



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



In the matter of: )  
 )  
----- ) ISCR Case No. 08-01431  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government:  
Melvin A. Howry, Esquire, Department Counsel

For Applicant:  
Charles T. Mathews, Esq.  
Charles T. Mathews & Associates

March 5, 2009

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**DECISION**

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ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (eQIP), on February 7, 2007 (Government Exhibit 1). On July 30, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines D and E concerning the 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 President Bush on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on August 19, 2008, and requested a hearing before an Administrative Judge. The case was assigned to another

Administrative Judge on September 12, 2008. I received the case assignment on November 13, 2008. DOHA had previously issued a notice of hearing on October 15, 2008, and I convened the hearing as scheduled on November 14, 2008. The Government offered Government Exhibits 1 and 2, which were received without objection. Applicant testified on his own behalf, called two additional witnesses, and submitted Applicant's Exhibits A and B, without objection. DOHA received the transcript of the hearing on November 25, 2008. The record closed on November 25, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Findings of Fact**

The Applicant is 55 and married. He is a co-founder and officer of a defense contractor and seeks to retain a security clearance in connection with his employment.

#### **Guideline D - Sexual Behavior** **Guideline E - Personal Conduct**

The Government alleges that the Applicant is ineligible for clearance because he has had an extra-marital affair since 2004 with a woman ("A"), that he loaned or gave A \$16,000.00, and that neither of their spouses know of the affair.<sup>1</sup> The Applicant admits the factual allegations in the SOR, but denies that his conduct has security significance.

The Applicant is currently married to his fourth wife. They have been married since 1992. The Applicant and his current wife had an extra-marital affair while he was married to his third wife.

According to the Applicant, he has known A since 1996. They began dating in 2004 and they have had a sexual relationship since that time. A was born in a foreign country, but is a naturalized American citizen. During their relationship, the Applicant and A have taken at least five vacations overseas. (Government Exhibit 2 at 5-7.) During one of these vacations, which was in conjunction with a business trip to A's home country, one of the Applicant's employees became aware of the affair between the Applicant and A. This occurred in February 2007. (Transcript at 38-39; Government Exhibit 2 at 6-7.)

The Applicant gave \$16,000.00 to A in the year 2005. According to the Applicant, this was a gift to A to allow her to purchase a home. Also according to the Applicant, A views the money as a loan. The Applicant was asked about this transaction during his interview with an authorized investigator of the Defense Department. It was as a result of that discussion that the Applicant admitted his affair with A. Once again, neither spouse is aware of this transaction. (Transcript at 46-47; Government Exhibit 2 at 4-5.)

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<sup>1</sup>The SOR originally had the monetary figure at \$15,000.00. This figure was amended to \$16,000.00 to comport with the evidence presented. (Transcript at 113.)

The Applicant continued the relationship with A during the pendency of the hearing. He testified that he saw A the day before the hearing (Transcript at 40), and that they had sex within a week of the hearing (Transcript at 43). The Applicant was asked why he continued to engage in this relationship knowing of the Federal Government's interest. (Transcript at 42-43.) The Applicant stated, "Because I feel it is unrelated to me being under any type of coercion to give up classified information. These are totally unrelated incidents or circumstances." (Transcript at 43.)

The Applicant has stated that he was not proud of his affair with A and that it was a mistake. (Transcript at 39; Government Exhibit 2 at 4.) However, he later testified:

There is a, you know, I believe, again, that it is a - - publicly, people might think it's immoral to have an extra-marital affair, but people do get attached to other people, and it does go further than just friendship, and that is what happened here. I don't intend it to - - I mean it's just something that I am now involved with. Although I might have mentioned it is a mistake, it is just that I am now into that relationship, and she has been a friend of mine for some time. And it is something that I just feel it is private, and I want to keep it to myself. (Transcript at 40-41.)

The Applicant's wife is not aware of his relationship with A (Transcript at 31), and A's spouse is not aware of her relationship with him (Government Exhibit 2 at 4). In addition, the Applicant's wife is not aware of the \$16,000.00 loan or gift to A, or the fact that A has accompanied the Applicant on at least five trips overseas. (Transcript at 34.)

The Applicant's business partner is not aware of his relationship with A. The business partner is aware that the Applicant's security clearance is at risk. (Transcript at 32, 41-42.)

The Applicant stated several times that he does not believe himself to be vulnerable to exploitation or pressure because of his relationship with A. (See e.g. Transcript at 30-31, 36.) He testified that he would inform his wife of the relationship if he was threatened with exposure. (Transcript at 38.) The Applicant has also indicated that, if his wife found out about the affair, he would terminate the relationship with A. (Government Exhibit 2 at 4.) He further stated that he has no fear of divorce because he has been through that before. (Transcript at 48-49.)

## **Mitigation**

The Applicant called a clinical psychologist to testify. (Applicant's Exhibit A.) The psychologist testified about the Applicant's psychological profile. In particular, the witness related his opinion concerning the Applicant's ability to withstand coercion. (Transcript at 58-61.) He also stated that the Applicant did not appear to have a personality disorder that might make the Applicant a security risk. (Transcript at 61-62.)

A retired FBI agent also testified for the Applicant and submitted a statement. (Applicant's Exhibit B.) This witness has done background investigations for agencies of the Federal Government. He was, however, unfamiliar with the Directive and the Adjudicative Guidelines. (Transcript at 94.) During his testimony, the witness stated that his opinion was the Applicant was not subject to coercion, and that his conduct did not show a lack of discretion or judgment. (Transcript at 102-103.)

## **Policies**

Security clearance decisions are not made in a vacuum. 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. In addition, the Administrative Judge may also rely on his own common sense, as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned 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 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. Security clearance decisions include, by

necessity, consideration of the possible risk that 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.

Finally, as emphasized by President Eisenhower in Section 7 of Executive Order 10865, "Any determination under this order . . . shall be a determination 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 D, Sexual Behavior** **Guideline E, Personal Conduct**

The security concern relating to the guideline for Sexual Behavior is set out in AG ¶ 12:

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.

The guideline notes several conditions that could raise security concerns. Based on the evidence presented, the following conditions have applicability in this case: AG ¶ 13(c), "sexual behavior that causes an individual to be vulnerable to coercion, exploitation or duress," and ¶ 13(d), "sexual behavior of a public nature and/or that reflects lack of discretion or judgment."

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 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. 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 guideline notes a condition that could raise security concerns given the facts of this case. Under AG ¶ 16(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. . .”

The Applicant has been involved in a long-term affair with A. He has actively kept his wife, business partner and others from finding out about the affair, or his giving A \$16,000.00. The Applicant may deny it, but the evidence convincingly shows that he feels he has something to hide concerning this relationship. Whether it is because he thinks the relationship is wrong, a mistake or nobody else's business is of no moment. It is axiomatic that having something to hide makes you vulnerable to exploitation, coercion or duress. He has done nothing to reduce or eliminate that vulnerability.

The Applicant claims that his relationship with A is private, consensual and discreet, and therefore not of interest to the Government. He is wrong. First, he has been so indiscreet as to take his lover on a business trip and have dinner with one of his employees along with her. Not only that, but they took this combined business and personal trip to her home country. This particular conduct shows not only a lack of discretion, but a lack of judgment. This lack of judgment on the Applicant's part, when it comes to A, is also shown by his continuing to have a sexual relationship with her during the pendency of this hearing and *knowing* the fact of that sexual relationship is of concern to the Government.

The Applicant was truthful with the Government once the right question was asked about his relationship with A. He then attempts to argue that the truthfulness shows he is not subject to coercion. That is a false attempt to make a virtue out of a necessity. Applicants for security clearance are required to provide truthful answers. The mere fact that he has been truthful with us does not show that he is, therefore, not subject to coercion. Once again, it is particularly troubling that his business partner does not know the basis for this action against the Applicant.

None of the Mitigating Conditions under Guidelines D or E have application in this case. Paragraphs 1 and 2 of the SOR are found against the Applicant.

### **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 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. The Applicant is a successful businessman. However, he is involved in a relationship which, under the particular circumstances of this case, makes him particularly vulnerable to coercion, and shows poor judgment and a lack of discretion.

In viewing all the facts of this case, I find that the Applicant has not mitigated the security significance of his relationship with A. As set forth at length above, the conduct was recent (AG ¶2(a)(3)), voluntary (AG ¶2(a)(5)), and there have been no pertinent behavioral changes (AG ¶2(a)(6)). I find that there is considerable potential for pressure, coercion, exploitation, or duress (AG ¶2(a)(8)), and that the likelihood of recurrence is close to 100% (AG ¶2(a)(9)).

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

On balance, it is concluded that the Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

### **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 D:	AGAINST THE APPLICANT
Subparagraph 1.a:	Against the Applicant
Paragraph 2, Guideline E:	AGAINST THE APPLICANT
Subparagraph 2.a:	Against the Applicant

## **Conclusion**

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

WILFORD H. ROSS  
Administrative Judge