



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



In the matter of:	)	
	)	
	)	ISCR Case No. 07-09301
SSN:	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Eric H. Borgstrom, Esquire, Department Counsel  
For Applicant: Pro Se

May 20, 2008

**Decision**

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HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information must be denied.

Applicant submitted his Security Clearance Application (SF 86), on March 16, 2006. On December 17, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines D, E and J 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 December 27, 2007. He submitted a notarized, written response to the SOR allegations on January 15, 2008, and requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a File of Relevant Material (FORM) and mailed Applicant with a complete copy on March 6, 2008. Applicant received the FORM on March 12, 2008. He had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He submitted a written response, but no additional evidence, dated April 4, 2008. DOHA assigned this case to me on May 9, 2008. The government submitted nine exhibits, which have been marked as Items 1-9 and admitted into the record.

### **Findings of Fact**

In his Answer to the SOR, dated January 15, 2008, Applicant admitted the allegations in ¶¶ 1.a-1.f, and 2.a-2.e of the SOR, with explanations. He denied the intentional falsification in ¶ 1.g and denied ¶ 3.a of the SOR. He completed his most recent security clearance application on March 16, 2006.<sup>1</sup>

Applicant is a 37-year-old senior information security engineer. He works for a Department of Defense contractor, a position he has held for over three years. He enlisted in the United States Navy in 1989 and received an honorable discharge in 2001.<sup>2</sup>

Applicant married in 1992 and divorced in 2005. He and his wife had no children, but she had two daughters from a previous marriage. His step-daughters are 28 and 25. He graduated from college in 2001 with a Bachelor of Science degree.<sup>3</sup>

While in the Navy and on overseas assignment in 1990 and 1991, Applicant sought sexual contact with Asian locals when his ship was in port. He paid foreign prostitutes for services, including fellatio, but does not remember if the activities took place in public or private. He has not hired prostitutes since 1991.<sup>4</sup>

In 1999, in a store parking lot, his wife aroused him then left the car. He also left the car and walked to a nearby park where he masturbated, in what he described as a secluded area. That same year, he and a friend went to a strip club. During the evening, his friend paid a woman employee for a lap dance. At the end of the evening, the

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<sup>1</sup>Item 2 (Applicant's response to the SOR, dated January 15, 2006) at 1-3; Item 3 (Applicant's Security Clearance Application).

<sup>2</sup>Item 3, *supra* note 1, at 6,12-13, 21.

<sup>3</sup>*Id.* at 11-12, 17-19; Item 4 (Applicant's Security Clearance Application, dated July 3, 2002) at 5.

<sup>4</sup>Item 6 (Applicant's signed, sworn statement, dated May 17, 2007) at 5; Item 8 (National Security Administration documents, January 2005) at 3.

woman followed them to the car, requesting additional sexual activity. He rejected her request for additional sexual activity, but at her request, masturbated in the parking lot for her. In 2002, while in his vehicle in a non-populated location of a public parking area, Applicant and his wife engaged in sexually stimulating conduct with each other. No one observed them. Applicant voluntarily acknowledged these three incidents.<sup>5</sup>

Applicant started work with the National Security Agency (NSA) in a temporary position in October 2002. On the morning of June 14, 2004, Applicant engaged in a telephone conversation with a woman with whom he had developed a friendly relationship over the internet. The content of the conversation became sexual and he began to masturbate in his car. He had parked his car in the NSA employee parking lot. A woman observed him and told NSA security, who investigated. NSA security officers also observed Applicant's conduct. They informed him that his conduct violated state law, but did not arrest him. The next day, June 15, 2004, he spoke with a NSA security investigator. He told the investigator that he was speaking with his wife on the telephone while in his car. He signed a written and sworn statement to this effect on the same day.<sup>6</sup>

The next day, June 16, 2004, Applicant contacted the investigator and advised that he had not been truthful the day before and admitted that he was talking on the telephone with a woman other than his wife. On this day, he signed a sworn statement acknowledging that he intentionally and deliberately falsified the statement given the previous day. NSA required him to be evaluated by a psychiatrist. The psychiatrist rendered an opinion, which is not of record.<sup>7</sup>

On August 30, 2004, Applicant met with NSA Human Resources staff. He resigned his position after being offered a choice of resigning or being fired. He believed that if he resigned, his security clearance remained in effect, but has since learned his belief was incorrect. Three months later, in November 2004, another contractor sponsored Applicant for a NSA Sensitive Compartmented Information (SCI) clearance. NSA issued a clearance decision, dated January 15, 2005, denying Applicant's request for a SCI security clearance because of the above sexual conduct and his falsification. Relying on this decision, the Defense Security Service denied him a security clearance on March 2, 2006.<sup>8</sup>

Applicant completed his security clearance application (SF 86) on March 17 2006. He answered "no" to the following question:

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<sup>5</sup>Item 6, *supra* note 4, at 4; Item 8, *supra* note 4, at 2.

<sup>6</sup>Item 3, *supra* note 1, at 14-15; Item 6, *supra* note 4, at 1-3; Item 9 (NSA documents - police report of incident) at 4-5, 11-12.

<sup>7</sup>Item 6, *supra* note 4, at 4-5; Item 9, *supra* note 6, at 14-15.

<sup>8</sup>Item 7 (Letter, dated March 2, 2006); Item 8, *supra* note 4.

## Section 22: Your Employment Record

Answer the following question.

Has any of the following happened to you in the last seven years?

1. Fired from a job.
2. Quit a job after being told you'd be fired.
3. Left a job by mutual agreement following allegations of misconduct.
4. Left a job by mutual agreement following allegations of unsatisfactory performance.
5. Left a job for other reasons under unfavorable circumstances.

Yes: ( ) No: ( )

Although Applicant left NSA 18 months earlier after being asked to resign, he answered "no" to this question. In his response, he denies deliberately falsifying his answers. He states that he did not read the question carefully. Rather, because he was being pressured by his office to hurry, he read part one and then answered the question. In completing his questionnaire, Applicant provided detailed answers to other questions, particularly those questions related to his finances.<sup>9</sup>

### 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(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

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<sup>9</sup>Item 2, *supra* note 1, at 3; Item 3, *supra* note 1, at 12-17, 23-24, 27-27.

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 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**

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 conduct will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(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.

Applicant provided false information to the NSA investigators on June 15, 2004 when questioned about his conduct in the parking lot on June 14, 2004. Unless he has mitigated this conduct, his clearance would be denied.

AG ¶ 16 describes conditions that could raise a security concern and the following conditions may be disqualifying in this case:

(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;

(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, and

(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.<sup>10</sup>

The government established that Applicant omitted material facts from his SF-86 when he answered “no” to Question 22 about his employment record. This information is material to the evaluation of Applicant’s trustworthiness to hold a security clearance and to his honesty. For this guideline to apply, Applicant’s omission must be deliberate. He denies, however, that he deliberately falsified his answer to this question. When a falsification allegation is controverted, the government has the burden of proving it.

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<sup>10</sup>The remaining disqualifying conditions, AG ¶¶ 16(c), 16(f), and 16(g) are not raised in this case.

Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.<sup>11</sup> For DC ¶ 16 (a) to apply, the government must establish that Applicant's omission, concealment or falsification in his answer was deliberate.

Applicant knew that he had been asked to resign from his NSA job and that he resigned under pressure. His statement that he did not read the question fully is not credible because the question format forces him to review all the criteria he should consider when answering the question. In addition, Applicant, as an engineer, is a person who is trained in detail work as shown by the detailed answers to other questions. His answers to other questions indicate he took his time to make sure he provided the information requested. The government has established its case as to allegation 1.g.

Concerning his sexual conduct, the record shows a pattern of conduct in public places. While Applicant has not been arrested for his conduct and states he is discreet, his decision to perform sexual acts in public places raises concerns about his judgment, lack of candor, and unwillingness to follow the public rules on such conduct. Applicant's conduct and his failure to be forthright about it makes him vulnerable to exploitation, pressure or coercion. DC ¶¶ 16 (d)(1), (d)(3), and (e)(1) apply.

I have considered the mitigating conditions under AG ¶ 17 which provides that the following conditions could mitigate the government's 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

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<sup>11</sup> See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

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 voluntarily reported his false statement to the NSA investigator one day later. By so doing, he made a good faith effort to report his conduct prior to being confronted with the information. He has mitigated the government's concerns about his conduct alleged in SOR ¶¶ 1.b and 1.c. However, none of the remaining SOR allegations and related security concerns are mitigated.

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

AG ¶ 12 expresses the security concern under this guideline as:

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.

Appellant acknowledges that years ago he paid for prostitutes while overseas. He also acknowledges several incidents of masturbating in public, sexual conduct which shows a lack of judgment. AG ¶¶ 13 (a), (c), and (d) apply.

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's conduct in 1990 and 1991 while serving in the Navy overseas occurred many years ago and has not occurred since. Thus, AG ¶ 14 (b) applies to allegation 2.b of the SOR. Concerning Applicant's more recent masturbation conduct, he has not mitigated the government's concerns. His actions reflect a pattern of public conduct over a period of time. His decisions to satisfy his sexual needs in public places reflect poor judgment and can serve as a basis for coercion or exploitation. He has not mitigated the government's security concerns under Guideline D.

## **Guideline J, Criminal Conduct**

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations."

Under AG ¶ 31, the following disqualifying condition could raise a security concern in this case:

c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant lied on his SF-86, which is a crime under 18 U.S.C. ¶ 1001. Thus, the government has established its case under this guideline. I have considered the

applicable mitigating conditions under AG ¶ 32 and conclude that none of them apply. Applicant has not mitigated the government's concerns.

### **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 common sense 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 sexual conduct problems first began when he was a young man in the Navy. (See AG ¶ 2(a)(4).) Although he no longer solicits prostitutes, he continues to occasionally satisfy his sexual desires in public places, which shows a serious lack of judgment. He has presented no evidence that he has changed his behavior, that he understands the negative implications of this conduct. As he ages, he has shown no improvement in his judgment about his conduct. In addition, he deliberately failed to acknowledge that NSA asked him to resign his position or be fired. Applicant's recent decisions indicate very poor judgment. These decisions have a potential for pressure, coercion, exploitation, or duress and could occur again. His conduct raises significant security concerns

Overall, the record evidence leaves me with questions or 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 his financial 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:	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 D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.e:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 1.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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MARY E. HENRY  
Administrative Judge