DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 17-01870
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: Richard M. Steingard, Esq., Applicant's Counsel

June 15, 2018

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Decision

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CEFOLA, Richard A., Administrative Judge:

Statement of the Case

On June 21, 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 Guidelines M, K, and E. 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. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within DOD on June 8, 2017.

Applicant answered the SOR on July 5, 2017, and requested a hearing before an administrative judge. (Answer.) The case was assigned to me on August 31, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August

31, 2017, scheduling the hearing for September 26, 2017. The hearing was convened as scheduled. The Government offered Exhibits (GX) 1 through 5, which were admitted without objection. Applicant testified on his own behalf. Applicant presented 14 documents, which I marked Applicant's Exhibits (AppXs) A through N, which were admitted without objection. DOHA received the transcript of the hearing (TR) on October 4, 2017.

Findings of Fact

Applicant admitted to all the allegations in SOR. (TR at page 7 line 17 to page 8 line 11.) After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 43-year-old employee of a defense contractor. (GX 1 at page 5.) He has been employed with the defense contractor since October of 2015. (GX 1 at page 13.) He has held a security clearance, intermittently, since 2004 or 2005. (TR at page 29 lines 22~25, and GX 1 at page 32.)

Guideline M - Use of Information Technology & Guideline E – Personal Conduct

1.a. and 3.a. From about May of 2011 until August of 2014, while employed by a defense contractor, Applicant used peer-to-peer file sharing services to illegally download approximately 5,000 songs and 60 movies to his personal computer (PC). (TR at page 40 line 6 to page 41 line 20, at page 43 line 9 to page 45 line 1, and at page 62 line 2.) Applicant freely admits to this, which he repeatedly, in his own words, styles as "foolish" behavior. (*Id*.)

Guideline K - Handling Protected Information & Guideline E – Personal Conduct

2.a. and 3.a. In April of 2008, while employed by a defense contractor, Applicant, in clear violation of security clearance guidelines, knowingly brought home classified documents. (TR at page 33 line 4 to page 40 line 5, and at page 47 line 13 to page 55 line 23.) He admitted this improper conduct when faced with a polygraph examination a year later in 2009. (*Id*.)

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 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 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 also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline M - Use of Information Technology

The security concern relating to the guideline for Use of Information Technology is set out in AG ¶ 39:

> Failure to comply with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology includes any computer-based, mobile, or wireless device used to create, store, access, process, manipulate, protect, or move information. This includes any component,

whether integrated into a larger system or not, such as hardware, software, or firmware, used to enable or facilitate these operations.

The guideline notes several conditions that could raise security concerns under AG ¶ 40. Three are potentially applicable in this case:

> (d) downloading, storing, or transmitting classified, sensitive, proprietary, or other protected information on or to any unauthorized information technology system;
>
> (e) unauthorized use of any information technology system; and
>
> (f) introduction, removal, or duplication of hardware, firmware, software, or media to or from any information technology system when prohibited by rules, procedures, guidelines, or regulations or when otherwise not authorized.

Over a period of about three years, Applicant illegally downloaded proprietary information.

AG ¶ 41 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 41 including:

> (a) so much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

This clearly illegal conduct occurred more than three years prior to Applicant's hearing. Due to this passage of time, this allegation is found for Applicant.

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. Two are potentially applicable in this case:

(b) collecting or storing protected information in any unauthorized location; and

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

Applicant intentionally and improperly took home classified documents.

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.

This clearly improper conduct occurred nine years prior to Applicant's hearing. Due to this passage of an extensive period of time, this allegation is also found for Applicant.

Guideline E - Personal Conduct

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 15:

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 or sensitive information.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. Two are potentially applicable in this case:

(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 judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

(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

individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

> (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;
>
> (2) any disruptive, violent, or other inappropriate behavior;
>
> (3) a pattern of dishonesty or rule violations; and
>
> (4) evidence of significant misuse of Government or other employer's time or resources.

Applicant's 2008 security clearance violation, coupled with his illegal downloading of proprietary information from 2011~2014 constitutes a clear pattern of dishonesty and rule violations. The evidence is sufficient to raise these disqualifying conditions.

AG ¶ 17 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 17 including:

> (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
>
> (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
>
> (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
>
> (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
>
> (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

I find that none of these mitigating conditions apply; and as such, Personal Conduct is found against Applicant. There is a clear pattern of rule violations, in 2008 with his clear security clearance violation, and from 2011~2014 with his illegal downloading.

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 Guidelines M, K, and E 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 his colleagues. He performs well at his job. (AppXs C~N.)

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated/failed to mitigate the Personal Conduct 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:

Paragraph 1, Guideline M:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline K:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	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. National security eligibility for access to classified information is denied.

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Richard A. Cefola
Administrative Judge