

KEYWORD: Security Violations

DIGEST: Applicant's three security violations between December 2001 and July 17, 2002 are aggravated by the fact they constitute a pattern of adverse conduct that is not isolated. Though the first security violation is extenuated by the lack of an adequate security briefing, the other two incidents are not assuaged by any of the mitigating conditions. Applicant was found not to be culpable for the last violation, but she admitted she was the last person in the secured area. The lack of security violations since July 2002 weighs in Applicant's favor but does not satisfy her ultimate burden of persuasion under the security violations guideline. Clearance is denied.

CASENO: 03-08519.h1

DATE: 03/28/2006

DATE: March 28, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-08519

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon Esq., Department Counsel

FOR APPLICANT

Robert R. Sparks, Jr. Esq.

SYNOPSIS

Applicant's three security violations between December 2001 and July 17, 2002 are aggravated by the fact they constitute a pattern of adverse conduct that is not isolated. Though the first security violation is extenuated by the lack of an adequate security briefing, the other two incidents are not assuaged by any of the mitigating conditions. Applicant was found not to be culpable for the last violation, but she admitted she was the last person in the secured area. The lack of security violations since July 2002 weighs in Applicant's favor but does not satisfy her ultimate burden of persuasion under the security violations guideline. Clearance is denied.

STATEMENT OF THE CASE

On December 14, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6, dated January 2, 1992, as reissued through Change 4 thereto, dated April 20, 1999, issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. On April 14, 2005, Applicant responded to the SOR and requested a hearing before an Administrative Judge.

The case was assigned to me on October 6, 2005. On October 27, 2005, this case was set for hearing on December 7, 2005. The Government submitted seven exhibits (GE 1-7), and Applicant submitted 3 exhibits (AE A-C) Testimony was taken from Applicant. The transcript was received on December 16, 2005.

FINDINGS OF FACT

The SOR alleges four violations of "failing to properly secure a DoD-approved Closed Area," a violation of paragraph 5-306 of the National Industrial Security Operating Manual (NISPOM). Applicant admitted the first three, but denied the fourth violation. Applicant is 29 years old and has been employed by a defense contractor as a database administrator since April 2005. Applicant seeks a secret security clearance (Tr. 19).

Applicant was 25 years old and employed as a physical security officer with another contractor when the four security violations (alleged in the SOR) occurred between December 2001 and July 25, 2002.

On September 4, 2001, Applicant began her employment as a physical security officer with a defense contractor. The security investigation reports (GE 4-GE 7) reflect she received four different types of security briefings in September 2001, including "Closed Area Briefing," which she received on September 30, 2001. She testified that when she took the physical security position in September 2001, she received no training in physical security, but her security-computer training included training in NISPOM, and she had access to the NISPOM before each of the listed security violations (Tr. 73-75).

The first three admitted violations occurred on December 4, 2001 (1.a.), June 25, 2002 (1.b.), and July 17, 2002 (1.c.). The fourth violation, that Applicant denies and where her employer initially found her to have committed the violation, then concluded she was not the culpable party, occurred on July 25, 2002 (1.d.). Each violation consisted of exiting the Closed Area and leaving the primary lock unengaged, so the Closed Area was secured only by the secondary lock mechanism, the cipher lock. The follow-up investigation to each of the four security violations concluded that the probability of compromise or loss of classified information was considered remote.

On December 4, 2001 (1.a.), Applicant was on duty in the Closed Area of the facility. At 12:30 P.M., she left the Closed Area secured by only the cipher lock. When she arrived at the cafeteria, (1) she realized she had not completely secured the Closed Area so she returned and reached the area at about 12:45 P.M. She conducted an inspection and concluded all classified information was properly secured. The next day during a routine inspection with her supervisor, she asked whether it was a security violation to leave the Closed Area unattended and secured only with a cipher lock for any period of time; she was told by a supervisor that it was a security violation. On December 12 and 17, 2001, she provided essentially the same information of how the violation occurred and action she took to notify her supervisors. Applicant was verbally reprimanded and received security reeducation. At the hearing, Applicant explained the security violation on December 4, 2001 resulted from improper security briefing (Tr. 51).

