

KEYWORD: Foreign Influence; Personal Conduct; Criminal Conduct

DIGEST: Applicant lives in the Republic of Korea with his wife who is a citizen of South Korea. Between 1986 and 1987, Applicant was arrested six times, which he failed to list on his security clearance application. The record evidence is sufficient to mitigate or extenuate the negative security implications stemming from his wife's foreign citizenship and residence, the arrests, and his failure to list the arrests on his application. Clearance is granted.

CASE NO: 04-11664.h1

DATE: 06/27/2006

DATE: June 27, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-11664

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant lives in the Republic of Korea with his wife who is a citizen of South Korea. Between 1986 and 1987, Applicant was arrested six times, which he failed to list on his security clearance application. The record evidence is sufficient to mitigate or extenuate the negative security implications stemming from his wife's foreign citizenship and residence, the arrests, and his failure to list the arrests on his application. Clearance is granted.

STATEMENT OF THE CASE

On August 17, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On October 5, 2005, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing.

On November 30, 2005, Applicant received a complete copy of the government's file of relevant material (FORM) dated November 29, 2005. Applicant was given the opportunity to file objections and submit material in extenuation, mitigation, or refutation. On December 15, 2005, Applicant responded to the FORM. On January 23, 2006, I was assigned the case.

FINDINGS OF FACT

The SOR alleges security concerns under the guidelines for Foreign Influence, Personal Conduct, and Criminal Conduct. Applicant admits, with explanation, the following: his wife and brother-in-law are citizens and residents of the Republic of Korea, his wife owns a house and has bank accounts in Korea. Applicant admits he was arrested in October 1986 and charged with public intoxication, arrested in December 1986 and charged with possession of a controlled substance, arrested in March 1987 and charged with driving while influenced (DWI), and being arrested in December

1987 and charged with burglary, minor in possession, and theft. He also admitted being arrested in March 1987 and charged with trespassing on government property, arrested in arch 1987 and charged with driving while license suspended, arrested in December 1991 and charged with failure to appear-theft rental property. Those admissions are incorporated herein as findings of fact. After thorough review of the whole record, I make the following additional findings of fact:

Applicant is 38 years old, has worked as a supply clerk for a defense contractor since February 2000, and is seeking to obtain a security clearance. He did hold a secret clearance granted in March 1995 while he was in the Army. His July 2002 security clearance application, standard form (SF) 86, indicates he served in the Army from February 1989 until March 1992 and from March 1993 to March 2000. His grade was E-4. His December 2005 answer to the FORM is signed United States Army retired. Applicant's commander and supervisor state they have observed Applicant's outstanding dedication to duty and selfless service. They indicate Applicant has an exceptional work ethic, vast knowledge, is an upstanding, honest, and loyal team member, and an outstanding civilian contractor.

In October 1986, Applicant was charge and found guilty of public intoxication. He had been at a party drinking and was arrested while walking home. In July 2002, Applicant completed a security clearance application, SF 86. Question 24 asked him if he had ever been charged with or convicted of any offense related to alcohol or drugs. He answered "no" to the question believing he was required to report only those incidences which occurred during the 10 years prior to completing the form. Applicant acknowledged he should have slowed down and read the questions more carefully.

In December 1986, his father was in the Navy and his family lived on a naval base. When Applicant was returning home, he was stopped for a random gate search. A small amount of a controlled substance was discovered. Applicant asserts another individual had left the material in the car. Again this was not listed on his SF 86 because he thought the form only applied to incidences within the previous 10 years.

In March 1987, then age 19, Applicant was driving a friend's car from one party to the next and had been drinking. In his July 2004 sworn statement (Item 5), Applicant states he was observed by the police switching drivers at a gas station. He states he served 30 days in jail for driving while intoxicated (DWI), but the SOR alleges he served only two days in jail, was fined \$820 and sentenced to three years probation. He did not list this arrest on his SF 86, because he mistakenly believed he only had to report incidences which occurred during the prior 10 years.

In March 1987, Applicant was charged with trespassing on government property. He was returning his car to his father's on-base quarters where it would be stored and stopped at the main gate. Because of his earlier March 1987 DWI his I.D. card was confiscated, and he was required to live off base. Had he known earlier he would have voluntarily surrendered his I.D. earlier and not come on base.

In December 1987, Applicant and friends stole alcohol and food from a grocery store. They broke into a windmill to

drink the alcohol. They took some items from the windmill and were arrested by police and charged with: burglary (a felony); minor in possession of alcohol; and theft (a felony). The felony charges were dismissed. After being found guilty he served 45 days in jail (he was sentenced to 365 days in jail with 320 days suspended), to perform community service, and pay restitution of approximately \$200. Question 21 of the SF 86 asked if the Applicant had ever been charged with or convicted of a felony offense. The arrest and conviction do not appear on his SF 86 because he believed the scope of the question was limited to a period of 10 years prior to the completion of the form.

In November 1991, applicant was charged with theft of rental property. He was in the Army and had rented a video. He was called out for a no notice field exercise and was unable to return the video. After the exercise was completed, he returned the video and paid the late charges. Once the store knew the circumstances, they dropped the charge. The charge was dismissed.

In 1993, Applicant was stationed with the U.S. Army in Korea. He met his wife who was working at an off base restaurant. They married in May 1997. She is a housewife and a citizen and resident of Korea. Her brother, also a citizen and resident of Korea, is a truck driver whom Applicant has met once.

In 2002, Applicant and his wife purchased a house in Korea. It is only in his wife's name because of the extensive paperwork required for a foreign national to own property in Korea. His wife had approximately \$150,000 in checking and savings accounts in Korea prior to the purchase of the house. The home is not listed on the SF 86 because it was purchased after the SF 86 was completed. His residence listed on the SF 86 is not the address of the house they currently own. (Item 4) He did not list his spouse's accounts on the SF 86 because he did not believe he was required to do so.

The Republic of Korea (South Korea, or ROK) is a highly developed, stable, democratic republic with powers shared between the president and the legislature. It is the U.S.'s seventh-largest trading partner. The U.S. is South Korea's second largest trading partner and largest export market. South Korea is an ally and has diplomatic ties with the U.S. The U.S. and South Korea have had a spirit of cooperation since the end of World War II. Korea has the third largest number of troops supporting the coalition efforts in Iraq. Since 1945, the U.S. has furnished more than \$6 billion in economic aid and more than \$8.8 billion in military aid. The U.S., because of its supremacy in industrial power, remains a prime target of foreign economic collection and industrial espionage. Due to the race to control scarce resources and the global markets, economic intelligence against the U.S., including the theft of trade secrets and competitive business information is likely to increase. (Item 7) Traditional allies as well as adversaries have increased their collection efforts against U.S. targets and will continue to do in the future. Korea is among the top seven most active collectors, although the information provided does not distinguish between North and South Korea.

POLICIES

The Directive sets forth adjudicative guidelines to be considered when evaluating a person's eligibility to hold a security clearance. Disqualifying Conditions (DC) and Mitigating Conditions (MC) are set forth for each applicable guideline. Additionally, each decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in Section 6.3 of the Directive. The adjudicative guidelines are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. The presence or absence of a particular condition or factor for or against clearance is not determinative of a conclusion for or against an applicant. However, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, I conclude the relevant guidelines to be applied here are Foreign Influence, Personal Conduct, and Criminal Conduct.

BURDEN OF PROOF

The sole 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. Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of an applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. The burden of proof in a security clearance case is something less than a preponderance of evidence, although the government is required to present substantial evidence to meet its burden of proof. Substantial evidence is more than a scintilla, but less than a preponderance of the evidence. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Once the government has met its burden, the burden shifts to an applicant to present evidence to refute, extenuate or mitigate government's case. An applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽²⁾

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information to be resolved in favor of protecting national security. Security clearance determinations should err, if they must, on the side of denials.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Guideline B, Foreign Influence. Under the Foreign Influence guideline, a security risk may exist when an individual's immediate family, or other persons to whom he may be bound by affection, influence, or obligation are not citizens of the U.S., reside in a foreign country, or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation or pressure. The Government established the Applicant's wife and brother-in-law are citizens and residents of the Republic of Korea. Disqualifying Condition (DC) 1 (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.*) applies.

Applicant's wife is a citizen and resident of Korea. In determining whether an applicant's family ties in a foreign country pose an unacceptable security risk, the Administrative Judge must consider the record evidence as a whole. Common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is improperly influenced or is brought under control or used as a hostage by a foreign intelligence or security service. However, merely having family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. ⁽³⁾ An administrative judge must consider the record evidence as a whole in deciding if the facts and circumstances of an applicant's family ties pose an unacceptable security concern under Guideline B.

While the mere presence of an applicant's relatives in a foreign country may be enough to disqualify one from holding a clearance, the analysis does not end there. His wife is a housewife living with him in Korea. She is not an agent of any foreign government within the meaning of the term under U.S. federal law. ⁽⁴⁾ However, Applicant's ultimate burden of persuasion in this case required him to also show his wife is not in a position to be exploited by the Korean government so as to force Applicant to choose between his responsibility to U.S. interests and loyalty to family.

Adjudication of this issue requires consideration of the whole body of record evidence available, including the nature and circumstances of the country involved. South Korea is a highly developed, stable, democratic republic with powers shared between the president and the legislature. There is no information to suggest that its current government has anything less than a satisfactory human rights record. Commercially and militarily, Korea is the U.S.'s seventh-largest trading partner, the U.S. is Korea's second-largest trading partner and largest export market. After considering the Guideline B mitigating conditions, I conclude Mitigating Condition (MC) 1 (E2.A2.1.3.1 *A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States.*) applies to his wife. I find for Applicant as to SOR paragraph 1.a.

Applicant's brother-in-law, a citizen and resident of Korea, is a truck driver. Applicant has met him once during the eight years Applicant has been married. C 3 (E2.A2.1.3.3. *Contact and correspondence with foreign citizens are casual and infrequent*) applies to his brother-in-law. I find for Applicant as to SOR paragraph 1.b.

Applicant and his wife live in a house in Korea that is in his wife's name. She also maintains bank accounts in Korea. Applicant's duty location is Korea. For his wife to own a house and have bank accounts there is not unusual nor does it rise to the level of security significance. I find for Applicant as to SOR paragraphs 1.c and 1.d.

In summary, the record evidence demonstrates Applicant has all the indicators of an industrious, mature, and trustworthy individual. He is retired from the U.S. Army and received a secret clearance in 1995. After weighting the record evidence as a whole, it is my determination that the facts and circumstances show Applicant's ties to the Republic of Korea do not pose an unacceptable risk or concern of foreign influence.

The Government has satisfied its initial burden of proof under guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate and meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. The nature of Applicant's actions, in providing false information to multiple questions on his July 2002 SF 86 poses a serious potential risk to the nation's security precautions.

When Applicant completed his SF 86 he answered "no" to question 21, which asked if he had ever been charged with or convicted of any felony offense. He had been arrested in December 1987 and charged with two felonies, which were later dismissed. In response to question 24, which asked Applicant if he had ever been charged with or convicted of any offense related to alcohol or drugs, he failed to list a 1986 arrest for public intoxication, a 1986 arrest for possession of a controlled substance, and a 1987 arrest for DWI. Applicant incorreccted believed the scope of the questions was limited to ten years prior the completion of the SF 86. The wording of the questions does not so limit the questions.

The Government has shown Applicant's answer to questions 21 and 24 were incorrect, but this does not prove the Applicant deliberately failed to disclose information about his arrests. The Applicant has denied intentional falsification. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance is a security concern. But every inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully. Applicant acknowledges he should have been more careful when he was completing the SF 86. He incorrecctly believed the questions were only concerned about the ten-year period prior to his completion the form. His answers were incorrect however, his explanation for providing incorrect and/or inaccurate information on his SF 86 is credible. I find for Applicant as to personal conduct.

The Government has satisfied its initial burden of proof under Criminal Conduct, Guideline J. Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. Between October 1986 and December 1987, Applicant was arrested six times. In December 1991, he was charged with theft of rental property for failing to return a rented video. Because of these incidents, Criminal Conduct Disqualifying Condition (DC) 1

(E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and 2 (E2.A10.1.2.2. *A single serious crime or multiple lesser offenses*) apply.

Applicant denied any wrong doing in the December 1991 incident. He had rented a video when called out for a no warning filed training exercise. When he returned from the exercise he returned the video, paid the late fee, and the charge was dropped when the store found out what had occurred.

The most recent charge occurred in December 1991, which was 14 years before the close of the record. This behavior is not recent. Criminal Conduct itigating Condition (MC) 1 (E2.A10.1.3.1. *The criminal behavior was not recent*) applies. The majority of the criminal conduct occurred in 1986 and 1987 when Applicant was 18 or 19 years old, single, and a juvenile. He is now 38 years old, has been married for nine years, has retired from the Army, and is well thought of by his employer and supervisor. His change in lifestyle makes it unlikely the factors leading to the violations will recur. MC 4 (E2.A10.1.3.4. *The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*) applies. Applicant's changes of lifestyle show clear evidence of successful rehabilitation. MC 6 (E2.A10.1.3.6. *There is clear evidence of successful rehabilitation*) applies. I find for Applicant as to criminal conduct.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; Applicant 's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Foreign Influence: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Paragraph 2 Personal Conduct: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Paragraph 3 Criminal Conduct: FOR APPLICANT

Subparagraph 3.a.: For Applicant

Subparagraph 3.b.: For Applicant

Subparagraph 3.c.: For Applicant

Subparagraph 3.d.: For Applicant

Subparagraph 3.e.: 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 a security clearance for Applicant. Clearance is granted.

Claude R. Heiny
Administrative Judge

HEINY

ADMINISTRATIVE JUDGE

CASE INFORMATION FORM

(Effective: May 1, 1996)

NAME OF CASE (LAST NAME OF APPLICANT, APPELLANT, OR CLAIMANT):

DITTMAYER, Craig Allen

Case No:

04-11664

INDUSTRIAL SECURITY HEARING CASE: _____ INDUSTRIAL SECURITY NON HEARING CASE: _____

PERSONAL APPEARANCE CASE: (CHECK APPROPRIATE CATEGORY) (DoD) (USA) (USN) (USAF) (USMC)

LOCATION OF HEARING OR PERSONAL APPEARANCE (CITY AND STATE):

FORM _____

DATE CASE ASSIGNED (NOT DATE RECEIVED):

January 23, 2006 _____

DATE LAST TRANSCRIPT RECEIVED:

FORM _____

DUE DATE:

March 10, 2005 _____

DATE ACTUALLY COMPLETED:

June 27, 2006 _____

.....

SUPPLEMENTAL INFORMATION ABOUT THE CASE (CHECK APPROPRIATE CATEGORY, OR MAKE APPROPRIATE ENTRY):

INDUSTRIAL SECURITY CASE: PERSONAL APPEARANCE CASE:

SOR INCLUDES ONE OR MORE OF CRITERIA A-C, OR K (Change 3 cases)

SOR INCLUDES CRITERION I (CHANGE 3 CASES)

TESTIMONY FROM WITNESSES

NUMBER OF GOVERNMENT WITNESSES 0

NUMBER OF APPLICANT/CLAIMANT WITNESSES 0

PRINCIPAL AUTHOR OF APPEAL BOARD DETERMINATION

NON-PRINCIPAL AUTHOR OF APPEAL BOARD DETERMINATION

REMAND DETERMINATION

PRINCIPAL AUTHOR OF APPEAL BOARD DETERMINATION

Peer Review Checklist for Administrative Judge's Decisions

CASE NO: 04-11664 AUTHOR:

Claude Heiny

DATE: June 28, 2006 PEER REVIEWER:

ITEMS FOR REVIEW DURING PEER REVIEW PROCESS:	Author	Peer Reviewer
1. Is the case caption correct and complete? Name of applicant/appellant (Identical to the SOR)? SSN? Case number and prefix (ISCR, ADP, or proper CAF)? AJ's name and identities of the parties?		
2. Is the format (font style and size, line spacing, section names, margins, macros, etc.) correct?		
3. Does the SYNOPSIS serve its function as a <u>brief</u> one paragraph head note highlighting only significant facts providing the reader a quick idea of what the case stands for?		
4. Does the last sentence of the SYNOPSIS clearly state the final action (in an ISCR/ADP case does it say "Clearance is granted" or "Clearance is denied," and in a PA is a meaningful recommended decision clearly indicated and made to the proper PSAB - with or without a conditional basis or warning)?		
5. Are the regulatory authorities (directive, executive orders, various regulations, 10 U.S.C. § 986, DCID 6/4) correctly and completely identified, to include the latest changes, modifications, and revisions?		
6. Is the chronology in the STATEMENT OF THE CASE or CASE HISTORY correct? SOR date? Answer date? If a PA, are the LOI/LON/LOD actions adequately described? If a PA, are the mitigated issues adequately described? Are the appropriate Adjudicative Guidelines indicated? Are the applicant's/appellant's admission identified?		
7. Are the FINDINGS OF FACT logically organized by chronology, subject, or another logical method?		

8. Are the FINDINGS OF FACT statements of fact as opposed to a mere summary of SOR allegations or events or summary of witness testimony?		
9. Does the policy section of an ISCR/ADP decision contain references to, and text from, the appropriate pertinent Adjudicative Guidelines and or other policy matters such as the Money Memo or 10 U.S.C. § 986 (Smith Amendment)?		
10. In the CONCLUSIONS section, are the relevant disqualifying and mitigating conditions identified, quoted, and discussed, with relation to the facts, as opposed to a mere repetition of the facts, without a meaningful synergism?		
11. In the CONCLUSIONS section, is there reasoned decision-making leading to a rational connection between the findings and conclusions?		
12. Do the FORMAL FINDINGS address each of the SOR allegations and are they consistent with the SYNOPSIS, e.g. - "is not" versus "is"?		
13. If a Smith Amendment case, does the decision comply with DOHA Operating Instruction No. 64 as to a recommendation for a waiver?	NA	NA
14. Is the decision or recommended decision, as appropriate, signed by the AJ?	Draft	Draft
15. Except in allegiance, foreign influence, and foreign preference cases, have all references to locations been avoided, and in all cases, have the privacy concerns - identities of individuals, organizations, employers, creditors, court systems, police departments, etc. - been addressed and references made generic?		
16. Have the punctuation, spelling, and grammar been checked for accuracy?		
17. Have potential "land mines" - slams of a particular perceived practice or procedure; "pokes-in-the-eye" - messages regarding a perceived injustice or controversial practice; and gratuitous, inflammatory dicta, been eliminated?		

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

2. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15

3. ISCR Case No. 98-0419 (April 30, 1999) at p.5.

4. *See*, 50 U.S.C. §1801 (c).