

KEYWORD: Security Violations; Pesonal Conduct

DIGEST: Applicant received a verbal reprimand for a security violation he committed in 1997 by mailing classified material through a commercial mail center. He committed two additional security violations in 2003, resulting in a security violation being issued to him and his access to special programs being suspended. Applicant has failed to mitigate the security concern caused by his mishandling of classified material. Clearance is denied.

CASENO: 04-05798.h1

DATE: 02/08/2006

DATE: February 8, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-05708

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant received a verbal reprimand for a security violation he committed in 1997 by mailing classified material through a commercial mail center. He committed two additional security violations in 2003, resulting in a security violation being issued to him and his access to special programs being suspended. Applicant has failed to mitigate the security concern caused by his mishandling of classified material. Clearance is denied.

**STATEMENT OF THE CASE**

On May 17, 2005, 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 security concerns under Guideline K, pertaining to security violations, and Guideline E, pertaining to personal conduct. Applicant submitted an answer to the SOR that was received by DOHA on July 14, 2005, and requested a hearing. Applicant admitted all Guideline K allegations in his answer, but made no reference to the Guideline E allegation. At the hearing, Applicant entered a denial to the Guideline E allegation.

The case was assigned to me on August 15, 2005. A notice of hearing was issued on October 3, 2005, scheduling the hearing for October 27, 2005. The hearing was conducted as scheduled. The government submitted eight documentary exhibits that were marked as Government Exhibits (GE) 1-8, and admitted into the record without objection. Applicant testified and submitted five documentary exhibits that were marked as Applicant Exhibits (AE) 1-5, and admitted into the record without objection. The transcript was received on November 14, 2005.

## FINDINGS OF FACT

Applicant's admissions to the Guideline K SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, exhibits and testimony, I make the following findings of fact:

Applicant is 61 years old, and has been employed as an electrical engineer by a defense contractor since June 1996. He was previously employed by a different defense contractor as an engineer/scientist from December 1990 until June 1996. From June 1979 until January 1988, he was employed as a measurement consultant, systems engineer by a United States business that involved him in a working relationship with a foreign government's space agency. In a security clearance application he submitted (GE 1), Applicant listed his military service as inactive in the Air Force from June 1962 until September 1965 with the rank of Airman Basic (paygrade E-1).

Applicant possessed a secret security clearance from 1972 until 1989; a top secret clearance from 1989 until 1996; a secret clearance from 1997 until 1998; and, a top secret clearance from 1998 until at least 2003. He was provided access to special programs by his present employer until that access was suspended following his last security violation. Applicant submitted numerous letters of recommendation from co-workers who attest to him being honest, trustworthy, responsible, and dependable. He is also considered by them to be a security conscious individual who can be entrusted to properly handle and safeguard classified material.

Applicant committed a security violation in February 1997 by placing Confidential material in the care of a commercial mail service for delivery to his employer's place of business. His explanation for the breach of security was that he intended to mail the package from a post office but could not get there before the post office closed for the day. Unable to return the package to a secure facility, he observed a mail truck and, with the agreement of the post office driver, went to the commercial mail service store, filled out the necessary forms, and then hand delivered the package to the post office driver. Earlier statements he provided about the incident are inconsistent with his present exaggerated claims of the effort he expended to properly ship the classified material.

The February 1997 violation was deemed to be "Minor" by Applicant's employer, and he was issued a verbal reprimand. The incident was reviewed by the Defense Investigative Service (DIS) which concluded there had been no actual compromise of classified information, but that the corrective actions taken by the employer were inadequate. (GE 2)

Applicant's next security violation occurred in May 2003, when he was found to have stored the combinations for numerous Top Secret containers in a two-drawer safe classified as only a Secret container. He compounded the violation by providing the combination to the Secret container to a co-worker who possessed only an interim Secret clearance, and allowing that individual to enter the safe. Applicant testified he had been specifically told by a security official that it was okay for him to store the combinations in the safe in which he stored them. He also testified he kept the person to whom he had given the combination under his direct observation at all times while that person accessed the safe, and that he changed the combination of the safe that same day. His testimony about the circumstances surrounding these violations was not credible.

Applicant was issued a security violation for failing to properly safeguard classified information as a result of the May 2003 incidents. Additionally, his access to special programs was suspended and he was prohibited from having further access to the combinations to controlled area doors and storage containers.

### **POLICIES**

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 K, pertaining to security violations, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are 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.<sup>(2)</sup> The government has the burden of proving controverted facts.<sup>(3)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(4)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(5)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(6)</sup> 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.<sup>(7)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(8)</sup>

No one has a right to a security clearance<sup>(9)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(10)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(11)</sup>

### **CONCLUSIONS**

Under Guideline K, noncompliance with security regulations raises doubt about an individual's trustworthiness, willingness, and ability to safeguard classified information. 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.

Applicant mishandled classified information on three occasions, each time seriously risking the compromise of that information. The last two incidents involved material that was classified as Top Secret. Under Guideline K, Disqualifying Condition (DC) 2: *Violations that are deliberate or multiple or due to negligence* applies. Under Guideline E, DC 5: *A pattern of . . . rule violations, including violation of any written agreement made between the individual and the agency* applies.

Applicant's explanations about the circumstances surrounding each of the security violations are not credible. Further, his attempt to place much of the blame for the violations on his employer's alleged failure to provide adequate training, despite the fact he possessed a Secret clearance for 17 years and a Top Secret clearance for seven years before he was ever hired by his present employer, is both unreasonable and unacceptable.

Having been issued a verbal reprimand in 1997, after he committed the first violation, Applicant was allowed to retain a Top Secret clearance until he committed two additional violations in 2003. The last two violations occurred after Applicant had possessed a security clearance for almost 31 years. It is again unreasonable to suggest, as Applicant has attempted to do, that over the course of those many years he remained unaware that Top Secret information could not be stored in Secret containers or that persons with a Secret clearance could not be provided access to Top Secret information. Further, the nature of Applicant's 2003 two violations clearly demonstrate the intentional disregard of rules designed to protect classified information.

The only Guideline K Mitigating Condition (MC) that applies in this case is MC 2: *(actions that) Were isolated or infrequent*. No Guideline E mitigating condition applies.

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.

Considering all relevant and material facts and circumstances, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and weighing the disqualifying conditions against the lone mitigating condition, I find Applicant has failed to mitigate the security concerns caused by his multiple security violations or otherwise satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance. Guideline K and Guideline E are decided against Applicant.

#### **FORMAL FINDINGS**

SOR ¶ 1-Guideline K: Against Applicant

Subparagraphs a-c: Against Applicant

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. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

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

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

10. *Id* at 531.

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