



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-16388
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esq., Department Counsel
For Applicant: Greg D. McCormack, Esq.

February 20, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines E (Personal Conduct) arising from Applicant's concealment of contacts with a citizen and resident of the Republic of China. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on July 5, 2006. On July 8, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline E. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on July 16, 2008; answered it on August 12, 2008; and requested a hearing before an administrative judge. DOHA received the request on

August 18, 2008. Department Counsel was ready to proceed on November 6, 2008, and the case was assigned to me on November 10, 2008. DOHA issued a notice of hearing on November 17, 2008, scheduling the hearing for December 8, 2008. Applicant retained counsel on November 28, 2008, and requested a continuance. On January 5, 2009, DOHA issued a second notice of hearing, scheduling the hearing for February 2, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified on his own behalf and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. AX C consists of seven separate documents, which are labeled as AX C-1 through AX C-7. The record closed upon adjournment of the hearing on February 2, 2009. DOHA received the transcript (Tr.) on February 13, 2009.

Findings of Fact

In his answer to the SOR, Applicant generally admitted the allegations in SOR, with some qualifications and explanation. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 65-year-old principal systems engineer for a federal contractor. He has worked for his current employer since September 2008 (Tr. 30). He has worked continuously for various federal contractors supporting the intelligence community since November 1981. He was a federal government employee from June 1974 to July 1979 (AX A). He has held a clearance since June 1982 and eligibility for access to Sensitive Compartmented Information (SCI) for more than 20 years (Tr. 29). His current position requires only a secret clearance (AX B).

Applicant was married in December 1968 and divorced in August 1975. He remarried in September 1977 and was divorced in December 2001. He has two children, a 39-year-old daughter and a 22-year-old son.

In September 2004, Applicant used a Euro-Asian on-line dating service to start an email relationship with a 45-year-old citizen of the Republic of China, residing in mainland China. She claimed she worked as an optometrist in a local hospital (Tr. 32). They maintained weekly email contact until April 2005 (GX 2 at 6-7). The woman spoke limited English and used translation software to communicate with Applicant, and he learned some Chinese phrases to communicate with her (GX 2 at 8). At the time, Applicant held a top secret clearance with access to SCI (Tr. 32).

In April 2005, Applicant requested approval to travel to Hong Kong to meet the woman. His request was disapproved because of his intended meeting with a Chinese national, and he was advised to terminate all contact with her. He cancelled his hotel and airline reservations. He could not obtain a refund of the airfare, about \$1,500, but he received a credit for the airfare on another trip. Applicant emailed the woman and told her he could not continue to see her because of his employment. He changed his email address and deleted all the emails and photographs she had sent him (GX 2 at 7; Tr. 38-39).

In May 2005, Applicant decided he needed a vacation because of stress at work and disappointment about his breakup with the Chinese woman. He requested vacation time from late June to early July 2005, but did not disclose that he intended to visit Hong Kong (GX 2 at 7). Although he testified he did not schedule the trip in order to meet with his Chinese friend, he emailed her about two weeks before traveling and told her his travel dates and where he would be staying (Tr. 40). At the hearing, he admitted his email was an implied invitation (Tr. 66). He testified he was “full of fear” on the flight to Hong Kong because he knew he had done something wrong (Tr. 44). Nevertheless, his friend met him at his hotel and they spent about a week together (Tr. 43). He admitted he did not request approval of his trip because he knew it would be denied (Tr. 58).

Applicant submitted a trip report after returning from Hong Kong, but he did not report his contact with his Chinese friend (Tr. 43, 64). He testified he did not disclose the foreign contact because he was “unbelievably full of fear” that he would lose his clearance, his job and his career (Tr. 52). His son was starting college, he was caring for his aged mother, and he had financial obligations arising from his previous marriages (Tr. 44).

After returning from Hong Kong in early July 2005, Applicant proposed marriage to the Chinese woman and she accepted. He contacted the chief of security for the agency he was supporting and asked if he could obtain a waiver of the restrictions on foreign contact if the person contacted was his fiancée (Tr. 45). He was informed that he could not continue his foreign contact without giving up his current classified assignment. He emailed the woman and informed her that he could not continue their relationship (Tr. 46). She sent one or two more emails to him but he did not respond (GX 2 at 9).

In late July 2005, Applicant’s supervisor informed him that he presented too much of a security risk to continue working on his assigned project (GX 1 at 28; GX 2 at 10). He left that employer in September 2005 and found employment with another federal contractor (GX 1 at 16; AX A).

In July 2006, Applicant submitted an application to continue his clearance. In response to question 22, pertaining to his employment record, he disclosed he had left his previous job because of the risk presented by his foreign contacts. He explained:

Security chief denied my request for foreign travel to Hong Kong due to foreign contact. I had completed the Request for Travel and Foreign Contract Report per policy. Upon trip denial I terminated communication with foreign contact 4/20. By late May-Early June/2005 I realized that I needed a vacation. I replanned the Hong Kong trip without former foreign contact. Due to the small window of time before more tasks would be assigned, I scheduled a trip for 6/25-7/4. I should have but did not submit a Request for Foreign Travel prior to the trip. I submitted the Request in the 1st week upon returning. During the trip I missed foreign contact

person. Post trip I emailed her to ask if she wanted to resume our relationship & submit for Fiance Visa.

GX 1 at 28. He intentionally did not mention that he and the "foreign contact" spent the week together in Hong Kong. At the hearing, he admitted his explanation on the security clearance application was intentionally incomplete (Tr. 49).

In early September 2006, Applicant received a voicemail message from a female Chinese medical student in the U.S., conveying a message that his Chinese friend "was still waiting for him." Applicant returned the call and told the medical student he could not continue the relationship without losing his job (GX 2 at 9).

During an interview with a security investigator on September 20, 2006, Applicant stated he had visited Hong Kong in 2005 "by himself," that he felt lonely during the trip, that he was worried about not submitting a foreign travel request. He denied contacting or meeting his friend while overseas (GX 2 at 8). At the hearing, he testified he was "full of fear" during the interview because he knew his clearance was at risk, and he was not candid about his foreign contact in Hong Kong (Tr. 50).

At some time in 2007, Applicant's Chinese friend contacted him by instant messaging. Applicant thought the message was a hoax or a trick and asked her to show herself on the video camera, which she did. Applicant told her his situation had not changed, and he had no further contact with her (Tr. 48). Applicant reported the contact to his security officer (Tr. 68).

In February 2008, Applicant hired a private polygraph examiner. He made a lengthy statement during the examination that was consistent with his testimony at the hearing. His motive in arranging for the polygraph examination was to express remorse for his lack of candor about his foreign contacts and to demonstrate that he did not disclose any classified or sensitive material (GX 2 at 25). He provided a copy of his statement in response to DOHA interrogatories asking him to authenticate his statement to the security investigator in September 2006, and he pointed out that he had omitted mentioning his one-week contact with his friend from China during that interview (GX 2 at 16).

Applicant had no further contact with the Chinese woman after the instant message contact in 2007. He testified he uninstalled the instant messaging software from his computer and no longer has any communication with anyone in a foreign country (Tr. 51-52).

In August 2008, Applicant married his current wife, a naturalized U.S. citizen. In September 2008, he began working for his current employer. According to his current supervisor, he was very candid about the issues surrounding his security clearance and he described the circumstances surrounding his trip to Hong Kong in 2005 in detail (AX B).

A retired Navy officer with 25 years of service, who met Applicant in June 2008 when he and his then-fiancée joined their church, now works with Applicant to establish and maintain a men's ministry. Based on observation of Applicant's interaction with his mother and new wife, the witness believes Applicant is an honest person, willing to be bound by conscience and to do what is right (AX C-1).

Applicant's pastor since the spring of 2008 describes Applicant as sincere, honest, and dedicated to God, his family, and his country. He is aware of Applicant's "mistakes" and believes they have motivated him to be wiser (AX C-5). Applicant's previous pastor for four years describes him as responsible, reliable, trustworthy, and committed to his family (AX C-6). A member of Applicant's previous church, who is a retired Army officer and has known him since 2002, was aware of his foreign contacts and believes he is remorseful about his poor judgment and has grown in his religious faith and maturity as a result of his mistake (AX C-7).

A former colleague who has known Applicant for three years and holds a top secret/SCI clearance describes him as exceptionally talented and a person of high integrity, honesty, and a strong work ethic (AX C-4). A long-time friend since 1965 describes Applicant as a person who is honest, mature, responsible, loyal, of high moral character, and a deeply religious man who tries to live his faith by example. He believes Applicant has been a caring father to his children, and a caring son to his aging mother. He considers Applicant a conservative person, a God-fearing and proud American, and a fierce patriot (AX C-2).

Applicant's son describes Applicant as his "best friend in life." His father has taught him "humility, responsibility, leadership, determination, respect, love, and honesty." He describes his father as a family man and a deeply religious person who will stand by his word and fight for what is right (AX C-3).

The Office of the National Counterintelligence Executive reported to Congress in September 2008 that a large number of countries target U.S. information and technology, but that the bulk of intelligence collection is from a "core group" of fewer than 10 countries, one of whom is China (GX 3 at 1). Foreign collectors target U.S. travelers with a variety of methods, including eliciting information from seemingly innocuous conversations (GX 3 at 4). The 2007 Report to Congress of the U.S.-China Economic and Security Review Commission states that China operates an aggressive clandestine industrial espionage network that is so extensive that China's espionage and industrial theft activities are the "single greatest risk" to the security of U.S. technology (GX 4 at 9, 11).

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 have access to such information." *Id.* at 527. The

President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication 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, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. 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 AG ¶ 2(b).

Analysis

Guideline E, Personal Conduct

The SOR alleges Applicant was given a choice in April 2005 of losing his clearance or terminating his relationship with a foreign contact, that he briefly broke off the relationship, and that he failed to report that he had resumed the relationship in May or June of 2005 (SOR ¶ 1.a). It alleges that, in June and July 2005, he traveled to Hong Kong without obtaining the approval for foreign travel required by his employer (SOR ¶ 1.b). It also alleges two instances of falsification. The first allegedly occurred when he submitted an application to continue his clearance in July 2006, and disclosed that he had left a job under unfavorable circumstances, but did not disclose that he attempted to conceal a foreign contact in Hong Kong (SOR ¶ 1.c). The second instance allegedly occurred during an interview with a security investigator in September 2006 when he stated he was laid off for “lack of work” by his previous employer and he did not disclose that he had initiated foreign contact during his trip to Hong Kong (SOR ¶ 1.d).

Applicant’s use of an on-line dating service to initiate foreign contacts and his weekly email contacts with a Chinese national before his trip to Hong Kong in June and July 2005 are not specifically alleged in the SOR. Thus, this conduct may not be used as an independent basis for revoking his clearance. However, conduct not alleged in the SOR may be considered to assess an applicant’s credibility; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of the whole person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered the conduct not specifically alleged in the SOR for these limited purposes.

Although Applicant has been eligible to SCI access for many years and listed himself on his resume as “TS/SCI eligible,” the SOR makes no reference to Director of Central Intelligence Directive 6/4, *Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information (SCI)*, which was the controlling directive at the time of the conduct alleged and the date of the SOR. Thus, this decision is limited to considering whether Applicant’s underlying collateral security clearance should be continued.

The concern under this guideline is set out in AG ¶ 15 as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Several potentially disqualifying conditions are relevant. The disqualifying condition set out in AG ¶ 16(a) applies to:

deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

AG ¶ 16(b) applies to “deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.”

AG ¶ 16(c) applies to:

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

AG ¶ 16(d) applies to:

credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations.

AG ¶ 16(e) applies to “personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.” Finally, AG ¶ 16(f) applies to “violation of a written or recorded commitment made by the individual to the employer as a condition of employment.”

Applicant's deliberate concealment of his week-long contact with a citizen and resident of mainland China on his security clearance application raises AG ¶ 16(a). His false statement to a security investigator that he had no contact with the Chinese woman during his Hong Kong visit raises AG ¶ 16(b). His intentional and repeated contacts with a Chinese national, while holding a top secret/SCI clearance and working on a sensitive project, and his intentional concealment of his contacts raise AG ¶¶ 16(c), (d), and (e). Finally, his violation of his employer's rules regarding foreign travel and reporting of foreign contacts raises AG ¶ 16(f).

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 16(a)-(f), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns raised by false or misleading answers on a security clearance application may be mitigated by showing that “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” AG ¶ 17(a). Applicant falsified his security application in July 2006, repeated the falsification during an interview with a security investigator in September 2006, and did not correct his omission until he responded to DOHA interrogatories in February 2008, about 19 months after he submitted his application. I conclude AG ¶ 17(a) is not established.

Security concerns based on personal conduct may be mitigated if “the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.” AG ¶ 17(c). The first and third prongs of this mitigating condition are not met because Applicant’s intentional falsifications were repeated, and they were not minor.

The second prong of this mitigating condition (“so much time”) focuses on whether the conduct was recent. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *Id.*

Applicant engaged in a 28-month pattern of deception, beginning with his false trip report in July of 2005 and finally ending with his acknowledgment in November 2008 that his earlier statements were false. About 17 months have elapsed since Applicant’s last falsehoods, and only about five months have elapsed since he finally corrected the false information. Within his family, church community, and the friends who have supported his application, he enjoys a reputation for honesty and integrity. He is no longer looking for companionship in the wrong places. He asserted at the hearing that he uninstalled the instant messaging software from his computer and no longer exchanges messages with anyone from a foreign country. What cannot be determined is whether he will again resort to falsehood if he believes his clearance and his job are in jeopardy. It is significant that his overriding fear while he was involved with a foreign national was not whether he would be exploited and protected information would be compromised, but rather whether he would lose his job. He still has substantial financial obligations and needs a clearance to keep his current job. Because of his pattern of

repeated deceptions motivated by self-preservation, I am not satisfied that enough time has passed to show that he is rehabilitated.

Now that Applicant has remarried, it is unlikely that he will engage in further romantic relationships with foreign nationals. Thus, I conclude the fourth prong of this mitigating condition (“unique circumstances”) is established. However, his bad judgment in fostering a romantic relationship with a citizen and resident of mainland China, and his repeated deceptions motivated by fear of losing his job cast doubt on his current reliability, trustworthiness, and good judgment. I conclude Applicant has not carried his burden of establishing AG ¶ 17(c).

Security concerns also may be mitigated if “the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.” AG ¶ 17(d). Applicant has acknowledged his behavior and no longer searches for companionship in foreign countries. While future inappropriate foreign contacts are unlikely, Applicant has not persuaded me that future deceptive behavior will not recur if he perceives that his clearance and his job are at risk. Thus, I conclude AG ¶ 17(d) is not established.

Finally, security concerns may be mitigated if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(e). This mitigating condition is established because Applicant is married, no longer seeks foreign companionship, and apparently has made full disclosure to his new employer.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my

comments under Guideline E in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a well-educated, mature adult, and he has a wealth of experience in the intelligence community. He has provided many years of dedicated service and held high-level clearances for many years. While his long and faithful service is a mitigating factor, his experience in the intelligence community is a double-edged sword, because his experience should have made him more attuned to the risks to national security posed by fostering a romantic relationship with a Chinese national, about whom he knew very little. He, more so than others less experienced, should have realized the danger of bypassing the rules designed to protect him from exploitation. He should have understood the necessity for absolute candor, but he engaged in deceptive behavior for 28 months because he feared losing his clearance and his job.

After weighing the disqualifying and mitigating conditions under Guideline E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge