



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
-----)	ISCR Case No. 08-01830
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel

For Applicant: *Pro se*

November 5, 2010

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Questionnaire for National Security Positions on March 27, 2007. (Government Exhibit 3.) On June 10, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines K (Security Violations) and E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on July 2, 2009, and requested a hearing. Department Counsel was prepared to proceed on November 12, 2009. This case was assigned to me on November 16, 2009. DOHA issued a notice of hearing on December 16, 2009, setting the hearing for January 26, 2010. I convened the hearing as scheduled. The Government offered Government Exhibits 1 through 6, which were admitted without objection. Applicant testified, and submitted Applicant Exhibits A

through D, which were also admitted without objection. DOHA received the transcript of the hearing on February 10, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

Applicant is 63 and single. He seeks to obtain a security clearance in connection with his employment in the defense industry. Applicant started work as a Federal employee in 1976. He began work with the Department of Defense in 1984, retiring in 2003. In January 2006 he began work as a senior manager with a state-run, Department of Defense funded research institution (Institution). He left that job during the pendency of this case because he did not have a security clearance. (Transcript at 30-39.)

Applicant admitted all of the allegations in the SOR. Those admissions are hereby deemed findings of fact.

Paragraph 1 (Guideline K, Security Violations)

Subparagraphs 1.a. through 1.e. involve the Applicant's conduct over a particular period of time and will be discussed together.

In April 2000 Applicant was transferring between jobs within the Defense Department. As part of his physical move, which involved moving outside the United States, he was going to give a series of briefings in different geographical locations. Applicant deliberately and knowingly downloaded classified material from a classified computer to his unclassified laptop computer. He used that laptop to make presentations in unclassified environments. When informed that he had classified material on his unclassified laptop, Applicant did nothing to correct the situation. Classified information was also downloaded from his unclassified laptop to unmarked disk drives, and left at several commands. All of this violated specific requirements of the DoD Information Security Program (DoD 5200.1-R). (Government Exhibit 6.)

Applicant describes his conduct this way:

[B]lessed with a series of good jobs, starting to get arrogant, thinking that the world rotates around me. . . . And, like many of my jobs, I was working up until April 19, 2000 on the last day wrapping things up and I hadn't thought ahead about what to do with what I was going to take to my next command. And knowing that I shouldn't have done it, I packed away this - - these classified documents and loaded them onto my computer, thinking that I would be able to readily use them at the debriefs that I was to conduct on the way. . . . The proper procedure would have been to mail them ahead under registered and certified mail. I didn't do that.

And not only was I arrogant enough to not follow the rules, I was sloppy in dealing with the classified material I had. I left traces of it around with the different commands I visited. And fortunately nothing was ever compromised, nothing got into the bad guy's hands, but it was a blatant, deliberate move on my part. I'm not saying the word mistake. It was stupid and arrogant. (Transcript at 33-34.) (See Transcript at 42-61; Government Exhibits 1, 2 and 4.)

In addition to the above incident, at some other time before April 2000 Applicant had downloaded other classified information to computer disks. He took these disks with him to his new command, and stored them at his apartment. They were eventually recovered from his apartment in February 2003, after he was interviewed concerning the major incident, discussed above. (Transcript at 61-62.)

Finally, in 1993 the Applicant had received a classified performance evaluation from a superior. Applicant kept a copy of this classified document at home with his personal files until its existence was also discovered in about 2003. (Transcript at 63, 78-79.)

Paragraph 2 (Guideline E, Personal Conduct)

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in conduct which displays questionable judgment, dishonesty, or unwillingness to comply with rules and regulations.

2.a. The information discussed under Paragraph 1, above, will also be examined under this guideline.

2.b. Applicant admitted that his security clearance was suspended by another governmental organization in about 2002. This was due to his conduct as set forth under Paragraph 1, above.

Mitigation

Applicant was candid, credible and contrite in talking about his security violations and the cost to him personally and professionally. When asked what he had learned from these incidents he said:

Personally what I learned was apparently I had gotten in the mode where these rules didn't apply to me. That I was working hard and I was doing good stuff I shouldn't be hindered by these rinky-dink procedural rules that just inhibit my performance and stop me from doing things that I want to do and nobody is working as hard as I am and how dare they think I should play by the same rules. (Transcript at 63-64.)

He was then asked, "What do you believe now?" Applicant replied, "That I was incredibly arrogant. That I had no business thinking that and there's good reasons for having these rules and that I - - I should never have gone down that road." (Transcript at 64.)

While working for the Institution Applicant did not have a security clearance. However, because some of the contracts the Institution administered were classified, Applicant thought it in his best interest to get training on security procedures. Accordingly, he attended a three day course in International Programs Security Requirements, put on by the Defense Institute of Security Assistance Management. (Applicant Exhibit D; Transcript at 66-67.)

Applicant also submitted 23 character reference letters. They are from co-workers at the Institute, senior managers of several defense contractors, and government employees. He is described as a "reliable and loyal government employee," "the consummate professional," and "completely trustworthy." (Applicant Exhibits A and B.)

Two of the letters are particularly noteworthy. Applicant's supervisor at the time the security violations were discovered provided a letter on Applicant's behalf. He writes, "[Applicant] acknowledged his violation and never attempted to minimize its significance. . . . I would trust [Applicant] with national security information with no hesitation. He is a patriotic American and solid citizen who has been punished adequately." (Applicant Exhibit A at 25.)

In addition, a senior staff member to a United States Senator also wrote on Applicant's behalf. Concerning his work at the Institute she says, "Throughout your tenure, there was never a concern about your reliability, trustworthiness, or judgment." (Applicant Exhibit C.)

Policies

Security clearance decisions are not made in a vacuum. When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used as appropriate in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in

making a decision. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Security clearance decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Paragraph 1 (Guideline K, Security Violations)

The security concern relating to the guideline for Handling Protected Information is set out in AG ¶ 33:

Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual’s trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is *a serious security concern*. (Emphasis supplied.)

The Applicant engaged in conduct which had potentially serious security consequences. In some cases the information was not found until 2003, three years after the original incident. I find that the following disqualifying conditions apply under Guideline K:

¶ 34(a) deliberate or negligent disclosure of classified or other protected information to unauthorized persons, including but not limited to personal or business contacts, to the media, or to persons present at seminars, meetings or conferences; ¶ 34(b) collecting or storing classified or other protected information at home or in any other unauthorized location; ¶ 34(c) loading, drafting, editing, modifying, storing, transmitting, or otherwise handling classified reports, data, or other information on any unapproved equipment including but not limited to any typewriter, word processor, or computer hardware, software, drive, system, gameboard, handheld, "palm" or pocket device or other adjunct equipment; and ¶ 34(g) any failure to comply with rules for the protection of classified or other sensitive information.

There are two mitigating conditions that apply to the Applicant's conduct under Guideline K. They are:

¶ 35(a) so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and ¶ 35(b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities.

Concerning cases such as this, the DOHA Appeal Board has stated, "A person who has committed security violations has a very heavy burden of demonstrating that they should be entrusted with classified information. Because security violations strike at the heart of the industrial security program, an Administrative Judge must give any claims of reform and rehabilitation strict scrutiny." (ISCR Case No. 00-0030 (Appeal Board, September 20, 2001 at 9).) In the same case, the Appeal Board further says that the Government has a compelling interest in protecting classified information from disclosure to unauthorized persons, regardless of whether the disclosure is the result of deliberate or negligent conduct.

In this case, Applicant has mitigated the Government's security concerns. His security violations occurred ten years ago, albeit some of the information was not recovered until 2003. His frank testimony was self-searching and honest to a remarkable degree. He understands his security responsibilities and has compellingly shown that he will fulfill them if granted a clearance. (See Transcript at 64-65.) His truthfulness, good judgment, and veracity was attested to by many people, most of whom are involved in the defense industry. Paragraph 1 is found for the Applicant.

Paragraph 2 (Guideline E, Personal Conduct)

The security concern for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The following Disqualifying Condition is arguably applicable:

¶16(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

I have also examined all of the Applicant's conduct under this Guideline. The following Mitigating Condition applies to his conduct, and supports a finding in Applicant's favor:

¶ 17(d) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

As shown above, Applicant freely admits that his conduct in copying and taking classified information with him from one command to another was "arrogant and stupid." He has always accepted full responsibility for his actions, affirmatively stating without prompting that it was not a mistake. Once again, his compelling testimony and evidence that he now has a positive attitude towards his security responsibilities justifies a finding in his favor under this paragraph as well.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the relevant circumstances. Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.

I considered the potentially disqualifying and mitigating conditions in light of all the relevant facts and circumstances surrounding this case. I specifically find that the Applicant has mitigated the Government's security concerns under the whole-person concept, independently of Guidelines K and E.

The admitted conduct involving the mishandling of classified information occurred at least ten years ago and has not been repeated. There is considerable evidence of rehabilitation under AG ¶ 2(a)(6). Under the particular facts of this case, I find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is no likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his Security Violations and Personal Conduct. On balance, I conclude that Applicant has successfully overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports granting his request for a security clearance.

Formal Findings

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

Paragraph 1, Guideline K:	FOR APPLICANT
Subparagraphs 1.a. through 1.g.:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a. and 2.b.:	For Applicant

Conclusion

In light of all of the circumstances presented by the record, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge