



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



In the matter of:

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ISCR Case No. 14-06751

Applicant for Security Clearance

Appearances

For Government: Richard Stevens, Esq., Department Counsel

For Applicant: *Pro se*

03/31/2016

Decision

RIVERA, Juan J., Administrative Judge:

Applicant, a married man, engaged in sexual activity with a female (A) who is a resident and citizen of Kyrgyzstan in 2013. At the time, he was deployed to Kyrgyzstan, and he was aware of his employer's policy prohibiting its employees from engaging in relationships with foreign nationals. After Applicant returned to the United States, he continued to frequently communicate with A, and to provide her with money. Applicant did not fully disclose his relationship with A to his employer. He has not ended his communications with A. Foreign influence and personal conduct security concerns are not mitigated. Access to classified information is denied.

History of the Case

Applicant submitted a security clearance application (SCA) on February 13, 2014. After reviewing it and the information gathered during a background investigation the Department of Defense (DOD) was unable to make an affirmative decision to grant Applicant eligibility for a clearance. On June 15, 2015, DOD issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline B (foreign influence) and Guideline E (personal conduct).¹ Applicant answered the SOR on July

¹ The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

23, 2015 and on August 19, 2015, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

The case was assigned to me on October 14, 2015. The DOHA issued a notice of hearing on October 19, 2015, scheduling the hearing for November 9, 2015. Applicant's hearing was held as scheduled. During the hearing, Department Counsel offered two exhibits (Government Exhibit (GE) 1-2) and Applicant offered two exhibits (Applicant Exhibit (AE) 1-2). All exhibits were admitted into evidence without objection. GE 2 is a summary of Applicant's May 12, 2014 interview with a government investigator. Applicant provided some corrections to the summary of his interview, and it was then admitted into evidence. (Tr. 31-38) DOHA received the transcript of the hearing on November 23, 2015.

Findings of Fact

In Applicant's response, he admitted the factual allegations in SOR ¶¶ 1.a and 1.c. He denied the remaining SOR allegations. Applicant's SOR and hearing admissions are incorporated into the findings of fact. After a thorough review of the record evidence, including his testimony and demeanor while testifying, I make the following additional findings of fact:

Applicant is a 59-year-old architect and construction manager employed with a defense contractor. He married his first wife in 1980 and divorced in 1989 – 1990. He married his second wife in 1990 and divorced in 1992. He married his current spouse in 1996. He has a 31-year-old son. Applicant completed his associate's degree in 1978, and earned a bachelor's degree in architecture and construction management in 1981.

Applicant's was self-employed within the United States in architecture and construction management from 1997 to May 2004. He worked for federal contractors, and was deployed overseas in support of federal construction contracts, between 2004 and 2014. During periods, he was deployed to Egypt, Kuwait, Afghanistan, Iraq, Pakistan, and Kyrgyzstan. He testified that he came under hostile fire in Egypt and Iraq sometime before 2005. Applicant was hired by his current employer, a federal contractor, in 2014.

From April 2013 to December 2013, Applicant worked for a federal contractor and was deployed to Kyrgyzstan. His function in Kyrgyzstan was to ensure maintenance and repair of buildings on a United States base. In September 2013, Applicant met a woman (A) who is a citizen and resident of Kyrgyzstan, and he hired her to be his housekeeper and cook. He claimed that he met A in a coffee shop that was about a 45-minute drive from A's residence. A could speak English, and she worked in Applicant's apartment twice-a-week. Two weeks after he met A, Applicant and A engaged in sexual activity. Sometimes after she cooked dinner, they ate together. Applicant paid A \$200 monthly, and he gave her severance pay of \$200. He left Kyrgyzstan in December 2013.

In April 2014, on the anniversary of A's father's death and out of respect for her culture, Applicant gave A \$500. He maintained contact with A after he left Kyrgyzstan because of their shared interest in each other's grandchildren, and he considers A to be his friend. Applicant was A's only source of income, and A's mother was ill.

At the time of Applicant's May 14, 2014 interview, Applicant's spouse was not aware of Applicant's relationship with A. At his hearing, Applicant claimed his spouse was now aware of his ongoing contacts with A. Applicant testified that around June 2015, his spouse asked him to end his relationship with A; however, Applicant continued his communications with A. He decided he would not ask his wife for a letter supporting reinstatement of his security clearance. He insisted that his spouse would verify that she was aware of his relationship with A.

Applicant denied parts of his May 12, 2014 summary interview that described he had a "sexual relationship" and a "romantic relationship" with A, and he substituted the words, "friendly relationship." He admitted he had sex with A in September 2013, on one occasion; however, he claimed their relationship was not romantic. Applicant and A continued to email, Skype, or text each other about every two weeks. He said his most recent contact with A was two months before his hearing. He offered to end his contacts with A now because "until this is resolved it is not worth the hassle. I don't want it to affect me. I want it to end so that I can go on and do my job." He emphasized that he would end his relationship with A if necessary to mitigate security concerns. (Tr. 34-38, 52-55, 67, 69)

Applicant did not inform his employer in Kyrgyzstan of his sexual relationship with A; however, he did disclose that A was his friend in his February 13, 2014 SCA. He claimed that he stopped the sexual part of his relationship with A before it became a security concern. He never met A's parents, and he never went to A's residence. Applicant was aware that his employer had a policy prohibiting its employees from engaging in relationships with foreign nationals. He was aware that other employees in Kyrgyzstan were in trouble because of their relationships with foreign nationals, and one employee was dismissed. Applicant acknowledged that he knew his sexual activity with A could adversely affect his employment.

Applicant presented four reference statements written on his behalf. A lieutenant colonel worked with Applicant for five months in Kyrgyzstan. He described Applicant as valuable, honest, frank, and having "a strong ability" to work with others to accomplish the mission. In 2008, a church administrator noted that through Applicant's supervision, a project was completed six months ahead of schedule. He considered Applicant to be enthusiastic, diligent, efficient, punctual, and conscientious.

In 2012, the president of a limited liability company (LLC) wrote that Applicant is a problem-solving, diligent, and dedicated employee. As a senior project manager, he gets the job done despite the obstacles. A project engineer wrote that Applicant was the chief inspector on various projects. Applicant kept him informed and was punctual and conscientious. His work would be an asset to any company.

Policies

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline B, Foreign Influence

AG ¶ 6 explains the security concern about “foreign contacts and interests” stating:

[I]f 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.

AG ¶ 7 indicates two conditions that could raise a security concern and may be disqualifying in this case:

(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

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information.

From April to December 2013, Applicant worked for a federal contractor and was deployed to Kyrgyzstan in support of U.S. interests. He was aware of the security concerns raised by the relationships of employees with foreign nationals. Notwithstanding, he hired a citizen and resident of Kyrgyzstan to be his housekeeper and cook, while he was living in Kyrgyzstan, and he engaged in sexual activity with her. A went to Applicant's apartment in Kyrgyzstan about twice a week from September to December 2013. After Applicant returned to the United States, he continued to frequently communicate with A, and in April 2014, he gave her \$500.

Applicant's relationship with a resident of Kyrgyzstan creates a security concern about his "obligation to protect sensitive information or technology" and his desire to help A. For example, if intelligence agents or government officials in Kyrgyzstan wanted to expose Applicant to coercion, they could exert pressure on A. Applicant would then be subject to coercion through A and classified information could potentially be compromised.

An applicant's possession of close ties with someone living in a foreign country are not, as a matter of law, disqualifying under Guideline B. However, if an applicant has a close relationship with even one person, living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See *Generally* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

The nature of a nation's government, its relationship with the United States, its history of intelligence gathering, and its human rights record are relevant in assessing the likelihood that an applicant (or his friends or family members) are vulnerable to

government coercion or inducement. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member or a foreign connection is associated with or dependent upon the government or the country is known to conduct intelligence collection operations against the United States. The relationship of Kyrgyzstan with the United States is not part of the record in this case. However, Applicant should not be placed into a position where he might be forced to choose between loyalty to the United States and a desire to assist A, who is living in Kyrgyzstan.

Guideline B is not limited to countries hostile to the United States. “The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States.” ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

There is no evidence that intelligence operatives from any foreign country seek or have sought classified or economic information from or through Applicant or A, nevertheless, it is not possible to rule out such a possibility in the future. Applicant’s relationship with A, and A’s relationships with her family members living in Kyrgyzstan create a potential conflict of interest because these relationships are sufficiently close to raise a security concern about his desire to assist A by providing sensitive or classified information. Department Counsel produced substantial evidence of Applicant’s and A’s contacts or relationships, and has raised the issue of potential foreign pressure or attempted exploitation. AG ¶¶ 7(a) and 7(b) are established and further inquiry is necessary to establish the potential application of any mitigating conditions.

AG ¶ 8 lists three conditions that could mitigate foreign influence security concerns including:

(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.;

(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; 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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶¶ 8(a) and 8(c) have limited applicability. Applicant has frequent contacts with A, who is living in Kyrgyzstan, and he provided \$500 to her after he returned to the United States. He continued to communicate with her after receiving the SOR and despite his spouse's objection. His connections with A negate the possibility of mitigation under AG ¶¶ 8(a) and 8(c), and Applicant failed to fully meet his burden of showing there is "little likelihood that [his relationship with A, who is living in Kyrgyzstan] could create a risk for foreign influence or exploitation."

AG ¶ 8(b) partially applies. A key factor in the AG ¶ 8(b) analysis is Applicant's "deep and longstanding relationships and loyalties in the U.S." Applicant's relationship with the United States must be weighed against the potential conflict of interest created by his relationships with A, who is living in Kyrgyzstan.

There is no evidence that the Kyrgyzstan government, or those conducting espionage against the United States, have approached or threatened Applicant, A, or A's family to coerce Applicant for classified or sensitive information. Notwithstanding, Applicant and A could become potential targets of intelligence agents because of Applicant's support for the United States, and Applicant's potential access to classified information could add some risk to A and A's family living in Kyrgyzstan.

Applicant has significant connections to the United States and more limited connections to A. Applicant was born, raised, and educated in the United States. His spouse and son are U.S. citizens. He supports the U.S. Government as an employee of a contractor. Over the past 25 years, he has served overseas, including in combat zones on behalf of his employer and the United States. He has manifested his patriotism, loyalty, and fidelity to the United States over all other countries.

In sum, Applicant's connections to A are significant. Applicant frequently communicates with A, who is living in Kyrgyzstan. In April 2014, he provided \$500 to A. Even though he received the SOR, and his spouse objected to his communications with A, he did not end his communications with her. Applicant's relationship to A, who is vulnerable to potential coercion, outweighs his connections to the United States in the security analysis. Foreign influence security concerns under Guideline B are not mitigated.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

The personal conduct allegation cross-alleged SOR ¶ 1.b, alleging that from April to December 2013, Applicant worked for a federal contractor and was deployed to Kyrgyzstan in support of U.S. interests. He was aware of security concerns about relationships of U.S. employees with foreign nationals. He hired an English-speaking housekeeper and cook, while he was living in Kyrgyzstan, and he engaged in sexual activity with her. She visited his apartment in Kyrgyzstan about twice a week from September to December 2013. After he returned to the United States, he continued to frequently communicate with A, and in April 2014, he gave her \$500. He continued the relationship with A after receipt of the SOR and after his spouse objected to his communications with her.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing. . . .

AG ¶ 16(c) applies because his relationship with A shows poor judgment. AG ¶ 16(e) applies because Applicant continues to communicate with A. Applicant's employer was not aware of his relationship with A. Applicant's decision to engage in a relationship with A raises significant judgment concerns at different levels. First, it violated his employer's policy prohibiting relationships with foreign nationals. Applicant was aware of the prohibition and the consequences of a violation. Notwithstanding, he engaged in a relationship with a foreign national and did not disclose it to his employer. Second, Applicant was married. He claimed that after he received the SOR he made his wife aware of his infidelity, and that she asked him to stop his continuing relationship with A. He failed to do so. Third, Applicant continued the relationship with A even after he received the SOR. Applicant's conduct adversely reflects upon his professional standing and judgment. AG ¶ 16(e) applies.

AG ¶ 17 provides four conditions that could mitigate the security concerns in this case:

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

As discussed above, Applicant engaged in sexual activity with A while he was deployed to Kyrgyzstan in 2013. He was aware of security concerns raised by relationships with foreign nationals in Kyrgyzstan. After he returned to the United States, he continued to frequently communicate with the foreign national, and in April 2014, he gave her \$500. His spouse objected to his communications with A, and even after he received the SOR, he continued to communicate with A. Personal conduct security concerns are not mitigated.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guidelines B and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a 59-year-old employee of a defense contractor. He received credit for his many years working for federal contractors and deployments in support of U.S. interests. He came under hostile fire in Egypt and Iraq. Applicant's references commended his work performance and endorsed the continuation of his security clearance. His references lauded Applicant's honesty, ability to work with others to accomplish the mission, enthusiasm, diligence, efficiency, punctuality, conscientiousness, and facility to solve problems.

The factors weighing against continuation of his security clearance are more substantial than the mitigating circumstances. From April to December 2013, Applicant was deployed to Kyrgyzstan. He was aware of security concerns about the relationships of contractor employees with foreign nationals. Applicant deliberately violated his employer's policy, hired A, a resident and citizen of Kyrgyzstan, to be his housekeeper and cook. A visited Applicant's apartment in Kyrgyzstan about twice a week from September to December 2013. He engaged in sexual activity with her.

After Applicant returned to the United States, he continued to frequently communicate with A, and in April 2014, he gave her \$500. Applicant's spouse objected to Applicant's communications with A; however, he continued to communicate with A. After he received the SOR, he was aware his relationship with A raised a security concern. Nevertheless, he continued to communicate with A. Foreign influence and personal conduct security concerns are not mitigated.

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: **AGAINST APPLICANT**

Subparagraphs 1.a through 1.c: Against Applicant

Paragraph 2, Guideline E: **AGAINST APPLICANT**

Subparagraph 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 national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

JUAN J. RIVERA
Administrative Judge