



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-07418
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Esq., Department Counsel
For Applicant: *Pro se*

February 17, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines E (Personal Conduct), M (Use of Information Technology Systems), and D (Sexual Behavior). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a Security Clearance Application on March 21, 2006. On August 26, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines E, M, and D. 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 adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on September 9, 2008; answered it on September 24, 2008; and requested a hearing before an administrative judge. DOHA received the request on September 29, 2008. Department Counsel was ready to proceed on November 26, 2008, and the case was assigned to me on December 4, 2008. DOHA issued a notice of hearing on December 29, 2008, scheduling the hearing for January 12, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified on his own behalf. The record closed upon adjournment of the hearing on January 12, 2009. DOHA received the transcript (Tr.) on January 26, 2009.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in the SOR and offered explanations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 50-year-old systems engineer for a federal contractor. He has worked for his current employer since August 2004 (Tr. 32). He has worked for federal contractors since July 2002. He served in the submarine service of the U.S. Navy for about 15 years and retired as a chief petty officer (Tr. 29, 31).

Applicant was married in November 1984. He is a high school graduate with two years of college but no degree (Tr. 10). He and his wife have two sons, ages 19 and 17 (Tr. 30).

Applicant has held a security clearance since July 1989. He received a Sensitive Compartmented Information (SCI) clearance in February 2005, but it was revoked in December 2005 because of security concerns under Guidelines M and E.

Between the fall of 2003 and August 2004, while working for a federal contractor, Applicant engaged in sexually graphic conversations on a government computer during duty hours, two to four hours a week, for up to an hour on each occasion. The conversations involved descriptions of sexual acts and physical descriptions of participants. He stored nude photographs of himself on his home computer, loaded them on a disk, transferred them to his government computer, and shared them with others by instant messaging while at work. He estimated he sent nude photographs of himself 10 to 15 times, and he received nude photographs from others about the same number of times (Tr. 42). Applicant's photographs did not show his face but depicted his genitalia (Tr. 45). His sexual activities involved only adult females (Tr. 57).

Applicant told a security investigator and he testified at the hearing that he participated in the sexually-oriented activities because he was bored and frustrated. He worked as a consultant for a manager who regarded him as a hindrance, he was not involved in the day-to-day activities of the office, and his work station was in an isolated location (Tr. 45). He could not explain why he resorted to sexual activity to alleviate his boredom and frustration instead of other activities such as playing games or watching

movies (Tr. 55). His sexual activity ended when he was transferred to another job site on a different contract (GX 2 at 3; GX 3). He destroyed the nude photographs of himself and the disks on which they were stored (Tr. 44).

During an interview with a security investigator on March 1, 2007, Applicant admitted that he consorted with prostitutes about once a month from 1985 to 1989. At the time, he was married and on active duty as a petty officer first class in the Navy (GX 2 at 4). At the hearing he admitted he also visited massage parlors that offered sexual gratification about once every other month from 1998 to 2001 (Tr. 48-49). He attributed his behavior to youthful rebelliousness (Tr. 56).

Applicant testified he has not visited a prostitute for 19 years, but he recanted this statement when confronted with evidence that he visited massage parlors for sexual gratification until 2001. He testified he stopped his sexual activities on the internet in 2004. He removed the instant messaging software from his personal and work computers (Tr. 28). He admitted he knew his participation in the sexually-oriented activity on his government computer was prohibited (Tr. 41).

Applicant testified his wife and sons are unaware of his involvement with prostitutes and his sexual activities on the internet (Tr. 54, 58). He did not disclose his activities to his wife because he did not want to hurt her (Tr. 54). He believes disclosure of his activities to his wife could cost him his marriage (Tr. 57).

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline E, Personal Conduct

The SOR alleges Applicant engaged in graphic, sexually inappropriate instant messaging on a government computer during work hours from 2003 to August 2004 (SOR ¶ 1.a); stored nude photographs of himself on his home computer, transferred them onto a disk, loaded the disk onto his work computer, and sent them to others (SOR ¶ 1.b); received nude photographs on his government computer (SOR ¶ 1.c); and visited prostitutes from about 1985 to 1989 (SOR ¶ 1.d). It also alleges his spouse has no knowledge of his computer sexual activities or his involvement with prostitutes (SOR ¶ 1.e). Finally, it alleges his SCI access was revoked in December 2005 for misuse of information technology systems and personal conduct (SOR ¶ 1.f).

Department Counsel introduced evidence that Applicant frequented massage parlors offering sexual activity from 1998 to 2001. This conduct was not alleged in the SOR. Conduct not alleged in the SOR may be considered: “(a) to assess an applicant’s

credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis." ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). I have limited my consideration of the conduct not alleged in the SOR to assessing Applicant's credibility, determining whether he has demonstrated successful rehabilitation, and in my whole person analysis.

The concern under this guideline is, "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 ¶ 15. Three potentially disqualifying conditions are relevant. First, the disqualifying condition in AG ¶ 16(c) applies to:

[C]redible 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.

Second, the disqualifying condition in AG ¶ 16(d) applies to:

[C]redible 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 . . . a pattern of dishonesty or rule violations [and] . . . evidence of significant misuse of Government or other employer's time or resources.

Finally, the disqualifying condition in AG ¶ 16(e) applies to:

[P]ersonal 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.