On June 25, 2002 (1.b.), Applicant departed the Closed Area at approximately 12:00 P.M. and forgot to secure the primary lock. At about 1:15 P.M., a coworker entered the Closed Area using only the cipher lock. The coworker's search of the Closed Area revealed that all classified information was secure. Applicant's explanation for the infraction was that she was preoccupied with other security matters. Applicant received a written warning and security reeducation.

On July 17, 2002 (1.c.) at 9:47 A.M., Applicant signed out of the Closed Area and properly secured only the cipher lock, but again left the primary lock unsecured. At approximately 10:15 A.M., two coworkers entered the Closed Area by using only the cipher lock. At 12:29 P.M., Applicant admitted to facility security by electronic mail that she was responsible for not properly securing the Closed Area. She also stated in the security report she had been distracted by medical problems. On July 22, 2002, Applicant's supervisor recommended she not be interviewed because "she was pre-occupied with ongoing medical problems." (GE 6) Applicant received a five-day suspension and was provided security reeducation by her employer.

Concerning her medical problems, six months after the July 17, 2002 security violation, Applicant told the investigative agent from the Defense Security Service (DSS):

I would like to clarify that on the 16th day of July [2002] I was advised that lab results from a test had come in [indicating] that I had some pre-cancerous cells. This matter was left unresolved until further testing was completed. Needless to say until the matter was resolved I felt somewhat pre-occupied with the matter at hand. The matter has been resolved with good results, And for now the matter is behind me (GE 2).

Applicant testified she had taken two medical tests in April and May 2002 that suggested human cell irregularity (Tr. 47: AE B), and was told (by telephone) on July 16, 2002, she would have to take a third procedure to determine whether the cells were pre-cancerous (Tr. 52). Understanding the problem would be eliminated after the conclusion of the third test, Applicant had the test performed on July 24, 2002 (Tr. 81).

On July 25, 2002 (1.d.) at approximately 11:10 A.M., Applicant escorted a repairman into the Closed Area. At about 11:30 A.M., Applicant signed out of and departed the Closed Area. At approximately 12:30 P.M., Applicant returned to the Closed Area with another member of security. Applicant entered the Closed Area using only the cipher lock. The "sign-in/sign out form disclosed that Applicant had signed out at 11:30 A.M. Both Applicant and the coworker conducted a check of the Closed Area and found everything secure. Applicant then reported the violation to her immediate supervisor and an investigation was launched. When interviewed on July 29, 2002, Applicant stated she was certain she properly secured the Closed Area. She reiterated that position in her sworn statement in January 2003, her answer to the SOR, and at the hearing.

After the fourth security violation, Applicant remained with her employer until October 2003 when she moved to the

middle part of the United States (U.S.) to be with her husband (Tr. 31-33). She followed him to Europe and began working for another defense contractor in May 2004 (AE A). Although the work required use of her security clearance, she ended her employment in August 2004. She did not feel challenged because her skills were not being utilized. After volunteering at a family support center for a branch of the military, Applicant began working for her current employer (defense contractor) in April 2005.

In an undated statement, Applicant's current security monitor for the United States Air Force (USAF) since April 2005 lauds Applicant's professionalism. He believes she is respected by her peers.

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Security Violations (Guideline K)

Failure to comply with security regulations creates doubt about an individual's judgment, reliability and trustworthiness.

CONCLUSIONS

Around-the-clock compliance with security regulations is essential to a successful industrial security program. Security violations (SV) of any type or number jeopardize the effectiveness of the program while spurring legitimate doubts about an individual's willingness and/or ability to safeguard classified information. Since there was no actual disclosure of classified information SV disqualifying condition (DC) E2.A11.1.2.1. (*unauthorized disclosure of classified information*) does not apply. However, Applicant's violation of paragraph 5-306 of NISPOM on at least three of four occasions in a seven month period between December 2001 through July 17, 2002 activates the "multiple" and "negligence" portions of SV DC E2.A11.1.2.2. (*violations that are deliberate or multiple or due to negligence*). Based on the findings of the three investigative reports, Applicant's January 2003 statement and testimony describing the violations, it is clear the violations were multiple and negligent rather than intentional. In each of the three violations, Applicant left the Closed Area improperly secured with the secondary lock mechanism instead of ensuring both primary and secondary locks were fully engaged. The Closed Area was left unattended for between 15 to 75 minutes.

Applicant's question to her supervisor the next day (included in the security report) following the December 4, 2001 violation about whether leaving the Closed Area for any length of time establishes a violation shows that Applicant was unaware of the redundant procedures required in safeguarding Closed Areas. In addition, her question indicates she did not intend to commit the violation. This lack of knowledge invokes the application of SV mitigating condition (MC) E2.A11.1.3.3. (*was due to improper or inadequate training*) to find in Applicant's favor under 1.a. The December 4, 2001 violation also triggers SV MC E2.A11.1.3.1. (*was inadvertent*). However, neither of the two MC conditions apply to the subsequent violations because Applicant received security reeducation after every violation, so she knew or should have known what her security responsibilities were when properly securing the Closed Area.

Seven months later on June 25, 2002, Applicant violated the same regulation by not properly engaging both locks to the Closed Area. Applicant's claim of preoccupation with other security matters does not forgive this violation. The violation was not inadvertent (SV MC E2.A11.1.3.1. and was not isolated within the meaning of E2.A11.1.3.2. (*was isolated or infrequent*). As noted in the preceding paragraph, the fact that Applicant received security reeducation after the December 2001 incident makes E2.A11.1.3.3. inapplicable to mitigate the circumstances of this violation. Furthermore, it is unlikely that more training could have prevented this violation.

The third violation that Applicant committed on July 17, 2002 receives limited extenuation. Applicant's lingering concern about the chances she could have cancer understandably drew her attention away from her security responsibilities. Significantly, Applicant's stress was so noticeable, the follow-up interview with her had to be delayed for several days. However, the serious anxiety Applicant was experiencing still does not eliminate the underlying

negligence she demonstrated for the third time since December 2001.

While Applicant denies she committed the final violation on July 25, 2002, the same circumstances present in the July 17 security violation were present in this one. Before this security incident however, Applicant was in a relieved state of mind, having undergone a surgical procedure the day before that eliminated her pre-cancerous condition. The second difference was that Applicant was carrying out her escorting duties on July 25, 2002. Even though facility security personnel reversed their initial decision (without explanation) by finding Applicant was not culpable for the security violation, her admission she was the last person to have initialed the sign out form, coupled with her probable awareness of the escalating discipline she was about to face, generates a strong suggestion Applicant committed the July 25, 2002 violation. However, I defer to the final decision of the facility personnel and find for Applicant under subparagraph 1.d., but against her under 1.b. and 1.c.

The absence of security violations before December 2001 and after July 2002 benefits Applicant in assessing her suitability for access (Tr. 57-58), and entitles her to limited mitigation under SV MC E2.A11.1.3.4. (*demonstrate a positive attitude towards the discharge of security responsibilities*). However, Applicant has not been employed in positions requiring a security clearance for the entire period since July 22, 2002. Between October 2003 and May 2004, she was unemployed. From August 2004 to April 2005, Applicant was performing volunteer work where her clearance was not necessary. Moreover, Applicant has presented no character evidence regarding her security clearance duties since July 2002. The character evidence from her current job provides complimentary descriptions of Applicant's professionalism but gives little insight into what Applicant's security responsibilities are and how she carries them out. Considering the evidence as a whole, I conclude the SV guideline against Applicant. In reaching my decision, I have examined the circumstances of this case under the general factors of the whole person concept found at E2.2.1. of Enclosure 2 of the Directive. The pattern of security violations in a seven month period as set forth in E2.2.1.3 (*the frequency and recency of the conduct*) and the absence of substantial evidence under E2.1.6. (*the presence or absence of rehabilitation and other behavioral changes*) preclude me from confidently predicting Applicant's past conduct will not recur in the future. See, E2.2.1.9 (*the likelihood of continuation or recurrence*).

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

Paragraph 1 (Security Violations, Guideline K): FOR THE APPLICANT.

Subparagraph 1.a. For the Applicant.

Subparagraph 1.b. Against the Applicant.

Subparagraph 1.c. Against the Applicant.

Subparagraph 1.d. For the 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.

Paul J. Mason

Administrative Judge

1. Applicant testified her destination was the bathroom (Tr. 42, 82-83).