



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



In the matter of: )  
)  
) ISCR Case No. 15-07333  
)  
Applicant for Security Clearance )

**Appearances**

For Government: David Hayes, Esq., Department Counsel  
For Applicant: *Pro se*

04/28/2017

**Decision**

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns pertaining to Guideline K (handling protected information). Clearance is granted.

**Statement of the Case**

On June 22, 2015, Applicant submitted a Questionnaire for National Security Positions (SF-86). On August 2, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an Statement of Reasons (SOR) to Applicant, pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline K (handling protected information). The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant or continue Applicant's access to classified information and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked.

On August 26, 2016, Applicant responded to the SOR allegations and requested a hearing. On October 21, 2016, Department Counsel was prepared to proceed. On January 31, 2017, the case was assigned to me. On March 2, 2017, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice setting the hearing for March 14, 2017. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 4, which were received into evidence without objection. Applicant testified, did not call any witnesses, and did not offer any evidence. I held the record open until April 14, 2017, to afford the Applicant an opportunity to submit evidence. Applicant timely submitted Applicant Exhibits (AE) A through G, which were received into evidence without objection. On March 22, 2017, DOHA received the hearing transcript (Tr.). The record closed on April 14, 2017.

### **Findings of Fact**

Applicant admitted with explanations all of the SOR allegations. After a thorough review of the evidence, I make the following findings of facts. (Tr. 24)

### **Background Information**

Applicant is a 47-year-old manufacturing engineer employed by a defense contractor since November 1990. He seeks to reinstate his secret security clearance, which is a requirement of his continued employment. (GE 1, AE F; Tr. 17-20)

Applicant graduated from high school in May 1988. (GE 1; Tr. 20) He was awarded an associate's degree in May 2008. (GE 1; Tr. 20-21) Applicant married in June 1991 and has three adult children. His wife is employed full-time as an electronics and computer trainer at a local public library. (GE 1; Tr. 21-24) Applicant did not serve in the U.S. armed forces. (GE 1; Tr. 24)

### **Handling Protected Information**

The allegations are relatively straightforward and the facts are not in dispute. The SOR cites three separate security lapses. The first occurred in January 2013 when Applicant left an unclassified laptop in proximity to classified material. He placed his company-issued computer in his classified workspace, which is a triple-locked closed area, in order to safeguard it, forgetting that the computer had a wireless card and camera. (Tr. 26-41)

The second occurred in December 2013 over a holiday stand-down period when Applicant did not adequately secure his workspace by failing to "spin the dial" on a door, one part of a three-lock process. The workspace was secured except for this portion of the three-lock process. (Tr. 41-53)

Both of these lapses were Type 2 security violations. Each violation was thoroughly investigated and it was determined that no compromise of classified material

occurred on either occasion. Applicant was counseled on both occasions and received refresher training. (Tr. 37-39, 41, 74-75)

The third occurred in May 2015 when Applicant did not to secure a classified security container by failing to secure the lock and complete the lock/unlock log within his secure triple-locked workspace. He further failed to stow properly a confidential portable USB hard drive within his secure workspace. This lapse was a Type 3 security violation. It was thoroughly investigated and it was determined there was no compromise of classified material. Applicant was counseled, received refresher training, and placed on security probation from June 2015 to June 2016. (Tr. 25, 59-70, 74-75)

This incident ultimately lead to the revocation of Applicant's security clearance approximately a year after the incident. Applicant had access to classified information until his clearance was revoked. (Tr. 25, 67-71) The day before his clearance was revoked, management inquired whether he was interested in becoming the facility security officer approached Applicant. (Tr. 57-59)

Applicant did not attempt to deflect or avoid responsibility for these security lapses. He accepted full responsibility and recognized his mistakes saying, "I just messed up" or it was a "loss of concentration." It was clear from Applicant's demeanor that he was extremely disappointed in himself. He added that his son and his son's fiancée are serving in the U.S. Army and that he would never do anything to jeopardize their security or the security of members of the armed forces. (Tr. 39, 53-54, 72-73) He credibly stated that he takes security matters very seriously. (Tr. 74)

In August 2015, Applicant was involved in a serious motorcycle accident in which he lost a leg. He has been recovering and in rehabilitation since then and has worked approximately "a little over a month" since the accident. (Tr. 25, 54-57, 71-72, 75-77)

## **Character Evidence**

Applicant's company continues to retain confidence in him and supports reinstatement of his clearance. (Tr. 71) A senior company official submitted a reference letter in his "unofficial capacity" lauding Applicant's trustworthiness, dependability, judgment, and ethics. (AE A-B) Applicant submitted work performance evaluations covering 2012 to 2016 that reflect rock solid performance. (AE C-F) Applicant also submitted a reference letter from his pastor of 18 years, who provided favorable comments regarding his integrity, honesty, and overall good character. (AE G)

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.*

at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## Analysis

### Handling Protected Information

AG ¶ 33 articulates the security concern relating to handling protected information as follows, “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.”

A review of the evidence supports application of two handling protected information disqualifying conditions. AG ¶ 34(g) “any failure to comply with rules for the protection of classified or other sensitive information;” and AG ¶ (h) “negligence or lax security habits that persist despite counseling by management.” The

Two mitigating conditions under AG ¶ 35 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;

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

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See Directive ¶ E3.1.15*. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” *Directive, Enclosure 2 ¶ 2(b)*.

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶¶ 35(a) and 35(c) apply. Applicant realized his mistakes and responded favorably to counseling. He in no way attempted to minimize his lapses and accepted responsibility for his actions. It is clear that these lapses were inadvertent. Applicant has a positive attitude towards security and recognizes the importance properly safeguarding classified materials. It is noteworthy that Applicant's employer maintains

confidence in him to the point of offering him the facility security officer position the day before his clearance was revoked. Applicant's actions show sufficient effort, good judgment, trustworthiness, and reliability to warrant mitigation of handling protected information security concerns. Even if handling protected information concerns are not mitigated under AG ¶¶ 35(a) through 35(c), they are mitigated under the whole-person concept, *infra*.

## **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 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 have incorporated my comments under Guideline K in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline K, but some warrant additional comment.

Applicant is a 47-year-old manufacturing engineer, who apart from these security lapses has had 27 years of unblemished employment with a defense contractor. As noted, none of these security lapses were intentional or resulted in a compromise of classified material. Applicant was counseled and most recently paid a heavy price for his inattentiveness by having his clearance revoked. The matters of security strike close to home for Applicant having a son and his son's fiancée serving in the U.S. Army. Lastly, his company continues to maintain confidence in him as evidenced by their offering him the facility security officer position the day before his clearance was revoked and continuing to support him to this day.

Applicant's character statements from a senior company official and his pastor emphasize his diligence, professionalism, efforts at security improvement, conscientious compliance with rules, dependability, loyalty, honesty, trustworthiness, and contributions to mission accomplishment. Applicant understands what he needs to do to maintain his eligibility for access to classified information. He expressed sincere remorse for his infractions of security rules and he emphasized his determination to conscientiously comply with all security rules and requirements. I am confident he will continue to conscientiously exercise his security responsibilities in the future.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Handling protected information concerns are mitigated, and eligibility for access to classified information is granted.

### **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 through 1.c:	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 grant or continue Applicant's eligibility for a security clearance. Clearance is granted.

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Robert Tuidier  
Administrative Judge