Applicant's use of his government computer during duty hours to engage in sexually explicit activity raises all three disqualifying conditions, shifting the burden to him to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶

E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns arising from personal conduct may be mitigated if “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.” AG ¶ 17(c). The first prong is arguably met. Applicant’s individual acts were either civil misdemeanors or infractions of rules imposed by the government or his employer.

The second prong of this mitigating condition focuses on the recentness of the conduct. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *Id.*

Applicant’s last misconduct was in August 2004, more than four years ago. In itself, this four-year period is “a significant period of time.” It stopped when Applicant’s job location changed. Applicant’s conduct spanned a 19-year period ending in 2004, during which he was married to his current wife. His justification for consorting with prostitutes was his youthful rebelliousness. His justification for misuse of his government computer while he was in his mid-40s was boredom and frustration. His choice of activities to relieve his boredom and frustration reflects poorly on his judgment. His misuse of his government computer went far beyond passive participation. He photographed himself at home, copies the photos onto a disk, took the disk to work, loaded the photographs of his genitalia on his government computer, and sent them to others. Notwithstanding his declared intention to avoid similar misconduct in the future, I am not convinced that his inappropriate conduct will not recur if he finds himself in another boring, frustrating, and physically isolated duty assignment.

Applicant was not completely candid at the hearing. At the hearing, he asserted that his involvements with prostitutes ended in 1989, but he recanted this statement when confronted with evidence that he frequented massage parlors offering sexual gratification as late as 2001. In light of his long history of flouting the rules and concealing his behavior, I am not persuaded that he is rehabilitated.

The remaining prongs of AG 17(c) are not established. His behavior was frequent, did not occur under unusual circumstances, and it casts doubt on his current reliability, trustworthiness, and good judgment.

Security concerns based on personal conduct may be mitigated if an applicant “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.” AG ¶ 17(d). Applicant acknowledged his behavior at the hearing. He has not received any counseling or treatment (Tr. 52). He testified he realizes he should have asked his supervisors to transfer him when his job became boring and frustrating, but there is little evidence that he has taken any positive steps to protect himself from future inappropriate reactions to boring or frustrating work. Applicant has not carried his burden of establishing this mitigating condition.

Finally, security concerns arising from personal conduct may be mitigated if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(e). Applicant’s employer is aware of his conduct, and it cost him his SCI clearance. Applicant remains vulnerable, however, because his wife and teenaged sons are unaware of his conduct. He admitted at the hearing that disclosure to his family could cost him his marriage. This mitigating condition is not established.

Guideline M, Use of Information Technology Systems

The SOR ¶¶ 2.a cross-alleges the conduct in SOR ¶¶ 1.a-1.c under this guideline. The security concern under this guideline is set out in AG ¶ 39 as follows:

Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.

The relevant disqualifying condition is “unauthorized use of a government or other information technology system.” AG ¶ 40(e).

Security concerns under this guideline may be mitigated if “so much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment. AG ¶ 41(a). For the reasons set out above in the discussion of AG ¶ 17(c) under Guideline E, I conclude this mitigating condition is not established. No other enumerated mitigating conditions are applicable.

Guideline D, Sexual Behavior

The SOR ¶ 3.a cross-alleges the conduct alleged in SOR ¶¶ 1.a–1.d under this guideline. The security concern under this guideline 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 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.”

A disqualifying condition under this guideline may be raised by “sexual behavior of a criminal nature, whether or not the individual has been prosecuted.” AG ¶ 13(a). Department Counsel produced no evidence that the conduct alleged in the SOR was a crime. Thus, I conclude AG ¶ 13(a) is not raised.

A disqualifying condition may be raised by “sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress” or “sexual behavior of a public nature and/or that reflects lack of discretion or judgment.” AG ¶¶ 13(c) and (d). These two disqualifying conditions are raised.

Security concerns under this guideline may be mitigated if “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.” AG ¶ 14(b). For the reasons set out above in the discussion of AG ¶ 17(c) under Guideline E, this mitigating condition is not established.

Security concerns also may be mitigated if “(c) the behavior no longer serves as a basis for coercion, exploitation, or duress.” AG ¶ 14(c). Applicant has not disclosed his conduct to his family, and he is concerned that it could destroy his marriage if it is disclosed to his wife. This mitigating condition is not established. No other enumerated mitigating conditions are applicable.

Whole Person Concept

Under the whole person concept, an 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. An 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guidelines E, M, and D in my whole person analysis. Some of the

factors in AG ¶ 2(a) were addressed under these guidelines, but some warrant additional comment.

Applicant is a mature, obviously intelligent man. He engaged in repeated inappropriate sexual behavior from shortly after his marriage until his mid-40s. He has a history of poor judgment and concealment of his behavior. He was remorseful and embarrassed at the hearing, but not fully candid about the extent of his sexual activity. He is deeply concerned about the impact of disclosure on his marriage and his family, making him vulnerable to pressure, coercion, exploitation, or duress. The likelihood of recurrence is difficult to assess, because he has not sought counseling or treatment, could not explain why he sought sexual gratification as a remedy for boredom and frustration, and has not been placed in a work situation similar to his situation in 2003 and 2004.

After weighing the disqualifying and mitigating conditions under Guidelines E, M, and D, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on his personal conduct, misuse of information technology systems, and sexual behavior. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a-1.f:	Against Applicant
Paragraph 2, Guideline M (Use of Information Technology Systems):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline D (Sexual Behavior):	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

In light of all of the circumstances, 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.

LeRoy F. Foreman
Administrative Judge