

KEYWORD: Foreign Influence

DIGEST: From October 2005 until January 2007, Applicant had a relationship with an Indonesian woman, whom he met over the internet. He lived in Japan at the time. She later moved to Japan. He has since terminated the relationship and returned to the States. Applicant mitigated the security concerns pertaining to foreign influence. Clearance is granted.

CASENO: 06-23415.h1

DATE: 07/19/2007

DATE: July 19, 2007

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In re:)  
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ISCR Case No. 06-23415  
SSN: -----  
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Applicant for Security Clearance)  
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**DECISION OF ADMINISTRATIVE JUDGE  
SHARI DAM**

**APPEARANCES**

**FOR GOVERNMENT**

Robert E. Coacher, Esq., Department Counsel

**FOR APPLICANT**

David P. Price, Esq.

**SYNOPSIS**

From October 2005 until January 2007, Applicant had a relationship with an Indonesian woman, whom he met over the internet. He lived in Japan at the time. She later moved to Japan. He has since terminated the relationship and returned to the States. Applicant mitigated the security concerns pertaining to foreign influence. Clearance is granted.

### **STATEMENT OF THE CASE**

On January 22, 2004, Applicant submitted a Security Clearance Application (SF 86). On February 28, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised.<sup>1</sup> The SOR alleges security concerns under Guideline B (Foreign Influence). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an answer notarized on March 22, 2007, Applicant responded to the SOR allegations, and elected to have his case decided at a hearing. On April 30, 2007, the case was assigned me. On May 15, 2007, a Notice of Hearing was issued setting the hearing for June 5, 2007. At the hearing the Government introduced two exhibits into evidence that were marked Government Exhibits (GX) 1 and 2 and admitted into evidence without objection. Applicant's Exhibits (AX), marked A through N, were introduced without objection. The record was left open until June 12, 2007, to give Applicant an opportunity to submit additional information. On June 12, 2007, that deadline was extended to June 15, 2007, by order. DOHA received the hearing transcript (Tr.) on June 13, 2007.

### **PROCEDURAL RULING**

Department Counsel requested administrative notice of the facts in Government Exhibits (GX) 3 through 12. Applicant did not object to me taking administrative notice of those documents, as they relate to Indonesia and Japan. (Tr. 7-8).

Administrative or official notice is the appropriate type of notice used for administrative proceedings. *See* ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12,

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<sup>1</sup>On August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guidelines to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended, in which the SOR was issued on or after September 1, 2006.

2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings, is to notice facts that are either well known or from government reports. *See* Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). I took administrative notice of the facts under subheading “Indonesia” and “Japan” of this decision, which are derived from GX 3 through 12.

### **FINDINGS OF FACT**

As to the SOR’s factual allegations, Applicant admitted he had a romantic relationship with a woman who is a citizen of Indonesia and a current resident of Japan. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 39 years old. Having come from a family of military servicemen, he enlisted in the Air Force after completing high school in 1986. He was a Senior Airman (E4) when he was honorably discharged in September 1992. (GX 2 at 5). He obtained a security clearance in 1987. (Tr. 20).

In 1987, Applicant was sent to Japan where he was on active duty for five years. (*Id.*). While there he met his wife, a Japanese citizen, whom he married in 1992. They have three children, ages 13, 9 and 6. (Tr. 22). After leaving the Air Force, he remained in Japan and taught English for a couple years. From October 1994 to October 1996, he worked as a computer technician at an air terminal. (Tr. 28). He then worked for a federal contractor as a CADD database administrator for a civil engineer squadron until January 2007, when he left Japan and returned to the States. (Tr. 29). He did not have access to classified information in his former position. (Tr. 57). In his present job, he does not have access to classified information, but will need a secret security clearance in order to work on classified networks in the future. (Tr. 57; 70).

Sometime in 2000, Applicant’s relationship with his wife began to deteriorate, becoming progressively strained by the middle of 2002. (Tr. 31-32). Over the next couple years, many of his friends left Japan and he began feeling very lonely. (Tr. 33). In October 2005, he initiated communication over the internet with a woman who was a citizen and resident of Indonesia. (Tr. 36). In February 2006, he flew to Indonesia for a few days to meet her. (Tr. 37). The next time he saw her was in April 2006 in Japan after she accepted a position in a medical program there. (Tr. 39). The relationship became romantic in September 2006 and continued until January 2007 when he left Japan. (Tr. 39). In March 2007, he completely terminated the relationship, after realizing that he needed to change his personal situation and learning that his interaction with the woman could jeopardize his employment. (Tr. 50; 63). He has not seen her since January 2007 and has not communicated with her since March 2007. He has no intention of returning to Japan. (Tr. 46). None of the woman’s family members are connected to the Indonesian government. (Tr. 61).

Currently, Applicant is separated from his wife and he intends to seek a divorce. (Tr. 50). She and the children live in Japan. He speaks to his wife twice a month, but calls his children several times a week. (Tr. 46). He would like his children to live with him in the future. He told his wife about the relationship with the Indonesian woman in October 2006. (Tr. 41). He also told his father. (Tr. 65).

Applicant was very candid about his connections to foreign nationals and his relationship with the Indonesian woman in the interrogatories he submitted to the Government in December 2006. (Tr. 51; GX 2). He is embarrassed by his actions and acknowledges the employment and personal problems that were created as a result of his indiscretions. (Tr. 52; 54). His expression of remorse was very credible.

Applicant submitted 15 character letters from colleagues, friends and family, who have known him over the years. All of them are supportive and speak highly of his character, loyalty and trustworthiness. Some of them are aware that his security clearance has been detained because of his relationships to people in Japan. He would disclose more details to his employer if necessary. (Tr. 69). One of his colleagues, who also served in the military, has known Applicant since 2001 when they worked together in Japan. He claims that Applicant “is American to the core; I have no reason to believe that his allegiance lies elsewhere.” (AX E).

### **Indonesia<sup>2</sup>**

Indonesia is a multi-party republic with approximately 245 million people. For the first time in 2004, the citizens directly elected their president, in elections that international observers determined were free and fair. Although the government has been unable to address serious human rights abuses in the past, legislation signed in 2005 has continued to yield significant legal and judicial improvements for the nation, including the expansion of rights for a free press. Due to possibility of terrorist attacks directed at Americans or Westerners at any time in the country, the U.S. State Department has issued a travel warning concerning the security situation in Indonesia.

### **Japan**

Japan is a stable parliamentary democracy with a generally good human rights record. It has been a strong ally of the United States since post-World War II. The two countries share military alliances and economic partnerships. It has offered the United States extensive support in the war on terror. More recently, it launched an intelligence-gathering satellite and intends to establish an intelligence office in

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<sup>2</sup>The contents of the Indonesia section are from GX 3, 4 and 5.

Washington, D.C. for purposes of sharing information with the U.S. Japan was listed in 2000 as an active collector of economic and proprietary information.

## POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider the "Adjudicative Guideline for Determining Eligibility For Access to Classified Information" (Guidelines), which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process. Guideline ¶ 2. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. Guideline ¶ 2(c).

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Guideline ¶ 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) 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."

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." Guideline ¶ 2(b). 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.

In the decision-making process, facts must be established by “substantial evidence.”<sup>3</sup> The Government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence and prove a mitigating condition. Directive ¶ E3.1.15 provides, “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, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).<sup>4</sup>

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an 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.

The scope of an administrative judge’s decision is limited. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. Executive Order 10865, § 7.

## CONCLUSIONS

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<sup>3</sup>“Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “Substantial evidence” is “more than a scintilla but less than a preponderance.” *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994).

<sup>4</sup>“The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

### **Foreign Influence**

Guideline ¶ 6 explains the Government's concern about "foreign contacts and interests" stating, "if the individual has divided loyalties or foreign financial interests, [he or she] 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."

One Foreign Influence Disqualifying Condition is particularly relevant and may be disqualifying in this case. Guideline ¶ 7(a) provides a disqualification when an individual has "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." Applicant admitted that for over a year, he had a relationship with a woman, personally and over the internet, with a woman who was a citizen and resident of Indonesia initially, and later a resident of Japan. Based on that admission the Government established a disqualification.

After the Government produced substantial evidence of the disqualifying condition, the burden shifted to Applicant to produce evidence and prove a mitigating condition. Two Foreign Influence Mitigating Conditions under Guideline ¶ 8 are potentially applicable:

- (a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.; and
- (c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

Given Applicant's assertion that he has terminated the relationship with the Indonesian woman, "it is unlikely [he] will be placed in a position of having to choose between the interests of [the woman] and the interests of the U.S." Another relevant factor in determining potential foreign influence is the nature of the government of the country in question. The woman now resides in Japan, a strong military and economic ally of the United States. It has a good human rights record and is less likely to exert coercion on its citizens and residents. He is no longer in contact with her, which is sufficient to meet his burden of showing there is "little likelihood that [his relationship with her] could create a risk for foreign influence or exploitation." Both conditions warrant application.

### **"Whole Person" Analysis**

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related

to the whole person concept under Directive ¶ E2.2.1. “Under the whole person concept, the Administrative Judge must not consider and weigh incidents in an applicant’s life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant’s security eligibility by considering the totality of an applicant’s conduct and circumstances.”<sup>5</sup> The directive lists nine adjudicative process factors (APF) which are used for “whole person” analysis. Because foreign influence does not involve misconduct, voluntariness of participation, rehabilitation and behavior changes, etc., the eighth APF, “the potential for pressure, coercion, exploitation, or duress,” Directive ¶ E2.2.1.8, is the most relevant of the nine APFs to this adjudication.<sup>6</sup> In addition to the eighth APF, other “[a]vailable, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.” Directive ¶ E2.2.1. Ultimately, the clearance decision is “an overall common sense determination.” Directive ¶ E2.2.3.

The Appeal Board requires the whole person analysis address “evidence of an applicant’s personal loyalties; the nature and extent of an applicant’s family’s ties to the U.S. relative to his [or her] ties to a foreign country; his or her ties social ties within the U.S.; and many others raised by the facts of a given case.” ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007).

Substantial mitigating evidence weighs towards grant of Applicant’s security clearance. Applicant was born and educated in the United States. He has family living here. He, along with several family members, has served in the U.S. military. In January 2007, he returned home to reside and work. He would like his children to live here in the future. He has no intention of returning to Japan to reside. He terminated his relationship with the Indonesian woman earlier this year, and understands the complications that it created in his personal and professional life. He disclosed the relationship to his wife and father. His colleagues know that his security clearance has been detained due to a foreign relationship. He is willing to further disclose the relationship to his employer if necessary. These disclosures diminish the potential for coercion by Japan. There is no evidence Applicant has ever taken any action which could cause potential harm to the United States. He testified credibly that he takes his loyalty to the United States seriously, and he has

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<sup>5</sup> ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (quoting ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003)); ISCR Case No. 05-02833 at 2 (App. Bd. Mar. 19, 2007) (citing *Raffone v. Adams*, 468 F.2d 860 (2nd Cir. 1972) (taken together, separate events may have a significance that is missing when each event is viewed in isolation).

<sup>6</sup> See ISCR Case No. 02-24566 at 3 (App. Bd. July 17, 2006) (stating that an analysis under the eighth APF apparently without discussion of the other APFs was sustainable); ISCR Case No. 03-10954 at 5 (App. Bd. Mar. 8, 2006) (sole APF mentioned is eighth APF); ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (remanding grant of clearance because Judge did not assess “the realistic potential for exploitation”), *but see* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 5, 2007) (rejecting contention that eighth APF is exclusive circumstance in whole person analysis in foreign influence cases).



worked diligently for a defense contractor for eleven years. His colleagues assess him as loyal and trustworthy.

After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude he has mitigated the security concerns pertaining to foreign influence. The evidence leaves me with no doubts as to Applicant's security eligibility and suitability.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"<sup>7</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated or overcome the Government's case. For the reasons stated, I conclude he is eligible for access to classified information.

### **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

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is granted.

Shari Dam  
Administrative Judge

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<sup>7</sup>See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).