



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



In the matter of:

SSN:

Applicant for Security Clearance

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ISCR Case No. 08-06859

Appearances

For Government: Tovah Minster, Esq., Department Counsel

For Applicant: William S. Aramony, Esq.

July 16, 2010

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated Sexual Behavior concerns, but he has not mitigated Personal Conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On December 23, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D (Sexual Behavior) and E (Personal Conduct). The action was taken under Executive Order (EO) 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 adjudicative guidelines (AG).

Applicant answered the SOR on January 29, 2010, and requested a hearing before an administrative judge. The case was assigned to another administrative judge on March 15, 2010, and reassigned to me on March 23, 2010. DOHA issued a notice of hearing on March 18, 2010, and the hearing was convened as scheduled on April 27,

2010. The Government offered Exhibits (GE) 1 through 4, which were received without objection. Department Counsel's exhibit list is marked Hearing Exhibit (HE) I. Applicant testified on his own behalf, called three witnesses, and submitted Exhibits (AE) A through I, which were admitted without objection. Applicant's exhibit list is marked HE II. DOHA received the transcript of the hearing (Tr.) on May 5, 2010.

Findings of Fact

Applicant is a 52-year-old independent contractor engineer. He is seeking to retain his security clearance. He has a Ph.D. in electrical engineering. Applicant has been married since 1979. He has two children, ages 19 and 18.¹

Applicant was granted a security clearance in about 1981. He smoked marijuana while holding a security clearance in about 1986 and 1988. He has not used illegal drugs since 1988.²

Applicant engaged the services of prostitutes from 1976 through 2001. He described his use as declining over time, with one involvement in 1995, and his last involvement with a prostitute in 2001.³

In the 1980s and 1990s, Applicant visited adult bookstores that had touchable live models. Applicant engaged in sexual contact with the models. He visited "pornographic"⁴ web sites on the internet from 1992 through 1995. In 2001, he subscribed to pornographic web sites that permitted interaction with live models. In the mid-1990s, and again in 2001 to early 2003, he visited establishments that had adult dancers and he received "lap dances."⁵

Applicant sought counselling for his sexual issues from a licensed clinical psychologist in 1998. He is still in treatment with the psychologist, who testified on his behalf. Applicant is being treated for social anxiety and sexual addiction. The diagnosis is Impulse-Control Disorder Not Otherwise Specified, as sexual addiction is not yet named in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). Applicant met weekly or every other week with the doctor for several years. The frequency of the sessions was reduced based upon Applicant's needs. The doctor uses the term relapse, similar to what is used with other addictions. Applicant relapsed in the late 1990s and early 2000s. He helped treat Applicant for his relapses, and there have been no relapses in more than seven years. The doctor is

¹ Tr. at 59-60, 135-136; GE 1, 2.

² Tr. at 73-74; Applicant's response to SOR; GE 1, 2.

³ Tr. at 63, 123; Applicant's response to SOR; GE 2-4.

⁴ I am using the colloquial meaning of pornography and not the strict legal definition.

⁵ Tr. at 65-68, 123-128; Applicant's response to SOR; GE 3, 4.

currently seeing Applicant for “relapse management,” so that he can maintain his sexual sobriety.⁶ The doctor testified:

Because it is an addictive concern . . . akin to alcohol, substance addictions, a person is always not really seen as fully cured in the same sense that they are always in recovery and they maintain sobriety. And to the extent that he’s maintained sexual sobriety has been over seven years, which is a significant period of time, without relapse.⁷

Applicant was actively involved with Sexaholics Anonymous (SA) from 2002 to 2006. Sexaholics Anonymous is a 12-step program based upon the model first developed by Alcoholics Anonymous. He completed all 12 steps and he was a sponsor. He has not relapsed since January 2003.⁸

Applicant’s wife has known about his sexual issues since the mid 1990s. She has been involved with his treatment since its inception. Her family is also aware of his issues. His children know about his sexual addiction issues, but they do not know all the details of what he has done.⁹

Between about 1988 and 1996, Applicant reported personal expenses, such as paint and maintenance items for his home, office equipment, supplies, and upgrades to his children’s computers, as business expenses on his federal income tax returns. He was interviewed by an investigator from another government agency in June 2002. He told the investigator that he claimed \$500 to \$1,000 of personal expenses as business expenses each year.¹⁰

Applicant’s security clearance was revoked by another government agency in 1997, due to his high-risk sexual behavior, tax issues, and software privacy. Applicant admitted that his “interim clearance [was] revoked for risky sexual behavior,” but he “believe[d] the tax and software issues were mitigated by hearing.”¹¹

Applicant owned a rental property. On his 1999 and 2000 income tax returns, he underreported the amount he received in rent from his tenants. He told the investigator in 2002 that he took in \$875 each month, but he only reported \$600 each month. The difference for the two years was about \$3,000. In his response to DOHA interrogatories in October 2008, Applicant wrote that he “filed amended returns in 2002. Because of other deductions found by [his] accountant, there was no additional tax or penalty.” In

⁶ Tr. at 21-40, 123; Applicant’s response to SOR; GE 2-4.

⁷ Tr. at 24.

⁸ Tr. at 40-47, 131-135, 145-146; GE 2.

⁹ Tr. at 48-53, 56-58, 62.

¹⁰ Tr. at 75-78; Applicant’s response to SOR; GE 3, 4.

¹¹ Tr. at 79-80; Applicant’s response to SOR; GE 1.

his response to the SOR, Applicant admitted “to not reporting all income. Upon submitting amended returns that included the unreported income and deductions not previously taken, [he] owed no taxes for those years.” Contrary to those assertions, Applicant did not submit amended returns. His accountant reviewed his records, but Applicant did not submit amended returns because the accountant told him that he would not owe the IRS any additional money. The rental property was sold in about 2005.¹²

Applicant’s mother passed away in about 1980. His father never completely settled the estate. Applicant’s father died in 2000. The value of both estates was about \$3.5 million. Applicant was named the executor for both estates. Applicant stated that he could have received executor fees of between three to five percent of the value of the estates, or between \$100,000 and \$150,000. He stated that he never intended to take that amount. Applicant’s brother has psychological problems. When their father died, Applicant’s brother was living by himself in their mother’s old house. Their father maintained the house for the brother. The brother is currently living in a psychiatric facility. Applicant and his sister are his guardians. There was concern after his father passed as to who would care for the brother. Applicant’s sister and her husband helped Applicant with his duties as executor, which included sorting through a massive amount of records and documents.¹³

Applicant’s brother-in-law was a building contractor. Applicant’s father had employed him on several occasions to make repairs to Applicant’s mother’s house. Acting as the executor, Applicant employed his brother-in-law to renovate the house before it was placed on the market. Applicant did not secure bids from other contractors but relied on the brother-in-law that the bid he submitted was reasonable. The brother-in-law had subcontractors, who were friends, submit two bids, a real bid and a false higher bid. He submitted the false bids to Applicant for his records. The brother-in-law was able to complete the project for less than the false bids. Applicant testified that the brother-in-law’s bids were genuine bids. Applicant paid the brother-in-law about \$97,000 for the job. The brother-in-law made a profit of about \$47,500. In about the summer of 2001, Applicant complained to the brother-in-law about the high cost of the renovation. The brother-in-law explained to Applicant about the double bids, and offered to split half the profits with Applicant. Applicant agreed and offered to split his fees as executor with him. The brother-in-law paid Applicant half the profit, which was \$23,734. Applicant’s sister who was married to the contractor was aware of the money going to Applicant, but none of his other siblings were aware of the payment.¹⁴

¹² Tr. at 77-80, 122; Applicant’s response to SOR; GE 2, 3; AE D, E.

¹³ Tr. at 82-91, 98; Applicant’s response to SOR; GE 3; AE I.

¹⁴ Tr. at 91-104, 107-112, 138; Applicant’s response to SOR; GE 3; AE C.

