



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

SSN: _____

Applicant for Security Clearance

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ISCR Case No. 06-07577

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro Se*

February 29, 2008

Decision

WHITE, David M., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on May 13, 2004. On October 3, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines E and D for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on October 9, 2007. He answered the SOR in writing on October 19, 2007, and requested that his case be adjudicated without a hearing. DOHA received that request on October 24, 2007. In subsequent communication with a DOHA Department Counsel, via telephone and electronic mail on December 14, 2007, Applicant requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on January 23, 2008, and the case was

assigned to me on January 25, 2008. On January 31, 2008, Applicant waived his right to receive written notice 15 days in advance of the hearing in order to accommodate his travel schedule and his desire for prompt resolution of his case. DOHA issued a notice of hearing on February 1, 2008, and I convened the hearing as scheduled on February 7, 2008. The government offered exhibits (GE) 1 through 4, which were admitted without objection. Applicant testified on his own behalf, and submitted exhibits (AE) A through E, which were admitted without objection. Department Counsel also offered a stipulation between the parties agreeing that GE 1 through 4 were admissible, that was marked as Hearing Exhibit (HE) I. On February 8 and 18, 2008, Applicant submitted signed copies of AE D and E, that were originally submitted without signatures. I granted Applicant's request to reopen the record and add these signed copies, without objection by Department Counsel. DOHA received the transcript of the hearing (Tr.) on February 19, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Notice

At the hearing, Applicant indicated he received the hearing notice on February 14, 2008. (Tr. at 14.) I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant confirmed his earlier election, discussed above, and again affirmatively waived his right to 15 days notice. (Tr. at 12-14.)

Motion to Amend SOR

Department Counsel moved to amend the SOR by changing the year in which Applicant was alleged to have resigned and suffered revocation of his former security clearance from "2004" to "2002." (Tr. at 58.) Applicant did not object to the motion, which was granted in order to correct either a typographical error or misunderstanding, and to conform the SOR allegation to the undisputed evidence. (Tr. at 59.)

Findings of Fact

In his Answer to the SOR, dated June 25, 2007, Applicant admitted all of the factual allegations in the SOR, with explanations. The allegations are based on admissions Applicant made in his SF 86 (GE 1), and during interviews with a Defense Security Service Special Agent on May 1, 2007 (GE 3), and May 7, 2007 (GE 2). Applicant's admissions are incorporated in the following findings of fact.

Applicant is a 50-year-old Chairman and Chief Executive Officer of a start-up corporation that is developing encryption technology for use in the government and commercial sectors. He and his wife have been married since 1985, and have a 22-year-old daughter. Applicant's wife and daughter live with her parents. Applicant resides much of the time in a distant state, where his business is located.

For about 12 years, Applicant worked for another government agency in which he was assigned to work in U.S. embassies abroad, and held a high-level security clearance. During one three-year overseas assignment, Applicant developed sexual relationships with three women who worked at the embassy. Two of them were U.S. citizens, and those relationships involved multiple sexual encounters. The third woman was a local-national employee with whom he had sexual intercourse only once.

At Applicant's next assignment in a different country, Applicant developed a long-running sexual relationship with a 21-year-old local-national woman he met in a bar. He soon learned that both she and her sister worked part-time as prostitutes to supplement their income. He and the woman had sex weekly until his transfer 18 months later. About two months after this relationship started, Applicant's wife moved back to the U.S. due to a medical condition. Three months later, Applicant gave the local woman a key to his apartment. Applicant returned to this country on short visits three and five months after his transfer. He and the woman again had sexual relations during both visits. Applicant also paid several other prostitutes for sex while stationed in these two countries.

Although Applicant knew he was required to report sexual relationships with foreign nationals to his supervisor, he chose not to do so in order to keep the matters secret and permit the relations to continue. About a year before Applicant left the second country, his mistress' sister visited them at his apartment with a foreign diplomat for purposes of introducing the two men. Applicant was also required to report this contact. He did report the contact, but falsified the circumstances under which it took place in order to conceal his ongoing affair. (Tr. at 51-54, 63-67, 69-71.)

Shortly after leaving the second country in 1997, Applicant admitted to his wife, in general terms, that he had a sexual relationship with his mistress there. He promised her that he would never have another extramarital affair, and asserts that he kept this promise. (See GE 2 at 4; Tr. at 56.) This claim, that he kept the promise, is inconsistent with the admitted sexual activity during his two subsequent short return visits. (GE 2 at 3; Tr. at 50-51.) Applicant has never admitted any of his other extramarital sexual activity to his wife because it would upset her and he thinks she does not want to know. (GE 2 at 4; Tr. at 54-56, 62-65, 84.)

About four and a half years after leaving the second country, Applicant was required to undergo a polygraph examination in connection with renewing his clearance. During the pre-test interview, he admitted to the 18-month relationship in the second country, and to lying to his boss about the meeting with the foreign diplomat. He underwent a series of debriefings and polygraph examinations, and was eventually cleared to return to work. About nine months later, he was informed that his employment was going to be terminated, and offered the option to resign or be fired. He chose the former option, which became effective in October 2002. Immediately thereafter, he founded his present company and began working to build the business.

Applicant submitted reference letters from five individuals, including board members and advisers of his company. They included one active-reserve and one retired general officer, former chief information officers for two security-related agencies, and a retired colonel who served as a career Intelligence officer. (Applicant's response to SOR; AE A through E; Tr. at 40-42.) Each offered a positive evaluation of Applicant's character. Applicant informed each person that he was seeking the letters in connection with his hearing to try to obtain a security clearance, but he did not inform any of them of the details leading to revocation of his former clearance in 2002. (Tr. at 47-49, 72-73.)

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides that "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

A person applying for access to classified information seeks to enter into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it

grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to 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.

Analysis

Guideline D, Sexual Behavior

AG ¶ 12 expresses the security concern:

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. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying:

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

(b) a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;

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

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

AG ¶ 14 provides conditions that could mitigate security concerns:

(a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;

(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;

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

(d) the sexual behavior is strictly private, consensual, and discreet.

Applicant engaged in multiple extramarital sexual relationships with prostitutes and coworkers over a five to six year period that ended about ten years ago. Some of these were one-time events, and several involved longer relationships, including one that lasted almost two years in total. Applicant revealed only general information about the longest relationship to his wife, and resumed the affair on two occasions after revealing it to her and promising to remain faithful. She knows nothing about those incidents, or any of the other relationships, and he does not want her to. He also concealed this sexual activity from his supervisors at the time, and filed a falsified report concerning contact with a foreign diplomat, despite his obligation to report such matters in connection with his security clearance. This ultimately led to revocation of his clearance and termination of his Government employment in October 2002. Applicant also concealed some or all of these matters from the board members and advisors to his present company when he asked them to vouch for his character in connection with these proceedings. This not only diminishes the evidentiary weight accorded to their opinions of his character, but increases the number of people for whom it is important to him to perpetuate ignorance of his past conduct.

There is no evidence from which to conclude that Applicant's admitted solicitation of and participation in sexual relations with multiple prostitutes, while he was married to another woman, was criminal in the two countries where this conduct took place. Accordingly, the Government has not established that AG ¶ 13(a) applies. Applicant apparently was able to stop the behavior about ten years ago, and no evidence was introduced concerning personality disorder symptoms, so AG ¶ 13(b) was not established.

The evidence does raise security concerns under both AG ¶¶ 13(c) and 13(d), however. Applicant's concealment of virtually all of this activity from his wife, his then-supervisors, and his current colleagues, demonstrates his susceptibility to coercion, exploitation, and duress should he be confronted by someone threatening to reveal it. Moreover, his extensive pattern of secretive and illicit casual sexual gratification, in violation of legal and moral obligations to both his wife and the United States Government, reflects a serious lack of discretion and good judgment.

Applicant's sexual conduct of concern primarily took place when he was in his mid and late 30s, so AG ¶ 14(a) does not provide mitigation. The latter half of the activity took place when he was living separate from his wife, a situation mirroring his current arrangements. The only evidence that such conduct might be unlikely to recur concerned his pledge to his wife not to further cheat on her that he admittedly violated twice, and his self-serving declaration that he intends not to repeat such actions. This evidence does not persuasively establish mitigation under AG ¶ 14(b), and his conduct casts continuing doubt on his reliability, trustworthiness, and good judgment.

Applicant's behavior serves as an ongoing basis for coercion, exploitation and duress because he continues to conceal it from his wife, family, and business colleagues. Applicant persuaded five high ranking current and former Government officials, on whom his future business prospects depend, to vouch for his character in these official proceedings without his informing them of the nature and extent of his conduct raising security concerns. This both reflects his ongoing concern over public knowledge of his conduct and increases his ongoing susceptibility to coercion, exploitation or duress by enlarging the pool of people to whom revelation of his conduct would be damaging and embarrassing. AG ¶ 14(c) does not apply. Although much of Applicant's illicit sexual behavior was conducted in private, prostitution is not the type of consensual behavior contemplated by AG ¶ 14(d), nor was any of the conduct discreet (which means prudent or judicious). Applicant has not demonstrated that any AG ¶ 14 conditions apply to mitigate security concerns raised by his sexual behavior.

Guideline E, Personal Conduct

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

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. 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 following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

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

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment

qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

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

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

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

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

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

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

(g) association with persons involved in criminal activity.

AG ¶ 17 provides conditions that could mitigate security concerns:

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

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

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

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

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

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

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

Applicant's sexual behavior, his deliberate lying to his supervisor about the circumstances surrounding his meeting with his mistress, her sister, and the foreign diplomat, and the resulting revocation of his security clearance and termination of his Government employment raise exploitation, manipulation or duress security concerns under AG ¶ 16(e), for the same reasons discussed above under Guideline D. These activities, if known, would adversely affect his personal, professional, and community standing, particularly in light of his ongoing concealment of much of the information from his family and business associates. Independent of prostitution's legal status in the

foreign countries involved, it is illegal in most jurisdictions of the U.S. He knowingly engaged in it multiple times, despite its evident potential to serve as a basis for exploitation or pressure by the security or intelligence services of those countries while he was performing Government duties there. The Government did not assert any other potentially disqualifying condition under Guideline E.

The only potentially mitigating condition relating to security concerns arising from this ongoing vulnerability to exploitation, manipulation, or duress is AG ¶ 17(e), because the existence of the past conduct remains of concern even if it was long ago and might be considered unlikely to recur. Applicant has not taken any positive steps, such as disclosure to his family and business associates, that could reduce or eliminate the vulnerability. To the contrary, he continues to conceal most of the details from these people to protect his desire for ongoing beneficial relationships. Applicant has not established mitigation of security concerns raised by his personal conduct.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

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

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

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's conduct of potential concern involved engaging in and deceptively concealing multiple extramarital sexual incidents, some arising from relationships formed in performance of his Government duties, and some with prostitutes, over a period of at least five years. He knowingly and voluntarily committed and concealed each of these acts in violation of obligations to his wife and the U.S. Government. There is no evidence of illicit sexual conduct during the last ten years, but Applicant's concealment of most details of his actions from his family and business colleagues is ongoing. The only evidence of rehabilitation or permanent behavioral change concerning the sexual behavior is Applicant's testimony and statement of intent to reform. The persuasiveness of his statements is weakened by his

admission that he resumed extramarital sexual relations with his most recent mistress during two visits to her country that he made after telling his wife about her and promising to be faithful in the future. Even should no further illicit sexual behavior take place, Applicant's ongoing concealment of many of these events from family and colleagues establishes continuing potential for pressure, coercion, exploitation, or duress.

Overall, the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from sexual behavior and personal conduct considerations.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

DAVID M. WHITE
Administrative Judge