



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 17-04158
)	
Applicant for Security Clearance)	

Appearances

For Government: Rhett Petcher, Esq., Deputy Chief Department Counsel
For Applicant: *Pro se*

07/19/2018

Decision

BORGSTROM, Eric H., Administrative Judge:

Applicant did not mitigate the security concerns raised by his security violations and falsifications. Eligibility for access to classified information is denied.

Statement of the Case

On February 23, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E (Personal Conduct) and Guideline K (Handling Protected Information).¹ Applicant responded to the SOR on April 10, 2018, and he elected a determination with a hearing. On May 29, 2018, a notice of hearing was issued, scheduling the hearing for June 12, 2018. The hearing proceeded as scheduled. Applicant testified and submitted no documents. Department Counsel submitted four documents, which I admitted as Government Exhibits (GE) 1 through 4, without objection. DOHA received the transcript on June 25, 2018.

¹ 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 implemented by the DOD on June 8, 2017.

Findings of Fact

The SOR alleges security concerns based on Applicant's two security violations and two falsifications. In his response to the SOR, Applicant denied all of the allegations.

Applicant is 43 years old. He earned an associate's degree in 2002 and a bachelor's degree in 2011. From April 2012 to January 2015, Applicant was employed as an engineer for a DOD contractor. He was granted a DOD secret clearance in August 2013. When initially hired at the DOD contractor, Applicant worked only a few weeks for Supervisor #1, after which he was assigned to another department. After about a year, he returned to the first department, now under the direction of Supervisor #2, where Applicant remained until he resigned in January 2015. Applicant testified that he was repeatedly mistreated by Supervisor #2.²

In August 2014, Supervisor #2 placed Applicant on a 90-day performance-improvement plan (PIP) due to unsatisfactory work performance. Applicant disagreed with Supervisor #2's characterization of his work performance and disputed the merits of the PIP. At the December 2014 conclusion of the PIP, Supervisor #2 determined that Applicant had not fulfilled the requirements of the PIP and that his work performance remained unsatisfactory. Shortly thereafter, Applicant voluntarily resigned his employment for a position elsewhere.³

In April 2014, Applicant committed a security violation when he included confidential information in a document that was emailed over an unclassified network. Applicant admitted that he knew the information included in the document was confidential and that he did not adhere to the required procedures for protecting this information. He received a written reprimand for this security violation, and he was required to complete remedial security training.⁴

In November 2014, Applicant emailed a presentation containing confidential information over an unclassified network. He included a document without reading it, missing the classification markings. Applicant received a written reprimand for this security violation, and he was required to complete remedial security training. Both the DOD contractor and the Defense Security Service (DSS) determined that a loss had occurred due to the insertion of classified material on an unclassified system and transmission over an unclassified network.⁵

On June 6, 2016, Applicant submitted a security clearance application (SCA). On the SCA, Applicant responded "NO" to the following queries:

² GE 1, GE 2; Answer.

³ Tr. 36-41, 57; GE 2.

⁴ Tr. 31-33.

⁵ GE 3, GE 4.

Section 13C – Employment Record

For this employment have any of the following happened to you in the last seven (7) years?

- Fired
- Quit after being told you would be fired
- Left by mutual agreement following charges or allegations of misconduct
- Left by mutual agreement following notice of unsatisfactory performance

For this employment, in the last seven (7) years have you received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of a policy?

Applicant did not list his two security violations, his two written reprimands, or his PIP on his SCA. Under Section 13A of the SCA, Applicant was required to list his supervisor to verify his employment. Applicant listed Supervisor #1, his former supervisor, and not Supervisor #2, as his supervisor for verifying his employment. Applicant testified that he listed Supervisor #1 because he believed that Supervisor #2 was biased and would be a bad reference.⁶

During his August 2017 security interview, Applicant admitted that he had resigned from his employment with the DOD contractor in January 2015. When questioned whether he had received a written warning, reprimand, or disciplinary action in the workplace, Applicant denied any such occurrence. He was then confronted with the November 2014 security violation, written reprimand, and remedial security training. Applicant admitted these circumstances, but claimed that he misinterpreted the SCA query and did not believe it applied to his security violations and reprimands because his clearance had not been suspended as a result of the November 2014 violation. Applicant expressly denied any other security violations within the previous seven years.⁷

The OPM investigator then confronted Applicant about his April 2014 security violation. He admitted that he had received a written reprimand for the violation and had been required to complete remedial security training. He claimed that he had initially denied any other security violation because he had forgotten about the April 2014 violation, even during the discussion of the November 2014 violation. He also claimed that his employment with the DOD contractor was so unpleasant that he had tried to forget it.⁸

⁶ Tr. 36-41, 57.

⁷ GE 2.

⁸ GE 2; Tr. 27, 69.

When confronted by the OPM investigator about his failure to disclose his PIP on his SCA or during his security interview, Applicant claimed that he had not believed that the PIP had fallen within the scope of the SCA queries. He further claimed that he tried not to remember his unpleasant experience at the DOD contractor, as discussed above.⁹

Applicant provided multiple, conflicting explanations for his omissions on his SCA and during the security interview. Applicant testified that he did not disclose the two security violations on his SCA because he misinterpreted the questions as querying whether his security clearance had been suspended or revoked. He further claimed that he had not listed his two written reprimands because he misunderstood the question and had not listed the PIP because he disputed its merits. He believed that he did not have an adequate opportunity on the SCA to fully explain the circumstances of the PIP, written reprimands, and security violations. He both claimed that he had rushed to fill out the SCA but also that he felt it was complete. He explained that at the time he completed the SCA, he was homeless, working temporary jobs, and eager to find gainful employment. I did not find Applicant's explanations credible, because they conflicted with the documentary evidence and with each other.¹⁰

Applicant's work performance was well regarded by a previous employer.¹¹

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.

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 the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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."

⁹ GE 2.

¹⁰ Tr. 43-45, 57, 66.

¹¹ Answer.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the 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.” The applicant has the ultimate burden of persuasion to obtain a favorable security 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

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

Guideline K, Handling Protected Information

The security concern 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. The following are potentially applicable in this case:

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

(h) negligence or lax security practices that persist despite counseling by management.

Applicant committed security violations in April 2014 and November 2014, despite initial security training and then remedial security training following the April 2014 security violation. Applicant had received a written reprimand following the April 2014 security violation and was on a PIP at the time of the November 2014 security violation. Nonetheless, he emailed materials that included confidential information with

classifications markings without reading the document himself. AG ¶¶ 34(g) and 34(h) apply.

Conditions that could mitigate the use of handling protected information concerns are provided under AG ¶ 35. The following 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;

(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.

"Once it is established that an applicant has committed security violations, he or she has a 'very heavy burden' to surmount in mitigating the concerns arising therefrom, insofar as security violations 'strike at the heart of the Industrial Security Program.'"¹² The extent to which an applicant was placed on notice of the security requirements of his job and to which he received adverse actions regarding infractions is also relevant in evaluating the seriousness of the applicant's conduct.¹³

Applicant's two security violations occurred in 2014, and there is no record evidence that he handled sensitive information after his January 2015 resignation. Although Applicant contends that he has learned from his security violations, Applicant's current reliability, trustworthiness, and judgment are undercut by his failure to disclose the security violations on the SCA and during his security interview. Therefore, AG ¶ 35(a) does not apply.

Applicant committed a second security violation while he was on a PIP and within months of his first violation and reprimand. Applicant remained at the DOD contractor for less than two months after the second security violation. Therefore, I cannot conclude that he has responded favorably to the second reprimand and remedial training. AG ¶ 35(b) does not apply.

There is no evidence that Applicant's security violations resulted from improper training. Applicant's violations were inadvertent; however, Applicant repeatedly failed to

¹² ISCR Case No. 11-09219 at 3 (App. Bd. Mar. 31, 2014)(quoting ISCR Case No. 10-07070 at 8-9 (App. Bd. April 19, 2012)).

¹³ See ISCR Case No. 11-09219 at 4 (App. Bd. Mar. 31, 2014).

disclose his security violations and reprimands when required on his SCA and during his interview. When specifically questioned whether he had committed any other security violations – after having discussed the November 2014 violation – Applicant denied any other violations. Furthermore, the November 2014 data spillage was considered a loss by DSS. AG ¶¶ 35(c) and (d) do not apply. Applicant did not surmount the “very heavy burden” necessary to mitigate the security concerns arising from his security violations.

Guideline E, Personal Conduct

The personal conduct security concern 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The guidelines notes two disqualifying conditions under AG ¶ 16 that potentially apply:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

On his June 2016 SCA and during his August 2017 security interview, Applicant omitted his PIP, two written reprimands, and two security violations, until confronted by the OPM investigator. I found Applicant’s explanations for his omissions to be not credible, because they conflicted with the record evidence and with each other. I did not find it plausible that Applicant interpreted Section 13C to exclude his written reprimands, when the plain language of the question seeks written reprimands. Similarly, it is not plausible that Applicant would remember one security violation but not another violation that occurred only a few months earlier. This conclusion is buttressed by Applicant’s admission that he was unemployed at the time and was concerned about disclosing the reprimands and PIP. Applicant listed Supervisor #1, who only supervised Applicant for a few weeks, instead of his long-term supervisor, Supervisor #2, due to his concerns about receiving a bad reference. AG ¶¶ 16(a) and 16(b) apply.

Conditions that could mitigate the established personal conduct security concerns are provided under AG ¶ 17. The following are potentially applicable:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and
- (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.

During his August 2017 security interview, Applicant did not disclose his PIP, two written reprimands, or two security violations until confronted by the OPM investigator. Applicant's falsifications raise significant security concerns. Applicant is unable to adequately explain his omissions, and he continues to deny all falsifications. AG ¶¶ 17(a) and (c) do not apply. I find that Applicant did not mitigate the personal conduct security concerns associated with the falsifications on his SCA and during his security interview.

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 eligibility for a security clearance 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines K and E and the factors in AG ¶ 2(d) in this whole-person analysis.

Applicant's work performance is well regarded by his former employer; however, Applicant's security violations and falsifications raise significant security concerns. Applicant's disagreement with the merits of the security violations, reprimands, or PIP do not justify his deliberate omission of this information during the industrial security investigation. Applicant continues to deny any deliberate omissions or falsifications. I

conclude Applicant did not mitigate the handling protected information and personal conduct security concerns.

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 E:	AGAINST APPLICANT
Subparagraphs 1.a.-1.b.:	Against Applicant
Paragraph 2, Guideline K:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant

Conclusion

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

Eric H. Borgstrom
Administrative Judge