



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



In the matter of:)
)
) ISCR Case No. 09-01896
)
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel

For Applicant: Alan V. Edmunds, Esquire

February 4, 2010

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the case file, pleadings, testimony, and exhibits, I conclude that Applicant failed to rebut or mitigate the Government’s security concerns under Guideline E, Personal Conduct, and the whole person analysis. His eligibility for a security clearance is denied.

Applicant executed and signed an Electronic Questionnaire for Investigations Processing (e-QIP) on July 9, 2007. On September 2, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct. 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 the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

On September 18, 2009, Applicant answered the SOR in writing and requested a hearing before an administrative judge. The case was assigned to me on December 1, 2009. I convened a hearing on January 13, 2010, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced nine exhibits, which were marked Ex. 1 through 9 and admitted to the record without objection. Applicant testified on his own behalf and called no witnesses. He introduced 15 exhibits, which were identified and marked as Applicant's Ex. A through Ex. O. All of Applicant's exhibits were admitted without objection. DOHA received the transcript (Tr.) of the hearing on January 21, 2010.

Findings of Fact

The SOR contains three allegations of disqualifying conduct under AG E, Personal Conduct (SOR ¶¶ 1.a. through 1.c.). SOR allegation 1.a. alleged that Applicant exhibited questionable judgment when he masturbated in various public locations. In his answer to the SOR, Applicant admitted the allegation and stated that he had not engaged in such conduct since 2004. (SOR; Answer to SOR.)

SOR allegation 1.b. alleged that Applicant exhibited questionable judgment when he engaged in multiple affairs despite being married. In his answer to the SOR, Applicant denied the allegation as written. He admitted to engaging in two extramarital affairs while married to his first wife. He attributed his affairs to his wife's depression and its negative impact on their intimacy. He identified his affair of approximately 10 years with a man as "not frequent and insignificant." He admitted a second affair with a woman in 2002. He reported that in 2007 he married the woman and, with her, he was involved in a faith community. He stated that the conduct alleged in SOR ¶ 1.b. "was not an accurate reflection of [his] current judgment or reliability." (SOR; Answer to SOR.)

SOR allegation 1.c. alleged that Applicant exhibited questionable judgment when he engaged in sexual relations with prostitutes. Applicant admitted that he had engaged in sexual relations with prostitutes on two occasions in 1985 and 1989. He denied any contact with prostitutes since 1989 and stated that he did not "believe that this outdated information accurately reflects [his] current reliability or trustworthiness." Applicant's admissions to the SOR allegations are admitted herein as findings of fact. (SOR; Answer to SOR.)

Applicant is 53 years old and employed as a senior program analyst by a government contractor. He is a graduate of one of the national service academies, where, in 1978, he received a Bachelor of Science degree in physical sciences. In 1989, he received a Master of Science degree in science and systems technology. (Ex. 1; Tr. 57-58.)

Applicant was first granted a security clearance in about 1974, when he was a student at a national service academy. After graduation from the service academy, he served on active military duty for 26 years and retired in 2004 as a colonel (O-6). He

held a security clearance throughout his military service. He received an honorable retirement from service. (Tr. 32-33, 58.)

Applicant was married in 1982. He is the father of two sons. His older son was born in 1984, and his younger son was born in 1989. Applicant's wife suffered from depression, which was diagnosed in about 1985. Applicant's wife's illness, which continued for about 18 years, was treated with medication. As a consequence of his wife's depression, there were times when Applicant and his wife were not intimate, and he assumed additional household and childcare duties. (Ex. 1; Tr. 88-91.)

In 1985 and 1989, Applicant engaged the services of female prostitutes. In the 1990s, he masturbated while driving on an interstate highway. In 1992, he began a sexual relationship with a man he met through a newspaper advertisement. The relationship lasted until 2002 or 2003. In an interview with a licensed psychologist in October 2009, Applicant stated that his sexual encounters with the man were "intermittent" and occurred "possibly 10 times a year."¹ He denied an emotional attachment with the man. He told the man he was in the U.S. military. Applicant was on active duty and held a security clearance throughout the affair. He knew that his active duty career would be jeopardized if his command learned of the affair, and he concealed it. His wife was not aware of the relationship. (Ex. K at 2; Tr. 62, 85-87.)

Between 2001 and 2003, Applicant masturbated in public shower rooms and steam rooms that were provided by his government employer for the use of male military and civilian employees. He also masturbated in public in an adult bookstore between 2001 and 2003. This behavior also occurred while he was assigned to active duty and held a security clearance. (Ex. K at 2; Tr. 36, 58, 65-66.)

In 2002, Applicant, while serving on active duty as an officer in the Department of Defense, met a woman at work who was serving on active duty as an enlisted person. Applicant began to date the woman in May 2002. He knew his relationship with the woman violated provisions of the Uniform Code of Military Justice (UCMJ) prohibiting adultery and fraternization. He kept the relationship hidden from his command. In September 2002, Applicant sought a legal separation from his wife. Sometime in 2002 or 2003, Applicant broke off his relationship with his male lover. He told the man he had become involved with a woman, was happy, and would not see him anymore. Applicant's divorce from his wife became final in July 2004. He pays alimony to his first wife. (Ex. 1; Ex. 9; Tr. 59-63, 91-92, 104-105.)

Applicant and his female friend were married in May 2007. Before their marriage, they joined a church and sought counseling to prepare themselves for marriage. They have remained in the church and are active in the congregation's

¹ At his hearing, Applicant asserted that he met the man "very infrequently, a couple of times a year." He had no explanation for the discrepancy between the "possibly 10 times a year" reported by the psychologist and his estimate at his hearing of infrequent meetings of about twice a year. He acknowledged that he was the only person who provided the psychologist with information about the affair. (Tr. 85, 98-99.)

marriage ministry. Applicant's second wife has three young adult children. They reside with their mother and Applicant. Applicant considers his second marriage to be normal and happy. He regrets the behavior alleged in the SOR and characterizes it as "stupid." (Ex. 1; Tr. 41-44, 49, 68.)

After retiring from active service, Applicant obtained employment as a government contractor. In 2004, Applicant's employer recommended him for a security clearance. As a part of the security clearance application process, Applicant was interviewed by investigators at another government agency and given a polygraph test. In interviews with the investigators, Applicant provided the information alleged in the SOR. In December 2004, the other government agency denied Applicant's access to classified information because of security concerns over his sexual behavior and personal conduct. (Ex. 8; Ex. 9; Tr. 33-35.)

In March 2007, Applicant accepted a job with another employer and completed an e-QIP. His employer sponsored him for a security clearance. In August 2007, he was interviewed by an authorized investigator. In his interview, Applicant told the investigator that his first wife might allege marital infidelity because he began dating his current wife after he and his first wife were legally separated. Applicant also told the investigator that another government agency had denied him a security clearance in 2004, after he failed a polygraph examination. Applicant also told the investigator that he "was not made aware of the reasons for not passing the polygraph." He did not discuss his 10-year affair and his masturbation behavior with the investigator. (Ex. 1; Ex. 7 at 5-6; Tr. 78-79.)

In response to DOHA interrogatories, Applicant explained that he had received two documents from the other government agency pertaining to the denial of his access to classified information. He stated that he had discarded both documents but had retrieved one of them, dated 1 September 2004, which he attached. He stated he no longer had a copy of the second document, which he characterized as follows:

As I recall, this second document described my responses to a life-style polygraph I had taken in 2004. I believe it included details describing my affair with an enlisted female soldier while I was married and an Active-duty officer . . . during the time period 2002 through 2004. I believe the document stated I was denied a security clearance because my conduct at that time demonstrated a lack of judgment. Retired and divorced in 2004, I eventually married the same enlisted female soldier (also retired) in May 2007.

(Ex. 8 at 4.)

The second communication that Applicant received from the other government agency was dated December 8, 2004. This document was offered and received into evidence, without objection, by the Government. The document recites why the other

government organization disapproved Applicant for access to classified information based on the following information:

During your June 2004 security testing sessions, you advised that over the last ten years you have engaged in several extra-marital affairs, to include some with prostitutes. You said that one of these affairs was a 10-year relationship with a male you met through a newspaper ad; you noted that you kept this affair hidden because you feared, as an active duty [officer], that you would lose your career should the affair become known. You also said that you have kept hidden an ongoing affair you have been engaged in with an active duty military female for the last two years. Because you are an officer and she is enlisted, the situation is considered fraternization and a violation of the United States [Uniform] Code of Military Justice. You further advised that you have engaged in repeated public masturbation in the following venues: the open bay showers at [a government agency] gym with a group of men; in your vehicle while driving on the interstate; and, in open-door video booths in an adult bookstore. You noted that you engaged in this behavior despite knowing there was a risk you could get caught.

(Ex. 9 at 1-2.)

On October 8 and October 22, 2009, Applicant voluntarily submitted to a psychological evaluation “to determine his current intellectual and personality functioning for the purpose of maintaining the security clearance necessary for his employment.” During his interview with a licensed psychologist, Applicant admitted the behaviors recited in the paragraph above that led the other government agency to conclude that he was not security worthy. (Ex. K; Ex. L.)

Over the two days of his evaluation by the psychologist, Applicant was given 18 psychological and intelligence-measuring tests. The several tests revealed that Applicant’s cognitive abilities were superior, and his intellectual quotient score of 120 placed him above 91% of his peers. The tests did not reveal that Applicant demonstrated sexually deviant beliefs or behaviors. In his summary and evaluation, the evaluating psychologist observed: “[I]t is likely that when [Applicant] becomes overwhelmed by stress due to outside situations, his social capacities modulate, creating the potential for impulsive behavior. This tendency is then compounded by a tendency to withdraw socially, become less expressive, and more self-protective through the use of denial and repression.” (Ex. K at 8-9.)

Applicant’s fitness report for the period covering April 2001 to May 2002, was laudatory. His reviewing officer commented that he was “an outstanding officer with unlimited potential,” possessed “rock solid character and values,” and had applied “a powerful intellect and energy to the emergent and tremendously complex homeland security challenges facing our nation.” His fitness report went on to state, in pertinent part:

In tough, demanding wartime conditions, [Applicant] demonstrated the moral courage to make the tough calls and give the hard advice required by leaders at the highest level of government. His efforts helped our senior leaders make the right decisions on complex issues dealing with the role of the US military in defense of the homeland. [Applicant] is a trusted advisor admired for his expertise, unwavering integrity, and selfless service. The issues he has worked are headlines of the Washington Post every day. He has delivered the highest standard of duty performance at a critical time in our nation's history. He has proved himself ready for command every day this past year. Applicant is a . . . leader worthy of respect, emulation, and most assuredly command of a . . . [large unit].

(Ex. C at 2-3.)

Applicant's military fitness report for the rating period of June 2003 to June 2004 stated that he had continued to "perform in an outstanding manner." The report also noted that Applicant was retiring "after a highly successful 26 years [of active military service.]" (Ex. D at 2-3.)

Applicant's current manager provided a letter of character reference for the record. He recited that he had known Applicant since 1978 and had served with him in the military. He stated that Applicant's personal and professional conduct was of the highest quality. He praised Applicant's leadership ability, reliability, dependability, and sound judgment. He stated that he hired Applicant "for his intellectual firepower, ethics, leadership ability, and his proven track record of integrity and truthfulness." (Ex. M at 1.)

When Applicant asked his current manager to write a letter of character reference for him, he told the manager that he had been denied a security clearance because he had been unfaithful to his first wife. (Tr. 55-56.)

A former employer also provided a letter of character reference for Applicant. He stated that he had known Applicant professionally and socially for 3½ years. He praised Applicant's logical thinking, trustworthiness, and integrity. (Ex. A at 1.)

Applicant told the woman who became his second wife about his 10-year affair with another male after he revealed it in his 2004 polygraph examination. His two sons do not know about the affair. Applicant's current manager and his former business associate and personal friend, who provided letters of character reference for Applicant, do not know about the 10-year affair or Applicant's relationships with prostitutes. Likewise, the military officers who assessed Applicant's job performance in his fitness reports did not know about his 10-year affair and his relationships with prostitutes. (Tr. 64-65.)

Neither Applicant's current wife nor the individuals who provided letters of character reference know that he masturbated in his government employer's shower rooms, in his automobile, and in adult bookstores while on active military duty. The

military officers who assessed Applicant's job performance in his fitness reports did not know that he masturbated in his government employer's shower rooms, in his automobile, and in adult bookstores while on active duty. They did not know that Applicant, a married man, was having an affair with an enlisted woman in military service in 2002. (Tr. 59-66.)

Applicant and his current wife have had marriage counseling from their pastor. His two meetings with the licensed psychologist in October 2009 were primarily for testing and evaluation, and he has not seen the psychologist since that time. He has discussed his infidelity in his first marriage in counseling sessions with the pastor. Applicant has not had psychological counseling or therapy related to the other behaviors alleged on the SOR. (Tr. 46, 68-71.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no 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 Applicant's 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.

When evaluating an applicant's suitability for a security clearance, an 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 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, the administrative judge applies these 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. 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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

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.

Applicant was a high-ranking officer who was educated at a national service academy. For approximately 26 years, he held a security clearance. He carried out duties of significance to national security.

Applicant served on active duty for 26 years, until he honorably retired in 2004. From about 1985, Applicant engaged in high risk personal conduct that, if discovered, likely would have ended his active duty career. As a married man, he hired female prostitutes, began and carried out a sexual relationship with an enlisted woman he met at work, and engaged in a sexual relationship with a male that lasted for over ten years.

Additionally, Applicant masturbated as he drove in his automobile, in public shower rooms in a government facility, and in adult book stores. Applicant knew his behavior violated various articles of the UCMJ, and he did not disclose his misconduct to his command. Six years later, as a civilian, he has not disclosed most of that behavior to his family, business associates, and to his current manager, who provided him with a letter of character reference and endorsed him for a security clearance.

Applicant's personal conduct raises security concerns under AG ¶¶ 16(b), 16(d)(3), and 16(e)(1). AG ¶ 16(b) reads: "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative." AG ¶ 16(d)(3) reads: "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 . . . a pattern of dishonesty or rule violations." AG ¶ 16(e)(1), reads in pertinent part as follows: "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."

The disqualifying behavior alleged in the SOR occurred between 1985 and 2004. However, with the exception of his marital infidelity with the enlisted woman who became his second wife, Applicant failed to disclose the other behavior alleged in the SOR to his employer. His failure to disclose this information is ongoing and continues to cast doubt on his reliability, trustworthiness, and good judgment. Additionally, the behaviors he failed to disclose would, if they were known, affect his personal, professional, and community standing, and they create in him a vulnerability to exploitation, manipulation, or duress.

Applicant is happily married to his second wife and he and his wife attend and participate in marriage counseling at their church. He has attempted to remedy his past vulnerability to marital infidelity.

Applicant's intellectual and psychological functioning was evaluated by a licensed psychologist, but he has not sought counseling or treatment from a psychiatrist or psychologist for the impulsive and high-risk sexual behavior and personal conduct he engaged in for many years. The licensed psychologist who evaluated him concluded that "[I]t is likely that when [Applicant] becomes overwhelmed by stress due to outside situations, his social capacities modulate, creating the potential for impulsive behavior. This tendency is then compounded by a tendency to withdraw socially, become less expressive, and more self-protective through the use of denial and repression." Applicant's inability or unwillingness to obtain sufficient counseling or to take other material positive steps to alleviate the stressors, circumstances, or factors that caused

his untrustworthy, unreliable, and inappropriate behavior raises concerns that the behavior may recur and that he may continue to be vulnerable to exploitation, manipulation, or duress.

I have carefully reviewed the several mitigating conditions under Guideline E. I conclude that AG ¶ 17(d) applies in part to Applicant's marital counseling from his pastor. I also conclude that no other mitigating conditions are applicable in this case.

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. Applicant is a mature adult of 53 years. He is intelligent and well-educated. For nearly 20 years, however, while holding a security clearance and while carrying out high-level security responsibilities as a senior officer, Applicant engaged in ongoing high-risk behavior that exposed him to the possibility of exploitation, manipulation, or duress. He violated rules when he deliberately carried out the behavior and then failed to disclose his misconduct to his command. Even now, he has not disclosed fully his rule-breaking and inappropriate behavior to his family, his business associates, and his current civilian government contractor employer.

Applicant has not sought professional psychological counseling or treatment for his impulsive and high risk behavior. He has not provided sufficient evidence of rehabilitation, and he failed to establish that the behavior would not recur. He has not disclosed his behavior to those in his personal and professional life who may have a need to know about it, raising ongoing concerns about his judgment, trustworthiness, and reliability.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. Accordingly, I conclude, after a careful review of the facts of his case, the Personal Conduct adjudicative guideline, and the whole person analysis, that Applicant failed to mitigate the security concerns arising from his personal conduct.

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 E: AGAINST APPLICANT

Subparagraphs 1.a. through 1.c.: Against Applicant

Conclusion

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

Joan Caton Anthony
Administrative Judge