



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



In the matter of:

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ISCR Case No. 09-08198

Applicant for Security Clearance

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: Alan Edmunds, Esq.

March 16, 2011

Decision

LYNCH, Noreen, A. Administrative Judge:

On June 15, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) listing security concerns arising under Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). 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).

On June 25, 2010, Applicant answered the SOR and requested a hearing. DOHA assigned the case to me on December 14, 2010. DOHA issued a Notice of Hearing on December 23, 2010, and I convened the hearing on January 26, 2011. Department Counsel offered four exhibits, which were admitted as Government Exhibits (GE) 1-4. Applicant testified and presented exhibits AE A through T for the record. DOHA received the transcript on February 3, 2011. Based on a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations under Guideline J (Criminal Activity), and Guideline E (Personal Conduct).

Applicant is a 43-year-old employee of a defense contractor. He graduated from high school and obtained a diploma from a technical college in 1998. Applicant is married and has three adult children. He has worked for his current employer since May 2005. Applicant served as a regional manager for his company in Kuwait from 2007 until 2009. He has held a security clearance for approximately eight years while working overseas. (Tr. 30)

Criminal Conduct

The U.S. Army Criminal Investigation Command (CID) investigated Applicant from April 2007 until July 2008 regarding charges of wrongful distribution of dangerous drugs, wrongful introduction of dangerous drugs, and wrongful possession of dangerous drugs, in violation of the UCMJ, Article 112a. (GE 3) As a result of the investigation, Applicant received administrative action. The prosecutor declined to prosecute Applicant, but on June 14, 2009, Applicant was barred from all area support groups (ASG) -Kuwait installations and his security clearance was revoked.

In June 2008, the Command received an anonymous tip concerning the possibility of drugs hidden in rental vehicles used by contractors in Applicant's location. Allegedly a rear tire well had a hidden compartment (felt lining). The investigation found that this was a part of the model design and not a modification made after the original design. No drugs were found. In late June another email referred to Applicant and several of his employees, including one woman who allegedly smuggled an unknown quantity of drugs onto the camp installation for Applicant. (GE 3)

The various heavily redacted, incomplete investigative reports confirm that a number of people were interviewed during the investigation. None of them had seen drugs or alcohol in Applicant's home. However, some of them had heard rumors. One woman who was interviewed regarding any knowledge of Applicant's smuggling, possessing or distributing of drugs provided a sworn statement that she was unaware of Applicant's involvement. (GE 3) Another woman stated that Applicant never offered her drugs and that she did not know of any instance when Applicant attempted to distribute or smuggle any controlled substance. (GE 4)

A former employee of Applicant provided a sworn statement that he believed a "disgruntled employee" filed the complaint about transporting illegal drugs into the command. He affirmed that he had never seen Applicant with drugs, and he had no knowledge of any illegal activity. (GE 3)

In July 2008, Applicant's wife received an email (letter) advising her that Applicant was having an affair with a Filipino woman in Kuwait and that she was

pregnant. Applicant's wife testified at the hearing that she and her husband discussed his affair after she learned about it. (Tr. 26) She is still married to Applicant. She acknowledges that he has a son as a result of the relationship.

Applicant admitted that he had an extra marital affair with a Filipino foreign national while he lived in Kuwait. As a result of the affair, a son was born in February 2009. Applicant's son lives with his mother in Kuwait. When the child was born, Applicant provided some financial support. However, he has no contact with his son or the Filipino mother since September 2009.

A woman who was supervised by Applicant provided a sworn statement that she recalls that her boyfriend (whose name she could not recall) asked her to go to Applicant's apartment to get drugs. She recalls that Applicant had a plastic bag with some "green stuff" inside. She stated that Applicant suggested that she put marijuana in her vagina to get the drug on base. (GE 4; Tr. 65) However, she also reports that she never saw Applicant exchange money for drugs.

Applicant explained to the OPM investigator in September 2009, that he was the senior representative for the contractor. (GE 2) Applicant had several problem employees who had moved or left the contractor. Applicant denied that he used any illegal drugs or distributed any illegal drugs. He believed that one of these former employees filed reports that Applicant was involved with illegal drugs. He believes that he was unjustly accused by a woman who had previously made complaints about her supervisor for sexual harassment. (GE 2)

Applicant disclosed the information about the CID investigation in detail in his June 2009 security clearance application. He commented that he has never been involved at any time with the use of illegal drugs while deployed. He was adamant that these reports are the result of former employees with an ax to grind. (GE 1) He also was emphatic that when he tried to explain his side of the story to the CID, they refused to listen to him. He claims that his managerial style was strict and that he is disappointed in the investigation. Applicant cooperated with the CID investigation. He offered his keys to search for drugs in his home or the vehicles. (Tr. 113)

Applicant provided many letters of recommendation from former colleagues who worked in Kuwait with him. They attest to his work ethic and trustworthiness. (AE E through O) He also submitted drug tests from July 2009 and January 2011. (AE A, B, and P) During his career Applicant received awards and letters of appreciation for his dedication and service. (AE C and D) One letter from Applicant's supervisor in Kuwait attested to the fact that she believed several employees attempted to sabotage Applicant's career. (AE Q)

At the hearing, Applicant was adamant that he was never involved in any way with drugs. (Tr. 33) He believes that the allegations stem from three individuals who worked for him in Kuwait. He had fired one of them and the allegations came after that time. (Tr. 37) Applicant also stated that one of them was angry that Applicant did not transfer her to a particular location.

Applicant accepts responsibility for his poor judgment concerning the extra-marital affair with a Filipino foreign national. His last contact with the mother of his son was in September 2009. He states that he told his liaison officer about the affair and he listed it on his most recent SF 86 in detail. (GE 1) He discussed the affair with the investigative officer in 2009. His employer knows about the situation. (Tr. 60)

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ¹ The burden of proof is something less than a preponderance of evidence. ² The ultimate burden of persuasion is on the applicant. ³

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 protect classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

¹ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

² *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

Section 7 of Executive Order 10865 provides that 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.”⁴ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁶ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.”

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying:

- (a) a single serious crime or multiple lesser offenses;
- (b) discharge or dismissal from the Armed Forces under dishonorable conditions;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
- (d) individual is currently on parole or probation;
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program; and
- (f) conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year.

⁴ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁶ *Id.*

Applicant's alleged involvement with drugs in Kuwait and his debarment based on a violation of UCMJ Article 112(a) (wrongful distribution of dangerous drugs, wrongful introduction of dangerous drugs, and wrongful possession of dangerous drugs) is sufficient to raise AG ¶ 31(c).

AG ¶ 32 provides four conditions that could mitigate security concerns:

(a) so much time has elapsed since the criminal 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 person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement; and,

After reviewing the mitigating conditions, I find that AG ¶ 32(c) applies in this case. Illegal drugs were never found in Applicant's possession. Illegal drugs were never found in any of the contractor's vehicles. The CID investigation sworn statements attribute the accusations against Applicant to disgruntled employees. Several people provided sworn statements that Applicant did not transport illegal drugs. One woman, however, described a conversation with Applicant and his agreement to give her marijuana to take on base. Applicant denied that this ever occurred. In light of his credible denial and the statements attesting to his reputation for integrity, I find her statement suspect. Based on the record evidence and Applicant's testimony, I find that he has mitigated the security concern under criminal conduct.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(a) 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;

(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;

(d) 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:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

(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 another 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;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

Applicant's extra-marital affair with a Filipino foreign national in 2007 and 2008 gives rise to disqualifying conditions AG ¶¶ 16(c), 16(d) and 16(e).

AG ¶ 17 provides conditions that could mitigate 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.

Applicant admitted that he had an affair with a Filipino foreign national while he was working in Kuwait. His wife learned about the affair and the child that was born as a result of the relationship. Applicant reported this on his SF 86 and to his employer. He does not maintain contact with her. His last contact with her was in September 2009. He and his wife are still married and living together.

After considering the mitigating conditions outlined in AG ¶ 17, I conclude Applicant has mitigated the security concern under personal conduct. AG ¶¶ 17(c) and 17(e) applies in this case. Applicant has acknowledged the affair that has now ended. He does not have any contact with the Filipino foreign national. Also, it happened under such circumstances that it is unlikely to recur, and it does not cast doubt on his reliability. He has met his burden of proof for his personal conduct.

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 an applicant's conduct and all the 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the "whole-person" factors. Applicant is a contractor who has held a security clearance for eight years. He has worked overseas for many years without incident. He has letters of recommendation and service awards. He regrets the extra-marital affair and his lapse in judgment. He has reported and disclosed the affair to his employer and in detail on his latest security clearance application. He is still married and living with his wife. He regrets the incident. The extra-marital affair will not recur.

Applicant was given an administrative action -debarment - due to the alleged charges under UCMJ Article 112(a). The prosecutor declined to prosecute. Applicant denied any involvement with illegal drugs while in Kuwait. I find the evidence of record not sufficient to establish Applicant possessed or distributed illegal drugs. I find him credible when he states that he has never had any involvement with illegal drugs. Based on the sworn statements in the investigation, I conclude that Applicant has mitigated any concerns under the criminal conduct guideline and under the personal conduct guideline. Clearance is granted.

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 J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Clearance is granted.

NOREEN A. LYNCH.
Administrative Judge