

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: In 2002, while employed in a foreign country, Applicant engaged in an extramarital affair with a foreign national prompting his reassignment to another position. He was not forthcoming about the circumstances of the reassignment when interviewed by an investigative agent in 2006. This creates personal conduct and criminal conduct security concerns which he failed to mitigate at the hearing. Clearance is denied.

CASENO: 06-18525.h1

DATE: 09/06/2007

DATE: September 6, 2007

In re:)	
)	
-----)	ISCR Case No. 06-18525
SSN: -----)	
)	
Applicant for Security Clearance)	

**DECISION OF ADMINISTRATIVE JUDGE
MARC E. CURRY**

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esq., Department Counsel

FOR APPLICANT

Bobby L. Warren, Esq.

SYNOPSIS

_____ In 2002, while employed in a foreign country, Applicant engaged in an extramarital affair with a foreign national prompting his reassignment to another position. He was not forthcoming about the circumstances of the reassignment when interviewed by an investigative agent in 2006. This creates personal conduct and criminal conduct security concerns which he failed to mitigate at the hearing. Clearance is denied.

STATEMENT OF THE CASE

On November 14, 2006, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) explaining why it was not clearly consistent with the national interest to grant or continue a security clearance. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended. Applicant answered the SOR on December 20, 2006. On January 26, 2007, Applicant submitted an addendum to his Answer, requesting an administrative determination. On February 8, 2007, the government requested a hearing.

On June 21, 2007, the case was assigned to me. On July 6, 2007, a hearing notice was issued, scheduling the hearing for July 31, 2007. At the hearing, I received four government exhibits and Applicant's testimony. The transcript was received on August 8, 2007.

PROCEDURAL RULING

The government filed a motion to amend the SOR on June 6, 2007. The original SOR alleges Applicant failed to disclose the circumstances of his departure from a job in 2002. It contains one subparagraph describing five allegation of employer misconduct set forth under five sub-allegations listed as subparagraphs 1.a(1)(a) through 1.a(1)(e). Also, it is alleged under two adjudicative guidelines.

The proposed amended SOR alleges each act of employee misconduct separately under subparagraph 1.b(1) through 1.b(5). Also, it alleges an additional personal conduct allegation (subparagraph 1.c), and eight additional criminal conduct allegations (subparagraphs 2.b through 2.i).

Applicant did not object to the amendment, and I granted the motion. I ordered department counsel to submit a new SOR consolidating the original SOR and the amendments. On August 6, 2007, he did so. I used the Amended SOR throughout the decision when referencing the various allegations.

FINDINGS OF FACT

_____ Applicant admitted all of the allegations except subparagraphs 1.a(1)(a), 1.a(1)(d), 1.b(1), and 2.b(4). These admissions are incorporated into the findings of fact. In addition, I make the following findings of fact.

Applicant is a 57-year-old man who has been married for 30 years. He earned a GED in the early 1970s, and has been working as a master plumber since approximately 1976. For the past 10 years, he has worked for several defense contractors on various overseas assignments where he has been involved in installing plumbing and building water treatment plants at military installations (Tr. 36).

While stationed on one assignment in the summer of 2002, Applicant grew romantically involved with a local woman. As the relationship progressed, he began meeting her for coffee during working hours, socializing with her at establishments that his employer had explicitly designated as “off limits” (Answer; Tr. 43), and lavishing her with gifts including a stereo, a television, and other electronic equipment (Tr. 45). Also, he found an apartment for her, and paid the rent (Answer; Tr. 48).

During the six months Applicant dated the foreign national, they went on vacation several times to a nearby country where they spent their time drinking and having “fun” at parties (Tr. 44). On one occasion, Applicant and his mistress caroused naked with several other female foreign nationals from the other country, “and there were several pictures taken.”(Tr. 44). Shortly after Applicant and his mistress returned from vacation, they had an argument. He demanded that she return the electronic equipment he had purchased for her, and she refused (*Id.*). Then, he said, “I bet [y]our brother sure would like to see some of these pictures” (Tr. 45). The mistress “was a Muslim girl,” (Tr. 45), and if her family had known what she was doing “it would have been kind of a disgrace” (Tr. 95).

The mistress then filed a complaint to the region’s United Nations (UN) administrator who “called [Applicant] in for a little counseling” (*Id.*). The administrator cautioned Applicant that his statement could be construed as extortion or blackmail, and ordered him to give him the pictures (*Id.*).

In February 2002, Applicant’s employer terminated his assignment. The specific reasons were as follows:¹

1. Falsification of timesheet
2. . . . fraternization with a local national female
3. Violation of Project Policy #3: Visiting “Off Limits” establishments
4. Violation of [Employer] and NATO policy: Alleged use of blackmail . . . [and]
5. Violation of Project Policy: Rented an off military installation apartment.

Applicant was not allowed to return to this particular theater, but was allowed to work for his employer anywhere else (Tr. 45). Approximately two years ago, after several successive jobs at various embassies, he returned to work for the employer with whom he had worked in 2002 (Tr. 51-55). He has not committed any additional workplace-related misconduct.

Applicant completed a security clearance application in July 2004. He answered “No” in response to Question 20 (*Your Employment Record Has any of the following happened to you in the past 7 years -Fired from job - Quit a job after being told you’d be fired -Left a job by mutual*

¹Exhibit 4, Supervisor’s E-mail Memorandum, dated August 17, 2003.

agreement following allegations of misconduct - Left a job by mutual agreement following allegations of unsatisfactory performance - Left a job for other reason under unfavorable circumstances). In 2006, Applicant met with a security clearance investigator, and was asked about the circumstances of his departure from the job in February 2002. He told the agent that it occurred because his employer was reducing its workload, and he was seen as a threat to his supervisor (Tr. 16 - Answer to Amended SOR).

Applicant has a history of criminal conduct. In 1969, a domestic dispute with his then-wife led to an arrest and battery charge. Because he was arrested in a county other than where the alleged battery occurred, he was charged as a foreign prisoner. The charge was later dismissed (Tr. 86).

In 1970, Applicant was charged and convicted of driving while intoxicated (DUI). He served four days of a nine-month sentence to imprisonment and was released (Tr. 89).

In 1976, Applicant was in a car accident. Because several empty beer cans were in the car, he was charged with DUI. He was later acquitted (Tr. 59).

In 1984, Applicant was confronted by the husband of a woman with whom he was having an affair (Tr. 66). The husband later pressed charges against him for sexual assault. At a subsequent hearing, Applicant pleaded guilty to a lesser charge of simple assault, and paid a fine (Tr. 66).

Applicant was arrested and charged with DUI in 1990. He pleaded guilty, resulting in a fine and two years probation (Tr. 17 - Answer to Amended SOR). In 2002, he was arrested and charged with DUI. He pleaded guilty and was sentenced to 15 days in jail, had his driver's license suspended for one year, and was fined (Tr. 17 - Answer to Amended SOR).

POLICIES

The adjudicative guidelines, as revised December 29, 2005, and implemented September 1, 2006, apply to the analysis of this case. In addition to brief introductory explanations for each guideline, they are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (disqualifying conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (mitigating conditions).

Because the entire process is a scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. Specifically these are: (1) the nature 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 age of the applicant; (5) the extent to which the 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.

The following adjudicative guidelines are raised:

Guideline E -Personal Conduct: 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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Guideline J - Criminal Conduct: Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, are set forth and discussed in the conclusions below.

Since the protection of national security is the paramount consideration, the final decision in each case must be reached by applying the standard that the issuance of the clearance is "clearly consistent with the national interest."² In reaching this decision, I have drawn only those conclusions that are based on the evidence contained in the record.

The Government is responsible for presenting evidence to establish facts in the SOR that have been controverted. The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by the Government, and has the ultimate burden of persuasion as to obtaining a favorable security decision.

CONCLUSIONS

Personal Conduct

Applicant's extramarital relationship with a foreign national in 2002 while working overseas, his comments to the mistress when the relationship began to deteriorate, and his corresponding employment-related misconduct generate a security concern under Personal Conduct Disqualifying Condition (PC DC) 16 (e): *personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress*. His omission of the circumstances surrounding his departure from the 2002 position from his security clearance application, and his mischaracterization of it to an investigative agent in 2006 raise the issue of whether PC DC 16(a): *deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire*, and PC DC 16 (b): *deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative*, apply.

Applicant did not leave the job in 2002. Instead, he left a particular project. His employer told him he was welcome to work on projects anywhere other than the region from which he was being reassigned. PC 16(a) is not applicable, and I conclude he did not falsify Question 20 of the 2004 security clearance application.

²See generally, Directive, Sec. 2.3, Sec. 2.5.3, Sec. 3.2, and Sec. 4.2.

Conversely, when an investigative agent asked Applicant to explain the circumstances of his departure, he deliberately mischaracterized it. PC DC 16(b) applies without mitigation to the statements made to the agent.

Applicant's employment-related misconduct occurred more than five years ago. He has worked abroad on several successive occasions, and has not committed any similar infractions involving foreign nationals. These positive factors are substantially outweighed by the nature of the violation and the subsequent failure to disclose it to an investigative agent. None of the mitigating conditions apply. Applicant has not mitigated the personal conduct security concern.

Criminal Conduct

For the reasons set forth above, Applicant's response to Question 20 of the security clearance application does not constitute criminal conduct under 18 U.S.C. §1001, and his response to the agent during the 2006 interview does constitute criminal conduct under 18 U.S.C. §1001.

Most of Applicant's criminal conduct occurred more than 20 years ago. When considered in conjunction with the 2006 falsification to the agent and the 2002 DUI, it reflects a longstanding pattern of criminal behavior that remains a security concern. Applicant has not mitigated the criminal conduct security concern.

Whole Person Concept

Applicant engaged in an extramarital affair with a foreign national of a country where he was working in 2002. During the course of the affair, he violated several company policies. Also, his comments to her as the relationship deteriorated prompted a complaint to the country's UN administrator.

Applicant was 52 years old when this conduct occurred. Consequently, neither youth nor immaturity are mitigating factors. This was not the first time an extramarital affair led to legal problems. Therefore, although he has not been involved in similar conduct since the incident, an unacceptably high possibility of recurrence remains. Most importantly, he misled an investigative agent by failing to disclose this conduct when asked why the 2002 job assignment was terminated. Evaluating this case in light of the whole person concept, I conclude Applicant remains a security risk. Clearance is denied.

FORMAL FINDINGS

Paragraph 1 – Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2 - Guideline J:	AGAINST APPLICANT

Subparagraph 1.a:
Subparagraphs 1.b-1.i:

For Applicant
Against Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Marc E. Curry
Administrative Judge