



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 09-03983
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: Darin Groteboer, Esq.

September 30, 2010

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated Personal Conduct and Use of Information Technology Systems security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On March 30, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (Personal Conduct) and M (Use of Information Technology Systems). The action was taken under Executive Order (EO) 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).

Applicant answered the SOR on May 12, 2010, and requested a hearing before an administrative judge. The case was assigned to me on August 4, 2010. DOHA issued a notice of hearing on August 18, 2010, as amended on August 19, 2010. The

hearing was convened as scheduled on September 13, 2010. The Government offered Exhibits (GE) 1 through 24, which were received without objection. Applicant testified and submitted Exhibits (AE) A through D, which were admitted without objection. The record was held open for Applicant to submit additional information. Applicant submitted a letter that was marked AE E and admitted without objection. Department Counsel's memorandum is marked Hearing Exhibit (HE) I. DOHA received the hearing transcript (Tr.) on September 21, 2010.

Findings of Fact

Applicant is a 40-year-old employee of a defense contractor. He graduated from a military service academy in 1992. He was commissioned in the U.S. military in 1982 and served continuously on active duty until he received a dismissal from a general court-martial. He seeks to retain a security clearance that he has held since before his dismissal. Applicant attended graduate school but did not obtain a post-graduate degree. He married in 1992 and divorced in 2009. He has two children, ages 15 and 13. He is engaged to be married.¹

Applicant was stationed overseas from 2004 to 2007. He was an aviator and had risen to pay grade O-4. In the summer of 2004, he met the wife (Mrs. A) of another officer of equal rank in his unit. Applicant and Mrs. A began an affair in late 2004. Applicant deployed to a Middle Eastern country from May 2005 to the beginning of September 2005. He and Mrs. A sent e-mails to each other with sexually-graphic pictures. Applicant received and sent the e-mails using the U.S. Government computer network, and he displayed them on his government computer. Applicant violated a military directive when he sent and displayed the "offensive" images using the government computer hardware and network.²

Applicant's commanding officer became aware of a possibly improper relationship between Applicant and the other officer's wife in late May or June 2005, shortly after the Applicant deployed. After a casual unit dinner, Applicant's wife told the commanding officer that she was concerned about the relationship between Applicant and Mrs. A. Shortly thereafter, the commanding officer spoke with Applicant on the phone. He told Applicant that his relationship with Mrs. A appeared inappropriate. Applicant told his commanding officer that his relationship with Mrs. A was over, and that they had only been friends. That statement was false in that Applicant and Mrs. A continued to send sexually explicit e-mails and digital images, and their affair continued until after he returned from deployment and lasted through late September or early October 2005. Applicant repeated the false statement to his commanding officer on several occasions and in an e-mail.³

¹ Tr. at 19-21, 35-40, 49, 57, 75; GE 1, 2, 16.

² Tr. at 20, 23, 32, 41-44; GE 5, 14, 16, 17.

³ Tr. at 23, 42, 44-45, 57-58; GE 3, 5, 6, 13-17.

In June 2005, the other officer discovered e-mails and a picture on his computer that suggested there was a relationship between Applicant and his wife. He sent Applicant an e-mail pleading with Applicant to consider the officer's four children and end any relationship Applicant had with the officer's wife.⁴

In September 2005, Applicant's commanding officer received from an anonymous source a CD-ROM that contained sexually-explicit digital images of the Applicant and Mrs. A. He told the Applicant in October 2005 that he was grounded pending an investigation into allegations of an adulterous relationship between Applicant and Mrs. A. He told the Applicant that if he discovered Applicant did anything wrong, he would punish him. Applicant said "I don't know what wrong is." The commanding officer responded with words to the effect that Applicant was an officer in the United States military, what did he mean he did not know. Applicant responded that he knew having sex with Mrs. A would be wrong, but he did not have sex with her. The commanding officer issued a written order on October 12, 2005, directing Applicant to have no contact with Mrs. A.⁵

Applicant was charged at a general court-martial with (I) disobeying the order of his commanding officer to have no further contact with Mrs. A; (II) violating a military general regulation by "wrongfully storing, displaying, sending or otherwise transmitting offensive material on government-provided computer hardware and networks"; (III) two specifications alleging multiple false official statements to his commanding officer that Applicant's relationship with Mrs. A was that of friendship and he did not have sex with her; (IV) conduct unbecoming an officer by engaging in the conduct charged under other sections of the Uniform Code of Military Justice; and (V) adultery.⁶

In January 2007, Applicant pleaded guilty, pursuant to a pretrial agreement, to charges II, III, and V. He pleaded not guilty and was found not guilty of the remaining charges. He was sentenced to a dismissal from the armed forces and 30 days confinement. The convening authority approved the sentence except reduced the confinement to 23 days, which had already been served. Applicant went on appellate leave in a no-pay status while his case pended appeal. He did not receive relief on appeal, and his dismissal was executed last year.⁷

Applicant stated that he is sorry for his poor judgment. He stated that he has learned from the experience and would never do anything similar again.⁸ He wrote in his response to the SOR:

⁴ GE 4, 7.

⁵ Tr. at 46-47; GE 8-10, 13, 15-17.

⁶ Tr. at 48, 57; Applicant's response to SOR; GE 17-21, 23.

⁷ *Id.*

⁸ Tr. at 30-34

I admit I was in an adulterous affair in 2004-2005, and failed to reveal the details of my involvement to my commander when asked about it. However, I think many in a similar situation would have done the same thing to prevent the disclosure of an inappropriate relationship, especially to your peers and friends. My behavior during that time was completely out of character and I allowed myself to engage in a negative behavior rather than deal with any troubles I had in my own marriage. However, I submit that I am a trustworthy person and extremely loyal to not only my superiors and subordinates but also the organization that which I'm employed, and have definitely learned from this mistake.

Applicant provided similar testimony at his hearing:

APPLICANT: Of course, I think most people in a situation like that would deny that they were in that, until they got caught and ended up getting myself in a lot of trouble through all of that, and just hope I can redeem myself for that, but no denying it. I had the affair. Tried to kind of bow out with a little grace from the military - -

ADMINISTRATIVE JUDGE: Why do you think that most people would deny it? Do you think most people would lie as opposed to tell the truth, or simply not say anything at all?

APPLICANT: Probably not say anything at all, or if you think you can get away with it or that they don't know, you would probably not say anything or deny it at the time.⁹

With the exception of the events that led to his general court-martial conviction, Applicant's service in the military was outstanding. Applicant has worked for his company overseas in a high-risk area for more than two years. His job performance has been excellent. He submitted a number of letters on his behalf. He is praised for his reliability, trustworthiness, credibility, strength of character, judgment, integrity, responsibility, dedication, and ability to do the right thing. The authors recommend that he retain his security clearance.¹⁰

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

⁹ Tr. at 23.

¹⁰ Tr. at 20-21; AE A-E.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk 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.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline E, Personal Conduct

The security concern for Personal Conduct is set out in AG ¶ 15:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(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, or other characteristics indicating that the person may not properly safeguard protected information; and

(e) 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 intentionally provided false information to his commanding officer on several occasions about his adulterous affair with the wife of another officer in his unit. AG ¶ 16(b) is applicable. His criminal actions that resulted in a general-court-martial conviction could also have been alleged under Guidelines J (Criminal Conduct) and D (Sexual Behavior), and one of the charges was alleged under Guideline M (Use of Information Technology Systems). His actions, when considered as a whole, support a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, and unwillingness to comply with rules and regulations. His conduct also created a vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(c) and 16(e) are applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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; and

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

Applicant's lies to his commanding officer occurred about five years ago. There is no evidence that he made prompt, good-faith efforts to correct the falsifications before being confronted with the facts. AG ¶¶ 17(a) and 17(b) are not applicable.

Applicant was having marital difficulties at the time of his actions. He is now divorced and engaged to be married. Other than the conduct that resulted in his conviction at a general court-martial, his military record is outstanding. He has worked overseas consistently since his dismissal, and he has earned a solid reputation. His actions resulted in a general court-martial conviction and are now common knowledge. All these factors show some mitigation under AG ¶ 17(e). However, I remain concerned about Applicant's reliability, trustworthiness, judgment, and willingness to comply with rules and regulations. I am particularly concerned about Applicant's willingness to lie to cover up his illegal acts. I am unable to find that the conduct is unlikely to recur. AG ¶¶ 17(c) and 17(d) are not applicable.

In sum, I conclude that Personal Conduct concerns remain despite some mitigation.

Guideline M, Use of Information Technology Systems

The security concern for Use of Information Technology Systems is set out in AG ¶ 39:

Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to protect sensitive systems, networks, and information. Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.

AG ¶ 40 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(e) unauthorized use of a government or other information technology system.

Applicant used a government computer and network to transmit and display offensive material in violation of a military directive. AG ¶ 40(e) is established.

Conditions that could mitigate the Use of Information Technology Systems security concerns are provided under AG ¶ 41:

(a) so much time has elapsed since the behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the misuse was minor and done only in the interest of organizational efficiency and effectiveness, such as letting another person use one's password or computer when no other timely alternative was readily available; and

(c) the conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification of supervisor.

It has been a number of years since Applicant committed the conduct alleged in the SOR. However, I am unable to find that the conduct is unlikely to recur and does not cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 41(a) is not applicable. The actions were intentional and they were not done in the interest of organizational efficiency and effectiveness. AG ¶¶ 41(b) and 41(c) have no applicability.

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.

Under AG ¶ 2(c), 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines E and M 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 Applicant's character evidence, his otherwise outstanding military career, and his service overseas in a high-risk area since he left the military. Applicant has divorced his wife and is engaged to be married. He provided a number of false statements to his commanding officer to conceal his illegal acts. He stated in his response to the SOR and again at his hearing that he would expect most people to act similarly. I have no faith, should circumstances such as a security infraction occur in the future, that Applicant would be completely honest and truthful. I am concerned that he would again resort to what "most people" would do, and he would lie to protect himself.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated Personal Conduct and Use of Information Technology Systems security concerns.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline M:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

Edward W. Loughran
Administrative Judge