



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 09-02707
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel

For Applicant: *Pro se*

August 19, 2010

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigation Processing (e-QIP), on October 14, 2008 (Government Exhibit 1). On September 4, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines D (Sexual Behavior) and 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on September 26, 2009, and requested a decision without a hearing. Pursuant to Paragraph E3.1.7 of the Additional Procedural Guidance at Enclosure 3 of the Directive, Department Counsel requested a hearing before an administrative judge on December 3, 2009. Department Counsel was prepared to proceed on December 2, 2009. The case was assigned to another administrative judge on December 7, 2009. The case was reassigned to me on January

15, 2010. DOHA issued notices of hearing on December 7, 2009; December 15, 2009; and January 13, 2010. I convened the hearing as scheduled on January 15, 2010. The Government offered Government Exhibits 1 through 4, which were received without objection. Applicant testified on his own behalf. DOHA received the transcript of the hearing, and the record closed, on January 27, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural Ruling

Applicant submitted an email request to reopen the hearing in his case on February 18, 2010. Department Counsel opposed the request, and I denied it. The correspondence is Hearing Exhibit I, and is included in the record for information purposes only.

Findings of Fact

Applicant is 50 and married. He seeks to obtain a security clearance in connection with his employment.

Guideline D - Sexual Behavior Guideline E - Personal Conduct

Government alleges that Applicant is ineligible for a clearance because he has engaged in sexual behavior which may be illegal, shows a lack of judgment or discretion, or which may subject him to coercion, exploitation or duress. Applicant admitted all of the allegations in the SOR. Those admissions are hereby deemed findings of fact.

Applicant admitted visiting prostitutes in the United States and overseas several times during the 1980s. (SOR 1.a. and 1.b.) (Government Exhibits 2 and 4; Transcript at 36-37.)

During the 2002-2004 time frame, the Applicant visited a strip club several times and became involved with a topless dancer. On at least two occasions, the Applicant took this woman to a hotel, paid for a room, and paid her \$500 hundred dollars each time to perform various sexual services with him. Applicant maintains that the services did not include intercourse or oral sex. He has not engaged in any such activity since that time. (Government Exhibits 2, 3 at 3, and 4; Transcript at 47-50.)

As of the time of the hearing, the Applicant had not told his wife about this activity with the prostitutes and the lap dancer. In addition, his children and his employers did

not know he had engaged in this activity. (Government Exhibit 3 at 3; Transcript at 50-56.)¹

Applicant's program access was denied by another government agency on May 22, 2006. (Government Exhibit 3.)

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 to be used as appropriate 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 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. 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

¹In Hearing Exhibit I, the Applicant asserts that he had told his wife about his activities and asked that a new hearing be held. As stated earlier, I denied this request.

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 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 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 . . .”

Applicant engaged the services of prostitutes in the 1980s and a lap dancer to give him “sexual services” six to seven years ago. Standing by themselves, these actions may not be sufficient to deny the Applicant a security clearance. The problem here, however, is that for many years he has hidden this information from his wife. As of the day of the hearing, he still had not told his wife what he had done. The Applicant may deny it, but the evidence convincingly shows that he feels he has something to hide concerning his conduct. 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.

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. 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. 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. My Guidelines D and E analysis is applicable to the whole-person analysis as well. The evidence shows that the Applicant engaged in sexual behavior and personal conduct of a kind that makes him vulnerable to coercion, exploitation or duress. In particular, his failure to inform his wife of his conduct makes him particularly vulnerable. I find that there is great “potential for pressure, coercion, exploitation, or duress” as set forth in AG ¶ 2(a)(8). Using the whole-person standard, the Applicant has not mitigated the security significance of his sexual behavior and related personal conduct. He is not eligible for a security clearance.

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
Subparagraph 1.b.:	Against the Applicant
Subparagraph 1.c.:	Against the Applicant
Subparagraph 1.d.:	Against the Applicant
Paragraph 2, Guideline E:	AGAINST THE APPLICANT
Subparagraph 2.a.:	Against the Applicant
Subparagraph 2.b.:	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