

DATE: July 14, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-05106

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Ronald C. Sykstus, Esq.

SYNOPSIS

Applicant, a longtime security-clearance holder, engaged in an extramarital affair with an Egyptian citizen while living and working in Egypt on behalf of his defense-contractor employer. When back in the U.S., he used his employer's computer to exchange e-mails with the Egyptian citizen. He lied to his wife and his employer so he could return to Egypt in December 2001. He charged his travel expenses to a company credit card. In January 2002, his employer investigated the matter and elected to end his employment via a scheduled layoff, but otherwise would have fired him for misusing company resources. Applicant failed to successfully mitigate the resulting personal conduct security concern. Clearance is denied.

STATEMENT OF THE CASE

Applicant is challenging the Defense Department's initial decision to deny or revoke his security clearance. Acting under the relevant Executive Order and DoD Directive, [\(U\)](#) on May 19, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline B for foreign influence, Guideline E for personal conduct, and Guideline M for misuse of information technology systems. Applicant replied to the SOR on June 9, 2004, and requested a decision without a hearing. Applicant changed his mind on February 28, 2005, and asked for a hearing. The case was assigned to me January 23, 2006. With the agreement of counsel, a notice of hearing was issued scheduling the hearing for March 9, 2006. Applicant appeared with counsel and the hearing took place as scheduled.

The record was kept open to allow Applicant to provide a complete copy of Exhibit F, which was timely received and admitted without objections. DOHA received the transcript March 17, 2006.

FINDINGS OF FACT

In his written reply to the SOR, Applicant's responses to the numerous allegations were mixed, admitting many, denying

a couple, and providing lengthy explanations for many of his responses. His admissions are incorporated herein as findings of fact. In addition, based on the record evidence as a whole, I make the following findings of fact.

Applicant is a 52-year-old man who is seeking to retain a security clearance for his employment with a contractor of the Defense Department. He has worked in the defense industry since December 1993 when he retired from active duty in the U.S. Army. He enlisted in the Army in 1973, and he rose in rank to sergeant first class when he was selected as a warrant officer. He retired at the rank of chief warrant officer two (CW2). He started working for his current employer in ay 2002. His current position or title is systems engineer on a ground-based missile defense program. His annual salary is about \$85,000.

Applicant married for the first time in 1977 and was divorced on February 5, 1982. Applicant married his current wife on February 8, 1982. He has four children, a 29-year-old daughter, a 24-year-old daughter, a 15-year-old son, and a 12-year-old son. His oldest daughter lives in another state while the three other children reside with Applicant and his wife. Also in his household is a four-year-old grandson. Applicant's wife is not employed outside the home.

Before his current job, Applicant worked for another defense contractor and worked overseas. For one assignment, he was accompanied by his family. For another assignment, he was not accompanied for the 15 months or so he lived and worked in Egypt from December 1999 to March 2001. During his assignment in Egypt, Applicant became involved in an extramarital affair with a then 24-year-old woman who was an Egyptian citizen. Until the affair was discovered by the company, Applicant did not report his contact with a foreign citizen to company security officials.

On February 27, 2002, Applicant's former employer, a large company engaged in defense contracting, submitted to the Defense Department a preliminary counterintelligence report of suspicious contact involving Applicant and a female Egyptian citizen. (2) Applicant had been employed with the company as a logistics specialist for a missile program. In summary, the report prepared by company security officials disclosed the following series of events:

- On December 15, 2001, Applicant left his home after telling his supervisor the previous day that he had to take paid time off to travel to another state to tend to his ailing mother. Applicant had told his wife that he was traveling to the United Kingdom over the paid holiday break due to company business. Applicant's conflicting stories were discovered on December 20th when his wife and his employer discussed his whereabouts. wife had previously contacted the local police and listed Applicant as a missing person. received a record of Applicant's company credit card that showed a charge for an airline ticket and a charge for dinner in Cairo, Egypt. and his Egyptian girlfriend, and the e-mails confirmed their relationship as lovers. The e-mails are attached to the report. citizen, the report's author describes Applicant as evasive and less than forthright. Applicant explained the relationship had resulted in a pregnancy that ended in a miscarriage. As he felt obligated to her, Applicant traveled to Egypt to make it appear that their relationship was permanent for appearances purposes. briefcase and informed Applicant he was suspended from work pending the investigation. the situation. On January 28, 2002, the company informed Applicant he was laid off. He was also told that had the layoff not taken place, he would have been terminated for misusing company resources.

Based on the report, the Defense Security Service interviewed Applicant in October 2002 and again in December 2002. Each interview produced a sworn statement, which is discussed below.

In his six-page October 2002 statement, (3) Applicant acknowledged his relationship with the Egyptian. He met her in April or May 2000 when he went into her pet store. He said they became friends, which led to a romantic relationship. He learned she was pregnant after he had returned to the U.S. in March 2001, and that she had a miscarriage in about June 2001. She experienced some medical problems associated with the miscarriage and he sent her money for medical expenses. He decided to travel to Egypt in December 2001 to check on her health and for appearances purposes due to her involvement with a non-Egyptian man. Also, since the trip, he said he had maintained contact with her on about a monthly basis "either by e-mail or telephone. These contacts are merely to follow-up on the status of her health and her well being." (4) He denied taking any company information to Egypt.

In his much shorter December 2002 statement, (5) Applicant continued to deny taking any company information to

Egypt. But he acknowledged in the past taking proprietary information and other information he knew was not to leave the office or military installation home to work on when he had an approaching deadline to meet.

In his hearing testimony, he explained that entire incident was "not the real me."⁽⁶⁾ He is ashamed of his behavior, but does not consider himself a security risk as the matter is now behind him.⁽⁷⁾ Applicant explained he met the Egyptian citizen in about May 2000, and their sexual relationship started in about January 2001, and continued until he left in March 2001. He denied having any contact, by telephone or e-mail, with her after returning to the U.S. in early January 2002, and he explained that his October 2002 statement on this point is incorrect.⁽⁸⁾ When asked to explain or reconcile the apparent inconsistency, he said he did not know why he made that statement and he continued to deny having any contact with her since returning from the trip.⁽⁹⁾

Likewise, he denied having sexual relations with her when he was in Egypt from about December 16, 2001, to about January 8, 2002.⁽¹⁰⁾ Although he denies resuming his extramarital affair during the trip, the e-mails attached to the report⁽¹¹⁾ indicate that was his intention. The series of e-mails are dated from November 11, 2001, to December 13, 2001, a few days before he departed for Egypt. The e-mails are highly personal and sometimes sexually graphic exchanges between Applicant and the Egyptian citizen. To summarize the e-mails, Applicant expressed his love for her and his intent to resume their sexual relationship when he arrived in Egypt.

Applicant served in the Army for 20 years and retired as a CW2. A review of his performance reports⁽¹²⁾ shows that Applicant enjoyed a successful career in the Army and he was well regarded by his superiors. Several character witnesses appeared at the hearing and vouched for Applicant's attributes as an employee or as a person. Some pointed out his involvement with an outreach ministry program and his work as the pastor of his own fellowship.

Applicant's wife testified at the hearing, and she described their marriage as getting better, back on track, not perfect, but good. She believes their marriage will survive her husband's affair and that he is committed to their marriage.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.⁽¹³⁾ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽¹⁴⁾ There is no presumption in favor of granting or continuing access to classified information.⁽¹⁵⁾ The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.⁽¹⁶⁾ An applicant is responsible for presenting witnesses and other evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁽¹⁷⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁸⁾

No one has a right to a security clearance.⁽¹⁹⁾ And as noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on

the side of denials." ⁽²⁰⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. Misuse of Information Technology Systems

Under Guideline M, ⁽²¹⁾ noncompliance with rules, procedures, guidelines, or regulations concerning information technology systems may raise a security concern about an individual's trustworthiness, willingness, and ability to protect classified systems, networks, and information. It may be part of a more general pattern of behavior tending to show inability or unwillingness to follow rules and regulations concerning the proper handling and safeguarding of classified information.

Here, based on the record evidence as a whole, the government did not establish its case under Guideline M. SOR subparagraph 3.a accused Applicant of using his employer's computer to send e-mails to his Egyptian girlfriend when doing so was specifically prohibited by rules, procedures, guidelines, or regulations. In his reply to the SOR, he admitted sending the e-mails, but made no mention of any specific prohibition. During his hearing testimony, he said he was unaware of the company policy. ⁽²²⁾ And the government's key documentary exhibit (Exhibit 5) in support of this aspect of the allegation was not admitted into the record evidence based on Applicant's counsel's objections. ⁽²³⁾ Given the lack of evidence showing that Applicant's actions were specifically prohibited by rules, procedures, guidelines, or regulations, Guideline M is decided for Applicant. The underlying conduct, however, will be considered under the personal conduct guideline as it is cross-alleged in SOR subparagraph 2.g.

2. Foreign Influence

Under Guideline B, ⁽²⁴⁾ a security concern may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she 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.

Here, based on the record evidence as a whole, the government established its case under Guideline B. While working as a cleared employee of a U.S. defense contractor in a foreign country, Applicant engaged in an extramarital affair with a foreign citizen. He did not report his relationship with her to company security officials. When he returned to the U.S., he maintained the relationship by telephone calls and e-mails. Out of a sense of obligation, he provided financial support to her. He returned to Egypt for about three weeks during December 2001-January 2002 to, according to him, check on her well-being. Taken together, these circumstances raise a potential security concern within the meaning of DC 1, ⁽²⁵⁾ DC 4, ⁽²⁶⁾ and DC 6. ⁽²⁷⁾ By any measure, Applicant's affair with a foreign citizen while living and working in Egypt, coupled with his return to the Middle East in December 2001, put him in a position of potential vulnerability to foreign influence.

I reviewed the mitigating conditions (MC) under Guideline B and conclude that none of formal MC apply in Applicant's favor. That does not end the analysis, however, as other facts and circumstances may explain away or mitigate the security concern. Applicant's relationship with the Egyptian woman is over and his communications with her have stopped. He has not returned to Egypt since his last trip in 2000-2001, and he appears to be focused on rebuilding his marriage, supporting his family, and doing a good job at work. And Applicant has a track record of service to the U.S. as a soldier and an employee in the defense industry, which is indicative of longstanding relationships, connections, and loyalties in the U.S. Therefore, I conclude that the security concern is mitigated because the circumstances that created his potential vulnerability to foreign influence have now become diminished to the point where they are no longer a concern. Accordingly, Guideline B is decided for Applicant. The extramarital affair, however, will be considered under the personal conduct guideline as it is cross-alleged in SOR subparagraph 2.f.

3. Personal Conduct

Personal conduct under Guideline E-(28) is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Conduct or behavior involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. Indeed, in this case, the personal conduct issues are the gravamen of the administrative complaint.

Here, based on the record evidence as a whole, the government established its case under Guideline E. While working as a cleared employee of a U.S. defense contractor in a foreign country, Applicant engaged in an extramarital affair with a foreign citizen. He did not report his relationship with her to company security officials. When he returned to the U.S., he maintained the relationship by telephone calls and e-mails by using his employer's computer. Out of a sense of obligation, he provided financial support to her. He returned to Egypt for about three weeks during December 2001-January 2002. To pull off the trip, he lied to his wife and his employer. He charged his travel expenses to a company credit card. When confronted upon his return to work, he was evasive and less than forthright according to company security officials. His employment ended due to a scheduled layoff, but otherwise he would have been fired. To sum up, the record evidence shows Applicant engaged in deceptive conduct for many months until he was caught when his concocted story fell apart. Taken together, these circumstances raise a security concern within the meaning of DC 1, (29) DC 4, (30) and DC 5. (31) His past conduct shows remarkable poor judgment, lack of candor, and dishonesty. His past conduct was a serious breach of trust on both personal and professional levels. And his past conduct is wholly incongruous with holding a security clearance.

Turning to his case in mitigation, I conclude that Applicant has failed to successfully explain, extenuate, or mitigate the security concern. I reviewed the mitigating conditions under Guideline E and conclude only MC 5 (32) applies in his favor. As discussed above, Applicant's relationship with the Egyptian woman is over and his communications with her have stopped. His wife and his employer are aware of his past transgressions, at least in general terms. Taken together, these circumstances are positive steps that support his case in mitigation, but are not enough to overcome the strong case against him.

In addition, I remain concerned about whether Applicant has provided a full, frank, and truthful accounting of his past conduct. (33) For one thing, he denies any communication with his Egyptian girlfriend after his return to the U.S. in January 2002, but his October 2002 statement and his answer to the SOR indicate otherwise. For another, he denies resuming the affair during the 2001-2002 trip to Egypt, but his e-mails show his intention to do otherwise. Although advised that his testimony was subject to criminal penalties under 18 U.S.C. § 1001, (34) his explanations or denials for these two matters were not credible. I considered his lack of credibility on these two matters for certain limited purposes. First, it causes me to discount his testimony in general. And second, it indicates he has not accepted full responsibility for his actions, which militates against his evidence of rehabilitation and other pertinent behavior changes. (35) His relationship with his Egyptian girlfriend has ended, but his lack of credibility erodes his case in mitigation. Accordingly, Guideline E is decided against Applicant.

To conclude, Applicant has not met his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I considered the record evidence as a whole--including Applicant's exhibits and witnesses and his 20 years of military service--the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline B: For Applicant

Subparagraphs a-d: For Applicant

SOR ¶ 2-Guideline E: Against Applicant

Subparagraphs a-g: Against Applicant

SOR ¶ 3-Guideline M: For Applicant

Subparagraph a: For 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.

Michael H. Leonard

Administrative Judge

1. Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. Exhibit 4.
3. Exhibit 2.
4. Exhibit 2 at 4.
5. Exhibit 3.
6. R. 52.
7. R. 54.
8. R. 68-69.
9. R. 88-89.
10. R. 66.
11. Exhibit 4.
12. Exhibit F.
13. Executive Order 10865, § 7.
14. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
15. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
16. Directive, Enclosure 3, Item E3.1.14.
17. Directive, Enclosure 3, Item E3.1.15.
18. Directive, Enclosure 3, Item E3.1.15.
19. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988)("it should be obvious that no one has a 'right' to a

security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.") (citations omitted).

20. 484 U.S. at 531.

21. Directive, Enclosure 2, Attachment 13.

22. R. 64.

23. R. 23-25.

24. Directive, Enclosure 2, Attachment 2.

25. Item E2.A2.1.2.1. An 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.

26. Item E2.A2.1.2.4. Failing to report, where required, associations with foreign nationals.

27. Item E2.A2.1.2.6. Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government.

28. Directive, Enclosure 2, Attachment 5.

29. Item E2.A5.1.2.1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances.

30. Item E2.A5.1.2.4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail.

31. Item E2.A5.1.2.5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement between the individual and the agency.

32. Item E2.A5.1.3.5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.

33. Under Item 6.2 of the Directive, an applicant is required to give full, frank, and truthful answers to relevant and material questions.

34. R. 37.

35. Directive, Enclosure 2, Item E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavior changes.