

KEYWORD: Security Violations; Personal Conduct

DIGEST: Applicant is 65 years old and has held a top secret security clearance for 37 years while working for a federal contractor. Applicant handled classified material on a daily basis during his career. During a four-month period he had two security violations, one inadvertent, and the other involved a difference in professional opinions on the classification of the project. Applicant acknowledged he should have been proactive on the issue when the classification could not be resolved immediately. Neither violation involved a compromise of classified information. Applicant has renewed his commitment to his security responsibilities and has taken affirmative steps in seeking expert advice on security issues. He has successfully mitigated security concerns regarding Guideline K, security violations, and Guideline E, personal conduct. Clearance is granted.

CASENO: 04-08785.h1

DATE: 02/27/2006

DATE: February 27, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-08785

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Melvin Howry, Esquire, Department Counsel

FOR APPLICANT

Kenneth Roberts, Esquire

SYNOPSIS

Applicant is 65 years old and has held a top secret security clearance for 37 years while working for a federal contractor. Applicant handled classified material on a daily basis during his career. During a four-month period he had two security violations, one inadvertent, and the other involved a difference in professional opinions on the classification of the project. Applicant acknowledged he should have been proactive on the issue when the classification could not be resolved immediately. Neither violation involved a compromise of classified information. Applicant has renewed his commitment to his security responsibilities and has taken affirmative steps in seeking expert advice on security issues. He has successfully mitigated security concerns regarding Guideline K, security violations, and Guideline E, personal conduct. Clearance is granted.

STATEMENT OF THE CASE

On August 2, 2005, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) stating it was 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 K (security violations) and Guideline E (personal conduct).

In a sworn statement, dated August 19, 2005, Applicant responded to the SOR allegations and requested a hearing. In his SOR response, Applicant denied all of the allegations under Guidelines K and E. The case was assigned to me on November 25, 2005. A notice of hearing was issued on December 23, 2005, scheduling the hearing for January 18, 2006. The hearing was conducted as scheduled. The government submitted five exhibits that were marked as Government Exhibits (GE) 1-5. The exhibits were admitted into the record without objection. The Government also offered two exhibits that were marked as Administrative Documents I and II and requested they be received for consideration. The documents were received without objection. Applicant testified on his own behalf, had three witnesses testify, and submitted twenty-one exhibits that were marked as Applicant's Exhibits A-U. The exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on January 26, 2006.

FINDINGS OF FACT

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

Applicant is 65 years old, married for almost forty years, has one grown daughter, and has worked for the same federal contractor (despite the name changing due to buy-outs) since 1969. He holds the position of senior principal with his employer. He first held a top secret security clearance while serving in the Army in 1967 and later when he was discharged and began civilian employment. He currently holds and has held a top secret clearance since 1967, and special access clearances when required, throughout his 37-year long career. Applicant is one of the top experts in the country in the field of electromagnetic pulsing. He is eligible to retire, but has delayed it to work on two programs in which he is the chief engineer, that have direct impact on protecting troops serving in Iraq.

Throughout the 37 years Applicant has held a security clearance he has handled classified material on almost a daily basis. Each project required a different degree of handling, dealing and working with classified material, but throughout his tenure he has been intimately involved with classified material. He prepared reports, letters and documents and applied the security classification guidelines to each to determine how to handle and classify the information.

During his 37 years of access to classified information he committed two security violations, one on April 17, 2002 and the other on July 17, 2002. In early 2002, Applicant was involved with a proposed addition to an ongoing program. That ongoing program had previously been secured by a security classification guide. Applicant and two of his colleagues applied the portion of the security classification guide that was appropriate for the ongoing program to the proposed additions. One of the provisions of the security classification guide was associating a program nickname to the actual work that was being done. The purpose of the nickname was for those working on the program to be able to talk about it in an unclassified setting. It was important not to associate the nature of the work with the name of the program, because it would reveal the real name of the program and its contents.⁽²⁾ The program Applicant was working on had a nickname, [Project X] and the nickname was unclassified. It was a technology feasibility study program. The association of the program nickname with the content of the program was not applicable because it was a feasibility program, so the content and the name were not classified as to the feasibility part of the program.⁽³⁾ The proposed additions to the program were classified. Applicant and his colleagues failed to note the difference in the shift in emphasis of the program, from research and development (R&D) to application of the program.⁽⁴⁾ There were differences in the rules on classification between the two types of programs. Under R& D it is permitted to connect the nickname of the program and its contents, but for production it was not permitted to use the nickname. The mistake Applicant made was not realizing the distinction when he submitted the proposal. He could either use the nickname or describe the technology, but was not permitted to put them both in the same document. Had Applicant not used the nickname on the document submitted, it would have been unclassified, or if he had a letter saying he was submitting a proposal for this nicknamed program and not describe the content of it it would have been unclassified.⁽⁵⁾ There was concurrence from witnesses that this is a complicated area of security classification.

Once Applicant was made aware of his mistake he rounded up every copy of the document, both in printed form and magnetic media and ensured the applicable computers were properly cleansed.⁽⁶⁾ The documents had not been distributed or released outside of government or contractor channels and had only gone to very secure clients. There was no disclosure to outsiders.

Applicant's second security violation on July 17, 2002, involved a project where he wrote a program that involved industrial standards governing computers and their interconnectivity. He created a model and prepared a document of computer simulation of the industrial standard. The industrial standard is common knowledge and was not classified. He divided his work between commonly known information and a data test that was classified. He prepared a document that was designed to be unclassified. The document was reviewed internally by 4-5 different levels of engineers, including a colleague scientist, science advisor and supervisor, chief scientist for the energy group, and chief of the energy group directorate. All agreed the document was unclassified. Later a question arose about whether the document should be classified. Applicant was notified and was "flabbergasted." He stated it was "like saying the rules of baseball are classified."⁽⁷⁾ He did not take any action at that time because he was hoping through his supervisor the issue would be resolved internally and the document would remain unclassified.⁽⁸⁾ Applicant admitted he should have collected the document and protected it as if it was classified until the issue was resolved. However, he was so convinced that there was nothing classified in the document he did not take immediate action.⁽⁹⁾ He admits his mistake was not being proactive in the control of the document, regardless of its actual classification at the time.⁽¹⁰⁾ If he had believed the documents were classified he would not have hesitated to take action, but he was convinced they were not.⁽¹¹⁾ He later received a notification that the issue could not be resolved quickly and he was to assume the document was classified. Applicant took action to recover all copies of the document, both printed and magnetic and cleansed the involved computers. None of the documents had been distributed outside of protected sources.

Applicant was disciplined and his salary was reduced for his mistake, to reinforce the importance of security, but he is not viewed by his employer to be a security risk.⁽¹²⁾ Subsequent to the two security violations, Applicant has taken the initiative to tighten up security procedures. He met with a security specialist and reviewed the entire classification guide line by line to ensure he understands it. He involves a security specialist in all of his projects and whenever he is generating documents, carrying a document, or talking on a phone, that may have security implications. He has redoubled his security awareness and efforts and he does not take any unilateral action involving classified material. Anytime he deals with anything new he seeks guidance from a security specialist. Those around him attest to his heightened security interest. He claims he has done everything he can imagine to raise his vigilance level to as high as it can be for dealing with security and classified material.⁽¹³⁾

Applicant's coworkers attest to his security consciousness and awareness. Those aware of the details of the incidents believe his action regarding the nicknamed project was a mistake and not a result of being careless. Regarding the second incident those involved also believe the action in changing the document from unclassified to classified was incorrect.

Numerous letters and witnesses attest to Applicant's trustworthiness, judgment and devotion to duty. He is not considered cavalier about handling classified information, but had the misfortune that during his 37 years of holding a security clearance having two violations within a short period of time.

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. 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, apply in this case. 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. 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.

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.⁽¹⁴⁾ The government has the burden of proving controverted facts.⁽¹⁵⁾ The burden of proof is something less than a preponderance of evidence.⁽¹⁶⁾ 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.⁽¹⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁸⁾

No one has a right to a security clearance⁽¹⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽²⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽²¹⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽²²⁾ 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 K-Security Violations- are obvious security concerns because noncompliance with security regulations raises doubt about an individual's trustworthiness, willingness, and ability to safeguard classified information.

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 K, security violations. They have not established a *prima facie* case for disqualification under Guideline E, personal conduct.

Based on all of the evidence, I considered Security Violations Disqualifying Condition (SV DC) E2.A11.1.2.2 (*Violations that are deliberate and multiple or due to negligence*) and conclude it applies. Applicant had two security violations in a four-month period. Neither were deliberate, but the first one involved attention to detail and Applicant failed to notice a classification issue. The second violation Applicant was diligent, but should have been proactive when an issue arose about whether the program should be classified. I find both violations were the result of negligence.

I have considered all the mitigating conditions, especially Security Violations Mitigating Condition (SV MC) E2.A11.1.3.1, in whether Applicant's actions (*Were inadvertent*), SV MC E2.A11.1.3.2, whether his actions (*Were isolated and infrequent*), and SV MC E2.A11.1.3.4, whether his actions (*Demonstrate a positive attitude towards the discharge of security responsibilities*). I conclude all the mitigating conditions apply. Applicant has handled, on a daily basis, classified information at the highest levels for 37 years. He has had two security violations in that 37 years. The first violation involved inadvertently combining the nickname of the program with the contents. He took immediate action when becoming aware of the mistake to ensure no classified information was compromised. With regard to the second violation, he went to extreme lengths to ensure the program he was working on was not classified. He had it reviewed by numerous experts in the field, all agreeing with his analysis. Later the client determined it should be classified. Applicant's error was in not taking immediate action. Once it was determined that the issue could not be

resolved internally, he took appropriate action. Applicant admitted he should have been more proactive. No classified information was compromised.

Since Applicant's two security violations, he has renewed his commitment to security and has on his own initiative gone through the security classification guidelines line by line with a security expert to ensure he knows the rules. He was remorseful for his actions and has redoubled his emphasis on being more conscientious about security. There was an overwhelming amount of evidence to support the fact that Applicant is a devoted scientist and engineer, who is trustworthy and serious about security. He had two minor lapses during his extended career. I find that although the violations happened within four months of each other, considering the volumes of classified information Applicant has handled over 37 years the incidents are isolated and infrequent. I also find that he has an extremely positive attitude and has taken demonstrative and positive steps in discharging his security responsibilities. Applicant is not a security risk and there are no doubts about his trustworthiness, willingness and ability to safeguard classified information. Applicant has successfully mitigated the security concerns under Guideline K.

Based on all the evidence I considered all the disqualifying conditions under Guideline E, Personal Conduct and especially considered Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.5 (*A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*), and conclude it does not apply. Applicant had two minor violations in 37 years of holding a top secret clearance. I do not construe this to be a pattern. Even if I were to conclude it was a pattern, my analysis above applies equally to this disqualifying condition and Applicant has sufficiently mitigated it by the positive steps he has taken.

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 has successfully mitigated the security concerns regarding Guideline K, security violations. I find the Government has not established a prima facie case regarding Guideline E, personal conduct. Therefore, I am persuaded by the totality of the evidence in this case, that it is clearly consistent with the national interest to continue Applicant's security clearance. Accordingly, Guidelines K and E are decided for 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 K: FOR THE APPLICANT

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: For the Applicant

Paragraph 2. Guideline E: FOR THE APPLICANT

Subparagraph 2.a: For the Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

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. Tr. 74-79; AE U.

3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. Tr. 83.
8. *Id.*
9. *Id.*
10. *Id.*
11. Tr. 99.
12. AE J.
13. Tr. 85-93.
14. ISCR Case No. 96-0277 at p. 2 (App. Bd. Jul 11, 1997).
15. ISCR Case No. 97-0016 at p. 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
16. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
17. ISCR Case No. 94-1075 at pp. 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
18. ISCR Case No. 93-1390 at pp. 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
19. *Egan*, 484 U.S. at 531.
20. *Id.*
21. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
22. Executive Order 10865 § 7.