DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:

----------	)	ISCR Case No. 14-05623
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Robert Blazewick, Esq., Department Counsel
For Applicant: *Pro se*

03/26/2018

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for access to classified information. He presented sufficient evidence to explain, extenuate, and mitigate the security concerns stemming from his personal conduct and foreign influence. Accordingly, this case is decided for Applicant.

Statement of the Case

On August 4, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that his circumstances raised security concerns under the personal conduct and foreign influence guidelines.[1] Applicant answered the SOR on September 29, 2016, and requested a hearing to establish his eligibility for continued access to classified information.

On February 5, 2018, a date mutually agreed to by the parties, a hearing was held. Applicant testified at the hearing and called one combination fact and character witness

[1] The DOD CAF took this action under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive).

to testify on his behalf. The Government offered five exhibits, which were marked for identification as Government Exhibits (GE) 1 through 5, and which were admitted without objection. The transcript of the hearing (Tr.) was received on February 13, 2018.

Procedural Issue

On December 10, 2016, the Security Executive Agent issued Directive 4 (SEAD-4), establishing a "single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position."[2] The National Security Adjudicative Guidelines (hereinafter "new adjudicative guidelines" or "AG"), which are found in Appendix A to SEAD-4, are to be used in all security clearance cases decisions issued on or after June 8, 2017.[3] In light of this explicit direction (and absent lawful authority to the contrary), I have applied the new adjudicative guidelines. ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DOD policy and standards).[4] DOD CAF adjudicators reviewed this case using the previous version of the adjudicative guidelines, dated September 1, 2006, which were in effect at the time. My decision and formal findings under the revised Guidelines E and B would not be different under the 2006 Guidelines E and B.

Findings of Fact

Applicant is 45 years old. He is a high school graduate with some college credits. He was married the first time in 1997 and divorced in 2002. He married his second wife in May 2005. Applicant has three children, two daughters ages 16 and 18, and a son age 6 who lives with Applicant and his wife. From March 1989 to November 1995, Applicant served as an Active Reservist in the Army National Guard. Between November 1995 and July 2001, Applicant was on active duty in the U.S. Army until he was honorably discharged. Since November 2001, he has been employed by a NATO support agency as a munitions expert.[5]

Under Guideline E, the SOR alleges that Applicant: (1) had an affair with a Russian national from October 2013 to December 2013; (2) failed to timely report his contact with a Russian citizen to his security office, as required, and did not report that contact until October 23, 2014, when the Russian national threatened him; and (3) during a May 16, 2014, background interview only disclosed that the Russian national was a university classmate but not that he had an affair with her.

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[2] SEAD-4, ¶ B, *Purpose*.

[3] SEAD-4, ¶ C, *Applicability*.

[4] *See also* ISCR Case No. 07-00029 at 3 (App. Bd. Dec. 7, 2007) (when the guidelines were last revised, the Board stated: "Quasi-judicial adjudications must be made within the bounds of applicable law and agency policy, not without regard to them.")

[5] GE 1. Tr. 26, 30.

Under Guideline B, the SOR alleged that: (1) Applicant's father-in-law, mother-in-law, and sister-in-law are citizens and residents of Albania and that his father-in-law is a retired Albanian army officer currently teaching at the Albanian military academy; and (2) a family friend is a citizen of Albania, a resident of Germany, and is the Albanian ambassador to Germany.[6]

Under Guideline E, Applicant admitted the "affair" but "only as far as that term . . .can include casual relationships not based upon commitment." He denied that he failed to timely report his Russian contact until October 2014. Applicant claimed that in January 2014 he reported this contact to the U.S representative at his NATO agency and to his security officer. He also claimed that the procedures to report this contact were unclear to him in that the relationship was not professionally related, the contact was not working for a foreign government, and was not asking questions about Applicant's job. When the Russian national contacted Applicant in October 2014, Applicant reported that to his security officer. Applicant admitted that he did not report the affair during his background interview, but he did report his "impression of the primary nature of the relationship" and that "it was not [his] intention to misrepresent the relationship."

Under Guideline B, Applicant admitted that his mother-in-law and father-in-law are citizens and residents of Albania, but that his father-in-law has retired from his position as a professor. Applicant claimed that his sister-in-law is now a naturalized United States citizen residing in the United States. Applicant admitted that a family friend is an Albanian citizen serving as the Albanian ambassador to Germany, but that since his friend's arrival in Germany several years ago, contact has been minimal.[7]

At hearing, Applicant testified about his relationship with the Russian national. In the summer of 2013, Applicant enrolled in a professional enrichment program run by a prestigious U. S. university. In August 2013, just after enrolling, Applicant filed for divorce, because he believed his wife had been unfaithful. The enrichment program consisted of intensive, week-long sessions with the first one being held at the campus of the sponsoring university. Thereafter, the sessions were held at satellite cities in Europe, the United Kingdom, Europe, and Asia. The professors for each session and the students traveled to those cities to attend. Applicant described the program as having "an international cohort," meaning that students from other countries participated.[8]

It was at the initial session in June or July 2013 that Applicant met the Russian national, who was also enrolled as a student. Thereafter, Applicant and the Russian national met while attending classes, and on two occasions, when Applicant was on personal or business travel. They met about seven times monthly during the course of their relationship, from about June or July 2013 to December 2013. Applicant broke off

[6] SOR ¶¶ 1 and 2. The Government did not offer at the hearing an Administrative Notice for Albania.

[7] Answer ¶¶ 1 and 2.

[8] Tr. 32.

the relationship in December 2013 in order to reunite with his wife, and in January 2014 he instructed his attorney to cancel the divorce proceedings. At about the same time, he informed his wife about his affair.[9]

Applicant testified that sometime in January 2014 "not knowing the right action in this case, [he] sought guidance from [his agency's] U.S. representative after confessing . . . [his] physical involvement with the Russian national." He was advised to report the matter to his local security office. Applicant called the U.S. representative to Applicant's agency as a witness.[10] The witness confirmed that Applicant did report his relationship in January 2014. At that time, Applicant's contact with the Russian national had been completely cut off. Applicant went immediately to the security office and reported the relationship to his security officer. At that time, Applicant did not know the woman's whereabouts. Thereafter, until October 2014, Applicant received only two emails from the Russian, which he did not answer. In October 2014, Applicant received an email from the Russian advising that she was planning to move to the city where Applicant worked. Applicant viewed that email as a threat. He immediately reported that message to his security officer.[11]

In November 2001, Applicant signed a "Security Declaration" required by his agency certifying that he understood and would comply with regulations concerning security. One of those regulations stated: "Any [agency] employee who, in his/her social contacts with persons from outside the Agency, believes himself/herself to be in contact with representatives of organisations or groups, or with a citizen of a nation that may hold opposing aims to those of NATO, is required to inform their Security Officer without delay."[12]

In March 2014, Applicant submitted his security clearance application. As noted below, he responded "No" to the question whether he had any contacts with a foreign national with whom he is "bound by affection, influence, common interests, and/or obligation."[13] The summary of the May 16, 2014, background interview, upon which SOR ¶ 1.c is based, is not in evidence. In April 2015, Applicant submitted an addendum to his security clearance application, fully describing his affair with a Russian national. He also

[9] Tr. 22-23, 31-32, 34-38. Applicant characterized the relationship as "only…one of a physical nature" not one that "held any commitment." Tr. 23-24. In Applicant's March 28, 2014 security clearance application, he responded "No" to the question whether he had any contacts with a foreign national with whom he is "bound by affection, influence, common interests, and/or obligation." GE 1. By the time he answered this question, Applicant had ended the affair and reunited with his wife.

[10] The U.S. representative's office is an extension of the office of the U.S. Ambassador to NATO. One of his responsibilities is dealing with the administration of U.S. personnel. That includes dealing with security clearances. Tr. 41-42.

[11] Tr. 24-25, 34-36, 44. That email resulted in a JPAS incident report and a memorandum by the security officer. GE 4; GE 5. There is nothing in the record that explains why Applicant's first report of his contact, in January 2014, did not result in a JPAS incident report.

[12] GE 5.

[13] GE 1.

stated that he and his wife have remained together due to support from friends, family, and couple's therapy.[14]

Applicant testified about his Albanian in-laws. His mother-in-law and father-in-law are both still alive, and his father-in-law just celebrated his 70th birthday. His mother-in-law is 64 and does not work outside the home. When asked about his current relationship with his in-laws, Applicant said that he "has no idea what they say to me, because [he] does not speak Albanian . . . and they don't speak English." They are pleasant, they love their daughter, and Applicant's son. Applicant and his family see his in-laws on average about four times a year, sometimes at holidays, such as Christmas.[15]

The U.S representative testified as to Applicant's character. The witness has known Applicant for 11 years and interacts with him at least weekly and sometimes daily, if there are U.S. visitors who require Applicant's presence. Applicant was "forthcoming and cooperative" in connection with reporting his relationship with the Russian national. The witness characterized Applicant as "well-respected, and a "very stellar" subject-matter expert. He believes Applicant is "capable of holding a . . . security clearance" and that he "handles and values . . . secret material in the manner which it's supposed to be handled." The witness does not consider Applicant to be a security risk.[16]

Law and Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individuals are eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865 § 2; SEAD-4, ¶ E.4.

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. SEAD-4, Appendix A, ¶¶ 2(c), 2(d).

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or

[14] GE 5. In GE 5 Applicant stated that his relationship with the Russian national began in October 2013 and continued through the end of the year. That is somewhat inconsistent with Applicant's testimony that they first met in June or July 2013. Tr. 32. When asked directly how long his affair with the Russian lasted, Applicant responded "it basically went on during the last three months of 2013." Tr. 37-38. The explanation is likely that the romantic aspect of the relationship occurred during the last three months of 2013.

[15] Tr. 36-37. GE 1.

[16] Tr. 47-52.

proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

Administrative Judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). In resolving the ultimate question regarding an applicant's eligibility, "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." SEAD-4, Appendix A, ¶ 2(b). *See also* SEAD-4, ¶ E.4. Moreover, the Supreme Court has held that officials making "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

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. 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 an 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.

Discussion

Guideline E, Personal Conduct

AG ¶ 15 sets out the security concern about 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.[17]

AG ¶¶ 16(a) through (c) set forth below are potentially disqualifying conditions that may apply to the conduct alleged under Guideline E:

> 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 national security eligibility or trustworthiness, or award fiduciary responsibilities;

[17] AG ¶¶ 15, 16, and 17 (setting forth the concern and the disqualifying and mitigating conditions).

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, 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 individual may not properly safeguard classified or sensitive information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

AG ¶¶ 17(a), (c), and (d) set forth below are potentially mitigating conditions that may apply to the conduct alleged under Guideline E:

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

(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; and

(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Under Guideline E, the Government's case is basically two-fold. First, Applicant had an affair with a Russian national and failed to timely report it. Second, in his May 2014 background interview, although Applicant disclosed his contact with a Russian national in a university project, he did not disclose that he had an affair with her.

Applicant admitted that he had an affair with a Russian national but qualified his admission that the relationship was only "casual and not based upon commitment." An

admitted extra-marital affair raises a security concern under AG ¶¶ 16(c) and (e).[18] The evidence adduced at the hearing, however, does not support the SOR's allegation that Applicant failed to report his contact until October 2014. Applicant, in fact, reported his contact to his U.S. representative and to his security officer in January 2014, after he had broken off his relationship in December 2013.

A narrower question is whether Applicant reported his contact "as required," as alleged in the SOR. The SOR did not state what "as required" meant. Nor did the Government at the hearing argue that Applicant's reporting to his U.S. representative and his security officer in January 2014 was insufficient or noncompliant. Applicant's security officer made no JPAS entry reflecting Applicant's January 2014 report, so it is fair to assume that the security officer did not deem Applicant's report to be insufficient or noncompliant. There is, however, the security regulation quoted above, which could inform the "as required" allegation:

"Any [agency] employee who, in his/her social contacts with persons from outside the Agency, believes himself/herself to be in contact with representatives of organisations or groups, or with a citizen of a nation that may hold opposing aims to those of NATO, is required to inform their Security Officer *without delay* (emphasis added)."

As noted, when Applicant took his employment with the agency in November 2001, he signed a declaration that he would comply with all security regulations. Giving Applicant the benefit of the doubt that the romantic aspect of his relationship with the Russian national did not evolve until October 2013, it could be argued that he should have reported his relationship between October 2013 and December 2013, when he broke off the relationship, that is, well before January 2014. An earlier report would have satisfied the "without delay" requirement. There is nothing in the record, however, showing that Applicant in the last three months of 2013 was aware of this regulation. In fact, Applicant testified that he contacted the U.S. representative in January 2014, because he wanted guidance on how to proceed in light of the then broken-off relationship with the Russian national. I conclude that Applicant did not know of (or remember) the reporting regulation and, therefore, did not intentionally violate it. Nonetheless, his belated reporting was a technical violation of that regulation triggering AG ¶ 16(c). The next inquiry is whether any mitigating conditions apply.

In the summer of 2013, Applicant decided to enroll in a professional enrichment program that would take him to foreign venues, where he would study with students from other countries. At about the same time, Applicant filed for a divorce believing that his wife had been unfaithful. During the first session of the enrichment program, in June or July 2013, Applicant met a Russian national who was also a student in the program. By about October 2013, Applicant's relationship with the Russian national evolved into a romantic one. Thereafter, they met about seven times either during the program's weekly sessions or on perhaps two occasions during Applicant's personal or professional travels. In December 2013, Applicant ended the relationship and returned to his wife.

[18] *See, e.g.*, ISCR Case No. 07-16240 (Oct. 1, 2008).

In January 2014, Applicant told his wife about his affair. At the same time, he instructed his lawyer to cancel the divorce proceedings. He also, again at about the same time, reported his affair to his agency's U.S. representative and to his security officer. He and his wife went through couples therapy, and they remain together to this day. The conduct giving rise to this case took place over four years ago. The circumstances recited above are unique, are unlikely to recur, and do not cast doubt on Applicant's reliability, trustworthiness, or good judgment. In addition, Applicant has acknowledged his behavior and has obtained counseling to address it. Mitigating conditions AG ¶¶ 17(c) and (d) apply.

That brings us to the SOR allegation that in his May 2014 background interview, although Applicant disclosed his contact with a Russian national in a university project, he deliberately failed to disclose that he had an affair with her. Applicant admitted that he did not disclose the romantic nature of the relationship but that he "reported the primary nature of the relationship," and that "it was not [his] intention to misrepresent the relationship." That qualified answer as to his intention is a denial, which shifts the burden to the Government to prove a deliberate failure to disclose. In assessing an allegation of deliberate falsification, I consider not only the allegation and applicant's answer but all relevant circumstances. Of particular significance here is the summary report of the background interview. That report, however, is not in evidence. I am, therefore, unable to assess the context of the exchange between the investigator and Applicant, and I am unable to review the actual words the investigator attributed to Applicant. On this record, I am reluctant to find a deliberate failure to disclose. Indeed, to make such a finding on this record may very likely be reversible error. Without more from the Government, it has not carried its burden.

Guideline B, Foreign Influence

The security concern for foreign influence is set out in AG ¶ 6:

> Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

The guideline notes one condition that could raise security concerns under AG ¶ 7. The following is potentially applicable in this case:

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology.

The guideline also notes several conditions in AG ¶ 8 that could mitigate security concerns raised under AG ¶ 7. The following are potentially applicable in this case:

(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 United States; and

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, 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 the foreign citizen is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

Applicant's relationship with his mother-in-law and father-in-law, who are citizens and residents of Albania, raises a security concern under AG ¶ 7(b).[19] The question is whether that concern is mitigated.

Applicant's in-laws are ages 64 and 70, respectively. Applicant's father-in-law, a former professor at the Albanian military academy, is now retired. Applicant correctly noted in his answer that Albania is a member of NATO. Applicant's mother-in-law does not work outside of the home. Because Applicant does not speak Albanian, and his in-laws do not speak English, he and they cannot communicate directly. Applicant and his family see his in-laws about four times a year. Applicant has worked for a U.S. support agency for NATO since 2011 and has served honorably in the U.S. Army and the Army National Guard. It is unlikely that under these circumstances Applicant would be placed in a position of having to choose between the interests of his in-laws and the interests of the United States. In addition, Applicant has such a deep and longstanding relationship and loyalties to the United States that he would resolve any conflict in favor of the United States. AG ¶¶ 8(a) and (b) apply.

Applicant's contact with his friend who is the Albanian Ambassador to Germany has been minimal. AG ¶ 8(c) applies.

[19] Applicant's sister-in-law is now a U.S. citizen residing in the United States. That former security concern is now moot.

The record does not raise doubts about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.[20] Accordingly, I conclude that Applicant met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant his eligibility for access to classified information.

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 (Personal Conduct):	For Applicant
Subparagraphs 1.a-1.c:	For Applicant
Paragraph 2, Guideline B (Foreign Influence)	For Applicant
Subparagraphs 2.a-2b:	For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant access to classified information.

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Philip J. Katauskas
Administrative Judge

[20] AG ¶ 2(a)(1)-(9). I took into positive account the U.S. representative's favorable character testimony on behalf of Applicant.