that Chapter in evidence. Considering that it may contain relevant information that would assist me in deciding this case, I requested at the hearing that Applicant obtain the chapter and submit it to me through Department Counsel for inclusion in the record. Both parties stated they had no objection to my request (Tr. p. 127).

Chapter 7 of the SPP was forwarded to me by Department Counsel on November 14, 2005, marked as Hearing Exhibit (HE) A, and admitted into

the record without objection. Written argument of Department Counsel and Applicant as to the relevancy of HE A, and the forwarding memo were marked as Appellate Exhibits (App.Ex.) I-III, and included in the record.

FINDINGS OF FACT

After a thorough review of the pleadings, exhibits, testimony, and arguments (oral and written), I make the following findings of fact:

Applicant is a 45-year-old married woman. She received a bachelor of science degree with a major in math in 1985. Applicant was hired by a defense contractor in July 1996, and was employed as a software engineer. She was fired by that employer in March 2001, and was thereafter employed by a different government contractor under contract until September 2005. She presently is serving as a consultant for the second contractor. She has held a security clearance since about 1988, and was written up in about 1999 for a "vault violation," apparently because she entrusted classified discs to the custody of her manager to be returned to the proper storage facility rather than returning the discs herself. There are no other reported security violations of record.

The record in this case is replete with irrelevant details about Applicant's difficulties with her former employer, and the resulting actions of both Applicant and the employer, to include the issuance of reprimands to Applicant, her transfer, discrimination complaints and lawsuits being filed and settled, etc. However, the single SOR allegation is as follows:

Your employment with (name omitted) was terminated for cause on or about March 23, 2001. They [sic] company determined you willfully and maliciously destroyed company and government documents that were critical to the software maintenance and enhancement of mission critical government intelligence systems.

While I have thoroughly considered all the other information, it will only be discussed to the extent it is relevant to deciding the SOR allegation.

Applicant's problems with her employer began on October 16, 2000, when the water main broke that provided water to the building where she was assigned. Applicant expressed a concern to her manager about her need to use a restroom in the absence of water, and requested permission to go home. Permission was denied, Applicant left anyway, and she was thereafter issued a reprimand. Although she received good evaluations before this occurrence, and was recommended by her manager for a raise in the preceding year (Tr. p. 24), irreconcilable differences between Applicant and the manager (at least in the opinion of management), necessitated her transfer to a different facility operated by her employer.

Applicant was notified she was being reassigned on December 22, 2000. She had previously scheduled holiday and vacation time from that date through January 1, 2001, and was therefore instructed to report to her new assignment on January 2, 2001. On December 26, 2000, Applicant returned to the workspace she had occupied prior to the notification of reassignment and undertook what is described as an extensive clean out of that workspace (GE 1, p. 3-[\(2\)](#)). Applicant shredded numerous documents, including all system maintenance related paperwork she had created or been entrusted with (GE 1), as part of this clean out of her work space.

The record contains two witness accounts of the shredding. One witness reported her observations as follows:

I observed (Applicant) at the shredder shredding a very large pile of manila folders and papers that were stacked over her head on a cart to her right. I heard (Applicant) say to (name omitted) "The only reason they moved me to (omitted) was because (name omitted) slandered mine's [sic] and (name omitted) name in a meeting with the Government." . . . I heard (name omitted) say "Well that's going to hurt the next developer that comes in and it could hurt us testers." (Applicant) replied "I don't care I'm getting rid of everything." (GE 1, p. 5)

The witness, concerned that Applicant might attempt to check out hard drives, immediately reported her observations to management.

The second witness, who was the person Applicant conversed with while shredding the documents, reported her observations as follows:

We struck up a conversation. . . . Within the conversation she stated that she was going to destroy all papers that she had that dealt with the project she was working on and that if I told anyone, she would deny it. When I questioned her about her actions being detrimental to the (omitted) project she had been working on, and the effect of them on the new person that would be taking over that position, she stated that she didn't care. . . . During the conversation, (Applicant) was extremely angry with being reassigned to a new project and made several negative comments about (name omitted) management. (GE 1, p. 6)

On January 5, 2001, Applicant was questioned by one of the company's group managers about what documents she had shredded. She indicated she had shredded system printouts from queries she made addressing the shortening/truncation of fields within the system, and that the material consisted of no more than one-half inch of printed materials. (GE 1, p. 8)

Applicant commenced a six to eight week medical leave on or about January 6, 2001, that had been scheduled prior to her reassignment. On February 17, 2001, she informed her employer that she had commenced mental health counseling sessions on January 29, 2001, to help her deal with the stress due to work-related incidents. (GE 3) On February 20, 2001, she notified her employer that she had filed charges with the state civil rights division alleging sexual discrimination and retaliation. (GE 4) On March 23, 2001, Applicant's employment was terminated for cause, based on the willful and malicious destruction of company and government files by shredding them on December 26, 2000.

It is unnecessary to discuss the employer's documentation for the reason for the termination of Applicant at length. Suffice it to say that all the documents, including reports, e-mails, requests to locate certain documents, except GE 1, pp.6 (3) and 8, are dated after the employer was notified of the civil rights complaint. Thereafter, the employer refused to engage in mediation. Applicant filed a lawsuit in state court that was removed to federal court, and a settlement was agreed to on or about October 28, 2003. The terms of the settlement are unknown.

When interviewed by a Special Agent (SA) of the Defense Security Service (DSS) on August 12, 2003, Applicant provided a somewhat different version of the conversation that took place at the shredder. While Applicant essentially agreed with the substance of the conversation as reported by the two witnesses, she maintained she had been speaking about her reassignment and the harm it would cause to the project and not about the destruction of the documents. She also acknowledged during the interview that she told the other person not to tell anyone about their conversation, but claimed that was because she was emotional at the time and didn't want the managers to know they had upset her. (GE 8)

Applicant contends she did not maliciously destroy documents, but rather acted in accord with established company policy as mandated by the SPP. She testified:

I had working papers and personal items at my desk. Mr. (name omitted) did not give me any instructions as to the proper disposition or to transition those working papers to any other individual. The weekend that I was home after being informed of the transfer I reviewed the security, (name omitted) standard practices and procedures, which indicate that all working papers, notes, etc. that are created during classified working hours are to be disposed of as classified material

So in accordance with that, at the first opportunity, which was during my vacation time, I went back into the building, cleared out the working papers and notes and so forth that were not to be left behind. And so in accordance with the SPP shredded those. (Tr. p. 25)

Applicant told the SA of the DSS that the material she destroyed consisted of notes, pieces of printouts, etc., that referred to work she had already completed or that was no longer relevant. Her statement asserts:

I determined that I needed to be sure to follow all procedures to the letter so there could be no reason for them to take any action against me. On the first day after the holiday weekend (Dec 26 2000) [sic] I went in to (name omitted) to clear out my desk. The (name omitted) SPP document (which each employee is required to read and sign) states that all notes, drawings, printouts, etc [sic] created during classified processing are required to be destroyed as classified (whether they are classified or unclassified). (GE 8, p. 9)

She testified the material she destroyed consisted of "working papers and personal items" (Tr. p. 25) that were no longer needed because the relevant information she possessed about the project had already been relayed to other employees in anticipation of her scheduled medical leave.

Applicant submitted a portion of chapter 5 of the employer's SPP in support of her assertion that she was required to destroy the material in question. That extract of chapter 5 does not support her claim that she was required or even authorized to destroy the material in question. Rather, it deals with the disposal of trash and items such as personal mail, the daily destruction of material described as classified waste, the handling and destruction of SCI wastepaper products, the handling of material described as unclassified waste, and other matters not relevant to this case.

Applicant also submitted a statement from the employer's head security officer which described the retention and destruction of "working papers." (AE 2) In relevant part, that statement discloses the following information:

Personnel are also required to keep a personnel file containing any notes or work papers dealing with projects in this file, this file is marked ("working papers") and is the personnel [sic] responsibility of the individual. This file is required to be locked up at the end of each work day also, and it may or may not contain classified information. To avoid these personnel [sic] work files becoming to large or unmanageable, there is a responsibility to turn working files into the facility librarian for posting and accountability within ninety (90) days of origination or they must be destroyed, under no circumstances will working papers within this file be kept longer than 90 days without some sort of action being taken. (Per DoD Manual 5105.21-M-1, Chapter 3, Para H, 1. thru 4. and (name omitted) SOP/SPP Chapter 7, Para 7.20).

SPP Chapter 7 provides the employer's guidance for the *Handling of Classified Material (HE A)*.⁽⁴⁾ The guidance for classified working papers is as follows:

7.20 Classified Working Papers.

Individual classified working papers, including but not limited to, notes, drafts and drawings accumulated or generated within the (name omitted) in preparation of a final document shall be:

7.20.1. Created/established and logged by the (name omitted) Document/Media Librarian.

7.20.2. Dated when created.

7.20.3. Marked with the overall classification, with any warning notices, caveats, or code words, and with the notation "WORKING PAPERS". Classified working papers should also contain portion markings as defined in Chapter 4, AR 380-5, and DoD C-5105.21 (SCI Security Manual Administrative Security).

7.20.4. Identified with a cover page (See Figure 9, Sample Classified Document Cover Page) containing the creation date, title, & classification authority.

7.20.5. Safeguarded and returned to the (name omitted) Document Librarian when not in use.

7.20.6. The creation kept to an absolute minimum, retained for the shortest period, and destroyed when no longer required. Classified working papers must be brought under control as a completed document, or destroyed not later than the 91st day after the "creation date."

7.20.7 Entered into the Classified Working Paper Log (See Appendix A, in the Library SOP), assigned a temporary working paper identification number, and stored in the Document Library when not in use.

7.20.8. Entered into the Library database and security accountability system, if retained for more than 90 days, regardless of the stage of development.

7.20.9. Entered into the accountability system, regardless of the stage of development, when transmitted outside the facility.

NOTE: CLASSIFIED WORKING PAPERS CANNOT BE TRANSMITTED OUT OF THE FACILITY.

The guidance provided for the destruction of classified material reads as follows:

7.10 Destruction or Removal of Classified Material from the (name omitted) Library.

The following steps/procedures will be followed for any classified material (minus classified waste) that must be destroyed or transferred out of the (name omitted):

STEP 1 - Identify the material, by library number, to the Document/Media Librarian.

STEP 2 - Receive a 5A Listing (identifies material & disposition) from the Librarian.

STEP 3 - Receive a blank Government Authorization Letter (GAL) from the Librarian.

STEP 4 - Fill out the GAL, attach to 5A Listing, and transmit to the Government Project Leader (GPL) for signature.

STEP 5 - Return the signed GAL and the 5A Listing to Librarian.

STEP 6 - Librarian will provide material to be transferred/destroyed and the signed GAL to the ASRC CSSO/FSO for further disposition.

With regard to possible sanctions for noncompliance, the employer's head security officer wrote:

Failure to comply with the instructions listed in the references above (that included SPP Chapter 7) may lead to Administrative Sanctions being taken against the individual. Sanctions include, but are not limited to, a warning notice, reprimand, termination of classification authority, suspension without pay, forfeiture of pay, and removal or discharge. For any of these actions to be taken a person must be judged to have committed a violation specified under Executive Order 12598.

To my knowledge none of these have been taken against (Applicant). . . . (Applicant), as required by regulation, did exactly what she was supposed to do by emptying her classified work file of all working papers, classified or unclassified, and were to be destroyed by shredding when no longer required. [sic] (AE 2)

There is no evidence indicating Applicant ever took any of the actions required under SPP Chapter 7.20 when she either created or retained in her possession the destroyed documents she has described as "working papers." Further, and despite her assertion to the SA of the DSS that she "needed to be sure to follow all procedures to the letter so there could be no reason for them to take any action against [her]," she has provided no evidence that she complied with any of the mandates contained in SPP Chapter 7.10. Moreover, it would have been very unlikely she would have been queried on January 5, 2001, about what documents she shredded, or that the shredding of the documents would have been claimed as justification for her termination if she had complied with either of those provisions of the SPP.

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 E, pertaining to personal conduct, with its respective DC and MC, is 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.⁽⁵⁾ The government has the burden of proving controverted facts.⁽⁶⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁷⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁸⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁹⁾ 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.⁽¹⁰⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹¹⁾

No one has a right to a security clearance⁽¹²⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹³⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹⁴⁾

CONCLUSIONS

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.

The record evidence, including the statements of the witnesses to the shredding and Applicant's noncompliance with the employer's SPP guidance pertaining to the creation, maintenance and destruction of classified material clearly establish the willfulness and maliciousness of Applicant's conduct. Her shredding those documents, with the intent of causing harm or at least severe inconvenience to her government contractor employer, creates a significant question as to whether she can be entrusted to properly safeguard classified information.

The severity of her misconduct cannot be overstated. She was assigned to work on projects of continuing importance to national security. As such, a high degree of trust was necessarily placed in her. While the record does not fully disclose the content of the documents Applicant shredded, the statements provided by the witnesses clearly demonstrate the shredding was done with total disregard of the detriment it would cause to the project she had been working on and the person(s) who would be assigned to replace her. The shredding potentially could have had serious repercussions to the detriment of national security.

Disqualifying Conditions (DC) 1: *Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*; DC 4: *Personal conduct or concealment of information 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*; 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* apply in this case.

