



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



In the matter of: )  
 )  
 [Redacted] ) ISCR Case No. 14-04441  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Julie R. Mendez, Esq., Department Counsel  
For Applicant: Eric A. Eisen, Esq.

01/14/2016

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines K (Handling Protected Information), B (Foreign Influence), D (Sexual Behavior), and E (Personal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on October 24, 2013, seeking to continue his eligibility for access to classified information.<sup>1</sup> On February 15, 2015, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines K, B, D, and E. The DOD acted under 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) implemented by the DOD on September 1, 2006.

<sup>1</sup> Applicant's SCA was triggered by several Joint Personnel Adjudication System (JPAS) incident reports regarding conduct alleged the SOR.

Applicant answered the SOR on March 16, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on June 18, 2015, and the case was assigned to an administrative judge on July 18, 2015. It was reassigned to me on September 17, 2015. On October 6, 2015, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for October 19, 2015. I convened the hearing as scheduled.<sup>2</sup> Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through G, which were admitted without objection. DOHA received the transcript (Tr.) on October 29, 2015. I kept the record open to enable the parties to submit matters for administrative notice, discussed below. The record closed on December 16, 2015

### **Administrative Notice**

On December 3, 2015, I ordered Department Counsel to submit a brief and supporting documentation setting out the facts that she considered relevant regarding Japan and the Philippines. (Hearing Exhibit (HX) II.<sup>3</sup>) She responded on December 10, 2015, and provided information regarding the Philippines, but not Japan. (HX III.) Applicant's counsel responded to Department Counsel's submission on December 16, 2015 (HX IV). On January 5, 2016, I notified Department Counsel and Applicant's counsel of my intention to *sua sponte* take administrative notice of relevant facts about Japan. (HX V.) The facts administratively noticed are set out below in my findings of fact.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.a, 1.b, 4.a, 4.b, and 4.d. He denied SOR ¶¶ 2.a, 3.a, 4.c, and 4.e. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 44-year-old engineer employed by a defense contractor since 1996. He has held a security clearance since February 1998.

Applicant attended a university from 1989 to 1991, attended a community college from 1991 to 1993, and attended a university from 1994 to 1996, but he did not receive a degree. (GX 3 at 5-6.) He married in August 2007. He and his wife have a five-year-old son.

Sometime between 2010 and 2012, Applicant was reprimanded for not properly securing his employer's workspace. The facility where this violation occurred had a front door with a magnetic lock and a deadbolt and a back door with only a deadbolt. The last person leaving the facility was responsible for checking both doors and signing a log sheet certifying that both doors were locked. The same key would unlock either

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<sup>2</sup> Applicant waived the 15-day-notice requirement in the Directive ¶ E.3.1.8. (Tr. 10.)

<sup>3</sup> HX I is the "discovery letter" transmitting the government exhibits to Applicant on June 18, 2015.

deadbolt. Applicant went to the office twice during a weekend. Each time he entered and left through the back door, which was easier to open. He failed to check the front door and did not notice that the deadbolt was unlocked. (Tr. 36-39.) In his answer to the SOR, he denied falsifying the log sheet. However, he admitted at the hearing that he did not check the front door but signed a log sheet stating that he had checked it. (Tr. 65.)

When Applicant submitted his SCA in October 2013, he answered “Yes” to the question, “Do you have, or have you had, close and/or continuing contact with a foreign national within the last seven (7) years with whom you . . . are bound by affection, influence, common interests, and/or obligation?” He disclosed his relationship with a Japanese married woman between August 2012 and October 2013. (GX 1 at 19-20.) He did not disclose his relationships with two other Japanese women and two Filipino women.

During a personal subject interview (PSI) in May 2014, Applicant disclosed that the Japanese woman identified in his SCA was a “lonely housewife” married to a Japanese military officer. He met her at a bar in August 2012, and they had frequent contact until he left Japan on August 31, 2012. In September and October 2012, they exchanged email three or four times a week, and they resumed frequent contact when Applicant returned to Japan for ten days in October 2012. From October 2012 to May 2013, they exchanged email twice a week. They had three days of contact when Applicant returned to Japan in May 2013, and he gave her a gift of jewelry worth about \$150 during this trip. (GX 3 at 16.) They had sexual intercourse about six times during their relationship. (Tr. 74.) They have had no contact or email exchanges since June 2013. Applicant made frequent attempts to contact her, but she did not respond. (GX 3 at 10-12.) Applicant used his work email rather than his personal email for his exchanges with the Japanese woman. (GX 3 at 13.) Applicant’s email exchanges with the woman were discovered by an information technology (IT) staff member investigating a problem unrelated to this case. (GX 2 at 2.) As of the date of the hearing, Applicant’s wife was unaware of his social and sexual activities with this Japanese woman. (Tr. 77.)

During the PSI, Applicant also disclosed that he had sexual contact with two other Japanese women and one Filipino woman during his trips to Japan. The Filipino woman was married to a Japanese man. (Tr. 83.) He maintained quarterly email contact with one of the Japanese women and the Filipino woman. His last sexual contact with a foreign woman was in March 2014. (GX 3 at 15; Tr. 88.) Applicant had social contact but no sexual contact with another Filipino woman and maintained quarterly email contact with her. (GX 3 at 15.) He testified that his quarterly email contacts with these three women were not personal, and they consisted of greetings on Christmas, New Year’s Day, Valentine’s Day, and general “how are you” inquiries. (Tr. 87.) They knew that he worked as a computer technician but did not know his specific job or his employer. (GX 3 at 19.) He has had no contact with any of these women since March 2014. None of the foreign women were aware that Applicant was married. (Tr. 58.)

Applicant has not had sexual relations with his wife since she became pregnant with their son in early 2015. The decision to not have sexual relations was his wife's. Applicant's wife and their son sleep in the same bed, and he sleeps in an adjoining room. (Tr. 52-53.)

Applicant submitted an article from Wa-pedia (a Japanese version of Wikipedia), discussing Japanese views regarding casual sex. According to this source, "Extramarital affairs are an almost culturally accepted part of life in Japan. A middle-aged married man won't be in trouble at home for seeking romance with young bar hostesses or having sex with prostitutes . . . ." (AX E.) The article does not state whether Japanese husbands have an equally casual attitude about extramarital affairs by their wives.

Applicant's employer requires that "continuing contacts with non-U.S. citizens" be reported to the facility security officer (FSO). (GX 4 at 11.) Applicant was made aware of this requirement at a briefing on security procedures on January 27, 2010. (GX 4 at 32.) In his answer to the SOR, he admitted that he did not report his foreign contacts and relationships as required by his employer. He testified that he orally notified his FSO in advance of his scheduled foreign travel. He asked the FSO if he needed to fill out any paperwork in advance of his foreign travel, and he was told, "No." The only question he was asked when he returned from his travel was whether anyone tried to obtain information from him while he was in a foreign country. (Tr. 44-47.) He admitted that he did not volunteer the information about his relationship with the married Japanese woman. (Tr. 81.)

In May 2014, after his previous FSO retired, he received an email from his new FSO, notifying him that he was required to submit a form reporting his intended foreign travel 15 days before traveling, and he was required to submit the questionnaire on second page of the form when he returned from traveling. The questionnaire included the question, "Did you meet a foreign national who requested future contact?" It did not ask any questions about "continuing contacts with non-U.S. citizens." (AX E.) The form was revised in June 2012 and would have been applicable to Applicant's first meetings with the married Japanese woman. He testified that he would not have disclosed his relationships with the foreign women on his employer's security questionnaire because they did not request any contact information from him. He asked them for their email addresses and initiated the email contacts. (Tr. 91-92.) Since the May 2014 email exchange with his FSO, he has filled out and submitted a notification of foreign travel before traveling and submitted the questionnaire upon his return. (Tr. 44-50; AX F.)

In December 2012, Applicant received a written warning for sending a classified email attachment via an unencrypted message. (GX 1 at 11.) The classified material was created by compiling two sets of unclassified data that became classified when combined. Applicant testified that he inserted the wrong code for a numerical value into a document, and the wrong code transformed a file from unclassified to classified. (Tr. 28.) A detailed investigation determined that the security violation was an unintentional

mistake, and that no classified information was compromised. He received a written reprimand. (GX 2; GX 3 at 27-32.)

In May 2014, Applicant was reprimanded for failing to complete the checkout procedures for securing a classified storage room. The facility where this violation occurred had a three-tier security system. The first-tier checker was the person working with classified information, who was responsible for putting all classified information in the safe and locking the safe. The second-tier checker was required to ensure that the first-tier checker properly secured all classified information and to initial a checklist. The third-tier checker was required to ensure the first two tiers had performed their duties correctly and that the second-tier checker had initialed the checklist. There was no place on the form for the third-tier checker to sign or initial. The third-tier checker was required to sign a general sign-out sheet at the front door of the facility. Applicant was the third-tier checker. He testified that he believed he either looked at the line for the wrong day on the checklist or failed to look at the checklist. In either event, he did not notice that the second-tier checker had not initialed the checklist for the day in question. (Tr. 31-35; AX D at 1-4.)

Between October 2004 and December 2012, Applicant has received pay raises and bonuses at least once a year for his outstanding performance. (AX A.) On October 1, 2015, shortly before the hearing, Applicant received a "Security on the Spot Award" from his employer. He was assigned to assess a spill of classified information by a major defense contractor and determine the extent of the spillage. None of the search utilities used by the contractor could find which computers contained the spilled information. Applicant was able to find a third-party application that could be used as a comprehensive scan tool to find the spilled information. He was commended for his diligence, creativity, and timely response to the problem. (Tr. 39-42; AX C.)

I have taken administrative notice of the following facts about Japan:

- Japan has a parliamentary government with a constitutional monarchy. It is one of the most successful democracies and largest economies in the world.
- Japan is a major non-NATO ally of the United States. The U.S.-Japan alliance is the cornerstone of U.S. security interests in Asia. Japan provides bases as well as financial and material support to U.S. forward-deployed forces, which are essential for maintaining stability in the region.
- Because of the two countries' combined economic and technological impact on the world, the U.S.-Japan relationship has become global. The two countries cooperate on a broad range of global issues, including development assistance, combating communicable diseases, and protecting the environment and natural resources. The two countries collaborate in science and technology in such as mapping the human genome, research on aging, and international space exploration.

- Japan contributes irreplaceable political, financial, and moral support to U.S.-Japan diplomatic efforts. The United States consults closely with Japan and the Republic of Korea on policies regarding North Korea. The United States works closely with Japan and Australia to exchange views and increase coordination on global and regional initiatives. In Southeast Asia, U.S.-Japan cooperation is vital for stability and for political and economic reform. Outside Asia, Japan's political and financial support has substantially strengthened the U.S. position on global issues such as countering the Islamic State in Iraq and the Levant (ISIL) and terrorism in all its forms, advancing environmental and climate change goals, maintaining solidarity in the face of Russian aggression in eastern Ukraine, assisting developing countries, countering piracy, and standing up for human rights and democracy.
- Japan's human rights record is generally good. Its leading human-rights problems include lack of due process for pretrial detainees, poor prison and detention center conditions, the exploitation of children, trafficking in persons, exploitation of foreign trainee workers, detention of asylum seekers, domestic violence and sexual harassment of women, and societal discrimination against minority group members.
- None of the U.S. Department of State publications reflect that Japan engages in economic or military intelligence activity directed toward the United States.

I also have taken administrative notice of the following facts about the Philippines:

- The Philippines is a multi-party, constitutional republic with a bicameral legislature. The United States recognized the Philippines as an independent state and established diplomatic relations in 1946. The United States has designated the Philippines as a major non-NATO ally, and there are close and abiding security ties between the two nations, based on strong historical and cultural links and a shared commitment to democracy and human rights. The Manila Declaration of 2011 reaffirmed the 1951 U.S.-Philippines Mutual Defense Treaty as the foundation for a robust, balanced, and responsive security partnership.
- The United States is among the Philippines' top trading partners, and it traditionally has been the Philippines' largest foreign investor. The United States and the Philippines have a bilateral trade and investment framework and a tax treaty. Philippine imports from the United States include raw and semi-processed materials for the manufacture of semiconductors, electronics and electrical machinery, transport equipment, cereals, and cereal preparations.

- Philippine national elections have been generally free and fair, but independent observers have noted widespread vote buying, and dynastic political families have monopolized elective offices at the national and local level.
- The most significant human rights problems are extrajudicial killings, enforced disappearances undertaken by security forces and vigilante groups, a weak and overburdened criminal justice system, widespread official corruption and abuse of power, and impunity from prosecution for human rights abuses.
- Other human rights problems include prisoner and detainee torture and abuse by security forces, violence and harassment against human rights activists by security forces, warrantless arrests, lengthy pretrial detentions, poor prison conditions, killings and harassment of journalists, violence against women, abuse and sexual exploitation of children, and trafficking in persons.
- Muslim separatists, communist insurgencies, and terrorist organizations are active in the Philippines; and they have killed Philippine security forces, local government officials, and other civilians. Through joint U.S.-Philippine cooperation, the ability of these various groups to operate in the Philippines has been constrained but not eliminated. In 2014, there were numerous attacks with small arms and improvised explosive devices, kidnappings for ransom, and extortion efforts by suspected terrorist groups. Gangs of kidnappers have targeted foreigners, including Filipino-Americans. The U.S. State Department has recommended that all U.S. citizens defer non-essential travel to the Sulu Archipelago due to the high threat of kidnapping in that area. The State Department also has warned U.S. citizens to exercise extreme caution if traveling to the main island of Mindanao due to violent activities of terrorist and insurgent groups.
- The Philippine government has recognized the potential threat posed by radicalized Philippine citizens supporting ISIL. In July 2014, the Philippine president's anti-terrorism council convened an ad hoc emergency technical working group focusing on persons of interest. The working group has tightened passport issuance, increased immigration screening, and increased monitoring of ISIL-related activity.
- None of the source documents submitted by Department Counsel and Applicant reflect that the Philippines engages in economic or military intelligence activity directed toward the United States.

## Policies

“[N]o 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 applicants 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication 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. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition,

and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[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 K, Handling Protected Information**

The SOR alleges that Applicant improperly emailed a classified document via unclassified email and was reprimanded for it (SOR ¶ 1.a), and he failed to report, as required, his contacts and relationships with multiple foreign nationals (SOR ¶ 1.b). 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.”

Security violations are one of the strongest possible reasons for denying or revoking access to classified information, as they raise very serious questions about an applicant's suitability for access to classified information. Once it is established that an applicant has committed a security violation, he or she has a very heavy burden of demonstrating that he or she should be entrusted with classified information. Because security violations strike at the very heart of the industrial security program, an administrative judge must give any claims of reform and rehabilitation strict scrutiny. See ISCR Case No. 03-26888 (App. Bd. Oct. 5, 2006). The frequency and duration of the security violations are aggravating factors. ISCR Case No. 97-0435 at 5 (App. Bd. July 14, 1998).

In his answer to the SOR, Applicant admitted both allegations under this guideline. The evidence adduced at the hearing showed that he was unaware of a requirement to report foreign contacts in writing. The evidence also showed that the employer's security questionnaire would not have required disclosure of Applicant's foreign contacts because they did not request any contact information from him. However, he admitted at the hearing that he knew about the requirement to report continuing foreign contacts and that he did not volunteer the information about his relationship with the married Japanese woman. His admissions in his answer to the SOR and at the hearing establish the following disqualifying conditions under this guideline:

AG ¶ 34(c): loading, drafting, editing, modifying, storing, transmitting, or otherwise handling classified reports, data, or other information on any unapproved equipment; and

AG ¶ 34(g): any failure to comply with rules for the protection of classified or other sensitive information.

Applicant's failure to complete the checkout procedures for a classified storage room and failure to properly secure his workplace, alleged in SOR ¶¶ 4.d and 4.e, combined with the conduct alleged in SOR ¶¶ 1.a and 1.b, would be relevant to AG ¶ 34(h) ("negligence or lax security habits that persist despite counseling by management"). However the derelictions in SOR ¶¶ 4.d and 4.e were not alleged under this guideline. Thus, the disqualifying condition in AG ¶ 34(h) may not be an independent basis for revoking Applicant's security clearance.

The following mitigating conditions are potentially relevant:

AG ¶ 35(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;

AG ¶ 35(b): the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities; and

AG ¶ 35(c): the security violations were due to improper or inadequate training.

AG ¶ 35(a) is not established. Applicant's violations were numerous, recent, and did not occur under unusual circumstances making recurrence unlikely. Although the incident alleged in SOR ¶ 1.a was more than five years ago, it was the beginning of a series of rules violations, including failure to report his continuing relationship with a married Japanese woman from August 2012 through June 2013, multiple sexual encounters and email contacts with Japanese and Filipino women until March 2014, and failure to complete the checkout procedures for a classified store room in May 2014.

AG ¶ 35(b) is partially established. Applicant began complying with the requirement to submit a written foreign travel questionnaire as soon as he became aware of it. He reported his continuing contact with the married Japanese woman when he submitted his SCA in October 2013.

AG ¶ 35(c) is not established for Applicant's inadvertent security violation alleged in SOR ¶ 1.a, but it is established for his failure to submit written foreign travel reports. The extensive email exchange between Applicant and the new FSO in May 2014 reflects that Applicant was made aware of the requirement to report "continuing contacts with non-U.S. citizens" at the briefing in January 2010, but he was not aware that his employer had a specific form for reporting contacts in writing until he was notified by the new FSO. Furthermore, the foreign travel questionnaire published in June 2011 did not

include the reporting requirement set out during the January 2010 briefing and would not have encompassed his continuing relationship with the married Japanese woman.

## **Guideline B, Foreign Influence**

The SOR alleges that Applicant, while married, had “sex and ongoing contacts with at least four foreign nationals between 2012 and 2014” (SOR ¶ 2.a). The evidence establishes that he had sexual intercourse with four foreign women between 2012 and 2014, that he had close and continuing foreign contact with one Japanese woman and occasional casual contacts with two other Japanese women and two Filipino women during the same period.

Four disqualifying conditions under this guideline are relevant:

AG ¶ 7(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;

AG ¶ 7(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;

AG ¶ 7(f): failure to report, when required, association with a foreign national; and

AG ¶ 7(i): conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country.

AG ¶ 7(a) requires substantial evidence of a “heightened risk.” The “heightened risk” required to raise one of these disqualifying conditions is a relatively low standard. “Heightened risk” denotes a risk greater than the normal risk inherent in living under a foreign government.

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, regardless of whether that person, organization, or country has interests inimical to those of the United States.” ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Furthermore, “even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security.” ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at \*\*15-16 (App. Bd. Mar. 29,

2002). Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, 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 foreign contacts 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, or the country is known to conduct intelligence operations against the United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. See *generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

The element of "heightened risk" is not established for Japan. Japan is a close ally and partner of the United States with no record of military or economic espionage targeted at the United States and no history of dealing with insurgent or terrorist groups sufficient to constitute a "heightened risk.

This element is also not established for the Philippines. I am satisfied that the activities of insurgent and terrorist groups, the risks of kidnapping by gangs, and the danger of radicalized ISIL sympathizers in the Philippines would be sufficient to establish the "heightened risk" in AG ¶ 7(a) if the two Filipino women lived in the Philippines or had family members in the Philippines. However, one of the women is married to a Japanese man and lives in Japan, and there is no evidence that either of the Filipino women have family members living in the Philippines. Thus, I conclude that the element of "heightened risk" is not established for any of the women with whom Applicant was involved. For the same reasons, the likelihood of a potential conflict of interest between the interests of the United States and any of the five women with whom Applicant was involved is too remote to raise a security concern. Accordingly, I conclude that AG ¶¶ 7(a) and 7(b) are not established.

AG ¶ 7(f) is established. Applicant was made aware of the requirement to report "continuing contacts with non-U.S. citizens" during his employer's security briefing in January 2010. While he plausibly did not regard his occasional emails to four of the women as "continuing contacts," he knew that his relationship with the married Japanese woman was a "continuing contact," and he disclosed it in his October 2013 SCA. In his answer to the SOR and at the hearing, he admitted that he had an obligation to report it. There is no possibility that his employer's foreign travel questionnaire misled him, because Applicant was not aware of it until May 2014.

AG ¶ 7(i) is established. Applicant's relationship with a Japanese woman married to a Japanese military officer made him vulnerable to exploitation, pressure, or coercion by any person, intelligence agent, government agent, terrorist group, or insurgent group that discovered it. His vulnerability is heightened by the fact that he has not disclosed his relationship to his wife.

Two mitigating conditions are potentially relevant:

AG ¶ 8(c): contact or communication with foreign citizens is so casual or infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation; and

AG ¶ 8(e): the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country.

AG ¶ 8(c) is not established for Applicant's contacts with the Japanese married woman, but it is established for his contacts with the other Japanese and Filipino women. AG ¶ 8(e) is established, because Applicant began complying with his employer's reporting requirement after he was made aware of it. No other mitigating conditions are applicable.

#### **Guideline D, Sexual Behavior**

The SOR cross-alleges the conduct in ¶ 2.a under this guideline. The security concern under this guideline is set out in AG ¶ 18:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. . . .

The following disqualifying conditions under this guideline are potentially applicable:

AG ¶ 13(a): sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

AG ¶ 13(c): sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

AG ¶ 13(d): sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

AG ¶ 13(a) is not established. There is no evidence in the record establishing that Applicant's adulterous conduct violated the law of Japan or Applicant's home state in the United States.

AG ¶ 13(c) and 13(d) are established. Applicant's behavior made him vulnerable to coercion, exploitation, or duress, for the reasons set out in the above discussion of

AG ¶ 7(i). His adulterous relationship with a Japanese woman married to a Japanese military officer demonstrated poor judgment.

The following mitigating conditions are potentially relevant:

AG ¶ 14(b): the sexual behavior happened so long ago, 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;

AG ¶ 14(c): the behavior no longer serves as a basis for coercion, exploitation, or duress; and

AG ¶ 14(d): the sexual behavior is strictly private, consensual, and discreet.

AG ¶ 14(b) is not established. Applicant's sexual behavior was recent, frequent, and did not occur under unusual circumstances making it unlikely to recur.

AG ¶ 14(c) is not established. Applicant has not disclosed his conduct to his wife, and he remains vulnerable to coercion, exploitation, or duress.

AG ¶ 14(d) is not fully established. Applicant's sexual activity was private and consensual, but his email exchanges were on his work computer, which was not private.

### **Guideline E, Personal Conduct**

The SOR cross-alleges the conduct in SOR ¶¶ 1.a and 1.b under this guideline (SOR ¶¶ 4.a and 4.b). It also alleges that Applicant deliberately falsified his SCA by disclosing his contacts with the married Japanese woman, but not disclosing his contacts with two other Japanese women and two Filipino women (SOR ¶ 4.c). Finally, it alleges that Applicant was reprimanded for failing to complete the checkout procedures for a classified storage room in May 2014 (SOR ¶ 1.d) and was reprimanded between 2010 and 2012 for improperly securing the workplace and warned for falsifying the log sheet by attesting that he had checked and secured the office doors (SOR ¶ 1.e).

The concern under this guideline is set out in AG ¶ 15:

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

The relevant disqualifying condition for SOR ¶ 4.c, alleging that Applicant falsified his SCA, is AG ¶ 16(a) (“deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . .”) When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant’s state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant’s level of education and business experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

The relevant disqualifying conditions for SOR ¶¶ 4.a, 4.b, 4.d, and 4.e are:

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

AG ¶ 16(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 . . . a pattern of dishonesty or rule violations; 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 . . . engaging in activities which, if known, may affect the person’s personal, professional, or community standing.

AG ¶ 16(a) is not established. When Applicant submitted his SCA, he disclosed the only serious relationship he had in Japan. While it is debatable whether the quarterly emails with the other four women were “continuing,” the evidence falls short of showing that Applicant was “bound by affection, influence, common interests, and/or obligation” to the four other women.

Applicant’s security violations alleged in SOR ¶¶ 1.a and 1.b, and the derelictions alleged in SOR ¶¶ 4.d and 4.e are sufficient to establish AG ¶¶ 16(c) and 16(d). Applicant’s adulterous conduct alleged in SOR ¶¶ 2.a and 3.d was not cross-alleged in

this guideline. Therefore, the disqualifying condition in AG ¶ 16(e) may not be an independent basis for revoking his security clearance.

The following mitigating conditions are potentially relevant:

AG ¶ 17(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;

AG ¶ 17(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶ 17(c) is not established. Applicant's sexual misconduct was not "minor" in a national security context. It was repeated several times over a two-year period. Applicant did not voluntarily terminate his relationship with the Japanese woman; she terminated it. His conduct did not occur under unique circumstances.

AG ¶ 17(d) is partially established, because Applicant has acknowledged his behavior. He presented no evidence of counseling or other remedial measures for his marital infidelity. Insufficient time has passed to determine whether he has overcome his carelessness regarding security procedures. Applicant's "Security on the Spot" award in October 2015 demonstrates his reputation for hard work and technical skill, but it does not overcome his record of carelessness regarding security checklists and log sheets.

AG ¶ 17(e) is not established. Applicant has not disclosed his infidelity to his wife, and he remains vulnerable to coercion, exploitation, and duress.

### **Whole-Person Concept**

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guidelines K, B, D, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant has worked for a defense contractor for more than 19 years and has held a security clearance for most of that time. He has a dysfunctional marriage, and his feelings of loneliness and rejection are understandable, but they do not justify the serious breach of trust that his sexual misconduct demonstrates. His security violations were negligent, not intentional, but insufficient time has not passed for him to demonstrate that he has overcome his inattention to administrative details. He has been under pressure to retain his clearance since October 2013, and I am not confident that he will not revert to previous habits when he is relieved of the pressure of keeping his clearance and his job.

After weighing the disqualifying and mitigating conditions under Guidelines K, B, D, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his security violations, foreign contacts, sexual behavior, and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline K:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
Paragraph 2, Guideline B:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline D:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Paragraph 4, Guideline E:	AGAINST APPLICANT
Subparagraphs 4.a-4.b:	Against Applicant
Subparagraph 4.c:	For Applicant
Subparagraphs 4.d-4.e:	Against Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman  
Administrative Judge