



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



In the matter of:)	
)	
)	ISCR Case No. 08-10066
)	
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Duyen Hoang Nguyen, Esq.

October 29, 2010

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated Handling Protected Information and Personal Conduct security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On March 24, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines K (Handling Protected Information) and E (Personal Conduct). The action was taken under Executive Order (EO) 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) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on April 6, 2010, and on April 30, 2010, and requested a hearing before an administrative judge. The case was assigned to me on

June 14, 2010. DOHA issued a notice of hearing on July 13, 2010, and the hearing was convened as scheduled on August 11, 2010. The Government offered Exhibits (GE) 1 through 5, which were received without objection. Applicant testified and called two witnesses but did not submit any documentary evidence. The record was held open for Applicant to submit additional information. Applicant submitted a letter that was marked Exhibit (AE) A and admitted without objection. Applicant's attorney's letter is marked Hearing Exhibit (HE) I; Department Counsel's memorandum is marked HE II. DOHA received the hearing transcript (Tr.) on August 19, 2010.

Findings of Fact

Applicant is a 53-year-old employee of a defense contractor. She has worked for her current employer since 2006. She seeks to retain a security clearance she has held for more than 20 years. She is a high school graduate. She was married for more than 25 years, but she is currently divorced. She has an adult child.¹

Applicant was born in another country. She came to the United States more than 30 years ago, and she became a U.S. citizen in the mid-1980s. English is her third language, as she learned a second language in her country of origin. Applicant worked for her former employer from 2004 to 2006.²

Applicant maintained two notebooks while working for her former employer. She wrote in the notebooks in her native language, which has a different alphabet and characters than English. She also wrote some words in English, if the words did not properly translate to the foreign language. She intended to use one of the notebooks to train her replacement. At some point, Applicant copied confidential frequencies into one of the books. The two pages with the confidential frequencies were eventually covered by other paper that was taped to the pages. Applicant left the notebooks in her desk drawer when she left the company.³

The notebooks were discovered in the desk drawer by another employee and were brought to the attention of the company's facility security officer (FSO), about seven weeks after Applicant left the company. The FSO was concerned that the notebooks could contain classified information. The FSO determined that the notebooks, except for the two pages with the confidential frequencies that were covered with the taped paper, did not contain any additional classified information. The FSO noted that the notebooks were unsecured in the desk.⁴ The FSO does not believe that the notebooks were read, nor classified information compromised, for three reasons:

¹ Tr. at 25-26, 43-46, 57-58; GE 1.

² Tr. at 44, 58; GE 1, 2.

³ Tr. at 22-39, 50-54; Applicant's responses to SOR; GE 2, 3.

⁴ GE 3.

[T]hey were written in [foreign language], no one else in the group of technicians spoke [foreign language], and the frequencies had been covered by other pages taped and stapled over them. Regardless, the possibility of compromise cannot be eliminated.⁵

Applicant testified that she has learned from this incident and would not repeat such behavior. She has not had a security infraction since the incident. She attended her current employer's required annual security refresher training in July 2010, and she passed the quiz the FSO gave at the end of the training. In August 2010, the FSO gave Applicant individualized training on the company's standard initial security briefing. This is the same briefing that is provided to all new employees the first time they are granted a security clearance.⁶ As prescribed in the National Industrial Security Program Operating Manual (NISPOM), the initial security briefing includes:

- a. A threat awareness briefing.
- b. A defensive security briefing.
- c. An overview of the security classification system.
- d. Employee reporting obligations and requirements.
- e. Security procedures and duties applicable to the employee's job.⁷

The FSO certified it was his observation that Applicant understood everything that was covered in the security briefing.⁸

Two witnesses appeared on Applicant's behalf. They testified she is dedicated, hardworking, takes pride in her work, a perfectionist, conscientious, and she "strives to do the best she can."⁹

Policies

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 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, administrative judges apply the guidelines 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

⁵ *Id.*

⁶ Tr. at 33, 39-41, 58-59, 66; AE A.

