



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



In the matter of:)
)
) ISCR Case No. 17-01111
)
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel
For Applicant: Mark S. Zaid, Esq., Applicant's Counsel

August 29, 2018

Decision

CEFOLA, Richard A., Administrative Judge:

Statement of the Case

On August 4, 2017, in accordance with DoD Directive 5220.6, as amended (Directive), the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline K. The SOR further informed Applicant that, based on information available to the government, DoD adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant's security clearance.

Applicant answered the SOR on August 29, 2017, and requested a hearing before an administrative judge. (Answer.) The case was assigned to me on October 23, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 16, 2017, scheduling the hearing for January 17, 2018. The hearing was convened as scheduled. The Government offered Exhibits (GX) 1 through 7, which were admitted into evidence. Applicant testified on his own behalf and called three witnesses. Applicant presented five documents, which I marked as Applicant's Exhibits (AppXs) A through E, and admitted into evidence. The record was left open until March

16, 2018, for receipt of additional documentation. On March 15, 2018, Applicant offered AppXs F~H, which were also admitted into evidence. DOHA received the transcript of the hearing (TR) on January 25, 2018.

Findings of Fact

Applicant admitted to the allegations in SOR ¶¶ 1.a., and 1.c~1.e. He denied SOR allegations ¶¶ 1.b. and 1.f. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 62-year-old employee of a defense contractor. He has been employed with the defense contractor since May of 2016. (GX 1 at page 5, and TR at page 59 line 2 to page 63 line 5.)

Guideline K – Handling Protected Information

1.a. Applicant admits that in November of 1983, more than 30 years ago, he failed to properly secure, inadvertently marked as Secret print-outs, in an approved container. (TR at page 66 line 3 to page 68 line 20, and GX 7 at page 1.) The printer in question designated everything printed on it as Secret. (*Id.*) Although the unclassified print-outs in question may have been improperly marked as Secret, they should have been given those protections required of a Secret document. As a result, Applicant was given a verbal warning.

1.b. Applicant denies that in February of 1984, again more than 30 years ago, he transmitted classified information on an unclassified computer. He, in fact, admits that he transmitted Top Secret materials on a Secret computer; and as such, may have caused unauthorized “spillover” of classified information. (TR at page 68 line 21 to page 77 line 16, and at page 116 line 16 to page 119 line 10.) As a result, Applicant was suspended for five days.

However, he denies that in February of 1984 he failed to properly secure classified materials in a room where a meeting was being held, as is required of the last person to depart the room. Applicant was not a participant in the meeting; and as such, was not the last person to depart the room, as the meeting continued after his departure. (*Id.*, and GX 7 at pages 1~2.)

1.c. Applicant admits that in December of 1988, nearly 30 years ago, he failed to secure classified containers, as he forgot to spin the locks on two safes. (TR at page 77 line 17 to page 79 line 10, and GX 7 at pages 3~4.) As a result, he was given a verbal warning and counseling.

1.d. Applicant admits that in February of 1989, again nearly 30 years ago, he failed to secure classified “diskettes.” Although he locked the door to his room, he left the diskettes on his desk. (TR at page 80 line 15 to page 82 line 8, and GX 7 at pages 2~3.) As a result, he was given a verbal counseling.

1.e. (2) Applicant admits that in 1998 or 1999, about 20 years ago while on a boat-outing, he may have inadvertently discussed his classified work with his parents. (TR at page 92 line 2 to page 96 line 9, and at page 121 at 7 to page 122 at 15.) Applicant's parents were, and still are, unaware of any classified information being discussed. (*Id.*, and AppX 7.) Applicant's father held a Top Secret security clearance from about 1967 to 2008. (AppX 7.)

1.e. (1) Applicant admits that in 2003, about 15 years ago, he show classified materials on slides to prospective employers during job interviews. (TR at page 85 line 10 to page 92 line 1, and at page 119 line 11 to page 121 line 6.) This was a clear security clearance violation.

1.f. (1) Applicant denies that in June of 2009, about nine years ago, he discussed classified information with a co-worker in a public place. It was, in fact, a secured conference room, where about 40 cleared people were attending a meeting. (TR at page 98 line 16 to page 103 line 3, and at page 122 line 16 to page 123 line 8.) Applicant sat well away from the door; and when un-cleared food servers entered the room, all classified conversations ceased. (*Id.*) This is corroborated by the testimony of two team leaders from Applicant's former employer. (TR at page 21 line 10 to page 26 line 5, and at page 44 lines 14~24.) I find no security clearance violation here, and none was determined as such at the time of the incident.

1.f. (2) Applicant denies that in August of 2011, about seven years ago, he knowingly gave his security code for a classified security container to his manager who did not have permission to have the security code. Applicant, his manager, who held a security clearance, and other cleared persons, attempted to enter a secured room. (TR at page 103 line 4 to page 107 line 18, and at page 123 line 9 to page 124 line 14.) After about "half an hour" of repeated, failed attempts to open the room's door; Applicant's manager asked for the combination, went to the front desk and returned with another cleared individual, who opened the secured door. (*Id.*) This is also corroborated by the testimony of two team leaders from Applicant's former employer. (TR at page 26 line 6 to page 31 line 17, and at page 34 line 23 to page 36 line 15.) I find no security clearance violation here, and none was determined as such at the time of the incident

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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 national security eligibility will be resolved in favor of the 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person who seeks national security eligibility 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 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 *a/so* 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 relating to the guideline for Handling Protected Information is set out in AG ¶ 33:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 34. Five are potentially applicable in this case:

- (a) deliberate or negligent disclosure of protected information to unauthorized persons, including, but not limited to, personal or business contacts, the media, or persons present at seminars, meetings, or conferences;
- (b) collecting or storing protected information in any unauthorized location;
- (c) loading, drafting, editing, modifying, storing, transmitting, or otherwise handling protected information, including images, on any unauthorized equipment or medium;
- (c) inappropriate efforts to obtain or view protected information outside one's need to know;
- (e) loading, drafting, editing, modifying, storing, transmitting, or otherwise handling protected information, including images, on any unauthorized equipment or medium; and
- (g) any failure to comply with rules for the protection of classified or sensitive information.

About 20 to 30 plus years ago, Applicant had five admitted and/or possible security clearance violations. More recently, about 15 years ago, Applicant had a clear violation when he shared classified materials during job interviews.

AG ¶ 35 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 35 including:

- (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;
- (c) the security violations were due to improper or inadequate training or unclear instructions; and
- (d) the violation was inadvertent, it was promptly reported, there is no evidence of compromise, and it does not suggest a pattern.

I find AG ¶ 35(a) and AG ¶ 35(b) clearly applicable here. Applicant's last security violation was 15 years ago. So much time has elapsed since the behavior that it is unlikely to recur. Furthermore, three witnesses, consisting of two former team leaders and a current co-worker, testified as to Applicant's trustworthiness. (TR at page 17 line 4 to page 36 line 15, at page 37 line 19 to page 50 line 18, and at page 52 line 2 to page 57 line 23.)

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(d):

(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 national security eligibility 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 facts and circumstances surrounding this case. I have incorporated my comments under Guideline K in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

Applicant has a distinguished history of working in the defense industry and is respected by those with whom and for whom, he worked. (TR at page 17 line 4 to page 57 line 23, and AppXs G and H.) He performs well at his job. (AppXs B, C and F.)

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the Handling of Protected Information security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraphs 1, Guideline K: FOR APPLICANT

Subparagraph 1.a.-1.f.: For Applicant

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 Applicant eligibility for a security clearance. National security eligibility for access to classified information is granted.

Richard A. Cefola
Administrative Judge