



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



In the matter of:)
)
-----) ISCR Case No. 07-03828
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel

For Applicant: Ronald C. Sykstus, Esq.

February 22, 2010

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance to work in the defense industry. The record shows Applicant, a retired Marine with 30 years of military service, wrongfully possessed two nine-millimeter pistols while working as a civilian employee of a Defense Department contractor supporting the U.S. Armed Forces in Iraq in 2006. In addition, in January 2006, he was involved in an incident where he shot two Iraqi nationals, although it appears his actions were in self-defense. Applicant did not report the shooting to his employer or to an appropriate U.S. authority. The shooting incident was discovered in June 2006, when his employer learned of it indirectly; the employer then reported it to the Defense Department. In May 2008, a law-enforcement investigation determined there was insufficient evidence to prove or disprove the death of an Iraqi national and the aggravated assault of a second Iraqi national did or did not occur. Taken together, the facts and circumstances surrounding Applicant's wrongful possession of the

firearms and his failure to timely report the shooting incident to his employer or appropriate U.S. authorities raise unanswered questions about his suitability or fitness for a security clearance. Accordingly, as explained below, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on April 9, 2009, the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) explaining it was unable to find it is clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the factual basis for the action under the security guideline known as Guideline E for personal conduct. The SOR also recommended that the case be submitted to an administrative judge to decide whether or not to deny or revoke Applicant's security clearance.

In summary, the SOR alleges Applicant possessed firearms (two pistols) while working as a civilian employee in Iraq during 2005–2006; he failed to report to appropriate authorities an incident in January 2006, when he shot two Iraqi nationals; and his subsequent departure from the company after the shooting incident became known in June 2006. Also, the SOR alleges two other matters under personal conduct. First, it alleges Applicant had a son out of wedlock in 2004, and that his spouse is unaware of the child or Applicant's relationship with the child's mother. Second, it alleges Applicant has had an ongoing relationship with a woman in Thailand since about 2001.

Applicant answered the SOR in a timely fashion and requested a hearing. The case was assigned to me on September 1, 2009. The hearing took place October 29, 2009. The transcript (Tr.) was received November 6, 2009.

Findings of Fact

Applicant is a 52-year-old employee of a federal contractor. Before working as a contractor, he served 30 years in the U.S. Marine Corps. He married for the first time in 1980, and the marriage ended in divorce in 1985. He married his current wife in 1985.

While on active military duty in 2001, Applicant established a relationship with a woman he met while deployed in Thailand. He has since traveled to Thailand on multiple occasions, usually once a year. Applicant maintains his relationship with the Thai woman is not sexual, and that his wife is aware of this relationship. Applicant

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines), effective within the Defense Department on September 1, 2006, apply to this case. They supersede or replace the guidelines published in Enclosure 2 to the Directive.

voluntarily disclosed his relationship with the Thai woman during a background investigation in 2005.² His most recent visit to Thailand, during which he spent time with the Thai woman, was in October 2009, shortly before the hearing in this case.

While on active military duty in 2004, Applicant had an affair with another woman in the U.S. resulting in a son being born. Applicant voluntarily pays child support for his son,³ but he no longer has a relationship with the child's mother. Applicant's wife is unaware of the affair or the child. Applicant volunteered this information during a background investigation in 2005.⁴ He is willing to tell his wife about the affair and his child if necessary, but prefers not to do so as he does not want to hurt his wife.

Applicant's service in the Marine Corps ended in February 2005, when he retired at the highest enlisted grade of master gunnery sergeant (pay grade E-9).⁵ He served, with distinction, in multiple positions of increasing responsibility in his primary specialty of field artillery. His fitness reports and other official documents show that Applicant had an outstanding career in the Marine Corps.⁶ He continues to be an excellent duty performer, as shown by two recent performance appraisals and a letter of recommendation from a Special Forces officer who has oversight responsibilities for Applicant's current employment in Afghanistan.⁷

After his retirement, Applicant obtained employment with a defense contractor. He then worked in Iraq from about June 2005 to June 2006 to support a program on behalf of his employer. While there, Applicant came into possession of two nine-millimeter pistols. He did not purchase the firearms, but obtained them from an unknown member of the U.S. Armed Forces. Applicant believes the Marine unit he supported knew he had firearms, as Applicant reports the unit provided ammunition to him.

Applicant's possession of the firearms was wrongful because possession of privately-owned firearms was a prohibited activity in violation of a General Order (GO), issued by the Commanding General of the Multi-National Corps – Iraq, in February 2005.⁸ The GO applied to Applicant in his capacity as a civilian serving with, employed by, or accompanying the U.S. Armed Forces while under the operational control of the command and present for duty in Iraq or Kuwait. The GO is a punitive order, meaning

² Exhibit 3.

³ Exhibit X.

⁴ Exhibit 3.

⁵ Exhibit C.

⁶ Exhibits E–R.

⁷ Exhibits A, B, and D.

⁸ Exhibit 7.

that a civilian could face criminal prosecution or adverse administrative action for violating the GO.

Applicant was working in Baghdad for a short time in about January 2006, when he was involved in an incident where he shot two Iraqi nationals. The incident took place when Applicant and two other individuals were on an evening sightseeing trip in Baghdad. The group stopped the vehicle they were traveling in and got out to look around. A young Iraqi man then approached the group and had a conversation with the driver of the vehicle. During the conversation, the Iraqi displayed a pistol and at the same time another Iraqi man approached the group from the rear. At some point, the armed Iraqi pulled back the pistol's slide and released it. In turn, Applicant withdrew his pistol and shot the armed Iraqi who fell to the ground and appeared to be dead. Applicant then turned and shot the second Iraqi who was able to flee on foot.

Applicant and the others in the group left the scene and returned to the U.S. Embassy compound in Baghdad where they went their separate ways. Applicant did not report the shooting to any civilian or military authority at the Embassy. The next day Applicant left the Embassy compound and returned to the camp where he was normally assigned. Applicant says he reported the shooting to some Marines he worked with at the camp, but he was unable to provide any corroborating information on that point.

In June 2006, Applicant returned to the U.S. to take care of some personal business. While at his company's headquarters, Applicant recounted the shooting incident informally to another employee. The information was passed along to the company's management officials who held a meeting to question Applicant about the incident. In doing so, the company concluded Applicant was forthright and cooperative during the interview. The company placed Applicant on administrative leave with pay. The company subsequently told Applicant he was being laid off and given 30 days of severance pay. On June 23, 2006, the company submitted to the Defense Department an adverse information report concerning the incident.⁹

The following month, Applicant found new employment with another defense contractor. He has worked for this company, or its successor in interest, since then, and he is currently working in Afghanistan.

As a result of the adverse information report, Applicant was interviewed by an authorized investigator from the U.S. Office of Personnel Management (OPM) in January 2007. Applicant gave a detailed account of the shooting incident to the OPM investigator in which he described shooting the Iraqis in self-defense.¹⁰

Thereafter, the shooting incident was reported to the Defense Criminal Investigative Service, which forwarded the matter to the U.S. Army Criminal

⁹ Exhibit 5.

¹⁰ Exhibit 2.

Investigation Command (CID) in about April 2007. The Army CID undertook a criminal investigation and completed its report of investigation in May 2008.¹¹ During the criminal investigation, Applicant provided a ten-page written statement in May 2007, describing the shooting and responding to various questions. The statement was provided after Applicant was advised of his rights and waived the same. This statement is like the others in that Applicant described a scenario where he acted in self-defense. Asked if he notified anyone of the shooting, he replied:

Not that night. Nobody wanted to get anyone else in trouble and when I got back to [the camp] the usual questions came up and I told them. I am not sure if they believed me or not. They did not say they did not believe me. It seemed as if it did not matter.¹²

Later in his written statement he said that, "If I thought I had committed a crime then I would have reported the crime but I don't feel that I committed a crime."¹³

In summary, the Army CID investigation concluded with a determination that there was insufficient evidence to prove or disprove the death of an Iraqi national and the aggravated assault of a second Iraqi national did or did not occur. In other words, the investigation could not substantiate or refute that the offenses occurred.

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, the only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information.

It is well-established law that no one has a right to a security clearance.¹⁴ As noted by the Supreme Court in the case of *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."¹⁵ 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.

¹¹ Exhibit 4.

¹² Exhibit 4 at 16.

¹³ Exhibit 4 at 17.

¹⁴ *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) (no right to a security clearance).

¹⁵ 484 U.S. at 531.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹⁶ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁷

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁸ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁰ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²¹ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²² The Agency's appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²³

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

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.²⁴ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

¹⁶ Directive, ¶ 3.2.

¹⁷ Directive, ¶ 3.2.

¹⁸ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁹ Directive, Enclosure 3, ¶ E3.1.14.

²⁰ Directive, Enclosure 3, ¶ E3.1.15.

²¹ Directive, Enclosure 3, ¶ E3.1.15.

²² *Egan*, 484 U.S. at 531.

²³ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²⁴ Executive Order 10865, § 7.

Analysis

Guideline E includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. In particular, security concerns may arise due to:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] 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.²⁵

Although the SOR alleges five different matters under Guideline E, this case involves two main issues. The first is whether Applicant's relationships with women other than his wife pose undue security concerns. The second is whether Applicant's wrongful possession and use of firearms in Iraq in 2006, and his failure to timely report the shooting incident to his employer or appropriate U.S. authorities, pose undue security concerns.

The first issue is resolved for Applicant. Although it appears that Applicant has an unconventional marriage and is withholding information from his spouse, his relationships with other women do not rise to the level of undue security concerns. The affair terminated and Applicant's contact consists of making monthly child-support payments, for which he is commended. Also, we would not know about the affair or the child but for Applicant's willingness to disclose this information during his background investigation in 2005. The same can be said of Applicant's long-term and ongoing relationship with the Thai woman, because we know about it only because Applicant disclosed it during the 2005 background investigation. Given his willingness to disclose these matters of a highly personal nature, they do not create a vulnerability to exploitation, manipulation, or duress in a security-clearance context. Accordingly, SOR ¶¶ 1.d and 1.e are decided for Applicant.

The second issue is resolved against Applicant. In broad terms, it concerns Applicant's workplace conduct, albeit in a war zone where the threat to life and limb was present,²⁶ as follows: (1) his wrongful possession of two firearms while employed by a Defense Department contractor in Iraq; and (2) his failure to timely report the January 2006 shooting incident to his employer or an appropriate U.S. authority. The record shows Applicant engaged in activity that he knew or should have known was unlawful by possessing two firearms while a civilian employee in a war zone. Indeed, it is common for incoming personnel to receive briefings on multiple subjects when deploying in support of U.S. Armed Forces. It is difficult to imagine Applicant was not

²⁵ Revised Guidelines, ¶ 15.

²⁶ Exhibits S, T, and U.

briefed on the prohibited activities of the GO, the first of which addressed the issue of privately-owned firearms.²⁷

Also, the record shows Applicant was willing to withhold information about a serious incident when he failed to timely report the January 2006 shooting to his employer or an appropriate U.S. authority. Applicant had several opportunities to report when the incident was still fresh. For example, he could have reported it to civilian or military officials at the Embassy when he returned there after the shooting. Likewise, he could have reported it the next day, again at the Embassy, or to his employer via e-mail or another communication method. Instead, Applicant, at best, mentioned it to some of the Marines he worked with when he returned to his camp. Again, given his background and experience, he knew or should have known a full report to his employer or an appropriate U.S. authority was required for such a serious incident. Instead, he elected to take no action (other than mentioning it to some of the Marines he worked with) because he was concerned about the potential for negative consequences to himself or others involved. Taken together, the totality of facts and circumstances raise two disqualifying conditions, as it amounts to inappropriate workplace behavior that calls into question Applicant's judgment, reliability, and trustworthiness.²⁸

All of the mitigating conditions under ¶ 17 of Guideline E were considered and none, individually or in combination, are sufficient to mitigate the security concerns. Accordingly, SOR ¶¶ 1.a and 1.b, as related to the workplace matters, are decided against Applicant. And SOR ¶ 1.c, as related to the workplace matters, is decided for Applicant because the allegation does not allege disqualifying conduct, it merely pleads proof by setting forth the employer's action in light of the January 2006 incident. Pleading proof (in this case, the consequences of the underlying events) should be discouraged.

Under the whole-person concept, an administrative judge must evaluate a person's eligibility by considering the totality of the person's conduct and all the circumstances. An administrative judge should consider the nine factors listed in the Revised Guidelines as follows:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation

²⁷ Exhibit 7 at ¶ 2.a.

²⁸ Revised Guidelines, ¶¶ 16(c) and 16(d).

for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.²⁹

I gave due consideration to Applicant's case in light of the whole-person concept, and any credit due him is not enough to overcome the security concerns. In reaching this conclusion, I gave substantial weight to Applicant's 30-year career in the Marine Corps, for which I have great respect. I also gave substantial weight to his willingness to serve in harm's way, in and out of uniform, on behalf of the U.S. And I gave substantial weight to the undisputed fact that Applicant was living and working in a dangerous place (Iraq during 2005–2006) where he likely felt the need to arm himself with a firearm. Nevertheless, I took into account that the U.S. Armed Forces operate in a highly regulated way for reasons that go beyond the interests of a single individual. This regulation extends to dictating who may carry a firearm consistent with the principles of the law of war. And it certainly extends to regulating the possession of privately-owned firearms in a war zone.

Questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations are core policy concerns under the personal conduct guideline.³⁰ Here, the record demonstrates that Applicant possessed two firearms when he knew or should have known it was wrongful and contrary to the GO. And the record demonstrates that Applicant did not report the January 2006 shooting incident to his employer or an appropriate U.S. authority, because he was no doubt concerned about negative consequences from the shooting or from his possession of the firearms or both. Taken together, these matters raise unanswered questions about his judgment, candor, honesty, or willingness to comply with rules and regulations. Following the principles of *Egan* and the clearly-consistent standard, those unanswered questions are resolved against Applicant. To conclude, Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline E:	Against Applicant
Subparagraphs 1.a–1.b:	Against Applicant
Subparagraphs 1.c–1.e:	For Applicant

²⁹ Revised Guidelines, ¶ 2(a)(1) – (9).

³⁰ Revised Guidelines, ¶ 15.

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard
Administrative Judge