



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No. 10-00320

Appearances

For Government: Melvin A. Howry, Department Counsel
For Applicant: *Pro se*

November 22, 2011

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIPS) on January 22, 2001, and on September 6, 2007. (Government Exhibits 1 and 3.) On March 7, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines K, L and E for Applicant. 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) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

The Applicant responded to the SOR on April 4, 2011, and requested an administrative decision without a hearing. On July 14, 2011, pursuant to Paragraph E3.1.7, of the Additional Procedural Guidance at Enclosure 3 of DoD Directive 5220.6, Department Counsel requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on July 5, 2011. A notice of hearing was issued

on July 8, 2011, and the hearing was scheduled for August 17, 2011. At the hearing the Government presented seven exhibits, referred to as Government Exhibits 1 through 7, which were admitted without objection. The Applicant presented four exhibits, referred to as Applicant's Exhibits A through D, which were also admitted without objection. He also testified on his own behalf. The official transcript (Tr.) was received on August 25, 2011. Based upon a review of the case file, pleadings and exhibits, eligibility for access to classified information is denied.

FINDINGS OF FACT

The Applicant is 61 years old and married. He has a Master's Degree in Engineering. He is employed as a Program Manager by a defense contractor and is applying for a security clearance in connection with his employment.

Paragraph 1 (Guideline K - Handling Protected Information. The Government alleges that the Applicant is ineligible for clearance because he engaged in conduct wherein he deliberately or negligently failed to comply with rules and regulations for protecting classified or other sensitive information.

The Applicant admits allegations 1(a) and 1(b) of the SOR. He denies allegation 1(c). The Applicant began working for the defense industry in 1976 when he first obtained a security clearance. He has held a security clearance consistently since then. He has committed three security violations.

In December 2006, the Applicant failed to secure two classified diskettes in an authorized manner in violation of paragraph 5-102 of DoD 5220.22-M, National Industrial Security Program Operating Manual (NISPOM), while employed for a defense contractor. As the Program Manager at the time, he explained that his deputy program manager handed him a computer in a bag. The Applicant took the computer out of the bag and put it in a classified container and secured it. He then went to lunch. The Applicant failed to check to see if there was anything else in the bag. After returning from lunch, the Applicant checked the bag and there were two classified diskettes in it. He then went to a neighbor's office who did not go to lunch and asked if anyone had approached the Applicant's office while he was at lunch and was told that no one had. The Applicant did not report the incident to his security officer. He stated that he made a conscious decision not to report this security violation because he felt that there was no compromise. (Government Exhibit 2.) This incident was only disclosed when undergoing his interview concerning his five year routine background investigation for his security clearance. Following this security violation the Applicant had some online security refresher courses. (Tr. p. 44.)

Four months later, in April 2007, the Applicant failed to properly secure a laptop computer containing classified material in an authorized manner in violation of Paragraph 5-102 of DoD 5220.22 M (NISPOM), while employed for a defense contractor. The Applicant explained that he had worked late that night, was tired and

left the computer out, went into the parking lot, got into his car and remembered it immediately. He went out of the parking lot and came right back. The next day he reported the incident to his security personnel. (Tr. p. 43.) The Applicant admits a lapse in judgment as to why the incident occurred.

In December 2007, the Applicant transmitted an e-mail that contained Secret information on a non-classified computer in violation of Paragraph 5-400 of DoD 5220.22M (NISPOM), while employed for a defense contractor. (Government Exhibit 4.) The Applicant contends that he did not violate this security guideline or that the violation was not his fault. He states that DARPA changed the security guide and that some pieces of the program were designated as classified on the program and were included in an addendum that was issued in November 2007. The Applicant claims that the addendum was not sent to the Applicant. (Applicant's Exhibits A and B, and Tr. p. 45-46.) The Applicant's computer was required to be sanitized and backup tapes were erased as a result. Following an investigation into the matter, the Applicant was not issued a security violation for the incident. (Tr. p. 47.) Every year the Applicant now takes a refresher course in security regulations.

Paragraph 2 (Guideline L - Outside Activities). The Government alleges that the Applicant is ineligible for clearance because he has engaged in certain types of outside-employment or other activities that pose a conflict with an individual's security responsibilities.

The Applicant admits each of the allegations set forth in the SOR under this guideline. From 1998 to 1999, while employed as a full time employee for a defense contractor, the Applicant was also employed as a consultant for an engineering manufacture. In 1999, during his employment with this outside company he traveled to Country A to locate a company there to mass produce a product for the manufacturing company. His job was to supervise the design. The Applicant did not report this outside employment to his defense contractor because the technology he applied to these activities was learned from past employers and may have constituted unauthorized sharing of proprietary information. (Tr. p. 35.) This outside employment was only disclosed during a polygraph examination administered in connection with his application for a Special Access Program.

When the Applicant completed the security clearance application, he failed to reveal the real reason he traveled to Country A in 1999. He indicated that he went for pleasure, when in fact he went to work for the manufactures. (Government Exhibit 2.) He stated that the reason he said he traveled to Country A for pleasure is because he had talked himself into thinking that since it was an outside job, he did not have to report it as business. (Tr. p. 39.)

Paragraph 3 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he has engaged in conduct involving questionable judgment, lack of candor, dishonesty, or an unwillingness to comply with rules and regulations.

The Applicant admits allegations 3(a), 3(b), and 3(d), as set forth in the SOR. He denied allegations 3(c), and 3(e). (Applicant's Answer to the SOR.)

The Applicant completed a security clearance application dated January 22, 2001. Question 6 asked him to list his employment activities, beginning with the present and working back ten years. He was asked to list full time work, part-time work, military service, temporary military duty locations over 90 days, self-employment, other paid work, and all periods of unemployment. The Applicant failed to list that he was employed as a consultant by the manufacturing company from 1998 to 1999. He states that he failed to list his consulting work through misunderstanding of the requirements for disclosure. (See Applicant's Answer to SOR.)

In 2002, the Applicant's Special Program Access was revoked by another Government agency in part, due to his work as a consultant for a foreign national whom he met in 1998; for acknowledging his involvement in unreported foreign business activities; for admitting his trips to Country A and Country B in December 1999 and January 2001 that were not solely for pleasure as previously reported, but for business as well; for continuing additional unreported work up to at least September 2001; for his failure to list foreign connections and consulting on his January 2001 security clearance application; and for his unauthorized disclosure of proprietary information.

The Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) dated September 6, 2007. Question 26 asked him if he had ever had a clearance or access authorization denied, suspended, or revoked, or has he ever been debarred from government employment. The Applicant answered, "NO," and failed to list that his Special Program Access was revoked by another Government agency in 2002. He states that he did not disclose this information on his security clearance application under the direction of the security representative at his company. (Government Exhibit 2.)

A letter of recommendation from the Applicant's direct supervisor, who has known the Applicant for six and half years indicates that the Applicant is a strong contributor to the organization, and is skilled in both the development of advanced concepts and program execution. He is a hardworking, dedicated employee who is a skilled leader. He has shown excellent organizational skills, gets along well with others and is well respected by the customer community. He is highly recommended for a position of trust. (Applicant's Exhibit D.)

An e-mail correspondence complimenting the Applicant for good performance on the job was also submitted. (Applicant's Exhibit C.)

POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline K (Handling Protected Information)

33. The Concern. 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.

Conditions that could raise a security concern:

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;

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

25.(h) negligence or lax security habits that persist despite counseling by management.

Conditions that could mitigate security concerns:

None.

Guideline L (Outside Activities)

36. The Concern. Involvement in certain types of outside employment or activities is of security concern if it poses a conflict of interest with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information.

Conditions that could raise a security concern:

37.(a) any employment or service, whether compensated or volunteer, with;

(2) any foreign national, organization, or other entity;

(3) a representative of any foreign interest.

37.(b) failure to report or fully disclose an outside activity when this is required.

Conditions that could mitigate security concerns:

None.

Guideline E (Personal Conduct)

15. The Concern. 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.

Conditions that could raise a security concern:

16.(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

16.(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 judgement, 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

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. This includes but is not limited to consideration of:

(3) a pattern of dishonesty or rules violations.

Conditions that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

a. The nature, extent, and seriousness of the conduct;

- b. The circumstances surrounding the conduct, to include knowledgeable participation;
- c. The frequency and recency of the conduct;
- d. The individual's age and maturity at the time of the conduct;
- e. The extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavioral changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in 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."

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in the mishandling of protected information, personal conduct and outside activities that demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in the mishandling of protected information (Guideline K), unreported outside activities (Guideline L) and personal conduct (Guideline E). The totality of this evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility. Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guidelines K, L and E of the SOR.

The evidence shows that the Applicant committed three security violations, one in December 2006, one in April 2007 and another in December 2007. He was negligent, careless, and failed to comply with the rules for the proper protection of classified or sensitive information. It is noted that these violations occurred almost four years ago, however, given his long history in the defense industry, coupled with his experience, training and his status as a Program Manager, there is absolutely no excuse for these violations. Disqualifying Conditions 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*, 25.(g) *any failure to comply with rules for the protection of classified or other sensitive information*; and 25.(h) *negligence or lax security habits that persist despite counseling by management* apply. Under the particularly circumstances of this case, none of the Mitigating Conditions are applicable. Accordingly, I find against the Applicant under Guideline K, Handling Protected Information.

In regard to his outside activities the record shows that the Applicant was employed as a consultant for another company while working for a defense contractor. He failed to report or disclose this outside activity when required. Under Guideline L, Outside Activities, Disqualifying Conditions 37.(a) *any employment or service, whether compensated or volunteer, with; (2) any foreign national, organization, or other entity; and (3) a representative of any foreign interest; and 37.(b) failure to report or fully disclose an outside activity when this is required* apply. None of the Mitigating Conditions are applicable. Accordingly, I find against him under Guideline L, Outside Activities.

Applicant's repeated security violations, in addition to his failure to report his security violation to his security personnel, his failure to list his employment as a consultant on his security clearance application of January 22, 2001, and his failure to

list the fact that his Special Program Access was revoked by another Government agency in 2002 on his 2007 questionnaire raises doubt about his trustworthiness, reliability, judgment and willingness properly safeguard classified information. His credibility is in question. Under the particular facts of this case, his poor personal conduct is considered a significant security risk, which prohibits a favorable determination in this case.

Under Guideline E, Personal Conduct, the following Disqualifying Conditions apply:

16.(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 judgement, 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 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. This includes but is not limited to consideration of: (3) a pattern of dishonesty or rules violations apply.

None of the mitigating conditions are applicable. Consequently, I find against the Applicant under Guideline E, Personal Conduct.

I have also considered the "whole-person concept" in evaluating the Applicant's eligibility for access to classified information. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole-person assessment of poor judgment, untrustworthiness, unreliability, a lack of candor, an unwillingness to comply with rules and regulations, and/or other characteristics indicating that the person may not properly safeguard classified information.

This Applicant's history of security violations, outside employment, unreported foreign business activities, and the fact that his Special Program Access was revoked by another government agency collectively demonstrate that he is not sufficiently trustworthy. He clearly does not meet the eligibility requirements for access to classified information. Accordingly, I find against the Applicant under Guideline K (Handling Protected Information), Guideline L (Outside Activities) and Guideline E (Personal Conduct).

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1, 2 and 3 of the SOR.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: Against the Applicant.

Subpara. 1.a.: Against the Applicant.
Subpara. 1.b.: Against the Applicant.
Subpara. 1.c. : Against the Applicant

Paragraph 2: Against the Applicant.

Subpara. 2.a.: Against the Applicant.
Subpara. 2.b.: Against the Applicant.
Subpara. 2.c.: Against the Applicant.

Paragraph 3: Against the Applicant.

Subpara. 3.a.: Against the Applicant.
Subpara. 3.b.: Against the Applicant.
Subpara. 3.c.: Against the Applicant.
Subpara. 3.d.: Against the Applicant.
Subpara. 3.e.: Against the 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 the Applicant.

Darlene Lokey Anderson
Administrative Judge

