



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



In the matter of:)
)
) ISCR Case No. 11-00541
)
)
Applicant for Security Clearance)

Appearances

For Government: Robert Kilmartin, Esq., Department Counsel
For Applicant: Steven H. Levin, Esq.

08/28/2012

Decision

CURRY, Marc E., Administrative Judge:

Between 2002 and 2005, Applicant disseminated sensitive and proprietary information to an independent consultant without authorization. Although this conduct does not constitute a violation of the U.S. Systems Procurement and Integrity Act (the Act), as the Government alleged, it raises security concerns under the guideline governing the handling of protected information. Also, Applicant's conduct raises broader questions about his personal conduct which he failed to mitigate. Clearance is denied.

Statement of the Case

On August 4, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under the guidelines covering the handling of protected information and personal conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2,

1992), as amended (Directive), and the adjudicative guidelines (AG) implemented by DoD on September 1, 2006.

Applicant answered the SOR on September 1, 2011. He denied all of the allegations and requested a hearing. The case was assigned to me on April 12, 2012. On May 8, 2012, a notice of hearing was issued scheduling the case for May 23, 2012. The hearing was conducted as scheduled. I received three Government exhibits (GE 1-3) and eight Applicant exhibits (AE A-H). Also, I considered the testimony of one Government witness and two Applicant witnesses. At the close of the hearing, I left the record open for Department Counsel to identify which provision of the Procurement Integrity Act was allegedly violated, and for Applicant's counsel to prepare a response. Within the time allotted, Department Counsel provided a one-page memo that I incorporated into the record as Hearing Exhibit I. Applicant's counsel did not respond. The transcript was received on June 12, 2012.

Findings of Fact

Applicant is a 60-year-old married man with four children. He has been married three times previously. All of his prior marriages ended in divorce. His two youngest children, ages two and five, are from his current marriage. The older children, both adults, were from prior marriages.

Applicant served in the U.S. Marine Corps from 1974 until his retirement in 1995. While in the Marines, he earned a bachelor of arts degree in natural science and a master's degree in human resources management. (Ex. A; Tr. 14) Since retiring, he has worked in the unmanned vehicle industry. (Ex. C) Applicant has held a security clearance for more than 35 years. (GE 2 at 12) Currently, Applicant works for a defense contractor that is developing technology for enhancing situational awareness between manned and unmanned aircraft, and technology for identifying friendly unmanned aircraft from unmanned aircraft operated by adversaries. He has worked for this company since 2010. (Ex. A)

From March 2002 to February 2010, Applicant worked for another defense contractor that specialized in unmanned combat systems. He was responsible for developing acquisition strategies and ensuring that the system specifications for the government's unmanned vehicles met Federal Aviation Administration regulations. (Ex. A) His job performance was good. Over the years, his supervisors have characterized him as "far-thinking" and "dependable." (Ex. H at 10, 28) Similarly, the company's customers were pleased with Applicant's performance. (Ex. H at 16)

From September 2004 to August 2005, Appellant performed part-time consulting services for Mr. X, an independent contractor specializing in marketing and business development of unmanned vehicle systems technology. (Ex. 3 at 9, 194) Mr. X did consulting work for several defense contractors in this field.

In August 2005, the federal government initiated a multi-agency investigation of Mr. X after several defense contractors complained that he had somehow obtained some of their proprietary information and was distributing it to his principal employer. Because his employer was a competitor of these other defense contractors, the concern was that Mr. X was giving his company an unfair advantage when competing for procurement contracts. (GE 3 at 9, 18, 23)

Investigators then met with counsel for Mr. X's client. After the meeting, Mr. X's client provided several documents it had received from Mr. X. Many of the documents were "pre-decisional" and "procurement sensitive." (GE 3 at 7) On November 17, 2005, the lead investigative agency obtained a search warrant for Mr. X's business and residence. As part of the search, it seized Mr. X's computer. (GE 2 at 6) Among other things, the investigators discovered six e-mails from Applicant to Mr. X with attached documents labelled either "source selection sensitive" "Distribution D," or "For Official Use Only" [FOUO]. (Tr. 146, 152; GE 3 at 54) According to Applicant, "source selection" documents are proposals from contractors. The government agency reviews them and then decides who is going to perform the work. (Tr. 152) "Distribution D" information is government-generated information that may only be reviewed by DoD contractors and DoD employers with a need to know. (Tr. 152)

In December 2007, investigators contacted Applicant and interviewed him. (Tr. 78) During the interview, Applicant stated that as part of his job he had access to government documents and information for the research and development of unmanned aerial vehicles. The investigators showed Applicant copies of each e-mail seized from Mr. X's computer, which Applicant had sent, and asked him if he should have sent them. The first e-mail (E-Mail 1) was dated April 9, 2005. E-Mail 2 was dated January 7, 2005, E-Mail 3 was dated March 25, 2005, E-Mail 4 was dated January 6, 2005, E-Mail 5 was dated December 24, 2004, and E-Mail 6 was dated August 15, 2002. (GE 3 at 55-64) Applicant admitted sending all of the e-mails except E-Mail 4. He stated that neither the government nor his employer authorized him to send any of the information that he forwarded to Mr. X. Although he did not admit sending E-Mail 4, he did not explicitly deny sending it. Rather, he stated that he did not remember sending it, but if he did, the information attached was not something that Mr. X was authorized to receive. (GE 3 at 56)

Each e-mail that Applicant sent to Mr. X included brief messages with attachments. For example, E-Mail 1 includes, in part, the following:

This is the whole kitchen sink. Pull what you want and be careful. Took me all day to get my hands on. (GE 3 at 58)

An excerpt from E-Mail 3 reads as follows:

Here is the draft we are working on. Disguise the words so as not to identify the source. (GE 3 at 60)

At the hearing, Applicant testified that he asked his supervisor for permission to consult part-time, and that his supervisor granted him permission. (Tr. 153) Applicant's supervisor and the president of the company where he worked during the period he e-mailed the information to Mr. X were interviewed as part of the criminal investigation of Mr. X. They told the criminal investigative agent that they were unaware that Applicant was working on the side. Also, neither knew Mr. X. (GE 3 at 82)

Applicant testified that the information he provided to Mr. X was all open source information that was in the public domain when he sent it. (Tr. 146) Per a "handshake" agreement with Mr. X, Applicant was paid \$100 per hour to research the Internet for information about unmanned aerial technology that Mr. X may find helpful. (Tr. 158) It is unclear from the record when Applicant started consulting for Mr. X. Also, Applicant testified that he did not commit procurement fraud because the competitive bidding had already occurred before he forwarded the information. Consequently, neither Mr. X nor anyone to whom Mr. X forwarded the information received any unfair competitive advantage.

When asked on cross-examination why his testimony contradicted what he told the investigator, Applicant attributed the contradiction to a misunderstanding as to whether Mr. X was a licensed DoD contractor. Specifically, he testified that before the interview, the investigative agent told him Mr. X was an unlicensed contractor. Some time after the interview, immediately before testifying before a grand jury,¹ the prosecutor informed Applicant that Mr. X was a licensed DoD contractor. Applicant contends that his statements were not contradictory because his disclosure to the investigative agent was predicated upon the agent's misinformation that Mr. X was an unlicensed contractor, whereas, his hearing testimony is based on his understanding that Mr. X was a licensed DoD contractor. (Tr. 82, 173)

The project manager of the agency that Applicant supported testified. He stated that Applicant reported primarily to him when he was assigned to the project. He served in the capacity of program director at or about the time Applicant was providing part-time consulting services for Mr. X. The project manager described his agency as public sector venture capitalists who typically "develop a piece of technology to a point where it is . . . validated." (Tr. 190) After developing the technology, it is provided to one of the branches of the armed services where the technology is "mature[d] further" and made operational. (Tr. 190) The process of transitioning a technology from the development agency to the armed service branch is large-scale and complex and requires a defense contractor to coordinate, together with multiple subcontractors. (Tr. 180, 188-190)

Applicant was part of a team hired to expedite the transition of the new technologies to the armed service branch. (Tr. 180) Consequently, he was required to "actively engage the contractor and government community outside of [the agency] with material such as the information at issue. (Tr. 180) Any material "related to operations

¹The grand jury related to the government's investigation of Mr. X. Applicant was not a target of the investigation. (Tr. 83)

requirement documents [or] statement of work . . .” was expected to be released. (Tr. 185) The project manager, testifying by phone, stated that he had reviewed the attachments to E-Mails 1 and 3 through 5. He concluded that Applicant was authorized to release this information. (Tr. 178-180) On cross-examination, the project manager acknowledged that he did not know whether Mr. X was part of the future combat systems contractor community that was authorized to receive this information. (Tr. 185-186)

E-Mail 6 is a message between two government employees that had been forwarded to Applicant, who then forwarded it to Mr. X. As part of the government investigation, the sender of the e-mail was interviewed. (GE 3 at 68) He told the agent that Applicant, as part of the team, would have been allowed to see the e-mail, but he should not have forwarded it to anyone outside the program. To his knowledge, Mr. X was not part of the program. (GE 3 at 68)

On March 20, 2008, the investigator interviewed the lead contracting officer of the armed services branch that was working with the research agency to develop the unmanned aviation technology. (GE 3 at 69) He stated that Applicant’s dissemination of the documents was inappropriate, but that it did not affect the procurement process because it occurred after contractors were already selected. (GE 3 at 69)

One of the investigators who interviewed Applicant as part of the investigation of Mr. X testified. According to the investigator, the issue of whether Mr. X was an authorized DoD contractor was never discussed during the interview.

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. 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 access to classified information will be resolved in favor of national security.”

Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate,

or mitigate facts admitted by applicant or proven by Department Counsel. . . .” Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

Analysis

Guideline K, Handling Protected Information

Under this guideline, “[d]eliberate 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” (AG ¶ 33). The Government alleges that Applicant violated the Act by providing sensitive information to Mr. X, a contractor, without authorization.

Under the Act, any person by virtue of his office, employment, or relationship with the federal government, who has access to contractor bid or proposal information, or source selection information shall not disclose such information before the award of the procurement contract to which the information relates. (41 U.S. Code §§ 2102(a)(1); (a)(3)(B)). According to the lead contracting officer of the armed service branch on the base where Applicant was working, the information that Applicant shared with Mr. X had no effect on the procurement process because it had already occurred before Applicant shared it. Absent any other evidence regarding a violation of the Act, and in light of Applicant’s denial, I conclude that Applicant’s disclosure of information to Mr. X did not constitute a violation of the Act.

Although Applicant did not violate the Act, this does not end the analysis of whether he violated any rules for protecting classified or sensitive information. The information was either sensitive, protected, or proprietary regardless of whether its disclosure violated the Act. Applicant contends that he was authorized to disclose it, whereas, the Government contends that he was not authorized to disclose it. This raises the issue of whether AG ¶ 34(a), “deliberate or negligent disclosure of classified or other protected information to unauthorized persons, including but not limited to personal or business contacts, to the media, or to persons present at seminars, meetings, or conferences,” applies.

The project manager for the agency where Applicant was assigned testified that Applicant was authorized to release the information, such as that which was released to Mr. X. However, he did not know specifically whether Mr. X was a licensed contractor. Moreover, the project manager only testified about four of the six e-mails that Applicant forwarded to Mr. X. He did not testify about E-Mail 2 and E-Mail 6. Moreover, E-Mail 6 was an e-mail conversation between two government employees, and the e-mail’s sender told the investigator that it was okay for Applicant to have seen the e-mail, but not to have forwarded it to anyone else.

Most important, Applicant initially admitted that he should not have forwarded the information to Mr. X. He states that his earlier investigative statement was based on

misinformation provided to him by the investigators regarding Mr. X's contractor status. One of the investigators who interviewed Applicant testified. He stated that he never discussed with Applicant the issue of whether Mr. X was a licensed contractor. (Tr. 227-255)

Applicant testified untruthfully about whether his employer knew he was performing independent consulting work part-time. This false testimony undermines the credibility of his assertion that the agent misled him about whether Mr. X was an authorized contractor. Conversely, there is nothing either in the documentary record or that was gleaned from cross-examination for me to conclude that the agent was not credible. I conclude that AG ¶ 34(a) applies without mitigation.

Guideline E, Personal Conduct

Under this guideline, "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 information" (AG ¶ 15).

Applicant's conduct triggers the application of AG ¶ 16(d)(1) "untrustworthy or unreliable behavior to include . . . release of proprietary information [or] unauthorized release of sensitive corporate or other government protected information." I conclude that none of the mitigating conditions apply for the same reasons, as discussed above. none of the mitigating conditions under the guideline concerning handling protected information, as discussed above, do not apply.

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.

Applicant enjoyed a successful career in the Marines, retiring after 21 years of service. During this time, he earned both an undergraduate degree and a master's degree. He is a highly talented individual who has nurtured a productive career in the defense contracting industry.

However, Applicant chose to perform part-time consulting work without the knowledge of his supervisors, and provided sensitive, protected information, and proprietary information to his part-time employer without authorization. He compounded this security violation by testifying about it untruthfully. Upon considering this case in light of the whole-person concept, I conclude Applicant has failed to mitigate the 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 K:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.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. Eligibility for access to classified information is denied.

MARC E. CURRY
Administrative Judge