

KEYWORD: Personal Conduct

DIGEST: Applicant is 48 years old and has worked as an engineer for a series of federal contractors since 1981. He has held a secret security clearance since 1982. Applicant released proprietary information of his company to an unauthorized foreign national and did not comply with his supervisor's directions regarding other proprietary information. Applicant provided testimony that was not believable and in conflict with his previous sworn statement. He failed to meet his heavy burden of persuasion to mitigate the security concerns under Guideline E, personal conduct. Clearance is denied.

CASENO: 03-17839

DATE: 04/06/2006

DATE: April 6, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17839

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Melvin Howry, Esq., Department Counsel

FOR APPLICANT

Robert S. Gardner, Esq.

Kevin R. Hancock, Esq.

SYNOPSIS

Applicant is 48 years old and has worked as an engineer for a series of federal contractors since 1981. He has held a secret security clearance since 1982. Applicant released proprietary information of his company to an unauthorized foreign national and did not comply with his supervisor's directions regarding other proprietary information. Applicant provided testimony that was not believable and in conflict with his previous sworn statement. He failed to meet his heavy burden of persuasion to mitigate the security concerns under Guideline E, personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On May 26, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) indicating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline E (personal conduct).

In a sworn statement, dated June 14, 2005, Applicant responded to the SOR allegations and requested a hearing. In his SOR response, Applicant denied both allegations under Guideline E, personal conduct. The case was assigned to me on November 23, 2005. A notice of hearing was issued on January 19, 2006, scheduling the hearing for February 7, 2006. The hearing was conducted as scheduled. DOHA received the hearing transcript (Tr.) on February 27, 2006.

EVIDENTIARY RULINGS

The government submitted seven exhibits that were marked as Government Exhibits (GE) 1-7. Applicant objected to

GE 2 because he believed it duplicated other evidence that was offered. I overruled the objection and admitted GE 2. Applicant objected to GE 6 and at the hearing it was admitted over his objection. However, I have reconsidered my ruling and find GE 6 is unsigned, redacted and lacks authenticity. Therefore, I overrule my previous ruling and have not admitted it into evidence, nor have I considered it for any purpose. All other government exhibits were admitted. Applicant testified on his own behalf, had one witness testify, and submitted five exhibits that were marked as Applicant's Exhibits A-E. Applicant requested that the Adjudicative Guidelines under AE A, ⁽²⁾ be used to determine security clearance eligibility. Department Counsel objected stating that until implementing provisions have been approved and specific direction received from the Director DOHA on the specific implementation date, the current guidelines should be used. I ruled until directed to use the new guidelines I am bound by the direction of the Director, DOHA. The objection was sustained. The exhibits were admitted without additional objections.

FINDINGS OF FACT

After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 48-year-old engineer, who is married and has two children, and has worked for a series of federal contractors since approximately 1981. He began work for Contractor A in about 1995, and left voluntarily in 1999. Prior to working for Contractor A he had been working in a job he enjoyed. When he went to work for Contractor A he did not have a great deal of job satisfaction. ⁽³⁾ While working for Company A, Applicant did not get along with his immediate supervisor or the next level supervisor and had friction with them for 3-4 years. He believed they were micro managers. ⁽⁴⁾ In 1999, he and his daughter became ill and he decided to take 4-6 months off to care for his child and recuperate. He left Company A because he was sick, his child was sick, he did not enjoy the work, he wanted time off, and he did not need the money. ⁽⁵⁾

His last day of work at Company A was February 12, 1999. On his last day Applicant downloaded information that was on his government-issued computer onto diskettes. The information was not classified. Applicant believed it was standard operating procedure to allow departing employees to download and backup information that may help the government later. ⁽⁶⁾ He was told it was time to leave the building by the deputy of the research project he had been working on and whose team he had worked for. The deputy was an employee of Company A. Applicant wanted to finish downloading information and the deputy told him "No, you can't do that. This is [Company A] information and we wouldn't give it to the government." ⁽⁷⁾ Applicant was asked at the hearing, "Were you instructed to stop downloading the information?" ⁽⁸⁾ His response was "Well, I had essentially finished at that time. It was like at the very dead-end of the day. And I knew what time of day it was, and everybody was leaving. I kind of finished what I was doing, which was trying to pack up my stuff. And when I got a chance, I would, like you know, back up anything, you know, after I looked on the files to say well, you know this might be useful for, you know, me or someone else later." ⁽⁹⁾ Applicant then talked to some military people about possibly coming back and working on a project in a different capacity, but not competing with Company A. ⁽¹⁰⁾ He wanted a place to "house" his stuff. He had not thought through what to do with the disks, whether to bring them home or transfer them to a government building. ⁽¹¹⁾

The data that was on the diskettes was not classified. Applicant believed himself to be a subject matter expert in a certain area and thought there were "golden nuggets" attributed to himself that he wanted to save. He stated "So quite frankly, my kids have grown up while I was at the [project]. And probably in the back of my mind I was thinking, you know, I probably got-you know, I want to go back up anything that says [name] and [name]."⁽¹²⁾ He believed he was allowed to back up personal information on the computer to a certain extent.

No evidence was provided regarding what rules and regulations were in place for personnel downloading unclassified, non-proprietary information for backup or for personal retrieval. No evidence was provided that the practice was prohibited.

Applicant made a sworn statement on May 31, 2001. He was asked "Did I forward [Company A] proprietary/intellectual information to other companies or government officials, specifically the United Kingdom, yes I did."⁽¹³⁾ He went on to say "the information was not significant proprietary/intellectual information that would hurt the company, [Company A]."⁽¹⁴⁾ He also stated,

I shared information with a foreign national, [Person X], United Kingdom, he is a scientist who is assigned to the [project] and worked many projects with us. I sent him emails under the context of government understanding and concurrence. Many people knew I was sharing this information with him and they never said anything to me about it. The information I sent him was ideas, concepts, studies, general planning information, information that would support current and future tasks. My supervisor believed this information to be [Company A] proprietary/intellectual information. I believe my supervisor overstated what was [Company A] proprietary/intellectual information.⁽¹⁵⁾

Applicant did not provide any credible evidence to show that he had verified that the UK foreign national was authorized to view the material he was providing him, nor did he know who the UK foreign national actually worked for, or what he was cleared for. The UK foreign national apparently worked on the staff of the same project that Applicant did. At his hearing, Applicant stated with regard to his supervisors believing the information was proprietary, "you know I'm really making a speculation there. I have no idea whether he even believed that that was proprietary information...."⁽¹⁶⁾ This statement contradicts his previous one.

Evidence of Applicant's character was provided and he is believed to be an extremely thorough analyst and a subject matter expert in his field. He is considered an asset to the government. He demonstrates good knowledge of properly controlling information at the appropriate levels and correctly controls classified information on a daily basis. Those who provided statements for him have no concern about his willingness, commitment and ability to safeguard classified and national security information.⁽¹⁷⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (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; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽¹⁸⁾ The government has the burden of proving controverted facts.⁽¹⁹⁾ The burden of proof is something less than a preponderance of evidence.⁽²⁰⁾ 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.⁽²¹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽²²⁾

No one has a right to a security clearance⁽²³⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽²⁴⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting such classified information.⁽²⁵⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽²⁶⁾ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline E-Personal Conduct is a security concern when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline E.

Based on all the evidence Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.1 (*Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*) applies.

At his hearing Applicant provided contradictory, inconsistent and confusing testimony about what he believed was proprietary verses intellectual information. Applicant was not credible in answering specific questions at his hearing. He failed to respond directly to the questions and would provide convoluted and conflicting testimony. His answers were not credible and his testimony attempted to change his previous sworn statement.

No evidence was proffered by the government to show that downloading information on Applicant's government computer to diskettes was a violation of rules or procedures. However, the evidence does show that Applicant was told by a supervisor to stop downloading what the supervisor believed to be proprietary information that should not be given to the government and Applicant continued to do so. His conduct in disregarding his supervisor's direction is troublesome and shows an unwillingness to comply with his supervisor's directions and a lack of judgment.

With regard to the allegation in SOR ¶ 1.b, the government raises the security concern that Applicant forwarded proprietary information to an unauthorized recipient. He admitted doing so in a sworn statement of May 31, 2001, ⁽²⁷⁾ although he later retracted it. He claims with regard to admitting forwarding information to a foreign national, he read the statement in a bifurcated way, meaning two separate questions, one referring to proprietary and the other referring to intellectual. ⁽²⁸⁾ His testimony was not credible and unbelievable. He admitted when providing his sworn statement he provided the information and modified it, initialed changes to it, swore to it and signed it. At his hearing he attempted to distance himself from his active participation in the process. ⁽²⁹⁾ He provided confusing, convoluted and conflicting answers to questions in an attempt to rationalize his earlier sworn admissions. He stated:

What I interpreted that statement to mean was, [Applicant], did you forward information to [Company A] considered to be proprietary? And I said or, slash intellectual. And I said, yes, you could consider what I said was what, you know, what [Supervisor Y] or somebody else, because they, you know, they sent, you know, because I was thinking of the emails that they sent over to [the project] that had, you know, out of the middle of ten pages, this, like one yellow line that said this could indicate propriety information. (30)

When asked specifically about sending propriety information, Applicant would change the question to ask "you mean competition specific" and then change it again to say "sensitive." (31) Despite repeated attempts to get clear answers to specific questions, Applicant continued to provide confusing and convoluted statements. His answers were not credible and his testimony attempted to change his previous sworn statement.

Applicant is a well educated person who has worked for federal contractors for more than 24 years. His supervisor believed certain information Applicant was providing to the foreign national was proprietary. Applicant referred in his written statement that the proprietary/intellectual information was "not significant" and would not hurt the company. He apparently overruled his supervisor's determination. (32) Applicant's testimony and written statement indicated to me that he was aware of their difference in opinions, believed his supervisor was too cautious in his interpretation of what was proprietary, so Applicant followed his own interpretation. In answering numerous questions, Applicant attempted to explain away and rationalize his actions, and also attempted to confuse the issues. Based on the questions being asked by both his attorney, government counsel and myself he would redirect the question and change the answer. I do not believe Applicant was being truthful, but was rather attempting to rationalize his earlier admissions through confusing testimony. When Applicant was told by his supervisor that the supervisor believed information he was downloading should not be shared with the government, Applicant finished downloading the information, despite the direction of his supervisor. In the other instance he was aware he was not to release proprietary information, disagreed with his supervisor and followed his own determinations. He showed a clear lack of candor in his testimony and repeatedly contradicted himself in his sworn statement and testimony. It is clear Applicant is a subject matter expert in his field, but it does not relieve him of complying with the appropriate determinations and requirements directed by his supervisors. His conduct is the type that makes him especially vulnerable because he may choose to chart his own course in the future with regard to classified information and not comply with determinations that have been appropriately made by others. PC DC E2.A5.1.2.1 applies.

I have considered all the Personal Conduct Mitigating Conditions (PC MC) and especially considered PC MC E2.A5.1.3.1 (*The information was unsubstantiated or not pertinent to a determination of judgment, untrustworthiness, or reliability*), and PC MC E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*) and conclude none apply. Applicant clearly admitted to releasing proprietary information to an unauthorized person and continued to download information after being directed to stop. This information is especially pertinent to a determination regarding his questionable judgment, untrustworthiness and reliability. His later attempts to misdirect and rationalize his actions raises questions as to his reliability and indicate he has not taken positive steps to reduce his vulnerability. Rather his deliberate attempts to confuse, his contradictory statements, and his actions when disagreeing with his supervisor raise serious questions about his judgment, reliability and trustworthiness. I have considered the whole person and specifically considered Applicant's age, his motivation, the voluntariness of his action, the length of time he has held a security clearance, the information provided regarding his character, and the probability of recurrence and find Applicant has failed to meet his heavy burden of persuasion and failed to mitigate the security concerns under Guideline E, personal conduct.

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 life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I considered the whole person and I find Applicant failed to mitigate the security concerns regarding Guideline E, personal conduct. Therefore, I am persuaded by the totality of the evidence in this case that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guideline E is decided against Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

DECISION

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

Carol G. Ricciardello

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. White House Memorandum from Stephen J. Hadley, Assistant to the President for National Security Affairs, Re: Adjudicative Guidelines, dated December 29, 2005.
3. Tr. 39.
4. Tr. 46.
5. Tr. 45.
6. Tr. 47.
7. Tr. 53.
8. Tr. 54.
9. Tr. 54-55.
10. Tr. 55.
11. Tr. 55.
12. Tr. 56.
13. GE 5 at 1.
14. *Id.*
15. *Id.* at 2.
16. Tr. 78.
17. AE B-E.
18. ISCR Case No. 96-0277 at 2 (App. Bd. Jul 11, 1997).
19. ISCR Case No. 97-0016 at 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
20. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
21. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
22. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
23. *Egan*, 484 U.S. at 531.

24. *Id.*
25. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
26. Executive Order 10865 § 7.
27. GE 5.
28. Tr. 60-65.
29. Tr. 75-76.
30. Tr. 65.
31. Tr. 66-67.
32. GE 5 at 1.