



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



In the matter of:)	
)	
)	ISCR Case No. 11-13906
)	
Applicant for Security Clearance)	

Appearances

For Government: Gina Marine, Esq., Department Counsel
For Applicant: Ernst Mitchell Martzen, Esquire *Pro se*

06/14/2013

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense’s (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. His wife has three uncles and an aunt who are citizens and residents of the Republic of South Korea. He inadvertently took his cell phone into a classified area. He has mitigated the foreign influence and security violations security concerns. Clearance is granted.

History of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on November 21, 2012, the DoD issued an SOR detailing security concerns. DoD adjudicators could not find that it is clearly consistent with the national interest to grant or continue Applicant’s security clearance. On January 17, 2013, Applicant answered the SOR and requested a

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

hearing. On April 16, 2013, I was assigned the case. On April 26, 2013, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing for a video teleconference hearing convened on May 3, 2013. I admitted Government's Exhibits (Ex) 1 and 2, without objection. Applicant testified at the hearing as did his supervisor. Applicant offered exhibits A and B, which were admitted without objection. On May 14, 2013, DOHA received the hearing transcript (Tr.).

Request for Administrative Notice

Department Counsel submitted a written request that I take administrative notice of certain facts about the Republic of Korea (South Korea). No objection was raised and the request was approved. The request and the attached documents were not admitted into evidence but were included in the record as Hearing Exhibit (HEx.) I. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In Applicant's Answer to the SOR, he admitted the factual allegations in the SOR, and his admissions are incorporated herein. After a thorough review of the pleadings, testimony, and exhibits, I make the following findings of fact.

Applicant is a 39-year-old systems engineer who has worked for a defense contractor since March 2000, and seeks to maintain a secret security clearance he has held since March 2001. Applicant's supervisor stated Applicant is a very conscientious, security-minded person. (Tr. 23)

Applicant was born and raised in the United States. In 1999, he received a Bachelor of Science degree in mechanical engineering. In December 2000, he met his wife and they married in September 2009. (Tr. 47) His wife was born in South Korea, but came to the United States at age three. In November 1998, at age 21, his wife became a naturalized U.S. citizen. (Ex. A, Tr. 51) His wife's parents have resided in the United States since the early 1980's. Her parents divorced in the mid-1980's. Her father, also a naturalized U.S. citizen, operates a dry cleaning establishment in a different state from Applicant and his wife. Following the death of her mother, Applicant's wife re-established contact with her father, and now talks with him weekly. (Tr. 53) Applicant had direct contact with his wife's father only once and that was in early 2011. (Ex. 2, Tr. 50)

In July 2007, Applicant's wife's mother became a naturalized U.S. citizen. (Ex. B, Tr. 52) In May 2010, his mother-in-law moved into his home because she was suffering from and eventually died from Amyotrophic Lateral Sclerosis (ALS), (also known as Lou Gehrig's disease). Her mother died in December 2010. Following her mother's death, Applicant's wife's contact with relatives in South Korea has been greatly reduced. (Tr. 84)

Applicant and his wife have two children both born in the United States, a daughter born December 2010 and a son born in January 2013. In 2007, his wife obtained her associate's degree in dental hygiene from a community college. His wife has three uncles and an aunt who are citizens and residents of South Korea. None of them speak English and Applicant does not speak Korean. (Tr. 54) Having come to the United States at age three, his wife did not grow up with her aunt and uncles. One uncle operates a bread and pastry store, another makes parts for cell phones, and the third work for the Red Cross. Her aunt is a cook in a restaurant. His wife talks with her Korean relatives once or twice a year.

From December 2010 through January 2011, Applicant's wife's aunt came to the United States and stayed with him and his wife. At the time, his mother-in-law was dying from ALS and his wife was expecting their first child. His mother-in-law died the day before his daughter was born. (Tr. 108) His wife's aunt came to help out and stayed until his mother-in-law died, at which time his wife's aunt returned to South Korea.

Applicant has visited South Korea twice. In 2009, he went for two weeks following his marriage. In 2010, he went for 11 days. (Ex. 2, Tr. 107) The purpose of the 2010 trip was to take his dying mother-in-law to see her relatives. (Tr. 63)

Applicant's wife's college roommate lived with them for two weeks in 2008. The roommate's citizenship is unknown. The roommate lived with them from January 2009 to January 2010, when the roommate was studying for her certified public accountant examination. (Ex. 2) The roommate moved to South Korea in January 2010. Applicant and his wife saw this person on their two trips to South Korea and his wife had email contact with her once or twice between January 2010 and March 2011. (Ex. 2)

Applicant's wife had a number of friends who were the owners or employees at a sushi restaurant. She has not talked with them since the restaurant closed in September 2010 except for one friend. Applicant and his wife met one of the coworkers of the closed restaurant in 2010 when that friend helped them with their sightseeing and travel in South Korea. (Ex. 2) Applicant has weekly contact with the pastor of his church. The pastor's citizenship is unknown. (Ex. 2)

Applicant has been involved in three incidents at work that resulted in two verbal reprimands. All three incidences involved having a cell phone in a closed laboratory area, which violated the closed area operating rules. (Ex. 2, Tr. 20). Routinely, he would go to his office and leave his cell phone there before going into the secured area or he would leave it in the lockers provided just outside the secured area.

In September 2010, Applicant accidentally took his cell phone into a closed laboratory area. (Tr. 20) (Ex. 2) When he realized his mistake, he left the area and self-reported the incident. There was no compromise of classified information.

Within three days there was a second incident. During the investigation into the first incident, he was asked to provide the make, model, and serial number of his cell

phone. (Tr. 103) He brought his cell phone to work so that he could provide the requested information. At that time, a second incident occurred. The first and second incidents were combined into a single violation. (Tr. 103) He received a verbal reprimand and took steps to assure such a violation would not recur. Following the two incidents, he decided to hand carry the cell phone or put it in a plastic bag to remind him he had it with him. (Tr. 94)

The section head, and alternate security custodian, who supervises 12 engineers, testified about the incidents. (Tr. 19) The section head believes cell phone violations to be one of the most-reported violations at the plant. (Tr. 22) The third and latest incident occurred in October 2012. Applicant had run an errand² and forgot he had his cell phone on his hip when he entered the closed area. That day he was not hand carrying it nor had he put it in a plastic bag, but had it attached to his hip. When he realized he had his phone with him, he immediately exited the area. (Tr. 61) He immediately called plant protection and reported the incident. (Tr. 62) Within 15 minutes, he informed his supervisor of his action. (Tr. 62) He now leaves his cell phone at home because he cannot risk another incident. (Tr. 92, 100)

South Korea

I have taken administrative notice that South Korea is a stable, democratic republic. The South Korean government generally respects the human rights of its citizens. However, South Korea has some reported human right problems including: hazing of military personnel, imprisonment of conscientious objectors, the government's interpretation of laws regulating the Internet and telecommunications, and sexual and domestic violence. South Korean National Security Law allows arrest and detention for conduct the Government views as "endangering the security of the State." (HEx. I)

I also have taken administrative notice that South Korea and North Korea have a strained relationship. In 2010, relations between the two nations experienced significant setbacks when a South Korean warship was struck by a North Korean torpedo and sunk. Tensions further increased when North Korea fired upon a South Korean island with artillery. (HEx. I)

Finally, I have taken administrative notice that South Korea has a history of collecting protected U.S. information. On several occasions, South Korea has been the unauthorized recipient of sensitive technology in violation of U.S. export control laws. South Korea has been identified as one of the seven most active nations engaging in foreign economic collection and industrial espionage. (HEx. I)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief

² Applicant had gone to the department of motor vehicles to complete paperwork concerning his car sale.

introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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 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 Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination of 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 B, Foreign Influence

AG ¶ 6 explains the Government's security concern regarding foreign influence:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 describes three conditions that could raise a security concern and may be disqualifying in this case:

- (a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;³
- (b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information; and
- (d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

Applicant was born and raised in the United States. In September 2009, he married his wife who came to the United States at age three and at age 21 became a naturalized U.S. citizen. His wife was from South Korea. His wife has three uncles and an aunt who are citizens and residents of South Korea. South Korea is a strong ally of the United States, but it has engaged in industrial espionage in the past. Applicant's relationship to his wife's relatives in South Korea is so remote that those relatives fail to create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. There is no potential conflict of interest. His wife is a U.S. citizen, living in the United States and he had no property interest of any kind in South Korea.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it,

³ The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

regardless of whether that person, organization, or country has interests inimical to those of the United States.”⁴ The distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly. Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. The nature of a nation’s government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an applicant’s family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, the country is known to conduct intelligence operations against the United States, or the foreign country is associated with a risk of terrorism. Applicant is a loyal U.S. citizen who has strong ties to his community. South Korea is a strong, reliable ally of the United States. It has a democratic government and respects human rights.

Three of the mitigating conditions under AG ¶ 8 are potentially applicable:

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation; and

Applicant’s wife’s mother is deceased and her father is a U.S. citizen who runs a dry cleaning business in the United States. His wife talks to her father weekly and to her aunt and uncles once or twice a year. Even his wife’s contacts with her relatives in Korea are casual and infrequent. Having come to the United States at age three, she never grew up with these relatives. Applicant does not speak Korean and his wife’s aunt and uncles do not speak English. Applicant’s contact with his wife’s relatives is minimal to nonexistent. His wife also had contact with her college roommate, who now lives in

⁴ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

South Korea. The last contact with this individual occurred in 2010. This contact was casual and infrequent.

None of Applicant's wife's relatives are affiliated with the South Korean government. The South Korean government is a stable, democratic government that generally respects human rights. It is also a very supportive ally of the United States. Consequently, given the nature of the relationship Applicant has with his wife's relatives, it is unlikely Applicant will be put in a position of having to choose between those relatives' interests and those of the United States. AG ¶ 8(a) applies.

Applicant has never lived in South Korea for an extended time, nor was he stationed there with the U.S. military. He has been to South Korea twice. He was there two weeks in 2009 and 11 days in 2010. While there, he met his wife's relatives. He knows his wife's aunt somewhat longer because she came to the United States to take care of her sister when her sister was dying. After his mother-in-law's death, his wife's contact with her relatives in South Korea decreased.

Applicant is a U.S. citizen born in the United States and has lived his entire life in the United States. He obtained all of his schooling in the United States. He works here and is raising his family here. He is respected as a loyal employee with good judgment who has been exposed to sensitive information and has always properly safeguarded it. His wife, having lived here since age three, has assimilated to the lifestyle and culture in this country. I find Applicant's obligations to his wife's relatives are minimal and he has such deep and longstanding relationships and loyalties in the United States that he can be expected to resolve any potential conflict of interest in favor of the United States. AG ¶ 8(b) is applicable.

Guideline K, Handling Protected Information

AG ¶ 33 expresses the security concern pertaining to handling protected information, "Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern."

AG ¶ 34(g) describes conditions that could raise a security concern and may be disqualifying, "any failure to comply with rules for the protection of classified or other sensitive information." On three occasions between September 2010 and October 2012, he took his cell phone into a closed area. For these incidents, he received two verbal reprimands. AG ¶ 34(g) applies.

AG ¶ 35 provides conditions that could mitigate security concerns:

(a) so much time has elapsed since the behavior, or it has happened 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; and

(b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities.

In September 2010, Applicant inadvertently took his cell phone into a closed area in violation of the closed area operating rules. He immediately recognized his mistake, left the area, and reported it to plant protection. He intended to leave his cell phone at home but was asked to supply the make, model, and serial number of the phone. When he brought the phone to work a second inadvertent violation occurred. He then attempted to prevent a repeat of the conduct by either hand carrying his phone or putting it in a plastic bag, which would put him on notice that he was carrying it and he would not enter the closed area with it. This worked well until October 2012, when he ran an errand to the DMV and forgot it was on his hip when he entered the closed area. Again, he immediately left the area and reported the incident to plant protection.

Applicant self-reported each incident. The Government relies on applicants to truthfully disclose adverse information in a timely fashion, not when it is perceived to be prudent or convenient. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, which the government relies on to perform damage assessments and limit the compromise of classified information. Applicant's conduct in immediately reporting the incidents indicates he is not willing to put his personal needs ahead of legitimate government interest. He acted appropriately.

The three incidents occurring two years apart constitute infrequent behavior. He no longer brings his cell phone to work, so the conduct is unlikely to recur. The conduct was an inadvertent action, which occurs with some frequency at the plant. However, the frequency that cell phones are taken into closed areas does not make the matter any less significant or serious. Applicant's positive attitude and work ethic make it unlikely the conduct will recur and the action does not cast doubt on his current reliability, trustworthiness, or good judgment. AG ¶ 35(a) and (b) apply.

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 considered Applicant's favorable character evidence and his only visits South Korea were two visits of less than two weeks each. Applicant has no ties to South Korea. His contact with his wife's relatives in Korea is minimal. The last contact with his wife's college roommate living in South Korea was in March 2011. Applicant inadvertently took his cell phone into a controlled area. He immediately reported the incidents to plant protection. He no longer takes his phone to work. His supervisor stated Applicant is a very conscientious, security-minded person.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated foreign influence and security violations 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, Foreign Influence:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Paragraph 2, Security Violations:	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. Eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge

