



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:	)	
	)	
-----	)	ISCR Case No. 06-18345
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Jennifer I. Goldstein, Esquire, Department Counsel  
For Applicant: William Savarino, Esquire

September 21, 2009

**Decision**

MOGUL, Martin H., Administrative Judge:

On January 20, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines B, K, and E for Applicant. 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant responded to the SOR (RSOR) in writing on February 20, 2009, and requested a hearing before an Administrative Judge. I received the case assignment on April 17, 2009. DOHA initially issued a notice of hearing on April 23, 2009, and the hearing was scheduled to be heard on June 24, 2009, in Honolulu, Hawaii. Because of scheduling issues, the hearing was rescheduled, and a second notice of hearing was issued on May 15, 2009. The hearing convened on July 24, 2009, in Honolulu, Hawaii.

The Government offered Exhibits 1 through 10, which were received without objection. Applicant testified on his own behalf, and he submitted Exhibits A through F, which were entered without objection. DOHA received the transcript of the hearing (Tr) on August 10, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

### **Request for Administrative Notice**

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to South Korea. The request and the attached documents were admitted into evidence as Exhibit 10. Applicant's counsel also submitted documents regarding South Korea (Exhibit F), and I have reviewed and incorporated them also. The facts administratively noticed are set out in the Findings of Fact, below.

### **Findings of Fact**

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 52 years old. He is married, and he has two children. His son and daughter are U.S. citizens. He has received two Bachelor's degrees, one in Business Administration and one in Information Systems. Applicant was born in the United States. He served in the United States Army from 1984 to 2004, and he received many decorations, medals, and badges, as reviewed in Exhibit A, Applicant's DD Form 214. His family, including his mother, father, four brothers, and two sisters are all U.S. born citizens, and they reside in the U.S.

Applicant first lived in South Korea while he was in the U.S. Army. He continues to live in South Korea, and works for a U.S. defense contractor there. Applicant has had a DoD security clearance since 1995, and he seeks to retain a DoD security clearance in connection with his employment in the defense sector.

### **Paragraph 1 (Guideline B - Foreign Influence)**

The SOR lists 3 allegations under Adjudicative Guideline B. All of the allegations will be discussed in the same order as they were listed in the SOR:

1.a. Applicant's wife, who is 48 year old, is a citizen and resident of South Korea. Applicant met his wife in South Korea, while he served in the U.S. Army. They have been married almost 18 years. He testified that it is his wife's intention to become a United States citizen, and she has begun the process of acquiring a green card and will thereafter apply when appropriate to get her U.S. citizenship. It is his plan for his family to move back to the United States by the summer of 2010 (Tr at 47-48). Applicant's wife is not employed.

1.b. Applicant's mother-in-law is a citizen and resident of South Korea, and she is 60 or 62 years old. She lives with Applicant's wife's older sister. Applicant estimated that he sees his mother-in-law every four months, although she was living with him and his wife at one point in 2008. His wife talks to her once or twice a week, and he speaks to her "hardly ever."

1.c. Applicant's siblings-in-law, which includes two sisters and a brother of Applicant's wife, are citizens and residents of South Korea. Applicant's brother-in-law has his own construction business. Neither he nor his wife ever worked for the Korean Government. Applicant's older sister-in-law does not work. Her husband was in the Republic of Korean (ROK) marines for 20 years and is now retired. He was a lieutenant colonel before he retired in 2008. He is now a consultant for the marines. His younger sister-in-law does not work and her husband is a salesman. Applicant's contact with his in-laws is infrequent.

Applicant does not own any property in Korea. He deposits his paycheck in a U.S. bank. He also has the assets of his 401k in the United States.

## **Paragraph 2 (Guideline K - Handling Protected Information)**

The SOR lists 2 allegations under Adjudicative Guideline K. The allegations will be discussed in the same order as they were listed in the SOR:

2.a. On or about December 1 and 2, 2004, Applicant failed to properly secure classified information, while employed in South Korea, in violation of Paragraph 6-9 of Army Regulation 380-5.

Applicant explained the situation that resulted in this violation. He was working with a coworker, making upgrades on laptop computers. Since they were not going to finish in one day, his coworker suggested that they keep the computers working throughout the night, so when they came back to work in the morning, the upgrades would be complete. They secured the area, and did leave the computers running until the next day. Applicant conceded that the correct course of action would have been to secure the computers in a safe overnight, and begin working on them again the next day. When his supervisor came in the next day, he questioned Applicant about the computers. Applicant testified that he honestly explained to his supervisor what they had done, and during an investigation that was held, he also cooperated and explained his action.

No unauthorized information was revealed as a result of Applicant's conduct. As a result of the investigation, Applicant received a written counseling statement. No other punishment was meted out for this infraction, and Applicant testified that he has never left the computers out of the safe at night after this incident (Tr at 65-77).

2.b. On or about April 1, 2005, Applicant failed to properly secure a security container, while employed in South Korea, in violation of Army Regulation 380-5.

Applicant testified that this incident resulted when Applicant opened a secured safe, and while the safe was still open, he moved about three feet into another room, where he greeted a secretary. Another individual came into the room, and it did not look like anyone was with the open safe, so he filed a report. He estimated that the safe was unattended for a minute or less (Tr at 125). Applicant testified that, as a result of this infraction, his punishment was to give a security course on base. He satisfied this requirement.

As stated above, Applicant has maintained a security clearance since 1995, and he testified that the two violations described above are the only violations that he has received from 1995 to the present, a span of 14 years (Tr at 64-65).

### **Paragraph 3 (Guideline E - Personal Conduct)**

3.a. The Government alleges that Applicant's security violation, as alleged in paragraph 2, above exhibits questionable judgement and unwillingness to comply with rules and regulations.

3.b. Applicant informed an investigator of the Department of Defense in an affidavit, signed by him on February 4, 2008, that he had unintentionally left 10 to 12 classified hard drives in laptop computers overnight in December 2004. The SOR alleges that Applicant failed to disclose that the hard drives were not secured because Applicant was performing required system maintenance and did not want to stop the process.

Applicant testified that when the investigator asked him about these security violations, specifically the one reviewed under 2.b., above, Applicant replied that it had been four years earlier and he did not really have a good recollection of the event. The investigator asked him whether the violation had been intentional or unintentional, and Applicant answered unintentional. Applicant conceded that he had been in error, as he had left the computers out of the safe for a specific purpose, to upgrade them. After his memory was refreshed he realized his error. However, Applicant never denied to the investigator that he had committed the act that was the subject of the violation (Tr at 85-92).

### **Mitigation**

Applicant also offered into evidence three affidavits from individuals who know or have known him in his professional life (Exhibit E). They all were extremely laudatory in describing Applicant as "defendable, reliable, honest and trustworthy."

## **Status of South Korea**

South Korea is currently a stable democratic republic. The United States and South Korea have been close allies since 1950, and have fought communism on the Korean peninsula and in Vietnam. The United States, since 1950 and currently, has thousands of U.S. military personnel stationed in South Korea, and frequently conducts joint military operations with South Korea. About 2.3 million Koreans live in the United States. South Korea is the United States' seventh largest trading partner. The South Korean Government generally respects the human right of its citizens. South Korea has a history of collecting protected U.S. information. However, as stated by President Obama on April 2, 2009, "[South] Korea is one of Americas closest allies and greatest friends."

## **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, 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense 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 access to classified information will be resolved in favor of 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, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining 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 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 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 B, Foreign Influence**

AG ¶ 6 expresses the security concern regarding foreign influence:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 describes conditions that could raise a security concern and may be disqualifying (DC). Those that could be applicable in this case include the following: (a) “contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion”; and (d) “sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.” Applicant’s relatives, including his wife, mother-in-law, and siblings-in-law, who are citizens and residents of South Korea make DC (a) a concern to the Government. His wife, who is also a citizen and resident of South Korea, and whose mother is both a citizen and resident of South Korea, make DC (d) applicable.

AG ¶ 8 provides conditions that could mitigate security concerns (MC): (b) “there is no conflict of interest, either because the individual’s sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.”

I find that MC (b) is applicable to this Applicant and controlling for the following reasons: Applicant, who is 52 years old, was born in the United States and is a natural born United States citizen. While he is married to a South Korean citizen, she is planning to apply for U.S. citizenship when she is eligible. The two children of Applicant and his wife are being raised solely as U.S. citizens. Applicant served in the United States Army from 1984 to 2004, during which he received many commendations and awards. His immediate family, including his mother, father, three brothers, and two sisters are all U.S. born citizens, and they reside in the U.S. Applicant has no assets in South Korea, and his savings and 401(k) are in United States banking facilities.

Applicant does not have a close relationship with any of his relatives through marriage, in South Korea. The evidence overwhelmingly suggests that Applicant has such deep and longstanding relationships and loyalties in the U.S., that he can be expected to resolve any conflict of interest in favor of the U.S. interest.

### **Guideline K - Handling Protected Information**

With respect to Guideline K, the Government has established that Applicant committed two incidents of security violations, in 2004 and 2005. His conduct comes within the DC ¶ 34. (g) “failure to comply with rules for the protection of classified or other sensitive information.”

In reviewing the Mitigating Conditions (MC) under ¶ 35., I find that Applicant’s violations occurred in 2004 and 2005, and are the only ones reported during the last 14 years, when Applicant has had a security clearance. I find that MC (a) “so much time has elapsed since the behavior, or it has happened so infrequently, . . . that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgement” is applicable. I also find that MC (b) “the individual now demonstrates a positive attitude toward the discharge of security responsibilities” applies in this case.

In this case, the Government has met its burden of proving that Applicant has negligently failed to comply with rules and regulations for protecting classified information, which raises doubt about his trustworthiness, judgement, reliability and willingness and ability to safeguard such information. However, since there have been only two violations in 14 years, the last occurring in 2005, I find that these events have been mitigated by time and infrequency, and Applicant has mitigated the Government’s concern against him. Accordingly, Paragraph 2, Guideline K of the SOR, is concluded for Applicant.

### **Guideline E - Personal Conduct**

With respect to Guideline E, I find that Applicant’s security clearance violations are not sufficient to come under DC ¶ (d) (3) because his pattern of rules violations do not “support a whole-person assessment of untrustworthiness, unreliability, and unwillingness to comply with rules and regulations.” I also find that his statement made to the investigator was not made in an attempt to mislead the Government. I resolve Paragraph 3, Guideline E, for Applicant.

## **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 considered the potentially disqualifying and mitigating conditions under Guidelines B, K, and E, in light of all the facts and circumstances surrounding this case. Based on all of the reasons cited above as to why the Mitigating Conditions outweigh the Disqualifying Conditions under each Guideline, the consideration of Applicant's twenty year service to the United States Army, and the strong letters of recommendation, I find that the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance under the whole person concept. For all these reasons, I conclude Applicant has mitigated 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 B:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline K:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraph 3.b:	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. Eligibility for access to classified information is granted.

Martin H. Mogul  
Administrative Judge