



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



In the matter of:)
)
) ISCR Case No. 13-00911
)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin Howry, Esquire, Department Counsel
For Applicant: Joseph Testan, Esquire

February 21, 2014

Decision

CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on August 17, 2012. On September 30, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E 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 adjudicative guidelines (AG), effective within the Department of Defense after September 1, 2006.

Applicant acknowledged receipt of the SOR on October 14, 2013. He answered the SOR in writing October 18, 2013, and requested a hearing before an Administrative Judge. DOHA received the request on October 23, 2013, and I received the case assignment on December 2, 2013. DOHA issued a notice of hearing on December 9, 2013, and I convened the hearing as scheduled on January 3, 2014. The Government offered Exhibits (GXs) 1 through 3, which were received without objection. Applicant

testified on his own behalf, as did three witnesses, and submitted Exhibits (AppXs) A through E, which were received without objection. DOHA received the transcript of the hearing (TR) on January 13, 2014. I granted Applicant's request to keep the record open until February 3, 2014, to submit additional matters. Nothing further was submitted on Applicant's behalf. The record closed on February 3, 2014. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in Subparagraph 1.a. of the SOR, with explanation. He denied the factual allegations in Subparagraphs 1.b. and 1.c. of the SOR.

Guideline E - Personal Conduct

Applicant is a 68 year old Ph.D., who works in the aerospace sector of the defense industry. (TR at page 4 line 9 to page 5 line 1.)

1.a. It is alleged that Applicant has "solicited prostitutes" in the past. The following colloquy between Applicant and his counsel encapsulates his admitted solicitations:

Q. How many times have you been married?

A. Three times.

Q. Okay. When were you first married, if you recall?

A. Around 1968. 1968.

Q. And do you remember when that first marriage ended?

A. It ended a year later when my wife died in a car accident.

Q. And that was about 1969?

A. Yes.

Q. After her death, did you begin to visit **legal** brothels in Nevada? (Emphasis supplied.)

A. Yes I did.

Q. Did you continue to do so for awhile?

A. Yes I did.

Q. Do you recall how often?

A. Probably up until - - to about 10 or 15 years ago.

Q. And how often would you go to these brothels in Nevada?

A. Once every three or five years.

Q. You also visited a couple of prostitutes while on trips to - - I think it was - - Amsterdam?

A. Amsterdam. Yes.

Q. Okay. **Was your activity legal?** (Emphasis supplied.)

A. Yes, it was.

Q. Okay. **Have you ever visited a prostitute when the activity was illegal?** (Emphasis supplied.)

A. No. (TR at page 65 line 12 to page 66 line 20.)

Applicant avers credibly that he has no intention of soliciting the services of prostitutes in the future (TR at page 66 line 21 to page 67 line 6.) His credibility is attested to by those who know Applicant in the work place. (TR at page 38 line 8 to page 50 line 18, and at page 52 line 8 to page 61 line 22.) Furthermore, his current spouse is aware of his past solicitations, as he told her "Over ten years ago," which is evidenced by her written statement. (AppX B.)

Applicant also admits going to "massage parlors." In this regard, the following is the colloquy between Applicant and his counsel:

Q. In your life, how many times would you say you visited a massage parlor?

A. Maybe seven to 10 times.

Q. During any of these visits to a massage parlor, did things of a sexual nature occur on any occasion?

A. Yes, on two occasions.

Q. On two occasions, was there - - were you provided sexual gratification by the masseuse?

A. Yes. **It was very unexpected.** (Emphasis supplied.)

Q. So, when you went there, you went for a massage?

A. I went for a massage.

Q. Did you ask for anything beyond that?

A. No.

Q. And this extra activity occurred on two times out of the seven to 10 times you went to a massage parlor?

A. Yes.

Q. When was the last time you went to a massage parlor?

A. About five or six years ago.

Q. As you sit here today, do you have any intention at all to ever visit a massage parlor again?

A. No, I don't. (TR at page 67 line 10 to page 68 line 12.)

Applicant further admits that the last time he "got sexual gratification" at a massage parlor "was about five or six years ago." (TR at page 86 lines 18~24.) I consider the fact that Applicant received sexual gratification twice at massage parlors to be questionable judgment as he could have stopped the conduct.

1.b. It is alleged that Applicant, "While in the workplace, . . . used a Government computer to research and view strip club websites and locations." Applicant denies this allegation as he used his company computer; and not a Government computer, to research and view these websites. (TR at page 69 line 8 to page 70 line 9.) Furthermore, his Project Manager testified, "There are no Government computers in . . . [Applicant's] office," and that it is not a violation of company policy to research and view such websites. (TR at page 58 line 9 to page 61 line 15.) Applicant's first line supervisor also testified that it was not a violation of company policy to research and view such websites on a company computer. (TR at page 40 lines 8~12.) I find that Applicant's actions here do not involve questionable judgment.

1.c. It is alleged that Applicant wilfully falsified his August 2012 e-QIP when he answered "No" to "**Section 22 - Police Record**" as to "EVER" being "charged with an offense involving alcohol." (GX 2 at page 26, emphasis in original.) In November of 2000, Applicant was arrested for and subsequently charged with "Count (1) Under the Influence Alcohol in Vehicle, Count (2) .08% More Alcohol Drive Vehicle." (GX 1.)

These charges were subsequently dismissed, and he pled nolo contendere to “Reckless Driving.” (*Id.*)

Applicant testified, credibly, that he misread the question and thought that he only had to go back “**seven (7) years,**” the questioned time period that is asked four times in the “**Section 22 - Police Record**” Section, immediately preceding the Section at issue. (TR at page 70 line 10 to page 75 line 20.) Applicant also avers that he disclosed this “offense involving alcohol” on his two previous e-QIPs. (*Id.*) [He has formally requested copies of these e-QIPs from the Government (AppX A), but the Government has yet to respond with the requested e-QIPs. Department Counsel does not have copies of the requested e-QIPs.]

I find no wilful falsification here. It is clear that Applicant did report his transgression to the Government. This conclusion is supported by the testimony of the co-worker, who was in the car that Applicant was driving in November of the 2000 incident; and that testimony of his Project Manager, who was made aware of this incident when it occurred. (TR at page 29 line 8 to page 34 line 24, and at page 57 lines 2~22.

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 commonsense decision. According to AG Paragraph 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 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. Paragraph 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of 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 Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph E3.1.15, the Applicant is responsible for presenting “witnesses and other evidence to rebut,

explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining 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 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.

Section 7 of Executive Order 10865 provides that 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 E - Personal Conduct

The security concern for Personal Conduct is set out in AG Paragraph 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.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 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: (3) a pattern of dishonesty or rule violations.”* Here, Applicant received illegal sexual gratification on two occasions at massage parlors. This is countered, however, by Subparagraph 17(c) as *“so much time has passed . . . that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgement.”* The Applicant no longer visits massage parlors, and the unsolicited sexual gratification occurred “five or six years ago.”

Subparagraph 16(e) is arguably also applicable where *“personal conduct, or concealment of information about one’s conduct, 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. . . ." Although his actions were legal, Applicant did solicit the services of prostitutes "10 or 15 years ago." This is countered, however, by Subparagraph 17(e) as Applicant "*has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.*" Applicant's wife is aware of his transgressions and has forgiven him. (AppX B.)

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. Under AG Paragraph 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole-person concept. The Administrative Judge should also consider the nine adjudicative process factors listed at AG Paragraph 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 considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. Applicant has the unqualified support of those who know him in the work place. (TR at page 38 line 8 to page 61 line 22, and AppX C.) The record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his Personal Conduct.

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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Richard A. Cefola
Administrative Judge