



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-05884

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Kristian A. Siegwart, Esq.

06/14/2017

Decision

RIVERA, Juan J., Administrative Judge:

Applicant mitigated security concerns raised by his inadvertent security infractions that occurred about two years ago. He self-reported the incidents and took corrective action. He has an otherwise long and successful 36-year career handling and safeguarding classified information. Applicant established that similar security incidents are unlikely to recur. Clearance is granted.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on August 22, 2014. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) on February 10, 2016, issued him a Statement of Reasons (SOR) alleging security concerns under Guideline K (handling protected information). Applicant answered the SOR on April 22, 2016, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

The case was assigned to me on October 20, 2016. The DOHA issued a notice of hearing on January 12, 2017, scheduling a hearing for February 2, 2017. At the hearing, the Government offered three exhibits (GE 1 through 3). Applicant testified and

submitted exhibit (AE) A (comprised of Tabs 1 through 24). All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on February 13, 2017.

Findings of Fact

Applicant admitted all the SOR factual allegations, with some comments. His admissions to the SOR and at his hearing are incorporated herein as findings of fact. After a thorough review of the record evidence, including his testimony and demeanor while testifying, I make the following additional findings of fact:

Applicant is a 55-year-old engineering manager employed with a large federal contractor. He is married to his wife of 28 years, and they have three children and five grandchildren. Applicant received a bachelor's degree in engineering in 1981. He completed a master's degree in 1985, and earned a certificate for post-master's degree studies in 1997. A federal contractor hired Applicant as an engineer in 1981, and he was granted a security clearance that he has held to present.

The SOR alleges, and Applicant admitted that he committed nine security infractions in the last eight years. All infractions involved Applicant bringing his cell phone, a Blackberry, and a laptop into secured areas. In January and March 2009, twice in March 2012, and twice in September 2014, Applicant took his Blackberry into secured areas. In March 2011, November 2011, and March 2015, Applicant took his cell phone into secured areas. Although not alleged in the SOR, Applicant also volunteered that in 2006, he left a company proprietary document unsecured in his office, and in October 2015, he took his laptop into a secured area. There is no evidence of any additional security infractions or violations during Applicant's 36 years of employment while holding a clearance.

In all these instances, Applicant self-reported the security infractions shortly after they occurred to his security officers and his supervisors. Most of the infractions occurred when he was opening the office and nobody else was around. As soon as he realized he was wearing the electronic device, he removed himself from the classified area and reported the infraction.

Applicant received yearly training on the handling and safeguarding of classified information since he was granted a clearance. He knew it was prohibited for him to bring electronic devices into secured areas. After each security infraction, a company security officer and his supervisors admonished Applicant of the security rules. He was issued two written warnings after having two security infractions within the same year. Based on Applicant's supervisor statements, there was no compromise of classified information as a result of any of these infractions.

Applicant credibly testified that his security infractions were inadvertent. He self-reported the security infractions shortly after they occurred, except on one instance where he waited over the weekend. Applicant explained his office has been located in a secured area since 2009. He attributed his security lapses to being distracted with

personal problems and working on complex work-related issues. His distractions led him to forget he was wearing an electronic device when he entered the secured areas. His mother's illness and death, and he being the guardian of his older brother (who is disabled) affected his concentration.

Applicant, with his supervisor's assistance, instituted measures to ensure there are no more security infractions. The measures included: (1) moving his office to an unsecure area; (2) turning in his Blackberry (he no longer has access to it); (3) buying a laptop that will not require him to bring it into the office for software updates; and (4) instituting a two-step self-checkup system to ensure he does not bring the cell phone to secure areas. Additionally, Applicant completed numerous refresher security training courses.

Applicant understands the importance of protecting classified information and his personal responsibilities. He noted that in the past, he took similar remedial actions to prevent security infractions. This time he has taken a more strict approach by getting rid of some of his electronic devices and moving his office outside of a classified environment. He believes he will succeed in avoiding any future security infractions.

Applicant is considered to be an honorable, forthright, and honest person. He is highly regarded among his colleagues for his technical knowledge, expertise, professional work, and because he has been a leader among his peers. He has held managerial positions among his colleagues for many years. According to his references, Applicant has a keen analytical mind, and his work product is considered to be outstanding.

Applicant's supervisors consider him to be a highly trusted employee. He has earned a reputation as a reliable, dependable, trustworthy, and loyal American. His references, some of whom have known Applicant since the 1980s, believe Applicant has established a reputation for careful adherence to security rules and procedures, and as a mentor to young engineers. His references (all with knowledge of the SOR allegations) endorsed his eligibility for a security clearance without reservations. They noted Applicant's responsibilities are complex, his mistakes were inadvertent, he reported them promptly, and he has taken measures to prevent recurrence. They also noted that Applicant engaged in security infractions – not in security violations – and there was no compromise of classified information.

Policies

The SOR was issued under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006. The case will be decided under Security Executive Agent Directive (SEAD) 4, National Security Adjudicative Guidelines (AG), effective 8 June 2017.

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline K, Handling Protected Information

Deliberate or negligent failure to comply with rules and regulations for handling protected information – which includes classified and other sensitive government information, and proprietary information - raises doubt about an individual's trustworthiness, judgment, reliability, or

willingness and ability to safeguard such information, and is a serious security concern.¹

Security clearance cases require administrative judges to assess whether an applicant has the requisite good judgment, reliability, and trustworthiness to be entrusted with classified information. When evidence is presented that an applicant previously mishandled classified information or violated a rule or regulation for the protection of protected information such an applicant bears a very heavy burden in demonstrating that they should once again be found eligible for a security clearance.²

Applicant's commission of nine security infractions raise Guideline K security concerns. In assessing Applicant's case, I considered the following pertinent disqualifying and mitigating conditions:

AG ¶ 34(g): any failure to comply with rules for the protection of classified or other sensitive information;

AG ¶ 34(h): negligence or lax security practices that persist despite counseling by management;

AG ¶ 35(a): so much time has elapsed since the behavior, or it happened so infrequently or under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

AG ¶ 35(b): the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities; and

AG ¶ 35(d): the violation was inadvertent, it was promptly reported, there is no evidence of compromise, and it does not suggest a pattern.

The security infractions at issue occurred almost two years ago. Moreover, Applicant participated in additional security training, established operating procedures, and changed his behavior to ensure that similar incidents are unlikely to recur. In light of the number of security infractions, I have reviewed Applicant's claim of reform and rehabilitation with "strict scrutiny."³ I find that Applicant met this burden.

¹ AG ¶ 33.

² ISCR Case No. 11-12202 at 5 (App. Bd. June 23, 2014) (very heavy burden standard); ISCR Case No. 01-25941 at 5 (App. Bd. May 7, 2004) (security clearance determinations are "not an exact science, but rather predicative judgments.").

³ ISCR Case No. 06-21537 at 4 (App. Bd. Feb. 21, 2008).

Applicant's past security infractions were not deliberate nor the result of a reckless or even negligent disregard for security rules and regulations. On the contrary, Applicant has established a strong reputation for following and complying with security rules and regulation. It appears the major contributing factors were inattentiveness due to personal problems, working in complex issues in different environments, and having his office inside a secured area. Of note, Applicant's supervisors and security officers noted he engaged in security infractions that did not rise to the level of a security violation because no classified information was compromised. They strongly recommended continuation of Applicant's eligibility.

Applicant fully acknowledged his responsibility for the infractions. He self-reported them, which allowed the responsible security officials to review the situation and determine that no compromise occurred. He responded favorably to the counseling with his supervisors and took corrective action to put in place safeguards to avoid a recurrence. He has not been involved in any type of security incident for almost two years. Notwithstanding the SOR security infractions, Applicant has had a long track record of properly handling and safeguarding protected information. AG ¶¶ 35(a), 35(b), and 35(c) apply.

Additionally, Applicant's evidence (performance evaluations and references) clearly establishes that he has and exhibits the good judgment, reliability, and trustworthiness expected of all clearance holders. Applicant's evidence established that he will continue to properly discharge his security responsibilities and that the security infractions were an aberration.⁴

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. SEAD 4, App. A, ¶¶ 2(a), 2(d) and 2(f). I have incorporated my comments under Guideline K in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant is a 55-year-old employee of a federal contractor. He has worked over 35 years for the same contractor while holding a clearance. He has established an excellent reputation for his knowledge, expertise, and leadership.

Applicant's supervisors consider him to be a highly trusted member of his company, who is a reliable, dependable, trustworthy, and loyal American. Applicant has established a reputation for careful adherence to the security rules and procedures, and

⁴ See generally ISCR Case No. 04-05802 at 3-4 (App. Bd. Jun. 13, 2007) (Board affirmed favorable decision where applicant had committed seven security violations in a short period of time, because the judge's findings "concerning the impact that Applicant's workload had upon his mistakes; the inadvertent nature of the violations; . . . and steps Applicant has taken to ensure his compliance with security procedures," as well as "the Judge's evaluation of Applicant as a believable and honest witness in his own behalf" were supported by the record evidence).

as a mentor to young engineers. His references (all with knowledge of the SOR allegations) endorsed his eligibility for a security clearance without reservations. They noted Applicant's responsibilities are complex, his mistakes were inadvertent, he reported them promptly, and he has taken measures to prevent recurrence. They also noted that Applicant engaged in security infractions – not in security violations – and there was no compromise of classified information.

Applicant's last infraction is not recent. There is no evidence of any further security infractions after October 2015. Applicant acknowledged his security infractions and credibly promised to prevent recurrence. He understands that any additional security infractions would raise additional security concerns. On balance, Applicant's 35 years working for a federal contractor while holding a clearance are sufficient to mitigate the security concerns raised by his nine security infractions.

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
Subparagraphs 1.a - 1.g:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national security interests of the United States to grant eligibility for a security clearance to Applicant. Clearance is granted.

JUAN J. RIVERA
Administrative Judge