



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



In the matter of:)
)
) ISCR Case No. 09-01509
)
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn Hoffman, Esquire, Department Counsel
For Applicant: *Pro se*

June 23, 2010

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s questionable behavior is mitigated by the passage of time, his character reputation, remorse, and his 22 years of honorable service which includes combat service. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted security clearance applications on November 5, 2008 and July 23, 2009. On September 22, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, and the Adjudicative Guidelines (AG), effective within DOD on September 1, 2006.

The SOR alleges security concerns under Guideline E (Personal Conduct) and Guideline D (Sexual Behavior). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and it recommended referral to an administrative judge to determine whether a clearance should be granted or denied.

On October 9, 2009, Applicant responded to the SOR allegations, and requested a hearing before an administrative judge. The case was assigned to me on February 19, 2010. DOHA issued a notice of hearing on March 5, 2010, scheduling a hearing for March 25, 2010. The hearing was convened as scheduled. The Government offered Exhibits (GE) 1 through 4, which were admitted without objection. Applicant testified on his own behalf and submitted Applicant Exhibits (AE) 1 and 2, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on March 31, 2010.

Findings of Fact

Applicant admitted all the SOR factual allegations. His admissions are incorporated here as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 44-year-old retired U.S. Air Force Lieutenant Colonel working for a defense contractor. He graduated from college in 1988, and received a Civil Engineering degree. Applicant married his wife in 1988, and they have two sons, ages 19 and 15. He completed his master's degree in Aeronautical Science in 1998. Applicant was commissioned in 1988, and served in the Air Force until his retirement in November 2008. The Air Force characterized his service as honorable. Applicant had a distinguished flying career and graduated from the Air Force's Fighter Weapons School. Moreover, he was commended twice with the Distinguished Flying Cross for Heroism for flying combat missions during Operation Iraqi Freedom. He also flew combat missions during Operation Southern Watch. While in the service, Applicant possessed a top secret security clearance with access to sensitive compartmented information. There is no evidence that he ever mishandled, compromised, or caused others to compromise classified information.

In January 2007, Applicant was a lieutenant colonel on active duty assigned for four months to work with the U.S. Military Assistance Group in a U.S. Embassy in a foreign country. Shortly after his arrival, Applicant established a sexual relationship with a woman from the foreign country that lasted approximately three weeks. During the relationship, he illegally used a U.S. Embassy car and driver to go to a resort during a weekend trip with another military member and two women from the foreign country. He provided meals and a tip to the driver for his services.

In April 2007, Applicant established another sexual relationship with a second woman from the foreign country that lasted approximately two months. He shared his

apartment with the woman. After leaving the country in May 2007, he continued to have infrequent telephone contact with the woman for approximately six months. Applicant also admitted that in 1995, while serving in the Air Force and in temporary duty to another country, he engaged in a sexual relationship with a woman from that foreign country. Applicant has had no contact with any of the women since 2007.

Applicant knew or should have known that engaging in an adulterous relationship was a violation of the Uniform Code of Military Justice (UCMJ), and that his improper use of an Embassy vehicle and driver for personal reasons was prohibited. Moreover, he knew or should have known that his relationship with a foreign national placed the security of his mission and unit at risk. He also placed himself in a vulnerable position to be extorted. In February 2008, Applicant received a general officer letter of reprimand for adultery, a violation of Article 134, UCMJ, and for his illegal use of the Embassy car and driver. Applicant also was reprimanded for paying off the driver to keep him quiet.¹ The letter of reprimand ended his promising career.

During the course of the Air Force Office of Special Investigations (OSI) investigation (from around September 2007 to February 2008) and until August 2008, Applicant was not relieved from duty and he was allowed to continue working with classified information at the top secret level. Applicant's supervisors did not consider him to be a security risk because of his character, performance, distinguished service record, and his full cooperation with the investigators. (AE 2) On August 27, 2008, the Air Force Central Adjudication Facility issued Applicant a memorandum of intent to revoke his eligibility for access to classified information. The memorandum suspended Applicant's access to classified information. Applicant's retirement in November 2008, prevented a full adjudication of the proceedings.

Applicant was hired by his current employer, a defense contractor, in July 2008, to start working after his retirement, in November 2008. After his access to classified information was suspended, he immediately disclosed to his employer the facts and circumstances surrounding the suspension. He worked full-time for his employer until October 2009, when he was placed on leave without pay pending the adjudication of his security clearance. (AE 1) In October 2009, Applicant started working on a dual master's degree in business administration and international relations. He expects to graduate in 2011.

Applicant has kept his family in the dark about his misconduct and the suspension of his security clearance. At his hearing, Applicant acknowledged that his family's lack of knowledge leaves him vulnerable to possible coercion, exploitation, or duress. In late 2008, Applicant sought counseling from his Catholic priest. He is trying to rectify and strengthen his commitment to his marriage. The priest advised him not to disclose to his wife his adulterous relationships in order to protect his marriage. (Tr. 71)

¹ Applicant provided meals and tipped the driver for his services at the time the services were performed. The record evidence does not support the conclusion that Applicant attempted to obstruct justice. Applicant was not reprimanded for obstruction of justice, nor is that allegation made in the SOR.

At his hearing, Applicant credibly and contritely accepted full responsibility for what he described as “his irresponsible, selfish, and immoral behavior.” He also apologized for placing his unit and himself in a compromising position. He credibly stated that he will never let it happen again. He promised his behavior will never cause his trustworthiness and judgment to be questioned again. Applicant highlighted his distinguished Air Force service, particularly, his 20 years handling classified information with no security violations, and his combat deployments when he honorably served the United States risking his life for national security and the defense of the United States. Applicant credibly testified that if anyone attempted to blackmail him with his misconduct, he would disclose the blackmail attempt to his security officer and his wife.

Applicant’s Air Force supervisor at the time of the OSI investigation and his current supervisor provided strong statements on his behalf. Both references consider Applicant to be honest and trustworthy. Except for the misconduct reflected on the SOR, he was commended for his judgment, maturity, work ethic, and overall performance. His references recommended that he receive access to classified information.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no 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 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 overarching adjudicative goal is a fair, impartial and commonsense 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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 [A]pplicant concerned.” See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication that 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 or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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

AG ¶ 15 explains why personal conduct is a security concern:

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.

Applicant was an Air Force active duty lieutenant colonel when he engaged in three adulterous relationships while on temporary duty to foreign countries in 1995, and twice in 2007. He also improperly used an Embassy car and driver for personal reasons. His behavior placed the security of his mission and unit at risk. He also placed himself in a vulnerable position to be blackmailed. As a result of his misconduct, his clearance was suspended.

Applicant's behavior triggers the applicability of disqualifying conditions AG ¶ 16(c): "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;" and AG ¶ 16(e): "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in a foreign country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group."

AG ¶ 17 lists seven conditions that could mitigate personal conduct security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) 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;

(d) 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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) 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.

After considering the above mitigating conditions, I find that AG ¶¶ 17(c), 17(d), and 17(e) all apply, at least in part, to the facts of this case. Applicant's questionable behavior occurred three years ago. Because he was a senior military officer, I do not consider his offenses minor. Notwithstanding, there is no evidence that he has been involved in similar activity since 2007, or that he has continued his association with the foreign women. He is no longer in the service.

Applicant credibly expressed remorse for his behavior and has learned his lesson. His behavior ended his promising Air Force career and subjected him to the security clearance process. He is now clearly aware of the possible consequences of his actions and what could happen if he engages in future misconduct. He acknowledged his behavior, obtained counseling, and has taken positive steps to reduce his vulnerability to exploitation, manipulation, or duress.

I specifically considered that Applicant could be vulnerable to exploitation because he has not told his family about his misconduct and the suspension of his clearance. I also considered Applicant's 20-year-service record and track record complying with security regulations and procedures, the trust placed on him by his military supervisors when they allowed him to continue working with classified information while under investigation, and his significant contributions to the United States risking his life flying combat missions. On balance, I find that Applicant can be trusted to disclose to U.S. authorities if someone attempts to extort or pressure him. Considering the evidence as a whole, I find his questionable behavior is unlikely to recur, and it currently does not cast doubt on Applicant's reliability, trustworthiness, or judgment.

Guideline D, Sexual Behavior,

AG ¶ 12 describes the concern about sexual behavior:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 13 provides four conditions relating to sexual behavior that could raise a security concern and may be disqualifying:

(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(b) a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;

(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

(d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

In 1995, and twice in 2007, Applicant engaged in adulterous relationships while serving on active duty and assigned in temporary duty to foreign countries. His behavior constituted a criminal offense under the UCMJ, and placed him in a vulnerable position to be pressured. He is still vulnerable to coercion because his family members are not aware of his past behavior. Applicant receives credit for cooperating with Government investigators, disclosing the information to his employer, and for his candid testimony during his hearing; however, that does not fully eliminate his vulnerability concerns.

Applicant was involved in high risk sexual behavior because he engaged in three adulterous relationships while on active duty and assigned on temporary duty to foreign countries. He knew or should have known that such behavior was a violation of the UCMJ. Moreover, he knew or should have known that his relationship with a foreign national placed the security of his mission and unit at risk. He also placed himself in a vulnerable position to be pressured. His sexual behavior shows a lack of judgment. AG ¶¶ 13(a), 13(c), and 13(d) apply and create a concern.

AG ¶ 14 lists four conditions that could mitigate security concerns:

(a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;

(b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress; and

(d) the sexual behavior is strictly private, consensual, and discreet.

AG ¶ 14(a) does not apply to this case. Concerning AG ¶¶ 14(b) and 14(c), the government cross-alleged the conduct involved in SOR ¶¶ 1.a and 1.b. The analysis and comments contained in the Personal Conduct discussions, *supra*, are incorporated under this subheading.

Applicant's questionable behavior occurred three years ago, while he was in the service, and on temporary duty. There is no evidence that he has been involved in similar behavior since 2007, or that he has continued his association with the foreign women. He is no longer in the service.

Applicant credibly expressed remorse for his behavior. I believe he has learned his lesson. His behavior ended his promising Air Force career and subjected him to the possible revocation of his security clearance. He is now clearly aware of the possible consequences of his actions and what could happen if he engages in similar future sexual behavior. He acknowledged his behavior, obtained counseling, and has taken positive steps to reduce his vulnerability to exploitation, manipulation, or duress.

I specifically considered that Applicant could be vulnerable to exploitation because he has not told his family about his misconduct and the suspension of his clearance. I also considered Applicant's 20-year-service record and track record complying with security regulations and procedures, the trust placed on him by his military supervisors when they allowed him to continue working with classified information while under investigation, and his significant contributions to the United States risking his life flying combat missions. On balance, I find that Applicant can be trusted to disclose to U.S. authorities if someone attempts to pressure him. Considering the evidence as a whole, I find his questionable behavior is unlikely to recur, and it currently does not cast doubt on Applicant's reliability, trustworthiness, or judgment.

Applicant's evidence shows that after 2007, he was able to continue a normal life with his family, was successful at work with the Air Force, handled classified information until August 2009, and has recently continued his advance education. These factors indicate that his prior questionable behavior is unlikely to recur. I also find Applicant was candid during his testimony. AG ¶¶ 14(b), (c), and (d) partially apply to his case.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The 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.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guidelines E and D in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature and well-educated man. Except for the misconduct addressed in this decision, there is no evidence of any other blemishes on Applicant's behavior, or that he has otherwise failed to follow rules and regulations, or violated security procedures.

Applicant has acknowledged his inappropriate behavior and expressed sincere remorse for his actions. He accepted full responsibility for his "irresponsible, selfish, and immoral behavior." He also apologized for placing his unit and himself in a compromising position. He credibly stated that he will never let it happen again, and vowed his conduct will never cause his trustworthiness and judgment to be questioned again.

Applicant had a distinguished 20-year career in the Air Force service. His service was characterized as honorable. He handled classified information during 20 years of service with no security violations. Applicant credibly testified that if anyone attempted to pressure him with his misconduct, he would disclose the pressure attempt to his security officer and his wife. I find that his character, service record, and his combat service provide a sufficient track record of past behavior to support a conclusion that it is likely that Applicant would disclose to proper authorities any attempted coercion, exploitation, or duress.

He has reduced his vulnerability to exploitation or duress because of his cooperation with Government investigators, his full disclosure to his employer, and his candid participation during the DOHA security clearance process. He is considered to be honest and trustworthy. Except for the misconduct on this SOR, he was commended for his judgment, maturity, work ethic, and overall performance. His references recommended that he receive access to classified information.

On balance, and after considering all the evidence, I conclude that Applicant's favorable evidence is sufficient to mitigate the security concerns arising from his personal conduct and sexual behavior. Applicant's favorable evidence outweighs his temporally remote questionable behavior. I believe he has learned from his mistakes and the security clearance process. He now understands what is required of him to maintain his eligibility for access to classified information. Overall, the record evidence convinces me of Applicant's eligibility and suitability for a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant
Paragraph 2, Guideline D:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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 eligibility for a security clearance for Applicant. Eligibility for a security clearance is granted.

JUAN J. RIVERA
Administrative Judge