



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-03960
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert E. Coacher, Esq., Department Counsel
For Applicant: James H. Shoemaker, Jr., Esq.

January 29, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline E (Personal Conduct), based on Applicant's relationship with a woman with a history of drug addiction and criminal conduct. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on November 1, 2006. On September 19, 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 October 7, 2008; answered it on October 20, 2008; and requested a hearing before an administrative judge. DOHA received the request on October 21, 2008. Department Counsel was ready to proceed on October 30, 2008, and the case was assigned to me on the following day. DOHA issued a notice of hearing on November 17, 2008, scheduling the hearing for December 9, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified on his own behalf, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. The record closed upon adjournment of the hearing. DOHA received the transcript (Tr.) on December 18, 2008.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations but denied that his conduct raised security concerns. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 64-year-old exercise planner employed by a defense contractor. He served on active duty in the U.S. Marine Corps from June 1962 until April 1989, when he retired as a master gunnery sergeant (pay grade E-9). During his military service, he was awarded the Marine Combat Action Ribbon, the Air Medal, the Navy Achievement Medal for valor, and numerous other decorations and awards.

After retiring from the Marine Corps, Applicant completed his undergraduate college education and then obtained a master's degree in adult education. He worked as a federal employee from February 1992 to August 2002, when he retired. In April 1997, he received the Meritorious Civilian Service award for his performance of duty while in charge of a counterdrug intelligence program (AX C). From about 1970, while in the Marine Corps and as a civilian employee, he had a security clearance and access to Sensitive Compartmented Information (SCI). He worked in intelligence operations throughout his military and civilian service. He has never had a security violation. He held two short-term jobs in the private sector, from August to September 2005 and from February to April 2006, when he was hired by his current employer. As of the date of his response to the SOR, he continued to hold a clearance.

Applicant was married in March 1969 and has been legally separated since November 2005. His spouse is 75 years old (GX 1 at Section 13/15). They have no children.

Applicant currently resides with a 46-year-old woman, a native of Guam. She has an adult daughter whose husband is serving in the U.S. Navy. His companion is described on his security clearance application as his cohabitant/fiancé. He met her on a computer network, and she disclosed that she had a prison record (Tr. 75). After about a month of online correspondence, they met in person in May 2005 (Tr. 76). Their relationship became romantic around July 2005. They now live together in a home Applicant has rented, and they are sexually intimate. When asked by Department

Counsel if he was in an “adulterous relationship,” he responded, “If you want to call it that, yes, sir.” He testified he deeply loves his companion (Tr. 44, 53, 56).

Applicant’s spouse is aware of his relationship with another woman and does not desire to terminate the marriage. Applicant likewise does not desire to terminate his marriage, because of concerns about his spouse’s financial security and his desire not to disturb her “comfort zone.” His spouse has never worked and has no income independent of Applicant. She lives in the house they jointly own. Applicant pays for all her medical needs, provides her with a vehicle, maintains the property, and gives her \$400 to \$600 per month in spending money (Tr. 53-54).

Applicant testified he has an amicable relationship with his spouse. He was living with his spouse when he met his companion, but the marital relationship had cooled to the point they were living as brother and sister (Tr. 71, 75). His spouse has met his companion. Applicant and his companion have visited his spouse in her home (Tr. 61).

Applicant’s immediate supervisor is generally aware of his situation and has stated he has no doubt about Applicant’s good judgment, trustworthiness, honesty, or integrity (AX A). He rated Applicant as exceeding standards in 10 of 12 performance factors, meeting standards in two factors, and described his overall performance as outstanding (AX B).

Applicant’s companion has a long criminal record (GX 2). All her criminal activity occurred while she was residing in Guam (Tr. 57-58). She was arrested twice in November 1994, the first time for three counts of theft and receiving stolen property and two counts of forgery, and the second time for illegal possession of a firearm, having a concealed firearm, and possessing a firearm with an obliterated serial number. She was arrested in May 1995 for unauthorized use of a motor vehicle, and arrested in June 1995 for theft of property. In October 1995 she was arrested for burglary and soliciting prostitution. In May 1996 she was arrested for burglary and possession of stolen property. In January 1997 she was arrested for distribution of methamphetamine, and she was sentenced to prison for 34 months.

The records of the Federal Bureau of Investigation reflect that Applicant’s companion was a member of a group responsible for passing numerous fraudulent and forged payroll checks. In December 1998, she was arrested for distribution of methamphetamine and bank fraud. She was sentenced to prison for 13 months for the drug offense and 10 months, served concurrently, for the bank fraud. In April 2000, she was charged with two counts of bank fraud and violation of her supervised release, and was sentenced to prison for a term not reflected in the record.

In July 2001, Applicant’s companion was charged with violation of her supervised release and sentenced to 11 months in prison. In June 2002, she was charged with possession of drug paraphernalia and being under the influence of a controlled substance, but the charges were dismissed. In August 2002, she was again charged with possession of drug paraphernalia and being under the influence of a controlled

substance. She was charged with violation of probation in September 2003 and jailed for 14 months. She was again charged with violation of probation in March 2004 and jailed for 14 months.

According to Applicant, his companion's criminal record was all the result of her drug addiction that began when she was about 11 years old (Tr. 45). When he met her in May 2005, she was living with her daughter and being treated for drug addiction. In August 2005, Applicant's companion admitted she had relapsed and used crack cocaine. Applicant responded to her relapse by purchasing a plane ticket to Guam and putting her on the plane. While his companion was at an intermediate stop and waiting to connect with the flight to Guam, she and Applicant talked by cell phone, and she told him she would not return to Guam because she would be back in the same environment that caused her problems. Applicant believed she was suicidal when they talked. Applicant told her she needed to go through detoxification and start attending Narcotics Anonymous (NA) meetings. She went through detoxification and they attended NA meetings together for 90 consecutive days. His companion did not undergo drug treatment or counseling because they could not afford it at the time (Tr. 65). Although a member of the NA group was designated as his companion's sponsor, Applicant decided he would be her unofficial sponsor (Tr. 60). She did not receive any counseling or treatment and did not attend any further NA meetings after the 90 consecutive meetings (Tr. 60).

Applicant believes she has not relapsed since August 2005, and that she is a changed person (Tr. 47-51, 57-58). He testified he knows his companion well enough that he would know if she relapsed, and he also believes she would tell him (Tr. 62-63). He testified that he would respond to a relapse by taking his companion to a "psych clinic or whatever," and place her in a rehabilitation program (Tr. 65).

When his counsel asked him what he would do if his companion asked him to compromise sensitive information, he testified:

[L]ook, I've been in this business for 40 years, the intelligence business. Almost 30 of those years I've [had] SCI clearance. I've been a special security officer, where I handle this stuff all the time.

I ran preliminary inquiries and investigations on people. I'm not stupid. I'm not going to compromise. If that happened again, first of all she would never be stupid enough to ask me that, she knows better. She knows me.

I really, I know, I'm not supposed to get upset, but I'm telling you, it's not going to happen, it simply will not happen. I will not allow it. I've done this a long time.

I've been in positions similar to [department counsel's] when I worked in counter intelligence and it's not going to happen. She knows it's not going to happen. It's as simple as that. I'm sorry, I'm going to tell it like it is.

(Tr. 63-64.) Applicant reacted indignantly to questions about his integrity, honesty, and judgment. He testified: "I'm not going to go ahead and compromise [the] United States of America for any reason, I don't care what it is. And by questioning my integrity, my honesty, my judgment, to me, I'm sorry, but it's a slap in the face. Okay, that's the way I see it." (Tr. 66.)

A friend of Applicant who retired from the Navy as a senior chief petty officer (pay grade E-8) testified he worked with Applicant from 1995 to 2002. He testified he would rank Applicant first or second among the hundreds of intelligence professionals he had worked with. He described Applicant as "honest to a fault" and a person of sound judgment (Tr. 80-81). He testified he has met Applicant's companion and knows her background. He believes Applicant is a very compassionate person who will go out of the way for someone who needs help (Tr. 83).

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 that Applicant maintains a “close relationship” with his companion, who has an extensive criminal record, including two incarcerations in a federal prison. Applicant admits the relationship and his companion’s criminal record.

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.” The disqualifying conditions in AG ¶¶ 16(d), (e), and (g) are relevant. AG ¶ 16(d) is raised by the following:

[C]redible 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.

Three aspects of AG ¶ 16(d) are relevant: (1) whether Applicant has exhibited “questionable judgment,” (2) whether he has exhibited “unwillingness to comply with rules and regulations,” and (3) whether his adulterous relationship with his companion demonstrates a “pattern of dishonesty or rule violations.”

Applicant was not employed and did not have access to classified information when he began his relationship with his companion. Nevertheless, I conclude Applicant exercised questionable judgment when he fostered an online relationship with a person with an extensive criminal record and allowed it to become romantic and sexually intimate, while he was still married. I would expect that Applicant, with his long public service and extensive experience in the intelligence community, would be cautious in pursuing a relationship with a recovering drug addict with a long criminal history. Instead, he went from initial contact to being deeply in love in the space of three months—a whirlwind courtship by any standard. While Applicant has focused on his companion’s drug addiction, her past also includes weapons offenses, bank fraud, forgery, burglary, theft of property, possession of stolen property, and prostitution.

I am satisfied that Applicant honestly believes his spouse does not object to his relationship, but his spouse did not testify or submit a written statement, leaving open the question whether she has agreed to Applicant’s arrangement or has simply acquiesced. Given the strong personality exhibited by Applicant during the hearing, mere acquiescence cannot be ruled out.

Applicant has a long record of impeccable public service. He does appear, however, to compartmentalize his professional life and his personal life, and he has demonstrated that he is unwilling to comply with his marital obligations. Based on his long record of public service, however, I believe he would be less likely to disregard job-related rules. With respect to the issue whether there is a “pattern” of rules violations, I note that his adulterous relationship, while continuous and long-standing, is a single continuing act rather than multiple independent transgressions. As such, it may not be a “pattern” as the term is used in AG ¶ 16(d). Nevertheless, based on Applicant’s exercise of questionable judgment, I conclude AG ¶ 16(d) applies.

The disqualifying condition in AG ¶ 16(e) is raised by “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.” Applicant has disclosed his relationship with his spouse, his immediate supervisor, and a long-time friend and former co-worker. His personal and professional standing with his supervisor and his friend apparently have not been affected by it, although the record does not reflect whether he disclosed the full extent of his companion’s criminal record. In the broader community, including the military community with whom he must interact, it is likely that his personal and professional standing would be adversely affected.

I am satisfied that Applicant is not vulnerable to direct and overt exploitation, manipulation, or duress by threats of disclosure, because of his background and

personality. He expressed no shame or remorse about his relationship and was indignant about the suggestion that it might affect his suitability for a clearance. He has adopted a “my way or the highway” stance with his companion and made it clear that he will not tolerate further criminal conduct. His extensive experience in counter-intelligence has made him especially sensitive and knowledgeable about efforts to gather sensitive information. He testified emphatically that he would never permit his companion or anyone else to exploit him.

On the other hand, Applicant’s extramarital relationship has increased his vulnerability to indirect exploitation, manipulation, or duress. He has made himself vulnerable to vindictive financial claims, unfounded criminal complaints, acts designed to sabotage his credit rating, identity theft, and similar means of coercion or retribution initiated by his companion (especially if he should decide to terminate their relationship at some time in the future) or his spouse. I conclude AG ¶ 16(e) applies.

Finally, the disqualifying condition in AG ¶ 16(g) is raised by “association with persons involved in criminal activity.” This disqualifying condition applies only to persons who are presently involved in criminal activity, not those who have engaged in criminal activity in the past. Applicant met his companion in May 2005, while she was struggling with and being treated for drug addiction. They were romantically involved by July 2005, and his companion relapsed and used crack cocaine in August 2005. I conclude AG ¶ 16(g) is not raised by his companion’s criminal record in Guam and her violations of probation before they met, but it is raised by his association with a crack cocaine user in August 2005.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶ 16(a) and (g), 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 based on personal conduct may be mitigated by showing that “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). Applicant’s conduct is ongoing, did not occur under “unique circumstances,” and casts doubt on his good judgment. Accordingly, I conclude AG ¶ 17(c) is not established.

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, but he has attempted to justify it. He was indignant that anyone would question it, and it is likely to continue. This mitigating condition is not established.

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). Applicant receives credit under this mitigating condition for disclosing his relationship to his spouse and his employer.

Finally, security concerns under this guideline may be mitigated if “association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.” AG ¶ 17(g). Applicant’s companion has not engaged in criminal activity since August 2005, but doubts about his good judgment remain.

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 had a stellar 40-year career as a Marine and a civilian in public service. His relationship with his companion began after his second retirement and when he was not contemplating the impact of that relationship on future employment or his eligibility for a security clearance. His conduct in searching for companionship and becoming deeply involved with his companion despite her history, while he was still married and living with his spouse, was a dramatic behavioral change.

Except for one character witness and a testimonial from his supervisor, Applicant was the sole source of evidence regarding the character and background of his companion and the reaction of his spouse to the situation. Applicant presented himself as sincere and candid. I believe he honestly described his companion and his spouse as he perceived them, but he was not testifying as an impartial observer. He believes

his companion is a changed person, but he has no expertise in prognosis of future drug involvement or in determining whether she has overcome the causes of her long criminal record. He presented no testimony or written documents from qualified medical professionals supporting his conclusions. Similarly, he presented no evidence to corroborate his assertion that his spouse did not object to his conduct. His indignation at being questioned indicates his lack of appreciation for the security concerns raised by his conduct. He is supremely confident in his ability to detect efforts to obtain information from him and to thwart them, but he is surprisingly naïve in his lack of appreciation of his vulnerability.

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
Subparagraph 1.a:	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