



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



In the matter of:)
)
) ISCR Case No. 11-10255
)
Applicant for Security Clearance)

Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel
For Applicant: Corey Williams, Esq.

03/25/2014

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for a security clearance to work in the defense industry. Applicant failed to mitigate the security concerns raised by his repeated security violations. Clearance is denied.

Statement of the Case

On June 4, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under the handling protected information and personal conduct guidelines.¹ DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue Applicant’s security clearance and recommended that the case be submitted to an administrative judge for a determination whether to revoke Applicant’s security clearance.

¹ This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

Applicant answered the SOR and requested a hearing.² At the hearing convened on December 10, 2013, I admitted Government's Exhibits (GE) 1 through 3 and Applicant's Exhibits (AE) A through D, without objection.³ After the hearing, Applicant timely submitted AE E through H, which were also admitted without objection.⁴ Applicant also submitted a written closing argument, which is appended to the record as HE II. I received the transcript (Tr.) on January 2, 2014.

Procedural Issues

Notice Requirement

Applicant received less than 15 days written notice of the time and place of the hearing as required under Directive ¶ E.3.1.8. Applicant waived the notice requirement, electing to proceed with the hearing as scheduled.⁵

SOR Amendment

Upon agreement of both parties, allegation 1.a is amended to read:

During security processing conducted in 2001, you admitted deliberately removing classified materials to your residence, an unauthorized location, on approximately three to five occasions in 1989.⁶

Findings of Fact

Applicant, 59, is an employee of a federal contractor. A scientist, Applicant has spent his career working on weapons systems. Due to the sensitive nature of his projects, Applicant was initially granted access to sensitive compartmented information (SCI) in April 1995. His access was administratively terminated in July 2001. Applicant received SCI access again in May 2007. However, based on the results of a 2008 periodic reinvestigation, another government agency (AGA) revoked Applicant's SCI access in 2010, citing Applicant's long history of security violations.⁷

² The letter from the Chief Administrative Judge regarding the Applicant's rights and obligations in a DOHA proceeding is appended to the record as Appellate Exhibit (AP E) I.

³ Applicant initially offered 16 documents to be admitted into evidence. All but four of the documents were already included in GE 2. Accordingly, I admitted the four documents that were not already included in the record.

⁴ Department Counsel's memorandum regarding the admissibility of the Applicant's post-hearing submissions is included in the record as Hearing Exhibit (HE) I.

⁵ Tr. 5-6.

⁶ Tr. 70-71.

⁷ GE 1-2.

As part of the 2008 reinvestigation, AGA reviewed Applicant's 2001 background investigation. During the 2001 investigation, Applicant admitted disclosing classified information to his ex-wife in 1988, to an uncleared co-worker in 1996, and to his pastor in 1998. Applicant admitted removing classification headers from documents that he took home. He also admitted using a classified floppy disk on his unclassified home computer three to five times in 1989. While Applicant admits that he committed these infractions, he believed his actions were justified at the time because of the urgency and importance of the work. He was also trying to balance the demands of his work with the stress his work-related absences caused on his marriage and family.⁸

In addition to reviewing Applicant's past investigative file, AGA interviewed Applicant. In October 2008, AGA conducted the first of three interviews during Applicant's periodic reinvestigation. In the interview, Applicant reported security violations he committed between 2004 and 2008. Applicant admitted taking, without permission, materials from his former employer, a national security laboratory in 2004 and in 2007. The materials included a total of 42 banker's boxes, 6 CDs, and 12⁹ videotapes containing proprietary information, documents, reports, and presentations related to the laboratory's national defense projects. Applicant assumed the materials contained in the 42 banker's boxes were declassified based on his interpretation of a 1992 memorandum;¹⁰ however, he did not review of the contents of each box to make sure they did not contain classified information before removing them from the premises.¹¹

Three days before the October 2008 interview, Applicant discovered that at least one of the boxes contained classified information, which Applicant turned over to his current employer's facility security officer (FSO). The FSO informed Applicant that he should not have the proprietary information from his former employer at his home. Applicant claims that the FSO instructed him to return the materials to his former employer, bring them into work for proper storage, or destroy the materials. Applicant did not offer any evidence corroborating this statement. Embarrassed and fearing repercussions, Applicant decided to use his personal shredder to destroy the remaining classified documents as well as the materials that had not been previously published or otherwise publicly released. At the hearing, Applicant admitted that his primary interest in taking the materials was to preserve his professional legacy and to reap the benefits associated with being the only person in possession of the materials. He knew that his former employer would destroy the information after a certain number of years. He also hoped that the purloined information would help him in his future work.¹²

⁸ Tr. 22-31, 68, 74-75, 78-81; GE 2.

⁹ The AGA documents indicate Applicant had possession of 24 tapes.

¹⁰ Applicant did not offer the memorandum as an exhibit.

¹¹ Tr. 32-46, 58-61, 85-86, 98-100, 104-106, 112-114; GE 2.

¹² Tr. 47-49, 51-54, 56-62, 87-96, 100-102, 106-107; GE 2; Answer.

Two weeks after the interview, the FBI contacted Applicant and interviewed him about the information he stored at his home. The FBI also executed a search warrant, removing 62 items, including 34 trash bags from Applicant's home. Applicant intended to dispose of the shredded documents with his household garbage. Several months later, the FBI returned some of the materials to Applicant. During the second and third interviews in October and November 2009, respectively, Applicant revealed that he disclosed classified information to another family member and a friend in 2009. He also admitted carrying a binder of what he described as random notes related to his work that he believed to be inappropriate outside the classified laboratory where he worked. Applicant claims that the notes were unclassified. At hearing, Applicant confidently testified that it would have been nearly impossible for another person to place his notes in context.¹³

In April 2010, AGA issued Applicant an SOR, revoking Applicant's SCI access. Applicant, through counsel, exhausted the due process offered by AGA, which included a personal appearance and appeal rights. During that process, Applicant argued that while he committed the security violations in the 1980s and 1990s, the 2004 through 2009 security violation allegations were based on factual errors. In July 2011, AGA's appeal board upheld the original decision to revoke Applicant's access to classified information. In response to DOHA interrogatories, which were ultimately admitted into the record, Applicant submitted the entire written record of his due process with AGA including the documents, records, and reports related to AGA's decision to revoke Applicant's SCI access.¹⁴

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.

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.

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

¹³ Tr. 50, 54-56, 62, 81-85, 108-109.

¹⁴ GE 2.

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.

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

Handling Protected Information

An applicant’s deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubts about his security worthiness and is a serious concern.¹⁵ The SOR alleges that Applicant committed a number of security violations between 1988 and 2009. Applicant admits SOR allegations ¶¶ 1.a through 1.e regarding the security violations he committed between 1988 and 1998, but he denies the allegations in SOR ¶¶ 1.f through 1.k that he committed a series of security violations between 2004 and 2009.¹⁶ However, the AGA documents in the record are sufficient to establish the Government’s *prima facie* case.

In interviews with AGA, Applicant admitted that between 1988 and 2009, he disclosed classified information to unauthorized individuals; collected, stored, and destroyed classified or other protected information at his home; and repeatedly failed to comply with the rules for protecting classified information.¹⁷ Applicant failed to meet his burdens of production and persuasion to mitigate the concerns surrounding his ability to handle protected information. Applicant only offered a favorable version of the events leading to revocation of his SCI access. He did not present any evidence to refute the fact that he has habitually mishandled classified or other protected information for many years. Nor did he present evidence of remedial security training. Ultimately, Applicant’s numerous security violations undermine any finding that his statements to behave more cautiously in the future are credible. None of the available mitigating conditions apply.

The SOR also alleges, in subparagraph 1.i, that Applicant failed to self-report his security violations as they occurred, but waited until his AGA interviews to report his misconduct. Failure to self-report security violations is not disqualifying under the handling protected information guideline, but it does raise concerns under the personal conduct guidelines where Applicant’s behavior is cross-alleged.

Personal Conduct

¹⁵ See AG ¶ 33.

¹⁶ Answer.

¹⁷ AG ¶¶ 34(a), (b), and (g).

Applicant's history of security violations is not disqualifying under the personal conduct guideline. The alleged conduct falls squarely under the handling protected information guideline as discussed above. However, Applicant's failure to self-report his security violations to his employers as they occurred and his reasons for doing so, raise personal conduct concerns. Applicant admits that he did not report his security violations until his AGA interviews in 2001, 2008, and 2009.¹⁸ Handling classified information is essential in Applicant's field. Applicant is well aware that developing a reputation for improperly handling of classified, sensitive, or proprietary information would negatively impact his professional standing and ability to obtain work.¹⁹ Applicant demonstrated the lengths to which he would go to protect his reputation by improperly destroying the information he took from his former employer, which contain classified, sensitive, and proprietary information instead of reporting his misconduct to his former employer. Applicant has not mitigated the concerns raised by his conduct, which continues to negatively affect his current security worthiness. None of the personal conduct mitigating conditions apply.

Whole-Person Concept

Based on the record, it is clear that Applicant should not be granted continued access to classified information. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. In doing so, I have also considered the whole-person concept as described in AG ¶ 2(a). The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information.²⁰ Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances.²¹ Applicant has repeatedly demonstrated a lack of respect and understanding of the rules that apply to the handling and safeguarding of classified information and has continually placed his self-interests above his fiduciary duty to the government. There is nothing in the record to suggest that Applicant will take his responsibility to protect and safeguard classified information more seriously in the future. As such, Applicant's continued access to classified information is denied.

¹⁸ Tr. 75, 96 - 97.

¹⁹ AG ¶ 16(e).

²⁰ *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980).

²¹ *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988).

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, Handling Protected Information:	AGAINST APPLICANT
Subparagraphs 1.a – 1.k:	Against Applicant
Subparagraph: 1.l:	For Applicant
Paragraph 2, Personal Conduct:	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	For Applicant
Subparagraphs 2.c – 2.d:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Nichole L. Noel
Administrative Judge