



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



In the matter of:)
)
) ISCR Case No. 09-05820
)
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Esquire, Department Counsel

For Applicant: Joseph P. Smith III, Esquire

August 31, 2010

Decision

O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns related to sexual behavior and personal conduct. Accordingly, his request for a security clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) signed on January 29, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

¹ Required by Executive Order 10865, as amended, and DoD Directive 5220.6 (Directive), as amended.

On December 23, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) that specified the basis for its decision: security concerns addressed in the Directive under Guidelines D (Sexual Behavior) and E (Personal Conduct) of the Adjudicative Guidelines (AG).²

Applicant signed his notarized Answer on February 11, 2010, in which he denied the allegations under Guideline D and Guideline E. Applicant requested a hearing before an administrative judge. Department Counsel was prepared to proceed on February 26, 2010, and the case was assigned to me on March 12, 2010. DOHA issued a Notice of Hearing on March 25, 2010. I convened the hearing as scheduled on April 20, 2010. The government offered three exhibits, which were admitted without objection as Government Exhibits (GE) 1 through 3. Applicant testified and presented three witnesses. He did not offer exhibits. I held the record open to allow Department Counsel to submit a document for administrative notice, and for Applicant to offer an exhibit. Both documents were timely submitted. I marked the Government's submission as Hearing Exhibit (HE) 1. I received Applicant's document into evidence without objection as Applicant Exhibit (AE) A. DOHA received the transcript on April 29, 2010.

Procedural Ruling

I granted the Government's request to take administrative notice of the Uniform Code of Military Justice. (Hearing Exhibit I)

Findings of Fact

After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings of fact.

Applicant is 53 years old. He holds a master's degree in mechanical engineering. During his 26 years in the Navy, he received numerous awards and accolades and was twice awarded the Legion of Merit. He was never disciplined while in the Navy. He retired honorably as a Captain in 2005. He has held a security clearance since 1984. He has been married for 26 years, and has two sons, 23 and 26 years of age. Applicant has worked for his current employer, a defense contractor, since 2005. (GE 1; Tr. 100-106).

During his 1992 periodic reinvestigation, Applicant disclosed three sexual liaisons that he had between 1989 and 1992. In 1989, while deployed overseas, he met a prostitute in a bar in the Philippines and spent the night with her. During the same year, he spent the night with another prostitute while in Thailand. In his sworn statement, he

² Adjudication of this case is controlled by the Adjudicative Guidelines that were implemented by the Department of Defense on September 1, 2006. The Adjudicative Guidelines supersede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

said that he did not know the name of either woman, and did not discuss his work with them. Applicant testified that they were foreign nationals. (GE 3; Tr. 133-134)

In 1992, when he was 35 years old, Applicant had an affair with a Navy nurse he met in the officers' club. He did not want to disclose her name in his 1992 sworn statement, but noted that she was not in his chain of command. He noted that he was lonely and under stress. He also stated that his wife was not aware of his extramarital relations, and he did not want her to find out about them. In his sworn statement, he said, "I have no intentions of repeating these actions in the future. I have made a mistake and have learned my lesson." His security clearance was renewed. To Applicant's knowledge, no one knew of his sexual affairs while he was in the Navy. (GE 3; Tr. 110, 136)

During his security interview on May 6, 2009, Applicant disclosed that he had an affair with a married woman he met in 2002, when he was 45 years old. They initially had relations about twice per week. Later, it decreased to about once per month, until 2004, when the sexual contacts ended.³ At the time, he was a base installation commander. Between 2004 and 2009, they remained friends, and met a few times per year for dinner or drinks. As of October 2009, Applicant expected to remain friends with this woman. No one knew of this affair, including his wife. (GE 2, Tr. 122, 125)

On May 15, 2009, Applicant contacted the investigator and requested a second interview. He disclosed that he had forgotten to mention other sexual affairs he had had. Applicant also disclosed that from summer 2007 to early 2008, he started a paid membership in an adult social website designed to meet sexual partners. He met four women, and had "one night stands" with two of them. In late 2007, he also used another website that focused on dating. Through that site, he met a woman with whom he had a longer relationship. She was married, but going through a divorce. They had sexual relations about seven times. At the time of Applicant's security interview in May 2009, the relationship was ongoing. According to his interrogatory response, Applicant ended the relationship after his May 2009 interview. (GE 2; Tr. 111, 126-128, 131-132)

Applicant also reported an affair that he had starting in October 2008. The woman was a former temporary employee of Applicant's company. They met about three times at a hotel. The woman was married, but in the process of obtaining a divorce. During his interview in May 2009, he said he was in the process of ending the affair. In his interrogatory response of October 2009, he stated, "Since the interview [May 2009] I have not engaged in any physical relations with her, and in fact, have

³ Many of Applicant's affairs occurred between 1989 and 2005 while he was serving in the Navy. Under the Uniform Code of Military Justice (UCMJ), Article 134, adultery is an offense, and is defined as wrongful sexual intercourse between two parties where one is married to someone else, and where such conduct "was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." It is punishable by dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year. Applicant was not prosecuted for adultery during his military career. See Hearing Exhibit 1.

stopped the affair altogether.” At the hearing, he testified that he ended this relationship in January 2009. However, his statements in his interrogatory response appear to indicate he ended two of the relationships “since the interview” in May 2009. He also testified that he has now ended all of his extramarital affairs. (GE 2, Tr. 111, 133)

Applicant met with a licensed clinical psychologist five times before the hearing. The psychologist conducted approximately three hours of testing and four hours of interviews. He testified that Applicant is a reliable and conventional man who respects authority and is no more likely to break rules than other people. However, because his needs were not being met through his marriage, he sought satisfaction elsewhere. He made poor choices and rationalized his actions. The psychologist stated that although Applicant does not have a serious psychopathology, counseling would help him deal with the underlying causes of his behavior and avoid reverting to similar negative conduct in the future. When asked if a person who returned to negative conduct after disclosing it would be likely to be a recidivist in the future, the psychologist agreed. However, he believed that Applicant's current disclosure differs from the disclosure in 1992 because at that time, Applicant's family never learned of his affairs, whereas they now know about them. Although the witness strongly recommended counseling several times during his testimony, he opined, “I don't think [Applicant] is a person who wants to go to counseling.” However, he thought Applicant would attend counseling if he said he would. Applicant testified that he is “open to that.” A few days before the hearing, Applicant asked the psychologist for names of counselors, but did not make an appointment. After the hearing, he made an initial appointment with a licensed clinical psychologist. (AE A; Tr. 40-63, 68-70, 75-77, 112)

Applicant's wife testified that her husband had an outstanding naval career. She never heard any hint of impropriety from his coworkers, and she held him in the highest regard. She first became aware of his infidelity in 2003, when she answered a phone call from a woman with whom Applicant was sexually involved. He admitted to his wife that he was having an affair. Applicant's wife was shocked, and does not remember if she asked him if he had had any other extramarital affairs. He did not disclose any of his previous liaisons. In February 2010, he informed his wife of the extent of his affairs. He also informed his older son, but had not told his younger son as of the time of the hearing. When asked if Applicant told his wife how many sexual liaisons he had, she testified, “He told me of many, of, you know, more than you want to hear.” But she was not concerned about the number because, “The fact that it was done is the line that was crossed at that time.” She has forgiven him, and intends to remain married. She is willing to attend counseling “if it is prescribed.” (Tr. 89, 92-95, 99, 114-115)

Applicant's direct supervisor testified at the hearing. He is a vice president with Applicant's employer and has held a security clearance for almost 30 years. He has known Applicant for four years. He testified that Applicant is reliable and trustworthy. When Applicant's five-year periodic reinvestigation was due in early 2009, he informed this supervisor and the facility security officer of his extramarital affairs. His friends and coworkers do not know. Applicant's supervisor testified that he was very surprised and

somewhat disappointed when he learned of Applicant's conduct. However, he still has confidence in Applicant's ability to do his job well. (Tr. 12-30, 115, 138)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.⁴ Decisions must also reflect consideration of the "whole-person" factors listed in ¶ 2(a) of the Guidelines.

The presence or absence of a disqualifying or mitigating condition does not determine the conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct).

A security clearance decision is intended only to resolve the question of whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness to protect the national interests as her or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁷

⁴ Directive. 6.3.

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

Analysis

Guideline D, Sexual Behavior

AG ¶ 12 expresses the security concern about personal conduct:

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.

AG ¶ 13 describes conditions that could raise security concerns and may be disqualifying. The following conditions are relevant:

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

(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.

In 1992, Applicant disclosed liaisons with two foreign prostitutes and an affair with another military member during his security investigation, but did not tell his wife. He specifically stated he did not want his conduct to be disclosed to her. In 2003, his wife accidentally discovered one of his affairs, and Applicant admitted it. He had actually engaged in repeated extramarital misconduct at that point, but did not disclose the other affairs. During 24 of Applicant's 26 years in the military, his wife was unaware of his extramarital involvements. It was not until January 2010 that he informed his supervisor and FSO, and only in February 2010 did he inform his wife and his son. Under the Appeal Board's jurisprudence, Applicant's behavior made him vulnerable to coercion during all the years that his conduct remained hidden from his family and his command.⁸ AG ¶ 13(c) applies. In addition, although his adultery was not prosecuted, it was an offense under the UCMJ. Applicant's conduct was discreet; however, his willingness to engage in extramarital affairs over a period of 20 years reflects, *inter alia*, a complete lack of judgment. AG ¶ 13(a) and (d) apply.

AG ¶ 14 provides the following relevant mitigating conditions:

⁸ See, ISCR Case No. 91-0259 at 5 (App. Bd. Oct. 7, 1992).

(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;

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

(d) the sexual behavior is strictly private, consensual, and discreet.

Applicant's frequent sexual misconduct occurred over a period of 20 years, and ended only last year. His behavior is recent and casts serious doubt on his current trustworthiness, reliability, and judgment. Applicant's expert witness strongly recommended that Applicant pursue counseling. As of the hearing date, Applicant had not pursued it further than obtaining therapists' names. Subsequent to the hearing, he set up an initial appointment. It is unknown how long he will attend, or if it will help him to refrain from engaging in future extramarital affairs. AG ¶ 14(b) does not apply.

Applicant revealed his history of sexual misconduct to his supervisor and FSO in January 2010, and to his wife and son in February 2010. His past is no longer a basis for coercion. However, I weigh his recent disclosure in light of the many years that Applicant allowed himself to be subject to coercion by engaging in conduct that he did not want his wife, family, command, or coworkers to know. AG ¶ 14(c) applies in part.

Applicant's behavior was discreet and private, as his wife, his supervisor, coworkers, his family, and friends never knew of his sexual misconduct. The record contains no evidence indicating that any of his affairs were not consensual. AG ¶ 14(d) applies. Overall, Applicant's recent disclosure and his discretion are insufficient to mitigate his disqualifying conduct.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern about personal conduct:

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 E allegations implicate the following disqualifying conditions 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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

As discussed *supra*, Applicant concealed his extramarital affairs between 1989 and 2010. He did not want his wife to learn about his liaisons. His command did not know during his military career; his supervisor and FSO did not know between 2005 and 2010. Applicant was vulnerable to exploitation because his professional and personal standing would undoubtedly have been affected by disclosure. AG ¶ 16(e) applies.

Under AG ¶ 17, the following mitigating conditions are relevant:

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant's offense was not minor. He violated the marriage oath and his wife's trust. The fact that he did not disclose his most recent affairs until 2010, when his periodic reinvestigation was due, indicates his disclosure was more a response to the security process than an effort at rehabilitation. His conduct casts doubt on his trustworthiness. Applicant receives mitigation because he has disclosed his conduct and is no longer subject to coercion. However, as discussed *supra*, this recent disclosure is weighed in light of the two decades that Applicant placed himself in a situation where he was vulnerable to exploitation. Partial mitigation applies under AG ¶ 17(e).

Applicant made an initial appointment with a counselor. However, he remains in the marriage that was a significant factor in his behavior. Moreover, in light of some apparent reluctance to engage in counseling, its efficacy is uncertain. Given these facts, his behavior may recur. AG ¶ 17(d) does not apply.

Whole-Person Analysis

Under the whole-person concept, an administrative judge must evaluate an applicant's security eligibility 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant's poor judgment and untrustworthiness began when he was 32 and continued until last year, when he was 52 years old. He is a well-educated, intelligent man who has held positions of significant responsibility. Yet he made conscious decisions to use prostitutes, maintain affairs, and go online to seek sex partners. When he disclosed his affairs in 1992, he signed a sworn statement that he would not engage in such conduct in the future. He did not uphold that promise. Applicant repeatedly engaged in behavior that violated his wife's trust. He failed to uphold the values of a military officer. Finally, he failed the Government by engaging in this activity while he held a security clearance. Those who are granted a security clearance enter into a fiduciary relationship with the Government based on trust. A decision to engage in extramarital sex, repeatedly, over two decades, and while holding a security clearance, raises serious doubts about Applicant's judgment and trustworthiness.

Overall, the record evidence fails to satisfy these doubts, which must be resolved in favor of the national security. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under Guidelines D and E.

Formal Findings

Paragraph 1, Guideline D	AGAINST APPLICANT
Subparagraph 1.a.:	Against Applicant

Paragraph 2, Guideline E

AGAINST APPLICANT

Subparagraph 2.a.:

Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge