



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



In the matter of: )  
 )  
----- ) ISCR Case No. 07-13395  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Nichole L. Noel, Esquire, Department Counsel  
For Applicant: *Pro Se*

April 29, 2009

**Decision**

ABLARD, Charles D., Administrative Judge:

Applicant failed to mitigate security concerns regarding Sexual Behavior (Guideline D), and Personal Conduct (Guideline E). Clearance is denied.

**Statement of the Case**

On June 2, 2004, Applicant submitted a Security Clearance Application (SF 86). On April 15, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised. The SOR alleges security concerns under Guidelines D and E.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations in a sworn statement signed on April 28, 2008, and elected to have his case decided on the written record in lieu of a hearing. Documents were attached to the answer with explanatory information. A complete copy of the file of relevant material (FORM), dated January 16, 2009, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant provided no additional material. The case was assigned to me on March 23, 2009.

### **Findings of Fact**

Applicant admitted all of the factual allegations of the SOR in his answer regarding sexual behavior, but stated that he no longer engaged in the activity cited in the SOR and has not done so since 2006. After a complete and thorough review of the evidence of record, I make the following findings of fact:

Applicant is a 50-year-old employee of a defense contractor. He has either been self-employed or worked for two defense contractors since 1987. He has held a security clearance at several levels since 1998. In 2004, when he held a top secret clearance, he applied to the National Security Agency for NSA access for Sensitive Compartmented Information (SCI). His application was denied in June 2005 (Item 9) on the same grounds that are alleged in this matter. The denial occurred after a polygraph test was administered to him and he admitted the conduct that is alleged here and in the NSA application.

Since 1990 Applicant has used the services of prostitutes three or four times a year until early 2006. He obtained their services through local massage parlors while living at home. When he traveled on business trips he found prostitutes through newspaper ads. He regularly used the services while holding a security clearance and during the course of the NSA investigation in 2004 (Item 11). He continued to use their services after being denied SCI clearance. He was never arrested for any of the conduct.

Applicant has been married for 27 years and has two grown sons. His wife is unaware of the conduct that led to this proceeding. He would be embarrassed if his wife and others found out. However, he knows he could not be blackmailed. In 2006 he developed an infection that he feared might be sexually transmitted. He then decided his past activity with prostitutes was too risky to continue. Also, his age caused him to re-evaluate his conduct since his interest in sex was declining (Item 5).

### **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 the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence," demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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* Executive Order 12968 (Aug. 2, 1995), Section 3.

## **Analysis**

### **Guideline D Sexual Behavior**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors and conditions above, I conclude the following with respect to all allegations set forth in the SOR:

AG ¶ 12 expresses the security concern as follows:

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.

Over a period of 15 years, Applicant engaged in conduct that was criminal in nature and made himself vulnerable to undue influence or coercion that might cause him to act in a manner inconsistent with the national security interests of the United States. Thus, I conclude that a prima facie case was established by the government.

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.

While the conduct started many years ago it continued until at least three years ago. During that period, Applicant held a security clearance and his actions placed him in a vulnerable position. This was risk-taking that a person with a security clearance should not have done knowing that he was placing himself in a vulnerable situation. While the actions may have been private in the sense that others were not knowledgeable about them, they were indiscreet acts. On each occasion, he was exposed to possible criminal repercussions. None of the mitigating conditions are applicable.

### **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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. With respect to the personal conduct concerns involving Applicant's sexual behavior, the pertinent disqualifying conditions are AG ¶¶16 (e)(1) and (g) which state:

(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; and

(g) association with persons involved in criminal activity.

The conduct of Applicant with prostitutes over a 15 year period clearly establishes the basis of a security concern under personal conduct. This conduct was also recognized by the NSA in the cited proceeding to deny him SCI clearance.

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.

While the involvement in the criminal activity may have ceased in 2006, the past activities continue to be a problem for exploitation and do not justify application of AG ¶ 17(g). All other mitigating conditions are inapplicable to the facts in this matter.

### **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) 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.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to sexual behavior and personal conduct allegations.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), a careful consideration of the whole person factors and supporting evidence, application of the pertinent factors under the adjudicative process, and interpretation of my responsibilities under the guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

### **Formal Findings**

Formal findings 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: 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 E: AGAINST APPLICANT

Subparagraph 1.a.:Against Applicant  
Subparagraph 1.b.:Against Applicant

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is denied.

Charles D. Ablard  
Administrative Judge