



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



In the matter of:)
)
) ISCR Case No. 07-06927
)
)
Applicant for Security Clearance)

Appearances

For Government: James Duffy, Esquire, Department Counsel
For Applicant: Mark S. Zaid, Esquire

December 17, 2009

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s questionable behavior from May 2000 to March 2001 is mitigated by the passage of time, his 28-years of honorable military service to his country, and his eight years working for defense contractors. Eligibility for access to classified information is granted.

Statement of the Case

On March 26, 2006, Applicant submitted a security clearance application. On January 16, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as modified

and revised.¹ The SOR alleges security concerns under Guideline E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and it recommended referral to an administrative judge to determine whether a clearance should be granted, denied, or revoked.

On February 2, 2009, Applicant responded to the SOR allegations, and requested a hearing before an administrative judge. The case was assigned to me on July 24, 2009. DOHA issued a notice of hearing on July 31, 2009. The hearing was convened as scheduled on August 25, 2009. The government offered Government Exhibits (GE) 1 through 5, which were admitted without objection. Applicant testified on his own behalf, presented three witnesses, and submitted Applicant Exhibits (AE) 1 through 5, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on September 1, 2009.

Findings of Fact

Applicant admitted the factual allegations under SOR ¶ 1, except for SOR ¶ 1.b, which he denied. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 58-year-old program manager in charge of his employer's logistics support for defense contractors. His father was an American service member and fought in World War Two. Applicant graduated from college in 1973, and received a Bachelor of Arts degree in political science. He completed his Master of Arts degree in 1976. After college, he received a Reserve Officer Training Corps commission. He started his service as a nuclear missile launch officer. Later, Applicant became a fighter pilot. In 1991, he flew combat missions during the Desert Storm War and was awarded the Distinguished Flying Cross for heroism in combat.

Between 1999 and 2001, Applicant was assigned to a North African country as the Defense Attaché to an American Embassy. In 2001, he retired honorably from the service after achieving the rank of colonel. He held access to classified information during all his time in the military. Outside of the SOR allegations, Applicant's military record is unblemished. There is no evidence that he was ever involved in any additional questionable behavior while in the military, or since his retirement in 2001. After his retirement, Applicant worked for two defense contractors. He has worked for his current employer since July 2002.

¹ On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) directed application of revised Adjudicative Guidelines in all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006.

Applicant married his wife in 1973, and they have two adult children. His daughter is an officer and a pilot in the military. She has flown combat missions in Iraq and Afghanistan. His son works for a government agency.

In August 2001, Applicant received non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ). He received a reprimand and forfeiture of \$3,000 pay per month for two months (\$2,000 suspended). He was found guilty of:

(a) Dereliction of duty (a violation of Article 92 (UCMJ)), because he allowed official vehicles to be used for non-authorized purposes – the transportation of his cook, between her residence and her place of employment. Applicant explained that, at the time, he erroneously believed he was using the official vehicles for authorized purposes because he followed the same course of conduct as his predecessors. He admitted that his improper use of the vehicles violated service rules and regulations.

(b) Dereliction of duty (a violation of Article 92 (UCMJ), because he willfully failed to report continuing personal contact with a foreign national as it was his duty to do.

At his hearing, Applicant admitted that he knew he was required to report to the Defense Intelligence Agency (DIA) any continuing personal contact with a foreign national. He hired an unmarried foreign national woman to be his French instructor. The woman visited, and usually stayed overnight at Applicant's residence in the U.S. Embassy compound at least three weekends per month from May 2000 to March 2001. Applicant willfully failed to report his continuing personal contact with his French instructor, because he was concerned about the adverse impact such reports would have on the foreign national.

Applicant's failure to report his continuing personal contact with a foreign national violated DIA security rules and procedures. The country to which Applicant was assigned had extreme security concerns because of the threat of a terrorist attack. Applicant acknowledged that his failure to report his continuing personal contact with a foreign national was a serious error in judgment. He has learned his lesson, and promised that if he was ever again in the same situation, he would report the contact.

(c) Conduct unbecoming an officer (a violation of Article 133 (UCMJ)), because he engaged in an inappropriate relationship with a woman who was not his wife. Applicant denied he ever engaged in a sexual relationship with his French instructor. He admitted, however, that his behavior and contact with the French instructor was improper.

SOR ¶ 1.c alleged that Applicant improperly allowed a foreign national to enter the U.S. Embassy Compound. Applicant's evidence shows, however, that he submitted visitor notification forms to the Embassy Regional Security Office and to the State Department, as he was required to do every time the French instructor visited the Embassy. I find this allegation for Applicant.

In his March 2006 security clearance application, Applicant disclosed that he received non-judicial punishment in August 2001, and that he received a reprimand. He also identified the command that imposed the non-judicial punishment. SOR ¶ 1.b alleged that during a September 2006 interview, Applicant deliberately failed to disclose to the investigator that he was issued non-judicial punishment for offenses that included conduct unbecoming an officer.

The September 2006 personal subject interview (GE 2) indicates that Applicant discussed with the investigator two of the non-judicial punishment specification against him: his improper use of an official vehicle and his failure to report his continuing personal conduct with a foreign national. There is no mention of the third allegation, that Applicant engaged in conduct unbecoming an officer by entering into an improper relationship with a woman not his wife.

Applicant presented five character letters for consideration, including a letter from the U.S. Ambassador under whom he served as Defense Attaché during the period in question. In her 2001 letter, the Ambassador stated that Applicant consistently conducted himself in a highly professional, competent, and dedicated manner. She highly valued his advice and counsel. She considered Applicant's service a credit to the U.S. Government. She noted that Applicant was awarded a Department of State Meritorious Honor Award for his outstanding work, a rare honor for a non-foreign service officer. Applicant was not relieved of his Defense Attaché position as a result of the circumstances that led to his non-judicial punishment. Neither DIA nor his service revoked Applicant's security clearance.

A senior special agent with the Department of State Office of Diplomatic Security testified on Applicant's behalf. He was the Deputy Regional Security Officer at the same embassy during the period Applicant engaged in the conduct alleged in the SOR. His job was to oversee the security of the embassy and the local guard program. To his knowledge, Applicant always filed the proper forms and notices to request foreign nationals be allowed to enter the Embassy compound. Applicant never allowed his French instructor to improperly access the Embassy compound.

Applicant has been successful working for two government contractors since his retirement in 2001. All of Applicant's references consider Applicant to be honest, trustworthy, and of high moral character. He was commended for his judgment, maturity, work ethic, and overall performance. All of his references recommended without reservations that he receive access to classified information.

Applicant credibly testified he never had any intent to falsify his 2006 statement to a government investigator. Because of his experience in the service, he knew that the government always keeps records of non-judicial punishments to officers. He loved his career in the service. He is proud that his father fought in World War Two, and that his daughter is currently a pilot flying combat missions.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the Applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication that the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an Applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline E, Personal Conduct

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

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

From about May 2000 to March 2001, while serving as a Defense Attaché to a U.S. Embassy, Applicant was derelict in the performance of his duties by using a government vehicle for unauthorized purposes. He also failed to follow security rules and procedures when he willfully failed to report to DIA his continuing personal conduct with a foreign national. Additionally, he wrongfully entered into an inappropriate relationship with a woman who was not his wife. At a minimum, he created the appearance of impropriety.

Applicant’s behavior triggers the applicability of disqualifying conditions AG ¶ 16(c): “credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations;” and AG ¶ 16(e): “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing.”

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

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

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

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

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

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

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

After considering the above mitigating conditions, I find that AG ¶¶ 17(c), 17(d), and 17(e) all apply, at least in part, to the facts of this case. Applicant's failure to follow security rules and regulations, particularly when they concerned the security of an Embassy compound, constituted a serious offense. Notwithstanding, the seriousness of his actions, I find his behavior to be remote. It occurred approximately eight years ago, and under circumstances that are unlikely to recur. After his retirement, Applicant returned to the country in question as an employee of a government contractor. There is no evidence to show he continued with his questionable behavior with respect to the foreign national.

Applicant's father fought in Europe during World War II. Applicant honorably served 28 years in the military, and achieved the rank of colonel. He served in combat missions and was awarded the Distinguish Flying Cross for heroism in battle. Except for the allegations in the current SOR, there is no evidence of any other blemish on Applicant's military career, or that he has otherwise failed to follow rules and regulations, or violated security procedures. His daughter is a captain in the service and has flown combat missions in the Middle East. These facts are indicative of Applicant's character and reliability.

Applicant has acknowledged his inappropriate behavior and expressed sincere remorse for his actions. He promised never to violate security rules and procedures in the future. Applicant's wife, colleagues, friends, and employers know about his inappropriate behavior. As such, he is not professionally vulnerable to exploitation or duress. He is happily married to his long-time wife and is stable.

Concerning SOR ¶ 1.b, I find the personal subject interview, by itself, is not sufficient to show Applicant lied to the investigator. Applicant disclosed in his March 2006, security clearance application that he received non-judicial punishment in August 2001, and was issued a reprimand. The September 2006 personal subject interview (GE 2) indicates that Applicant discussed, at least in part, the non-judicial punishment allegations with the investigator. Available information does not show that Applicant intended to make a false statement or to conceal information about his 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 the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature and well-educated man. He was successful in the military and retired as a colonel after 28 years of honorable service to his country. He served in combat missions and was awarded the Distinguish Flying Cross for heroism in battle. Except for the allegations in the current SOR, there is no evidence of any other blemishes on Applicant's military career, or that he has otherwise failed to follow rules and regulations, or violated security procedures.

Applicant has acknowledged his inappropriate behavior and expressed sincere remorse for his actions. He promised never to violate security rules and procedures in the future. He has substantially reduced or eliminated his vulnerability to exploitation or

duress. Since 2001, he has been successful working for two defense contractors. He has established a reputation as a valuable, dedicated and reliable employee.

On the other hand, Applicant deliberately violated security rules and procedures for approximately one year notwithstanding his knowledge of the illegality of his actions and the risks associated with it. His failure to follow security rules and procedures is a serious offense. It squarely brings up the issue of whether Applicant is a security risk based on his past behavior. On balance, and after considering all the evidence, I conclude that Applicant's favorable evidence is sufficient to mitigate the security concerns arising from his personal conduct. Applicant's life-long favorable evidence of honorable service to his country outweighs his questionable behavior. Overall, the record evidence convinces me of Applicant's eligibility and suitability for a security clearance.

Formal Findings

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

Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraphs 1.a-1.c:	For Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge