



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



In the matter of:)
)
-----) ISCR Case No. 08-00157
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jennifer Goldstein, Esquire, Department Counsel
For Applicant: *Pro Se*

November 10, 2008

Decision

WESLEY, Roger C., Administrative Judge:

Statement of Case

On June 11, 2008, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, and Department of Defense (DoD) Regulation 5200.2-R, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on July 3, 2008 and requested a hearing. The case was assigned to another judge on June 12, 2008, and reassigned to me on September 4, 2008. It was scheduled for hearing on October 6, 2008. A hearing was held on October 6, 2008, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, or deny, Applicant's application for a security clearance. At hearing, the Government's case consisted of six exhibits; Applicant relied on three witnesses (including himself) and four exhibits. The transcript

(R.T.) was received on October 15, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural Rulings

Before the close of the hearing, Department Counsel moved to amend the SOR to correct the date in subparagraph 2.d to read September 1990. For good cause shown, Department Counsel's motion was granted. Applicant admitted the corrected date in his own answer and did not contest the date correction.

Summary of Pleadings

Under Guideline E, Applicant is alleged to have (a) carried on a four-year long extra-marital sexual relationship with an unknown individual to which neither his wife, family, or friends are aware of, (b) refused to provide the name or the contact information of the individual he was having the affair with, and ©) freely admitted that this extra-marital sexual relationship could be used against him if blackmailed.

Under Guideline D, Applicant is alleged to have (i) concealed his sexual affair from his wife, family and friends, (ii) freely admitted that this extra-marital sexual relationship could be used against him if blackmailed, (iii) consumed too much alcohol on several occasions and had sexual relationships with unknown individuals, and (iv) was caught masturbating in a movie booth by local police in September 1999 (corrected to 1990), and issued a citation for committing a lewd act in a public place.

For his answer to the SOR, Applicant admitted each of the allegations with explanations. He claimed he has been monogamous with his wife for the past six months, and his relationship with the other individual was always of a casual nature. He claimed he never discussed work with this individual, and they parted ways amicably. He claimed his wife, family, and friends do not know about his affair, and there is no need to inform them of something that does not exist any more.

In his answer, Applicant claimed he recently made e-mail contact with the individual and obtained permission to disclose his name. He claimed that since he has worked through his own issues, there is no longer any reason to suspect or fear blackmail from this individual any more. He claimed he no longer engages in excessive alcohol consumption or questionable activities any more. And he claimed the 1990 incident was an isolated occurrence before he met his future wife, and he has not received any other citations since he met and married his wife.

Findings of Fact

Applicant is a 45-year-old-executive assistant for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant

are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Applicant married W in 1992 and has two children from his marriage and one step child (R.T., at 58). He served on active duty in the Navy from September 1983 through December 2005 (see exs. 1 and 2), and was honorably discharged in December 2006 with the rank of chief petty officer (R.T., at 57). Between December 2005 and December 2006, Applicant was unemployed (although attached to his Navy command) while waiting for his final navy detachment orders.

In September 1990 (before his marriage to W), Applicant was caught masturbating in a movie booth by local police and was issued a citation for committing a lewd act in a public place (R.T., at 59). The reporting officer wrote in his report that Applicant could be easily observed by any person walking down the aisle, for the booth used by Applicant had no door, curtains or other barrier concealing the entryway (see ex. 5). Applicant pleaded guilty to a misdemeanor and was fined \$330.00, sentenced to three years of summary probation, and ordered to attend an AIDS counseling class (see exs. 4 and 6; R.T., at 59-60). Applicant assures that he made W (who he was cohabiting with at the time) aware of the incident (R.T., at 61). Applicant's assurances are credible on this disclosure issue and are accepted.

Beginning in 2004, while still on active duty, Applicant initiated a four-year extra-marital sexual relationship with a casual male acquaintance he identified as A (see ex. 2; R.T., at 53). Before initiating this affair with A, Applicant had never cheated on his wife. In a June 2007 interview with an OPM investigator, Applicant cautioned that in the event that any of his encounters were recorded, his sexual relationship with this individual (A) could possibly be used against him (ex. 2). However, he had no reason to believe that any of them were recorded (ex. 2). In this interview, he told the OPM investigator that he broke off his relationship with A in May 2007 out of guilt for "cheating on his wife" (ex. 2). He also told the investigator that neither W, his family, nor his friends, had any knowledge of his relationship with A. Noting that the relationship with A had ended, he did not want to provide any contact information and identity of this individual he was seeing out of concern it could hurt his marriage relationship (see ex. 2; R.T., at 65-66).

Since initiating his extra-marital affair with A in 2004, Applicant had an encounter with one other individual (R.T., at 62). He provided no further details of this encounter or how far it went. Although he admitted to past battles with alcohol, and several incidents of questionable behavior, he never provided any specifics. The record is not sufficiently developed on the allegations covered by sub-paragraph 2.c to warrant any adverse inferences on these alcohol-related allegations.

Asked at the hearing, whether he ever disclosed his relationship with A to W or his family, Applicant indicated he had not, and had no intention of doing so now that the relationship has been ended (R.T., at 65). Applicant assures he loves his wife and has a very good monogamous relationship with her. He doesn't want to risk impairment of

this positive marital relationship with W by disclosing his prior affairs with A, who he has not seen since his last encounter in December 2007 (R.T., at 54, 70-72).

In an e-mail interchange with A in September 2007, Applicant asked A a series of questions about their affairs. Responding to a question in the e-mail inquiry about how long he knew Applicant, A said April 2004 to March 2007 (see ex. D).

When questioned further on the date of his break-up with his male partner, he confirmed it was December 2007, and not March 2007, as stated by A (with Applicant's suggesting) in A's e-mail response (see ex. D), or May 2007, as previously claimed by Applicant in his June 2007 interview with an investigator from the Office of Personnel Management (OPM) (R.T., at 70). When pressed at hearing to reconcile the conflicting termination dates he and A provided earlier, he acknowledged concern over appearances of a more recent cut-off (R.T., at 80). Applicant has never disclosed his e-mail to A or his e-mail account to W (R.T., at 71).

After talking with his ex-partner, Applicant is now convinced that this individual would never try to blackmail him (R.T., at 54-55). Considering both the inconsistencies in Applicant's and A's accounts of their last encounters, and Applicant's understandable unwillingness to inform W of his affairs, it is not possible to discount all doubts about the Applicant's potential vulnerability to blackmail at this time.

Applicant's military service records include an excellent fitness evaluation for 2004 (ex. C). His evaluation assigns excellent scores for his expertise, teamwork, and initiative.

Applicant is well regarded by his employer. His direct supervisor describes Applicant as a fine performer (R.T., at 6-10). His program manager rates him as top tier performer (R.T., at 17-19). Applicant's 2008 performance appraisal assigns a solid rating in some categories and an excellent rating in others (ex. A). His rater characterizes him as honest and reliable, with a good attitude, and one who works well with others (see ex. A). His rater also praises Applicant for his exceptional communication skills and outstanding team work (ex. A). Applicant is credited with completing an acquisition course in August 2008 (see ex. B).

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation

set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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. See Adjudicative Guidelines (AG), ¶ 18.

Sexual Behavior

The Concern. Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress, 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. See Adjudicative Guidelines (AG), ¶ 18.

Burden of Proof

By virtue of the precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled

or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

Analysis

Applicant is a meritorious defense contractor employee who pleaded guilty to a misdemeanor public indecency charge in 1990 and beginning in 2004 was involved in a four-year series of extra-marital affairs with another individual without telling his wife and family. Applicant admitted to risks of blackmail over his affairs in an OPM interview and repeated his intention to withhold the information about these affairs from his wife. Security concerns are raised over Applicant's 1990 conviction, his four-year sexual extra-marital relationship with A, and allegations pertaining to his consuming alcohol and having sexual relationships with other unnamed individuals.

Applicant's actions raise security concerns under both the personal conduct and sexual behavior guidelines. DC ¶ 16(e) of Guideline E, "Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing . . .," is applicable to Applicant's situation. While much of Applicant's conduct is covered by Guideline D and can be resolved under that Guideline, there are several allegations under each guideline that are not incorporated in the other. For example, subparagraph 1.a that addresses Applicant's four-year extra-marital affair is not incorporated in the Guideline D allegations. *Vice versa*, subparagraphs 2.c (addressing alcohol-related sexual relationships) and 2.d (covering Applicant's 1990 citation) are alleged under sexual behavior but not under personal conduct.

Judgment and blackmail concerns exist over Applicant's four-year sexual affairs spanning 2004 and 2007 with A that he has declined to explain to his wife. These actions reflect both serious judgment lapses and actions that expose him to risks of potential blackmail. Applicant's actions are expressly covered by Guideline E, and are entitled to independent cognizance under this Guideline according to the Appeal Board. See ISCR Case No. 06-20964, at 6 (April 10, 2008). Where (as here) there is additional probative adverse information covered by Guideline E that is not covered by Guideline D, and *vice versa*, and which reflects a recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior, independent grounds do exist for considering questionable judgment and trustworthiness and exploitation and coercion risk allegations under Guideline E and Guideline D, respectively. Authority for considering overlapping conduct under both guidelines is contained in the guidance provided in Enclosure 2, ¶ 2(d) of the Directive's August 2006 amendments.

So, under Guideline E, core judgment and exploitation concerns covered by D.C. ¶ 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,” are applicable in this case

Turning to the specific allegations covered by Guideline D (several of which overlap with those under Guideline E), the pertinent ones associated with Applicant’s 2004-2007 extra-marital affairs with A are covered by several of the disqualifying conditions in Guideline D. Applicable to the particular facts surrounding Applicant’s extra-marital affairs are DC ¶ 13(a), “sexual behavior of a criminal nature, whether or not the individual has been prosecuted,” DC ¶ 13(c), “sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress,” and DC ¶ 13(d), “sexual behavior of a public nature and/or that reflects lack of discretion or judgment.”

Additional allegations covering alcohol-related sexual relationships separate and apart from his extra-marital affairs with A were never developed in the record and lack any probative evidence. As such, these allegations covered by subparagraph 2.c are concluded to be unsubstantiated.

To be sure, Applicant is of record in advising W of his 1990 citation and public decency conviction before their marriage. While this reduces his vulnerability risk to coercion and pressure, it does not resolve concerns about his judgment and trustworthiness. His 1990 conduct reflects not only poor judgment but a reckless disposition towards imprudent sexual misbehavior that manifested itself years later in his series of extra-marital affairs with A. Such conduct cannot be compartmentalized on a piece-meal basis and isolated from one another. Considering the totality of Applicant’s behavior over a 15-year period, his actions reflect considerable recurrence risks associated with his judgment lapses and sexual behavior that make him vulnerable to coercion, exploitation, or duress. This collective pattern of recurrent behavior are independently covered by the disqualifying conditions previously set forth under Guideline D.

Both judgment lapses and blackmail risks remain key Guideline D concerns. For Applicant has never disclosed his sexual encounters with A over the past four years out of concern for his wife and their marriage. His concerns are quite understandable. But his declinations to inform his wife of his encounters with A also increase his vulnerability to coercion, exploitation and duress. Neither the private, discreet nature of Applicant’s sexual encounters with A, Applicant’s assured cessation of the encounters, nor A’s reported disinclination to make any trouble for Applicant absolve Applicant of potential risks of compromise or coercion associated with his encounters with A.

The recurrent judgment lapses that inhere in Applicant’s 1990 public indecency conviction and more recent extra-marital affairs, and Applicant’s failure to disclose his

extra-marital encounters to W, preclude safe predictive judgments at this time that he will not engage in any similar activity in the foreseeable future. Neither the timing of his actions, the accompanying circumstances, the recurrence risks, nor the still potential for blackmail warrant the application of any of the mitigating conditions in Guideline D or Guideline E. So recurrent and recent are his encounters that the likelihood of their occurring again cannot be safely discounted. As long as risks of recurrence and blackmail exist, Applicant's conduct cannot be mitigated, either under the guidelines or under the whole person concept.

From a whole person perspective, Applicant has established a good relationship of trust with his employer. Both his direct supervisor and his program manager characterize him as a good performer and strong team player. These are qualities that serve him well in fulfilling his fiducial responsibilities in protecting accessed classified information. Applicant credibly makes the case, too, to his making renewed efforts to strengthen his marriage, but at a price. For in doing so, he is determined to withhold information about his sexual encounters (casual as they may be) that could impair or weaken his marital relationship. While understandable, his reluctance to inform his wife also places him at continued risk to pressure, coercion, or duress (core security concerns).

It is true that Applicant's telling his wife about his affairs may well pose something of a Hobson's choice for him. Informing her of the details of his encounters, though, is a necessary prerequisite to absolving himself of risks of blackmail and other forms of pressure and coercion. This is a situation where strong work and family credits cannot overcome the security risks associated with his undisclosed sexual relationships with A.

Taking into account all of the circumstances surrounding Applicant's recurrent sexual encounters in the 1990 time frame and more recently spanning 2004 and 2007, it is still too soon to absolve Applicant of security risks associated with his recurrent 2004-2007 sexual encounters with A. Based on his recurrent actions reflecting questionable judgment and trustworthiness concerns, and his continued unwillingness to disclose his affairs to his wife, Applicant does not mitigate the Government's security concerns. Unfavorable conclusions warrant with respect to the underlying conduct covered by subparagraphs 1.a through 1.d of Guideline E and subparagraphs 2.a, 2.b and 2.d of Guideline D. Favorable conclusions warrant with respect to subparagraph 2.c. of Guideline D.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Enclosure 2(a) of the Adjudicative Guidelines of the Directive.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

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| GUIDELINE E: (PERSONAL CONDUCT): | AGAINST APPLICANT |
| Sub-para. 1.a: | Against Applicant |
| Sub-para. 1.b: | Against Applicant |
| Sub-para. 1.c: | Against Applicant |
| Sub-para. 1.d: | Against Applicant |

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| GUIDELINE D: (SEXUAL BEHAVIOR): | AGAINST APPLICANT |
| Sub-para. 2.a:: | Against Applicant |
| Sub-para. 2.b:: | Against Applicant |
| Sub-para. 2.c:: | For Applicant |
| Sub-para. 2.d:: | Against Applicant |

Conclusions

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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