⁷ AE A.

⁸ *Id.*

⁹ Tr. at 61-82.

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.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny 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.

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 the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain 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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be “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

Guideline K, Handling Protected Information

The security concern 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.

AG ¶ 34 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

(b) collecting or storing classified or other protected information at home or in any other unauthorized location;

(e) copying classified or other protected information in a manner designed to conceal or remove classification or other document control markings; and

(g) any failure to comply with rules for the protection of classified or other sensitive information.

Applicant copied classified information into a notebook without authorization, and failed to ensure that it was properly safeguarded. The evidence raises all the above disqualifying conditions.

Conditions that could mitigate Handling Protected Information security concerns are provided under AG ¶ 35. The following are potentially applicable:

(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

(b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities.

Applicant's security violations occurred more than four years ago. Her actions were not discovered until she left employment at her previous job in 2006. She has lived in the United States for more than three decades, and she has held a security clearance for more than 20 years. However, English is her third language. I believe a language barrier may have played some role in her actions. She has not had any security infractions at her new job. She received her annual training and passed a quiz. She received individual training from her FSO, who stated he believed Applicant understood everything that was covered in the briefing. After listening to her testimony, hearing her witnesses, and reviewing all other evidence, I am convinced that Applicant is remorseful for her actions, and she will not repeat the behavior. She possesses a positive attitude toward the discharge of her security responsibilities. I find both mitigating conditions to be applicable.

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant's conduct was alleged under the Handling Protected Information guideline, as addressed above. It constitutes credible adverse information in another adjudicative issue area that may not be sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, and unwillingness to comply with rules and regulations. It also constitutes personal conduct that could create a vulnerability to exploitation, manipulation, or duress. AG ¶¶ 16(a) and 16(e) have been raised as disqualifying conditions.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(c) 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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

The discussion under the guideline for Handling Protected Information is equally appropriate for this guideline. Additionally, Applicant has been open and honest about the conduct which has reduced any potential vulnerability to exploitation, manipulation, and duress. The above mitigating conditions are applicable.

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 relevant circumstances. 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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines K and E in this whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant committed security violations by improperly copying classified information into a notebook and not properly safeguarding the notebook. This occurred before she left her former job in 2006. Security violations are one of the strongest possible reasons for denying or revoking access to classified information, as they raise very serious questions about an applicant's suitability for access to classified information. Once it is established that an applicant has committed a security violation, he or she has a very heavy burden of demonstrating that he or she should be entrusted with classified information. Because security violations strike at the very heart of the industrial security program, an administrative judge must give any claims of reform and rehabilitation strict scrutiny. In many security clearance cases, applicants are denied a clearance for having an indicator of a risk that they might commit a security violation (e.g., alcohol abuse, delinquent debts, or drug use). Security violation cases reveal more than simply an indicator of risk.¹⁰ The frequency and duration of the security violations are also aggravating factors.¹¹

I considered Applicant's favorable character evidence along with all the other evidence. This incident appears to be an isolated incident and out of character for

¹⁰ ISCR Case No. 03-26888 (App. Bd. Oct. 5, 2006).

¹¹ ISCR Case No. 97-0435 at 5 (App. Bd. July 14, 1998).

Applicant. I believe it was at least partially caused by a language barrier. I further believe the discovery of the notebook and the experience of going through the adjudicative process had an additional value, in that Applicant is more cognizant that she must ensure that she completely understands all that is required of someone responsible for maintaining and safeguarding classified information. Applicant has met her heavy burden of demonstrating that it is clearly consistent with the national interest to continue her security clearance.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has mitigated Handling Protected Information and Personal Conduct security concerns.

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 APPLICANT
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Subparagraphs 1.a-1.b:	For Applicant
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Paragraph 2, Guideline E:	FOR APPLICANT
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Subparagraph 2.a:	For Applicant
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Conclusion

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

Edward W. Loughran
Administrative Judge