



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



In the matter of:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-06329

**Appearances**

For Government: Gregg Cervi, Esquire, Department Counsel

For Applicant: *Pro Se*

October 30, 2009

**Decision**

LYNCH, Noreen, Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86) on May 18, 2006. On February 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E and K for personal conduct and handling protected information. DOHA acted 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, answered the allegations, and requested a hearing before an administrative judge. I received the case assignment on July 2, 2009. DOHA issued a notice of hearing on July 27, 2009, and I convened the hearing as scheduled on August 27, 2009. The Government offered Exhibits (GE 1-4), which were admitted without objection. Applicant testified on his own behalf and

presented Exhibit (AE) A which was admitted into the record without objection. DOHA received the transcript on September 3, 2009. Based upon a review of the record, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Procedural and Evidentiary Rulings**

Department Counsel moved to amend the SOR at the hearing by adding allegation ¶ 1.g under Guideline E: ¶ 1.g You falsified material facts to an authorized investigator during a security clearance interview on July 28, 2006 by admitting that you engaged in sex with prostitutes, a statement that was knowingly false. Applicant did not object. I granted the motion to amend.

### **Findings of Fact**

Applicant denied the factual allegations in the SOR except for SOR ¶ 1.d and 1.f

Applicant is a 46-year-old employee of a defense contractor. He graduated from high school and obtained an undergraduate degree. He is married and has two grown children (Tr. 71). He has worked in a professional capacity in the technology field for his entire career. He has been with his current employer since 1998 (Tr. 72). He has held a security clearance since 2006 (Tr. 73).

### **Security Violation**

In 2006, Applicant was on his first assignment in a foreign country. He worked with another U.S. contractor in a U.S. Embassy. In May 2006, approximately three months into his assignment, he came to work and found a "pink slip" on his desk (Tr. 59). The slip had the words "security violation" on it (Tr. 60). Applicant had never seen such a notice before that day. He spoke to someone in the regional security office (RSO) to determine its import. Applicant explained at the hearing that he was told to sign for it. He claims that he had no idea at that time what the significance was of receiving and signing for the pink slip (Tr. 79).

Approximately one week later, Applicant's co-worker, who shared his cubicle, learned that Applicant had signed for the security violation. Applicant learned from his co-worker that his co-worker had not secured the hard drive at the end of a business day which was a security violation. He told Applicant that he already had received other security violations and that this was another violation, albeit a minor one (Tr. 65). Applicant's co-worker told Applicant that he did not want to tell the authorities that it was his fault. Applicant agreed that he would take responsibility for the security violation. Applicant claimed that he believed since he was a new employee and that this co-worker was senior to him, Applicant would not report the co-worker's violation (Tr. 81).

The embassy official counseled Applicant for the security violation during an interview in 2006. Applicant claimed that the official already knew from his co-worker

that Applicant was not the person who had neglected to return the hard drive to a secure place. Applicant received no other disciplinary action (Tr. 83).

Applicant received training in handling secure, classified information prior to the May 2006 incident. He acknowledged that he was familiar with the reporting requirement for contractors concerning any adverse information about other employees (GE 4).

In July 2006, a Department of State investigator interviewed Applicant at the embassy concerning the May 2006 incident. Applicant told the investigator that he was responsible for a security violation at his post in May. According to the report of the investigation (ROI), Applicant explained that he really was not responsible for the violation. He elaborated that he accepted responsibility for the violation on behalf of a co-worker. He explained that the co-worker had several previous security violations and was concerned that this would affect his employment. The investigator made a note in the ROI that Applicant lied to the RSO official by accepting responsibility for the violation when he learned that it was his co-worker's fault (GE 3).

## **Sexual Relationship**

During the same July 2006 RSO investigation, Applicant was questioned about any sexual relationships with prostitutes while in country. Applicant explained that the RSO closed the door of his office and Applicant was told anything he would now report was "off the record" (Tr. 16). Applicant claimed he told the RSO that he told him that he went out with a prostitute because he believed the RSO thought that Applicant was gay (Tr. 17). Applicant further explained that he did this to "fit in." Applicant claimed that he tried to please people and give answers that he thought they wanted (Tr. 17).

In 2006, Applicant attended a party with Embassy co-workers and foreign nationals at the home of a co-worker. Applicant believes that he had four or five mixed drinks. He reported being sleepy and going into one of the bedrooms to lie down. Applicant "felt someone walk into the room." He stated that the person was female and got into the bed with him. He did not remember whether they had sexual intercourse (GE 2). When he awoke the next morning, she was gone. He reported that he did not solicit the female and he did not provide any payment to her for anything (GE 2).

In August 2008, Applicant affirmed to an Office of Personnel Management (OPM) investigator that he never had sexual relationships with any foreign national females or any females while in country (GE 2).

In October 2008, Applicant responded to DOHA interrogatories. He reported that he admitted the security violation in May 2006, because he believed he was the last person to leave the office the evening before, and that he neglected to retrieve the hard drive from the computer and secure it (GE 3). This was a lie.

At the hearing, Applicant provided a slightly different explanation about the May 2006 security violation incident (Tr. 14). He claimed that he presented information “off the record” to the RSO. He also claimed that contractors were not in favor at the embassy (Tr. 15). Applicant retold events in a different sequence concerning his knowledge of the security violation and the pink slip. His explanations were confusing and self-serving at the hearing (Tr. 16). He emphasized that he remained at the embassy for at least a few months after the May 2006 incident. He also served in another country on assignment after that. However, Applicant admitted that he misled the RSO during the 2006 investigation in the Embassy (Tr. 87).

Regarding the prostitution allegations, Applicant explained at the hearing that he did not recall whether a male or female was in the bed with him at the party in his co-worker’s home (Tr. 44). This account differs from his statement to the RSO in 2006. He was adamant at the hearing that regardless, it was not a prostitute (Tr. 45). At the hearing, he maintained that he had no idea whether he engaged in sexual intercourse that evening. Applicant said that he had told his wife about the incident at the party (Tr. 52). However, he reported in one of his interviews, that his spouse was not aware of that information.

## **Character References**

Applicant’s supervisor recommended that Applicant retain his security clearance. He applauded his diligence, ability and technical accomplishments (AE A). His supervisor since 1998 describes Applicant as one of his best technicians who consistently completes projects quickly and accurately. He possesses a professional attitude and bearing on and off duty. He is trustworthy in all endeavors. Applicant presented 25 letters of recommendation from colleagues (AE A).

The embassy official who counseled Applicant in May 2006 describes him as a highly motivated individual who took great pride in his work during office hours and as an American representative working overseas. He further described Applicant as a dedicated professional and a valuable asset (AE A).

## **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 required 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 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 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.” 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 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 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 (EO) 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**

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.

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

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

(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

(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;

Applicant admitted to having sex with prostitutes in a foreign country, and then said he lied to please the investigator. He changed his story about being in a bed with an unknown male or female in country. He said he did not remember. He admitted that he provided false material information to the RSO in country in 2006, when he accepted responsibility for a security violation. He gave another description of the security violation incident in a 2008 sworn affidavit. He lied to DOHA when he said he was responsible for the security violation. He did not report the security violation of his co-worker. A person may wish to conceal this conduct, as it adversely affects a person's professional and community standing.

The mitigating condition outline in AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress" partially applies because he disclosed all of his misconduct to security officials.

## **Guideline K, Handling Protected Information**

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."

AG ¶ 34 describes conditions that could raise a security concern and may be disqualifying:

(g) any failure to comply with rules for the protection of classified or other sensitive information; and

Applicant acknowledged that he falsely took responsibility for his co-worker's security violation in 2006. He lied to an investigator about the incident. He did not disclose his co-worker's security violation until 2008 even though he knew that he had a duty to report the violation. Disqualifying conditions AG ¶¶ 34(g) applies to the security violation issue.

AG ¶ 35 provides conditions that could mitigate security concerns:

(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;

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

(c) the security violations were due to improper or inadequate training.

After considering the mitigating conditions, I find that none of them apply to this case. Applicant was not credible at the hearing. His various descriptions of the security violation and his involvement with a prostitute in a foreign country while serving as a contractor show he is not trustworthy. Although Applicant had never had any difficulty prior to this time, his admissions of lying at various times to investigators and his somewhat incredible testimony regarding a male or female who slept next to him in a room at a party casts grave doubt on his judgment and reliability.

### **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 and conclude that the mitigating conditions are not sufficient to overcome the government's case. Applicant is a mature, well-educated professional. He served in a professional capacity for his entire career. He has held an interim clearance. He is highly regarded by his employer and colleagues. He is a man who has provided for his family. He loves this country. He wants to continue with his employment.

Applicant's training provided him with the requisite knowledge concerning reporting security violations. While he may have been confused at the beginning of the security investigation by the 2006 pink slip, he accepted responsibility for a violation that he did not commit. He lied to investigators. He provided inconsistent statements several times. He admits that he wanted to please people and did not tell the truth. He did not report that a co-worker was the cause of the security violation until 2008. His comments at the hearing were less than candid. He did not demonstrate good judgment. I have doubts about his reliability and trustworthiness.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility, judgment, and suitability for a security clearance. For all the reasons discussed above, I conclude Applicant has not mitigated the security concerns arising from his personal conduct and handling protected information.

### **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:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant



Paragraph 2, Guideline K

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 national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Noreen A. Lynch  
Administrative Judge