

DATE: February 10, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-04145

## **DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jennifer I. Campbell, Esquire

Department Counsel

#### **FOR APPLICANT**

James R. Tanner, Esquire

### **SYNOPSIS**

This 47-year-old engineer has worked for the same defense contractor for 18 years. In 2001 and 2002, when he had the responsibility to protect classified documents used in a specific project, he inadvertently left open a safe on February 23, 2001, and left classified documents outside the safe overnight on two other occasions, March 15, 2002 and August 27, 2002. He received a written warning letter from his employer. The violations were admitted by Applicant, but they are aberrations in an otherwise praiseworthy career of protecting classified material. The unusual work-related circumstances that contributed to the violations have been changed for the better. Mitigation has been shown. Clearance is granted.

### **STATEMENT OF THE CASE**

On July 24, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On July 31, 2003<sup>(1)</sup>, Applicant responded to the allegations set forth in the SOR, and elected to have a hearing before a DOHA Administrative Judge. The case was assigned to me on September 10, 2003. A Notice of Hearing was issued on September 25, 2003, and the hearing was conducted on October 15, 2003. The transcript was received at DOHA on October 27, 2003.

### **FINDINGS OF FACT**

Applicant is a 47-year-old plant engineer. The SOR contains four allegations under Guideline K (Security Violations). In his response, Applicant *denied* all four allegations. <sup>(2)</sup>

After considering the totality of the evidence derived from Applicant's testimony and all exhibits, I make the following additional FINDINGS OF FACT as to each SOR allegation:

#### Guideline F (Security Violations)

1.a. - On or about August 2001, Applicant violated the National Industrial Security Operating Manual (NISPOM), Chapter 5 Section 304 when he left a Confidential document on top of a Confidential security container overnight at his place of employment.

1.b. - On or about March 15, 2002, Applicant violated the NISPOM, Chapter 5 Section 304 when he left a Confidential security container unlocked overnight at his place of employment.

1.c. - On or about August 27, 2002, Applicant violated the NISPOM Chapter 5 Section 304 when he left a Confidential security container unlocked overnight at his place of employment.

1.d. - After the third incident, above, Applicant received a final written warning, which was placed in his employment file, and which advised him that he would be terminated if he committed another security violation.

Applicant's testimony, other witnesses and documentation establish Applicant as a man of dedication, integrity and attention to detail. I find that the three violations alleged above were inadvertent, and not intentional or negligent.

### **POLICIES**

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

#### GUIDELINE K (Security Violations)

*The Concern:* Noncompliance with security regulations raises doubt about an individual's trustworthiness, willingness, and ability to safeguard classified information.

Condition that could raise a security concern and may be disqualifying:

2. Violations that are deliberate or multiple or due to negligence.

Condition that could mitigate security concerns:

1. Violations were inadvertent.

Eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the Directive's "whole person" concept, I am not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private or work life, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by an applicant's admissions or by other evidence) and establishes conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

### CONCLUSIONS

Applicant is a 47-year-old test engineer for a defense contractor. He has worked for his present employer since 1980. (GX 1). The Government's case is based on an official document received by the Defense Security Service (DSS) from Applicant's employer. The report, GX 2, was issued on August 30, 2002, because of a "third incident wherein [Applicant] received a security violation [for leaving a] CONFIDENTIAL container unlocked and opened overnight on 27 August 2002. He left a CONFIDENTIAL document out of that container overnight on 8 August 01 [and he] left the same container unlocked overnight on 15 ar 02." (GX 2). On August 28, 2002, Applicant's employer issued a SECURITY VIOLATION REPORT that provides the details of August 27/28, 2002 violation. (GX 3). This document cites the "similar" August 2001 and March 14, 2002 violations and states that Applicant will be terminated if another violation occurs.

The nature of the violations clearly falls within the coverage of NISPOM Chapter 5 Section 5-304, which is found in GX 4. There is no suggestion in the record that the violations were intentional. I therefore conclude that only Disqualifying Condition (DC) 2 is applicable and only part of DC 2; i.e., if the violations were multiple or due to negligence. The three separate alleged violations were clearly multiple, so the remaining issue is whether they were the result of *negligence*. The only Mitigating Condition (MC) that appears possible is MC 1, that the violations were *inadvertent*. This last word is defined in Webster's New Collegiate Dictionary as (1) not turning one's mind to a matter, and (2) unintentional. Applying this latter definition, it appears that act of conduct, if unintentional, is not or may not be the result of negligence.

Applicant's evidence focuses on this precise point. He testified that he has worked for his present employer for 18 years. (Tr at 124). During the first 15 years of his employment, Applicant did not have any security problems or violations. (Tr at 124). Since the August 2002 violation cited in SOR 1.c., he has not had any additional problems or violations. All three of the cited violations occurred while he was working on a single Navy project. (*Id.*).

The first violation occurred near the beginning of the project, which involved "a large quantity of classified information . . . on a daily basis." (Tr at 125). The work involved moving these documents from a secured container to the work area at the beginning of the shift and back to the secured container at the end of the shift. (*Id.*). Applicant was taking a document back to the secured container, but on the way put it down on a colleague's desk for a moment, and "never picked it up to complete the process." He locked the secured container without realizing the document was not inside it. (Tr at 129).

The second violation again occurred at the end of the work day. Because of the first incident, he was being careful to collect all classified material, by making a "sweep" of the work area to ensure that no classified material was still out. He used a checklist he had devised to do so. His mistake on that day was that he "never finished the job of putting the lock on the safe." (Tr at 130).

He discovered his mistake the next morning after a colleague noticed the absence of a lock when he first arrived. Applicant does not know how he missed noticing the absence of a lock when he left the night before.

The same mistake occurred in the same day five months later. After the third incident, earlier discussions as to how to better protect the documents resulted in the construction of a secure room. (Tr at 134). Other than the presence of a lot of documents for which he was personally responsible, working long hours, and being overtired, Applicant does not know how the violations occurred (Tr at 137, 140, 141). There have been no similar violations since that time. His colleagues now work closely with Applicant to ensure that all classified documents are collected and that the secured container is locked each day. A second person now does the "sweep" for classified documents. (Tr at 137).

Applicant discussed what might happen in the future. The new process, which includes all classified documents being used within a secure room, effectively prevents the problems inherent in moving them around. In addition Applicant now has less personal responsibility and more help in keeping track of classified material. (Tr at 143).

A colleague of Applicant states that he is "very conscientious" about safeguarding classified information, based on his own observations and the conditions under which he works. (AX A). The writer describes the violations as occurring "during lengthy shifts with large amounts of classified information. [Applicant] was the only one responsible for handling all of the classified information. . . . The situation has been changed for the better, as three engineers now work in a secured room." (*Id.*, at paragraph 3 and AX B, a diagram of the secured room used at present; also Tr at 32, 33). Applicant has documented that during the period of the August 2001 incident, he was working well over 50 hours a week; at the time of the March 2002 incident more than 42 hours per week, and during the time of the August 2002 violation about 59.6 and 67.7 hours per week. (AX C).

Another sworn statement was provided by the Navy's project manager for the contract under which Applicant was working in March 2003, the date of the second incident. (AX D). On that date, the project manager and other government representatives left late in the evening, with Applicant remaining to secure the classified material at the facility. In the morning, when they returned, Applicant informed them of the violation. The project manager states that while there was a violation, there was no real risk of unauthorized disclosure because of other sources of protection.

She adds that Applicant had worked approximately 16-18 hours that day, by the time the violation occurred. (*Id.*, at para 4). She has worked with Applicant for three years on the contract and never observed him to improperly handle classified material. (*Id.*, at para 5).

The government's only witness was the facilities security officer (FSO) for Applicant's employer. She has been so employed for 14 years and has known Applicant for the entire 14 years. She has provided Applicant and other employees with yearly retraining and updating on security procedures. The training includes confidential storage and she described the requirements. (Tr at 22-25). She is familiar with all three of Applicant's alleged violations (Tr at 25). The first one, in which he left a classified document on top of the security container, was reported by another employee, before Applicant arrived at work. He was given an "oral warning." (Tr at 26). His response was that he was sorry and would not let it happen again. (Tr at 27).

The second incident occurred when Applicant left unlocked a security container that was in a locked room. Applicant himself reported the violation. He was advised that a third violation would result in a final written warning. He

expressed a determination to do everything right. (Tr at 28). The third incident repeated the second, an unlocked security container in a locked room. It came at the end of a 13-hour shift and Applicant was "totally surprised that the document was out." (Tr at 29).

As the FSO believed she was required to do by the Company Manual, she issued a "final written warning" of termination if the violation recurred. She discovered that the first incident was more than one year old, and so dropped off the reporting procedures for a *Final* Written Warning. (Tr at 30). She issued a Written Warning that was not "final" and sent that to DSS. (Tr at 30). The FSO reported to DSS that she had determined that no compromise had occurred and DSS accepted that report. (Tr at 31, 32). Applicant has submitted the entire "Standard Practices Procedures Report" issued by his employer. (AX E).

The company has received awards for its outstanding security practices and maintains a "very stringent security awareness program" (Tr at 40, 41). In a 2000 DoD audit, Applicant was cited as "having superior security knowledge of his restricted area and his responsibilities with security." (Tr at 47). In the first 11 or 12 years that she worked with Applicant, he had no security violations (Tr at 64, 64). Of all the employees at the company she trusts Applicant the most. (Tr at 67). All three of Applicant's violations occurred after he was assigned to a specific new program. Two other employees working on that program also had security violations. Her opinion is that the novel nature of the program, in which the hardware was classified along with the software, was unfamiliar and caused problems, which were eventually resolved by constructing a secured vault. (Tr at 65). She explained that since the construction of the vault, there have been no security violations, including none by Applicant, (Tr at 67).

Applicant's first witness has worked at the same company for more than 10 years and has known Applicant during the entire period. He was the one that saw the unprotected document in the first incident. He does not believe that Applicant acted intentionally, based on his working with Applicant and knowing how "conscientious Applicant has been about the confidential stuff." (Tr at 78).

Applicant's second witness has also worked with him for more than 10 years and knew him even before that time. He is aware of what happened relating to the three alleged violations and nevertheless views Applicant as "doing a good job protecting classified material" and doing his best to comply with the rules. (Tr at 84, 85). Applicant has continued to handle classified material since the August 2002 incident and has had no problems as far as the witness knows. (Tr at 87). Applicant is an "incredibly dedicated and reliable employee" who "works harder than anyone [else] and has incredible work ethics." (Tr at 92). The witness views the three incidents to be "inadvertent." (Tr at 99) and "the result of coincidences based on Applicant's heavy work load" (Tr at 98), "overwork," and "fatigue" (Tr at 99, 100). The company plans to add new employees so that such overwork does not recur (Tr at 101).

Applicant's third witness also works with him, is aware of what happened, and believes him to be very careful about handling classified material. (Tr at 111). Applicant's fourth witness is his second level supervisor, and is familiar with the surroundings and circumstances of the three violations. (Tr at 116, 117). He considers Applicant to be very serious about his security clearance and the proper handling of confidential material. (Tr at 119). He believes there may have been one security violation since the secure room/vault was constructed, but that was not by Applicant. (Tr at 121).

Of all the Directive's concerns, the Security Violations guidelines go most directly to the heart the NISPOM. There is no question that violations occurred, as alleged in the SOR. These facts are central to the issues before us. At the same time, the purpose of the adjudication program is not to punish an Applicant but to determine the risk of future conduct, here as to Applicant's handling of classified information and material. Despite the absence of any damage or disclosure being shown, the violations are serious. In the absence of a showing of unauthorized disclosure (DC 1) or deliberation (DC 2, first part), the issue is whether re violations were *multiple* or *due to negligence*. (DC, second and third parts). Negligence, as defined in Webster's New Collegiate Dictionary, means "failure to exercise the care that a prudent person would use," while inadvertence, as used in MC 1, is defined as "not deliberate." As discussed below, I conclude that the Applicant's violations were inadvertent and not deliberate.

The three incidents are multiple in the sense of being more than one. However, the three incidents must be evaluated in the context of an 18-year history of dealing with classified material. I conclude that the violations were situational, in the sense that they were the result of a combination of unfortunate circumstances. Those circumstances have now been

understood and acted upon by Applicant and his employer, including the creation of a secure room, reduced responsibility for Applicant, and the involvement of other people in the screening process. The effectiveness of the changes is apparent from the absence of any subsequent security problems involving Applicant.

I give considerable weight to the testimony of the employer's facility security officer and to Applicant's work colleagues, all of whom have known Applicant for long periods and speak highly of his dedication and ability. Based on the totality of the record, I conclude that the violations, which occurred in a period of slightly more than one year, which ended about 14 months prior to the hearing, were more of an aberration than a fundamental flaw in Applicant's character or ability to protect classified information and material. I conclude that Applicant possesses the judgment, reliability, and trustworthiness required of anyone seeking access to the nation's secrets.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline K (Security Violations) For the Applicant

Subparagraph 1.a. . For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. 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.

**BARRY M. SAX**

**ADMINISTRATIVE JUDGE**

1. The response is actually dated July 31, 2002, but in context this appears to be a typographical error since the SOR was issued in July 2003.
2. In his hearing testimony, Applicant clarified that he was denying that he was not trustworthy. He did admit the factual allegations of 1.a., 1.b., and 1.c. (Tr at 136).