Applicant has four siblings. Three of the siblings brought action in probate court to have Applicant removed as executor. Part of the complaint was Applicant's employing his brother-in-law.¹⁵

In his June 2002 interview by an investigator from another government agency, Applicant explained the actions with his brother-in-law and that he received about \$23,000. He told the investigator that he planned to commit perjury at the upcoming trial if asked directly about his involvement in the renovations. He stated that he and the brother-in-law agreed that if the \$23,000 payment was discovered, they would claim that the payment was for a business proposal that Applicant wrote for the brother-in-law. He told the investigator that his brother-in-law had friends who were willing to come into court and testify about the false bids.¹⁶

Applicant was deposed for the lawsuit in about June 2002. He stated that he did not testify at the deposition about the \$23,734 received from the brother-in-law. He stated that he did not believe he committed perjury because he was not asked a specific question about accepting money from the brother-in-law. He stated that he testified at the deposition that the brother-in-law renovated the house and the contract price of about \$97,000 was the cost of the renovation. Applicant returned the \$23,734 to his brother-in-law in about July 2002. His brother-in-law was deposed in about September 2002. Applicant stated that his brother-in-law "opened his records, all the records to the court." It is unclear if Applicant was talking about the false bids, or if the brother-in-law actually produced the accurate bids. The brother-in-law did not admit that he gave Applicant \$23,734. Applicant testified at his DOHA hearing that he could not even conceive of perjuring himself.¹⁷

The lawsuit to remove Applicant as executor was settled in about November 2002. The parties agreed that Applicant would remain as executor. His fees as executor were limited to \$35,000. Other provisions included that Applicant would file estate tax returns within 60 days; he would provide each heir a quarterly accounting; he would obtain their approval for any single estate expense exceeding \$5,000; and the residual estate, if any, would be held in trust for Applicant's brother. Applicant inherited about \$750,000 from the estates. He also received about \$40,000 from life insurance. Other than the sister married to the contractor, Applicant's siblings are still not aware of the \$23,734 payment.¹⁸ Applicant was asked at his hearing how he felt about taking the check from his brother-in-law:

¹⁵ Tr. at 98, 139; Applicant's response to SOR; GE 1-4.

¹⁶ GE 3.

¹⁷ Tr. at 114-120, 142.

¹⁸ Tr. at 99, 113-114, 137-140; AE A, B.

Well it was really stupid I mean and I feel bad and I had to explain it to several people and after a lot of reflection I don't feel like I did anything morally wrong but I never seem to get that across to people.¹⁹

In about 2001, Applicant was denied a security clearance by one of the branches of the military due to his sexual behavior and involvement in civil law suits.²⁰

Applicant submitted a letter attesting to his job performance, technical skills, professionalism, and good judgment. His performance evaluations reported that he exhibited the company's ethics principles of accountability, honesty, integrity, openness, and respect in the conduct of the company business.²¹

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 to be used 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, administrative judges apply the guidelines 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.

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

¹⁹ Tr. at 145.

²⁰ Applicant's response to SOR; GE 1, 2.

²¹ AE G, H.

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 EO 10865 provides that adverse 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 D, Sexual Behavior

The security concern for Sexual Behavior is set out in AG ¶ 12, as follows:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which can 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. The following disqualifying conditions are potentially applicable:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (a) 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.

Applicant’s criminal behavior with prostitutes and his other compulsive sexual behavior establish all of the above disqualifying conditions.

SOR ¶ 1.a alleges that Applicant “solicited and paid prostitutes for sexual activities from about 1976 to at least September 2001.” SOR ¶ 1.b alleges that Applicant “continued [his] involvement with prostitutes even though [he] knew that it was an issue in [his] security clearance in 1995.” That constitutes facts and circumstances surrounding the sexual behavior that is already alleged in SOR ¶ 1.a. I conclude SOR ¶ 1.b for Applicant.

SOR ¶ 1.f alleges that Applicant received treatment at a counseling center from 1998 to 2008. Counseling and treatment are matters in mitigation. The allegation does not raise a disqualifying condition. SOR ¶ 1.f is concluded for Applicant.

