

KEYWORD: Security Violations; Personal Conduct

DIGEST: Applicant was fired in March 2002 when his defense contractor employer concluded he had committed a security violation. The security concerns raised by the security violation and his termination are mitigated. The totality of facts and circumstances establish that the security violation was an inadvertent, isolated incident. Clearance is granted.

CASENO: 03-23974.h1

DATE: 05/25/2006

DATE: May 25, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23974

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Stephen C. Glassman, Esq.

SYNOPSIS

Applicant was fired in March 2002 when his defense contractor employer concluded he had committed a security violation. The security concerns raised by the security violation and his termination are mitigated. The totality of facts and circumstances establish that the security violation was an inadvertent, isolated incident. Clearance is granted.

STATEMENT OF THE CASE

This case rose when the Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On June 29, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline K for security violations and Guideline E for personal conduct (termination of employment due to a security violation). Applicant replied to the SOR on July 28, 2004, and requested a hearing. The case was assigned to me August 18, 2005. With the agreement of counsel, a notice of hearing was issued scheduling the hearing for November 16, 2005.

Applicant appeared with counsel and the hearing took place as scheduled. During the hearing, Government Exhibits 1 - 8 were admitted into evidence, while Exhibit 9 ⁽²⁾ was excluded from evidence. Applicant's Exhibits A1 - A20 and A22 were admitted into evidence, while Exhibit A21 ⁽³⁾ was excluded from evidence. DOHA received the 288-page transcript on December 1, 2005.

The record was left open until March 17, 2006, for Applicant to pursue obtaining information about his case under the FOIA. The details of keeping the record were set forth in a memorandum order (Appellate Exhibit I). Subsequently, at Applicant's request and without objections by Department Counsel, the March 17th deadline was extended to May 1st.

Applicant timely submitted his post-hearing submissions, which are marked as Applicant's Exhibits B1 - B8. Also, Applicant's counsel submitted a memorandum explaining the relevance and significance of the exhibits (Appellate Exhibit II). In turn, on May 4, 2006, Department Counsel submitted a memorandum objecting to the exhibits on relevance grounds (Appellate Exhibit III). I reviewed the exhibits and the arguments of counsel. Department Counsel's objections are sustained; Exhibits B1 - B8 are excluded from the record evidence. Accordingly, the record of this case closed on or about May 4, 2006.

FINDINGS OF FACT

In his Answer to the SOR, Applicant admitted the factual allegations in subparagraphs 1.a and 2.a. His admissions are incorporated herein by reference. In addition, I make the following findings of fact.

Applicant is a 35-year-old married man who is seeking to retain a security clearance for his employment with a company engaged in defense contracting. He is a senior systems administrator for the company's high performance computing center. His wife is a stay-at-home mother with a four-year-old and a one-year-old. Also, Applicant's wife works part-time for a defense contractor with whom she has worked for about ten years.

Applicant graduated from one of service academies in May 1993. Thereafter, he served as a commissioned officer in the U.S. Navy until May 1998. He served onboard two ships where he gained extensive experience with classified information. Applicant received highly favorable performance evaluations as reflected in Applicant's Exhibits A5 - A8, which are incorporated herein as findings of fact by reference.

In May 2000, Applicant accepted a position with a major consulting firm engaged in defense contracting. He worked with this firm as a computer consultant until he was fired in March 2002. When he accepted this employment, the secret-level security clearance that he previously held as a military officer was reinstated. Applicant's work required him to work in a classified computer lab or space where he was responsible for developing and conducting tests to evaluate service-level agreements between the prime contractor and the government. In other words, Applicant was essentially auditing the work of another defense contractor and reporting the results to the government.

On or about March 29, 2002, Applicant was fired due to unprofessional conduct based on his failure to properly safeguard classified information on or about March 18th (Exhibit 5). In short, Applicant e-mailed a classified document to another employee over the company's unclassified local area network (LAN). He admitted doing so in his Answer to the SOR, in his sworn statement taken during a background investigation (Exhibit 2), in his letter of rebuttal to company's termination letter (Exhibit 6), and in his hearing testimony.

Based on the incident, the company's security officials conducted an inquiry. The company's findings and conclusions are set forth in the preliminary administrative inquiry (Exhibit 4) and the completed administrative inquiry (Exhibit 3).

In its summary of events, the preliminary inquiry concluded that Applicant "inadvertently" e-mailed a classified document to a company employee over the company's LAN. The inquiry included a memorandum for the record written by Applicant. In it, he expressed "great remorse and frustration" about the incident and took full responsibility for his actions.

The completed administrative inquiry concluded that the possibility of the compromise of classified information could not be precluded, although the computers and the network were successfully sanitized. It also determined that Applicant committed a "major violation" and was "clearly culpable." The inquiry credited Applicant for being forthcoming with information and for not trying to engage in a cover-up, but it faulted him not admitting any wrongdoing and trying to place the blame on others.

During the hearing, Applicant explained that was not his intent to shift the blame (Transcript at 183). Instead, he was interested in finding out what took place. He had worked with unclassified information for many months, he was shocked that there was a classified document contained in the archive of documents that he sent to the manager, and he did not understand how it happened. Applicant thought the document was unclassified, as was the usual case. The document was provided by a government employee who did not indicate otherwise. Applicant did not knowingly copy and e-mail the classified information over the unclassified LAN, as he explained in his sworn statement (Exhibit 2):

I was not aware that the document in question was classified. If I would have known that the information was classified I would not have taken the information out of the lab. This was a serious mistake that I made. I have not had any other incidents of security violations.

Since his termination in March 2002, Applicant has worked for three other companies engaged in defense contracting (including his current employer). His work performance has remained high, meeting or exceeding expectations (*E.g.*, Exhibit A11).

Applicant has held a security clearance for many years as both a military officer and a defense contractor. During these many years, except for the March 2002 incident, Applicant has not been accused of or cited for a security violation.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on 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.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security

clearance is not a determination of an applicant's loyalty.⁽⁴⁾ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

BURDEN OF PROOF

The only 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⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁶⁾ The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.⁽⁷⁾ An applicant is responsible for presenting witnesses and other evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁽⁸⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

As noted by the Supreme Court in *Department of Navy v. Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

The security violations concern under Guideline K⁽¹¹⁾ and the personal conduct concern under under Guideline E⁽¹²⁾ will be discussed together as the matters are interrelated. Under Guideline K, noncompliance with security regulations raises doubt about an individual's trustworthiness, willingness, and ability to safeguard classified information. Personal conduct under Guideline E 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.

Here, based on the record evidence as a whole, the government established its case under both guidelines. Due to his negligence or carelessness in not making certain that the document in question was unclassified, Applicant committed a security violation by copying classified information onto a disk, which he took home without a courier brief. He then e-mailed it to a manager over his employer's unclassified LAN. As a result, Applicant was fired. Given these facts and circumstances, security concerns are raised under DC 2⁽¹³⁾ for Guideline K and DC 1⁽¹⁴⁾ for Guideline E. By any measure, the security violation and the resulting employment termination are matters that raise concerns about Applicant's suitability to hold a security clearance.

I reviewed the mitigating conditions under both guidelines and conclude that the security concerns raised by the security violation and his termination are mitigated. The totality of facts and circumstances establish that the security violation was an inadvertent,⁽¹⁵⁾ isolated incident.⁽¹⁶⁾ Indeed, Applicant has not engaged in a long-term pattern of negligence or questionable judgment concerning his handling and safeguarding of classified information, as the record evidence shows just the opposite (for example, his assigned duties in the Navy involving classified information). Concerning the incident, Applicant thought he was dealing with unclassified information, as was his routine at the lab. Although his employer considered the incident a major violation, the record evidence shows (1) it was a one-time incident that took place due to a mistake; (2) it did not take place due to a deliberate plan or design; and (3) it did not take place due to gross or criminal negligence.

In reaching this decision, I also considered the whole-person concept. Applicant has worked in positions of responsibility since completing the arduous requirements of graduating from one of this country's service academies. He appears to have a stable lifestyle, as evidenced by his employment history and his responsibilities as a husband and father. Other than the incident under review, Applicant has performed his military and employment duties in a satisfactory or exemplary manner. Given his experience and training in handling and safeguarding classified information, coupled with the negative consequences from this incident, it is unlikely that Applicant will allow such an incident to occur again. At bottom, Applicant is a mature individual with a history of service to this country, both as a military officer and as a defense contractor. Based on the record evidence as a whole, he can be trusted to properly handle and safeguard classified information.

To conclude, Applicant has met his ultimate burden of persuasion to obtain a favorable clearance decision. Accordingly, both Guidelines K and E are decided for Applicant. In reaching my decision, I have considered the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline K: For Applicant

Subparagraph a: For Applicant

SOR ¶ 2-Guideline E: For Applicant

Subparagraph a: For 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.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. The transcript at page 213 erroneously reflects that Exhibit 9 was admitted.
3. The transcript at page 67 erroneously reflects that Exhibit A21 was admitted.
4. Executive Order 10865, § 7.

5. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
6. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
7. Directive, Enclosure 3, Item E3.1.14.
8. Directive, Enclosure 3, Item E3.1.15.
9. Directive, Enclosure 3, Item E3.1.15.
10. 484 U.S. at 528, 531 (1988).
11. Directive, Enclosure 2, Attachment 11.
12. Directive, Enclosure 2, Attachment 5.
13. Directive, Item E2.A11.1.2.2. Violations that are deliberate or multiple or due to negligence.
14. Directive, Item E2.A5.1.2.1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances.
15. Directive, Item E2.A11.1.3.1. [Actions that] were inadvertent.
16. Directive, Item E2.A.11.1.3.2. [Actions that] were isolated or infrequent.