I have considered all Guideline E Mitigating Conditions (MC) and find none apply. MC 5: *The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress* is inapplicable. While the passage of time, Applicant's employment termination, and the resolution of her civil lawsuit against her employer may have reduced her vulnerability to coercion, exploitation, or duress, there has not been a single positive step taken by Applicant to reduce those possibilities. By their plain language, the remaining mitigating conditions have no applicability.

As required, I have carefully considered and weighed the requirement that clearance decisions be fair and impartial common sense determinations based upon consideration of all relevant and material information and the pertinent criteria and adjudication policy in enclosure 2 of the Directive, including: 1) the nature and seriousness of the conduct and surrounding circumstances; 2) the frequency and recency of the conduct; 3) the age of the applicant; 4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved; 5) the absence of presence of rehabilitation; and 6) the probability that the circumstances or conduct will continue or recur in the future. [\(15\)](#)

Weighing in Applicant's favor is that this was a one-time incident that occurred almost five years ago. However, those factors are overwhelmingly outweighed by the facts that she was a mature woman who was motivated by a desire to harm her employer. Her actions were willful and undertaken with full knowledge that they had at least the potential to cause harm to the national security. While she apparently quickly established herself as a valued employee to her new employer, it must be noted that she was well thought of by the employer she attempted to harm prior to her disagreement with her manager. Finally, although not alleged as separate Guideline E concerns, the misleading statements she provided to the SA of the DSS and during the hearing undermine finding the presence of rehabilitation in this case or that similar conduct is unlikely to recur.

I am aware that there apparently was a resolution of the civil lawsuit somewhat in favor of Applicant. However, unlike what was apparently at issue in the civil lawsuit, the issue herein does not deal with the reasons for Applicant's termination and/or whether her termination was in retaliation for her filing a claim against the employer. The concern here is solely her action of shredding documents on December 26, 2000, and what that conduct demonstrates about her suitability to be entrusted with the nation's secrets.

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. Once again, it must be noted that no one has a right to a security clearance⁽¹⁶⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁷⁾

After carefully considering the record evidence in this case, I find Applicant has failed to mitigate the security concern caused by her personal conduct. She has failed to overcome the case against her or satisfy her ultimate burden of persuasion. Guideline E is decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline E: Against Applicant

Subparagraph a: Against Applicant

DECISION

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

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. I inserted page numbers on each page of GE 1 after the hearing to facilitate identification of the relevant excerpts to be discussed herein.
3. It is unclear when the memorandum contained in GE 1, p. 6 was created. While it is dated December 26, 2000, the opening line tends to indicate it may have been created at a later date. Further the other memorandums documenting the shredding were not created until March 2001. Moreover, I would expect management to have taken more aggressive action than is recorded in GE 1, p. 8 to investigate the destruction of material if the contents of the memorandum had been made known to them in December 2000.

4. Department Counsel contends in her response (App. Ex. I) to Applicant's submission of HE A at my request that HE A is inapplicable to the facts of this case because it only deals with classified material and it was not established that Applicant's working papers were classified working papers. However, SPP Chapter 5.6 provides that "All printed material CREATED in the (name omitted) will be treated as "CLASSIFIED WASTE" and destroyed by the "producer/owner" at the end of every workday." (AE 1) SPP Chapter 5.6.1 provides that "All paper products, i.e., computer listings, drawings, sketches, notes, etc, created in (name omitted) during collateral operations will be handled as classified material." (AE 1) While there is some ambiguity, probably due to the fact that I have only been provided portions of the SPP, I am satisfied by these provisions of the SPP, the nature of the facility in which Applicant worked, Applicant's statement to the SA from DSS, and her testimony concerning the nature of the projects she worked on, that her "working papers" were considered to be classified material that was to handled and disposed of in accordance with SPP Chapter 7, as indicated by the head security officer in AE 2.

Further, whether Applicant's "working papers" were actually considered to be classified papers or not, SPP Chapter 5, which she submitted at the hearing, and Chapter 7, that was referenced in her submission of AE 2, are the justification provided by Applicant for her actions on December 26, 2000, and, as such, must be considered by me in deciding whether or not her actions were consistent with the employer's SPP as she contends.

5. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

6. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

7. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

8. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

9. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

10. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

11. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15

12. *Egan*, 484 U.S. at 528, 531.

13. *Id* at 531.

14. *Egan*, Executive Order 10865, and the Directive.

15. Directive, 6.3., et. seq.

16. *Egan*, 484 U.S. at 528, 531.

17. *Id* at 531.