

DATE: November 1, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-16917

ECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Trowbridge, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant works for a defense contractor. He began a sexual and social relationship with a Bolivian woman in 1994. He did not disclose this relationship on his security clearance application. He continued this relationship after he married another Bolivian woman in 1998. He disclosed his adulterous relationship to his wife, but he continues to send money to the first woman and intends to bequeath half of his estate to her. His wife has become a U.S. citizen, but her parents have remained in Bolivia. Security concerns based on foreign influence were mitigated, but concerns based on personal conduct and sexual conduct have not been mitigated. Clearance is denied.

STATEMENT OF THE CASE

On February 27, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guidelines E (Personal Conduct), B (Foreign Influence), and D (Sexual Behavior) of the Directive. Applicant answered the SOR in writing on April 30, 2004, and requested a closed hearing. The case was assigned to me on August 11, 2004. On August 23, 2004, DOHA issued a Notice of Hearing setting this case for September 14, 2004. Applicant appeared as scheduled and testified in his own behalf. DOHA received the transcript (Tr.) on September 30, 2004.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a 52-year-old senior staff analyst for a defense contractor. (Government Exhibit 1, pp. 1-2). He is involved in counter-narcotics operations in Columbia, and he is required to have a security clearance for access to his place of

duty. His supervisors regard him as loyal, responsible, and honorable. (Applicant's Exhibit B-1 and B-2)

Applicant is a retired Air Force officer. He served more than 20 years on active duty, from January 6, 1997, to January 30, 1997, and held a Top Secret clearance. (Government Exhibit 1, p. 6; Tr. 99) While on active duty, he enjoyed a reputation for generosity, leadership, technical skill, and exemplary character. (Applicant's Exhibits B-6, B-7, B-8, D-10, and D-11)

In 1994, while Applicant was still on active duty, he began a sexual relationship with a Bolivian woman. The sexual relationship continued after April 1998 when Applicant married another Bolivian woman, who is now a resident and naturalized citizen of the United States. (Government Exhibit 1, p. 5; Tr. 69, 84) He and his wife are currently living apart but not divorced. (Tr. 65) His wife is attending college in the United States and will graduate in December 2004. (Tr. 62)

When Applicant was interviewed by a Defense Security Service (DSS) investigator in October 2002, his sexual relationship with the Bolivian woman was still ongoing. They last met in Panama in February 2004. (Government Exhibit 2, p. 2; Tr. 87) Applicant gives her money regularly, usually \$250.00 per month, which she uses to pay her rent. (Government Exhibit 2, p. 2) He also paid her transportation expenses whenever they met in Panama. (Tr. 88) He last gave her money in September 2004. (Tr. 87) He places the money in a checking account to which the woman has access. Applicant's intends to bequeath half of his estate to her. (Answer to SOR; p. 3; Tr. 100)

Applicant sends about \$200.00 per month to his wife's family in Bolivia. (Government Exhibit 2, p. 2) He has sent his wife's family more than \$18,000.00. (Tr. 70) His wife's parents live in a remote region of Bolivia, geographically separated from the illegal drug trade. (Tr. 78-80) His mother-in-law works as "domestic help," and his father-in-law does occasional auto painting and auto repair work. They have no connection with the Bolivian government. (Government Exhibit 2, p. 2)

At Department Counsel's request, I took official notice of the following facts: Certain regions of Bolivia are dangerous because of violence and civil unrest associated with anti-narcotics activities. Certain regions have experienced frequent theft, car jacking, robbery, and sexual assaults. Violations of Bolivian law are punished more severely than comparable crimes in the U.S. Bolivian civil and criminal cases often take years to resolve. (Government Exhibit 3, pp. 1-2, 6-7) At Applicant's request, I took official notice that his Bolivian girlfriend's home is remote, virtually inaccessible during bad weather, unsuitable for growing cocoa, peaceful, and geographically separated from illegal drug activities. (Applicant's Exhibits E-5, E-6, E-7; Tr. 78-80, 118) Applicant has presented evidence that Colombia produces more than 80% of the global cocaine supply and 90% of the cocaine reaching the U.S. (Applicant's Exhibit E-4) Applicant's present duties are directly involved in the interdiction of drug traffic within Colombia. (Applicant's Exhibit E-1, Tr. 75-76)

Before their marriage, Applicant told his wife he did not intend to be sexually faithful and he did not expect her to be sexually faithful. (Tr. 62-63) He disclosed his relationship with the Bolivian woman to his wife on July 15, 2004. (Tr. 62; Applicant's Exhibit C-4) He has promised his wife he will stop his sexual relationship with the Bolivian woman but will continue to send her money. (Tr. 95-96)

In 1999, while stationed in Panama, Applicant began a sexual and social relationship with a woman who was a citizen and resident of Colombia. They had "weekly to monthly" contact until 1993. He gave her money twice, totaling about \$300.00. (Government Exhibit 2, p. 4; Applicant's Exhibit D-9; Tr. 93) Their contacts were limited to e-mail for the past four years. In early 2004 Applicant terminated the relationship. (Answer to SOR, p. 3)

In addition to the relationships listed above, Applicant has a history of sexual relationships beginning in 1985, when he had a Panamanian woman living with him in his bachelor officer's quarters in Panama. His supervisors were aware of this relationship. (Tr. 70, 98-99) In 1989, he had a relationship with an American woman. In 1992 and 1994, he had social and sexual relationships with two other Panamanian women. In 2004, he had a brief relationship with a Colombian woman. He gave all these women financial assistance, ranging from \$350.00 to \$2500.00. (Applicant's Exhibit D-9; Tr. 89-90)

Applicant gave money to all the women in his life, including his present wife, because they were needy. In the case of the Bolivian woman, he has continued the financial assistance even though the sexual relationship has ended. He prides

himself on his generosity. Applicant has not acquired any foreign financial or business interests as a result of his gifts of money.

On August 16, 2002, Applicant applied for a security clearance. He did not list the Bolivian woman in the block for foreign national associates to whom he was bound by affection, obligation, or close and continuing contact. He has admitted he thought about the question, realized his relationship with the Bolivian woman fit the criteria for disclosure, but decided the information was "immaterial" and not relevant to the question whether he was a security risk. (Answer to SOR, p. 2) At the hearing he testified he thought his relationship with the Bolivian woman was a private matter and was not significant. (Tr. 98) Applicant testified he realized the information was significant when he was questioned about his wife, who was then not a citizen of the United States. At that time, Applicant decided he had made a "bad mistake," and he disclosed his relationship with the Bolivian woman. Applicant is willing to terminate his relationship with the Bolivian woman if it is a prerequisite for obtaining a security clearance. (Answer to SOR, p. 2; Tr. 98-100)

Applicant is suffering from cancer. He had a radical prostatectomy in July 2001, but his cancer has not been cured. (Applicant's Exhibits D-6 through E-10) He has saved considerable sums of money and is financially secure. (Applicant's Exhibits D-1 through D-5, E-11 and E-12) He intends to spend his remaining years enjoying himself and being generous to other people. (Tr. 69)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander-in-Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to

rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline E (Personal Conduct)

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. The SOR alleges that Applicant maintained an extramarital relationship with a Bolivian woman after he was married in April 1998, maintained a joint checking account with the woman, and sent her approximately \$20,000.00 over the past nine years. (SOR, ¶¶ 1.a., 1.b., and 1.c.) Applicant admitted these allegations in his answer to the SOR and during the hearing.

Personal conduct that increases an individual's vulnerability to coercion, exploitation, or duress may be a disqualifying condition (DC 4). Activities that may affect a person's personal, professional, or community standing or render the person susceptible to blackmail are included in DC 4 Directive ¶ E2.A5.2.4.

During a two-year period shortly after his marriage, Applicant was involved in adulterous relationships with two other women. He did not disclose his adultery to his wife until July 2004. As a retired Air Force officer, Applicant was subject to prosecution for adultery under Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, and he was vulnerable to losing his retired pay if his conduct was disclosed to Air Force officials by his wife or girlfriend. *See* Art. 2(a)(4), Uniform Code of Military Justice, 10 U.S.C. § 832(a)(4) (jurisdiction over retired personnel); Manual for Courts-Martial, United States (2002 ed.), Part IV, ¶ 62 (defining adultery). Notwithstanding Applicant's views to the contrary, his simultaneous sexual involvements with three women would not be well received in most communities. I conclude DC 4 is established.

A mitigating condition (MC 5) may apply to conduct under Guideline E if "[t]he individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress." Directive ¶ E2.A5.1.3.5. Although Applicant eliminated his vulnerability with respect to his wife by his disclosure in July 2004, he did not do so with respect to the Air Force or the civilian community. I conclude MC 5 is not established.

The SOR also alleges that Applicant falsified his security clearance application by not disclosing his relationship with his Bolivian girl friend. (SOR ¶ 1.d.) He admits his answer was false, but he asserts he did not intend to falsify his answer. Applicant served 20 years in the Air Force and previously held a Top Secret clearance, making him familiar with the security clearance process. Proof Applicant omitted this information from his SF 86 shifted the burden to him to explain the omissions sufficiently to negate a finding of knowing and deliberate falsification. *See* ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004). After considering all the evidence, including Applicant's testimony, I conclude Applicant has not rebutted the evidence of deliberate falsification. Accordingly, I conclude DC 1 (deliberate omission of relevant and material facts from a security clearance application) is established.

A mitigating condition (MC 3) may apply if the "individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts." Directive ¶ E2A51.3.3. In this case, Applicant did not seek out a security official to correct the record. It was only after Applicant was questioned by a DSS investigator about his wife and her parents that he volunteered the information about his Bolivian girlfriend. Applicant's answer to the SOR and his testimony show he intentionally omitted the information because he made his own judgment that his adulterous conduct was a private matter and not relevant to a security determination. His eventual disclosure was not motivated by devotion to the truth, but by fear that he would not receive a security clearance if he did not attempt to repair the damage caused by his false answer. I conclude MC 3 is not established. No other mitigating conditions are established.

Based on all the evidence, I find all the allegations under Guideline E are established. I further find that the security concerns under Guideline E are not mitigated.

Guideline B (Foreign Influence)

A security risk may exist when an applicant's immediate family, or other persons to whom he may be bound by affection, influence, or obligation, are not citizens of the U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Directive ¶ E2.A2.1.1. A disqualifying condition (DC 1) may arise when "[a]n immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country." Directive ¶ E2.A2.1.2.1.

The SOR ¶ 1.a. alleges that Applicant's wife is a Bolivian citizen. This allegation is not established, because she has become a United States citizen. The SOR ¶ 1.b. and 1.c. allege that Applicant's parents-in-law and his Bolivian girlfriend are citizens and residents of Bolivia. The SOR ¶ 1.d. alleges that Applicant's will leaves one-half of his estate to his Bolivian girlfriend. Applicant admitted these allegations in his answer to the SOR and at the hearing. The SOR ¶ 1.e. alleges that Applicant stays in contact with a former girlfriend who was a Columbian citizen and resident. Applicant admitted he had a Columbian girlfriend in the past, but he asserted that he terminated the relationship. I conclude DC 1 is established for Applicant's in-laws and his Bolivian girlfriend, but not for his former girlfriend from Colombia.

In cases where an Applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "the immediate family members (spouse, father, mother, sons, daughters, brothers, sisters) . . . are not agents of a foreign power or in a position to be exploited by a foreign power in a way could force the individual to choose between loyalty to the person(s) involved and the United States." Directive ¶ E2A2.1.3.1.

Notwithstanding the facially disjunctive language of MC 1 ("agents of a foreign power **or** in a position to be exploited"), it requires proof "that an applicant's family members, cohabitant, or associates in question are (a) not agents of a foreign power, **and** (b) not in a position to be exploited by a foreign power in a way that could force the applicant to chose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004); *see* 50 U.S.C. § 1801(b) (defining "agent of a foreign power"). Since the Government has produced substantial evidence to establish DC 1, the burden has shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15.

There is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse. ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002). In his answer to the SOR, Applicant states he is not close to his in-laws and has "very limited communications and contact with them." (Answer to SOR, p. 3) However, he regularly sends them money. The record reflects Applicant feels sufficiently obligated to his wife's family to have sent them more than \$18,000.00. I conclude Applicant has not rebutted the presumption that he has ties of obligation to his wife's family.

Applicant produced evidence showing his Bolivian girlfriend and his wife's parents live in a remote, peaceful area unaffected by the drug trade or counter-narcotics operations. They are not employed by or connected with the Bolivian government. They are working-class Bolivian citizens unaffected by politics or drug trafficking. I conduct MC 1 is established regarding Applicant's Bolivian girlfriend and his wife's parents.

Based on all the evidence, I conclude the allegations in the SOR ¶¶ 1.a. and 1.e. are not established. I conclude that the allegations in the SOR ¶¶ 1.b., 1.c., and 1.d. are established, but that the security concerns under Guideline B have been mitigated.

Guideline D (Sexual Behavior)

Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress, or reflects lack of judgment or discretion. Directive ¶ E2.A4.1.1. The SOR alleges that Applicant's extramarital affair with the Bolivian women, alleged in the SOR ¶ 1.a., also raises security concerns under Guideline D.

As noted above, adultery is a crime under military law, to which Applicant remains subject. Accordingly, DC-1 (sexual

behavior of a criminal nature) is established. No mitigating conditions are established.

FORMAL FINDINGS

The following are my findings as to each allegation in the SOR:

Paragraph 1. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Paragraph 2. Guideline F (Foreign Influence): FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For Applicant

Subparagraph 2.e.: For Applicant

Paragraph 3. Guideline D (Sexual Conduct): AGAINST APPLICANT

Subparagraph 3.a.: 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 a security clearance to Applicant. Clearance is denied.

LeRoy F. Foreman

Administrative Judge