



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



In the matter of: )  
)  
) ISCR Case No. 12-06311  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Robert J. Kilmartin, Esq., Department Counsel  
For Applicant: Kenneth M. Roberts, Esq.

05/13/2015

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the sexual behavior and personal conduct security concerns. Eligibility for access to classified information is granted.

**Statement of the Case**

On October 3, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D (sexual behavior) and E (personal conduct). The action was taken under Executive Order (EO) 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.

Applicant responded to the SOR on October 23, 2014, and requested a hearing before an administrative judge. The case was assigned to me on February 27, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 4, 2015, scheduling the hearing for March 31, 2015. The hearing was convened as scheduled. Government Exhibits (GE) 1 and 2 were admitted in evidence without

objection. Applicant testified, called three witnesses, and submitted Applicant's Exhibits (AE) A through O, which were admitted without objection. Applicant's closing brief is marked Hearing Exhibit (HE) I. DOHA received the hearing transcript (Tr.) on April 7, 2015.

### **Findings of Fact**

Applicant is a 51-year-old employee of a defense contractor. He has worked for his current employer since 2012. He served in the U.S. military from 1987 until he retired in 2011. He seeks to retain his security clearance, which he has held for more than 25 years. He has a bachelor's degree. He is married without children.<sup>1</sup>

Applicant attended college in the early to mid-1980s. His longtime friend, who was also his college roommate, met and married a woman after college. The friend and his wife lived near Applicant's home. Applicant met his friend's wife while she and his friend were dating. Applicant, his friend, and his friend's wife spent a lot of time together. Unbeknownst to his friend, Applicant and his friend's wife began having an affair in about 1988 or 1989.<sup>2</sup>

Applicant and his friend's wife had sexual relations when Applicant went home on leave from the military, which amounted to about once or twice a year. They also had sexual-related communications by phone and the Internet after that technology became prevalent. The affair continued after Applicant married in 1991, and then off and on for more than 20 years.<sup>3</sup>

Applicant's friend and his wife moved to a distant state for about five to seven years. Applicant never saw her during this period, but the affair resumed when she and her husband moved back to Applicant's home state.<sup>4</sup>

In 2011, the woman moved temporarily for work to the state where Applicant has lived, except for overseas deployments, since 2005. Her husband remained in his home state.<sup>5</sup>

Applicant's friend and Applicant's wife did not know about the affair when it was going on, nor did anyone in the military. Applicant did not think he was required to report it. He was aware that adultery was a crime under the Uniform Code of Military Justice (UCMJ), and he could have been subjected to disciplinary action.<sup>6</sup>

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<sup>1</sup> Tr. at 37, 45, 57, 64, 71-72; GE 1, 2; AE A, D, O.

<sup>2</sup> Tr. at 56, 64-65, 78; Applicant's response to SOR; GE 1.

<sup>3</sup> Tr. at 37, 64-65, 88; Applicant's response to SOR; GE 2.

<sup>4</sup> Tr. at 66; GE 2.

<sup>5</sup> Tr. at 66, 77-78; GE 1, 2.

<sup>6</sup> Tr. at 43, 80-82, 88-89; GE 2.

Applicant submitted a Questionnaire for National Security Positions (SF 86) in January 2012. He was applying for an upgraded clearance to work in a sensitive area, and he felt that he should divulge his affair. There is no specific question that required him to reveal the affair, so he discussed it under Additional Comments. Applicant also discussed the affair during his background interview in March 2012. He told the investigator that he intended to continue with the affair.<sup>7</sup>

Applicant's friend is aware of the affair. He discussed it with Applicant's parents and siblings. He called Applicant at one point and asked him if he was having an affair with his wife, but Applicant lied and said he was not.<sup>8</sup>

Applicant and his friend's wife ended the affair in 2013. Applicant has not seen or talked to her in about two years. He believes that she is still married and living in their home state.<sup>9</sup>

Applicant told his wife about the affair in October 2014. His wife testified that it was difficult, but they are still together and working through their problems. Applicant denied having any other affairs.<sup>10</sup>

Applicant deployed in support of Operations Desert Shield, Iraqi Freedom, and Enduring Freedom. Three witnesses testified, and Applicant submitted several letters attesting to his excellent duty and job performance, dedication, work ethic, honesty, dependability, reliability, trustworthiness, patriotism, and integrity.<sup>11</sup>

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all

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<sup>7</sup> Tr. at 67-71, 82-87; GE 1, 2.

<sup>8</sup> Tr. at 70-71, 85, 91.

<sup>9</sup> Tr. at 67-71, 76; Applicant's response to SOR.

<sup>10</sup> Tr. at 40-44, 48, 81, 9; AE O.

<sup>11</sup> Tr. at 16-50; AE A, D-O.

available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.”

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.” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

The security concern for sexual behavior is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which can 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. The following disqualifying conditions are potentially applicable:

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

(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.

Applicant, a married man, engaged in an extramarital affair with his friend's wife over the course of more than 20 years. His conduct could have subjected him to disciplinary action under the UCMJ. All of the above disqualifying conditions have been established.

Conditions that could mitigate sexual behavior security concerns are provided under AG ¶ 14. The following are potentially applicable:

(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 ended the affair in 2013. He divulged the affair on his SF 86 even though no specific question required that response. He informed his wife. It was difficult for his wife, but they are still together and working through their problems. I find that the conduct is unlikely to recur; it no longer serves as a basis for coercion, exploitation, or duress; and it does not cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 14(b), 14(c), and 14(d) are applicable.

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

The security concern for personal conduct 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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; and

(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.

Applicant's extramarital affair showed questionable judgment. It also created a vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(c) and 16(e) are applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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; and

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

Under the same rationale discussed above for sexual behavior, I find that the conduct is unlikely to recur; it does not cast doubt on Applicant's current reliability, trustworthiness, and good judgment; and it no longer serves as a basis for coercion, exploitation, or duress. AG ¶¶ 17(c), 17(d), and 17(e) are applicable.

### **Whole-Person Concept**

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

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to

which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines D and E in my whole-person analysis.

I considered Applicant's favorable character evidence and honorable military service, particularly his deployments in support of his national defense. Applicant marred an otherwise outstanding career with decades of infidelity and poor judgment. However, the DOD is aware of the affair because Applicant disclosed it on his SF 86; the affair is over; and the key people in Applicant's life are aware of it.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the sexual behavior and personal conduct security concerns.

### **Formal Findings**

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

Paragraph 1, Guideline D:	For Applicant
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraph 2.a:	For Applicant

### **Conclusion**

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

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Edward W. Loughran  
Administrative Judge