SOR ¶ 1.g alleges that Applicant “had problems in [his] marriage due to [his] sexual behavior.” That allegation, even if true, constitutes consequences of the sexual behavior that is already alleged in the SOR. I conclude SOR ¶ 1.g for Applicant.

Conditions that could mitigate Sexual Behavior security concerns are provided under AG ¶ 14. The following are potentially applicable:

(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; and

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress.

Applicant has been in counseling for his sexual addiction since 1998. He attended Sexaholics Anonymous and has maintained his sexual sobriety, without relapse, since early 2003. Applicant’s sexual behavior is not recent. However, for AG ¶ 14(b) to be applicable, there must also be a finding that the sexual behavior is unlikely to recur and that it does not cast doubt on Applicant’s current reliability, trustworthiness, or good judgment. At this point, his sexual behavior may be unlikely to occur. However, despite the passage of time, I find that Applicant’s criminal sexual acts continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 14(b) is partially applicable.

Applicant’s wife and other important people in his life are aware of his sexual issues, which has reduced his vulnerability to coercion, exploitation, and duress. AG ¶ 14(b) is applicable.

Guideline E, Personal Conduct

The security concern for Personal Conduct is set out in AG ¶ 15, as follows:

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. The following disqualifying conditions are potentially applicable:

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

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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;

(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 propriety information, unauthorized release of sensitive corporate or other government protected information;

(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 . . . 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.

Applicant used illegal drugs while holding a security clearance. He provided false information on income tax returns. He violated his duties as the executor of his parents' estate by accepting a payment from his contractor brother-in-law. He was involved in questionable and illegal sexual behavior that included frequenting prostitutes. All the above disqualifying conditions are applicable.

SOR ¶ 2.c alleges that Applicant's security clearance was revoked in 1997 due to his high risk sexual behavior, tax issues, and software privacy. SOR ¶ 2.f alleges that Applicant was denied a security clearance in about 2001 due to his risky sexual behavior and involvement in civil law suits. SOR ¶¶ 2.c and 2.f do not allege distinctive conduct by Applicant. They allege the action of the Government in response to personal conduct already alleged. SOR ¶¶ 2.c and 2.f are concluded for Applicant.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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.

Applicant has not used illegal drugs since 1988. His income tax issues occurred more than nine years ago. He stated that his accountant reviewed his documents and it was unnecessary to file amended returns because he does not owe any additional taxes. He obtained counselling for his sexual problems and attended Sexaholics Anonymous. He has maintained his sexual sobriety since January 2003. The important people in his life are aware of his sexual addiction. He returned the payment he

received from his brother-in-law in 2002. All these factors show some mitigation under AG ¶¶ 17(c), 17(d), 17(e), and 17(g) for the individual acts alleged in the SOR. However, when I view the totality of his acts, I remain concerned about Applicant's reliability, trustworthiness, judgment, and willingness to comply with rules and regulations. I am particularly concerned about Applicant's violation of his fiduciary duties as executor and his willingness to commit perjury. Applicant denies committing perjury, or that he ever even considered committing perjury. At a minimum, his testimony had to have been intentionally misleading. Other than his sister who is married to the contractor, his siblings are still unaware of the payment.

In sum, I conclude that Personal Conduct concerns remain despite the presence of some mitigation.

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. I have incorporated my comments under Guidelines D and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I considered Applicant's favorable character evidence and his efforts to control his sexual addiction problems. However, he exhibited a history of illegal and dishonest behavior. I have significant unresolved concerns about his honesty, trustworthiness, judgment, and willingness to comply with rules and regulations.

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 Applicant mitigated Sexual Behavior concerns, but he has not mitigated Personal Conduct security concerns.

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:	FOR APPLICANT
Subparagraphs 1.a-1.g:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Subparagraphs 2.d-2.e:	Against Applicant
Subparagraph 2.f:	For Applicant
Subparagraph 2.g:	Against 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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge