



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



In the matter of: )  
)  
) ISCR Case No. 09-06026  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: John Bayard Glendon, Esquire, Deputy Chief Department Counsel  
For Applicant: *Pro se*

12/19/2012

**Decision**

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

**Statement of the Case**

On December 9, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his position with a defense contractor. After reviewing the results of an ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant interrogatories to clarify or augment potentially disqualifying information. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOHA could not make the preliminary affirmative findings required to issue a security clearance. On May 23, 2012, DOHA issued to Applicant a Statement of Reasons (SOR) detailing security concerns for sexual behavior under Guideline D, and the same conduct was cross alleged as personal conduct under Guideline E. 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 in the Department of Defense on September 1, 2006. Applicant received the SOR on June 4, 2010.

Applicant answered the SOR on June 22, 2012. He admitted the allegations under both Guidelines D and E with explanation and a minor change to the dates of the incidents of security concern. He did not request a hearing before an administrative judge. Department Counsel timely requested a hearing on July 22, 2012. Department Counsel was prepared to proceed on October 2, 2012. The case was assigned to me on October 9, 2012. DOHA issued a Notice of Hearing on October 16, 2012, for a hearing on November 19, 2012. I convened the hearing as scheduled. The Government offered seven exhibits, which I marked and admitted into the record without objections as Government Exhibits (Gov. Ex.) 1 through 7. Applicant testified on his behalf. I kept the record open for Applicant to submit documents. Applicant timely submitted two documents that I marked and admitted into the record as Applicant Exhibits (App. Ex) A and B. Department Counsel had no objection to the admission of the documents. (Gov. Ex. 8, e-mail, dated December 6, 2012) DOHA received the transcript of the hearing (Tr.) on November 29, 2012.

### **Findings of Fact**

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact. Applicant admitted the allegations under sexual behavior and personal conduct with explanation. His admissions are included in my findings of fact.

Applicant is 56 years old and has been married for over 30 years, since January 1982. He has three children, two grown and one in college. He has a bachelor's degree and a master's of business administration degree. He worked for a government agency in the counterterrorism area, much of the time in foreign countries, for over 23 years before retiring in September 2007. Since retiring from the government agency, he has worked in various positions for the same defense contractor. His present position is teaching counterterrorism and counterintelligence subjects under a government agency contract. In addition to working for the defense contractor, Applicant may be employed in the future as an independent contractor instructor for the same courses. (Tr. 11-17, 39-42; Gov. Ex. 1, e-QUIP, dated December 9, 2008; App. Ex. 2, Employment Contract, dated November 12, 2012)

The alleged sexual behavior security concerns arose because Applicant, from 2003 to 2006, engaged in sexual activities with foreign prostitutes in foreign countries while he was employed with a U.S. government agency in a sensitive undercover overseas national security position (SOR 1.a); because in February 2006 he engaged in a sexual act with a foreign national in a foreign hotel "steam room" while working for the U.S. government agency in a sensitive undercover national security position (SOR 1.b);

and because from September 2007 until October 2010 he engaged in an extramarital affair that his wife is unaware of (SOR 1.c). The same conduct is cross alleged as a personal conduct security concern under Guideline E (SOR 2.a).

The information concerning his sexual behavior was provided by Applicant during various investigations conducted by his previous government agency employer concerning his access to classified information. He was also candid about his sexual behavior when he was interviewed by security investigators on January 6, 2009, concerning his current access to classified information. He admitted that he engaged in sexual behavior with prostitutes about five or ten times in Amsterdam between 1999 and 2002 while on government business. He disclosed this information in his previous 2004 security investigation. The activity was clearly known by his former government agency, it was voluntarily disclosed, no action was taken, and he was cleared for access to classified information. (Tr. 46-48; Gov. Ex. 2 and Gov. Ex. 3, Response to Interrogatories, dated August 25, 2012; Gov. Ex. 4, Letter, dated January 11, 2011; Gov. Ex. 6, Investigative Information, dated May 5, 2011; Gov. Ex. 7, Report, dated November 6, 2009)

He admitted to engaging in sexual behavior with prostitutes in various locations overseas from 2004 until July 2006. Applicant also provided information to security investigators that in February 2006, he engaged in a sexual act with a foreign national in a hotel steam room in a foreign country. His friends and spouse are not aware of his sexual behavior with prostitutes or his sexual encounter in the hotel steam room. Applicant believes that the unwritten policy of his former government agency was that one-time visit to an individual prostitute does not constitute a foreign relationship requiring reporting. He did not consider his actions with prostitutes to be a security threat. He disclosed the information willingly to investigators and no action was taken. To Applicant, this confirmed what was considered the unwritten policy. Applicant believes that his visits to prostitutes were in an environment considered benign from a counterterrorism point. In all of the encounters, he was anonymous and the prostitutes did not know of his government position. He knows that this sexual behavior in a foreign country could put him in a position to be compromised, but he has never been compromised and he is no longer vulnerable to exploitation for this sexual behavior. The situations happened over six years ago during a period of serious marital problems. He has not been threatened or compromised in those six years. (Tr. 32-33, 48, 69-72; Gov. Ex. 2, Testimonies, December 17, 2008 – February 18, 2009, at 2-4)

Applicant also admitted to investigators that he has engaged in an extramarital affair with a former college friend since September 2007. The affair started a few months before he retired from his former government agency. The affair ended in October 2010 but resumed again in February 2012. The affair is still ongoing. No one is aware of the affair. The affair is only known to Applicant and the woman. His former agency, his friends, his wife, and his present employer are not aware of the affair. If someone made an attempt to use the affair to exploit him, he would immediately reveal it to all concerned. (Tr. 51-55; Gov. Ex. 2, Testimonies, June 17, 2009 – July 7, 2009, at 1)

Applicant admitted that he still occasionally engages in extramarital affairs. He admits to recently having sexual encounters with various females when he is on travel and teaching courses for his employer. He admits that there is a potential concern about his activities from a counterintelligence point, but he believes that there is no counterterrorism threat because there is no focus by adversaries on his activities. The information he has access to is not highly classified. (Tr. 68-69)

Applicant attributes some of his sexual behavior to learning from his wife that she had an extramarital affair from 2001 until 2005. He engaged in this sexual behavior because of difficulties in his marriage and his wife's lack of sexual interest in him. She advised him that if he ever had an affair, she would not want to learn about it. That is one of the reasons he has not told his wife of his sexual behavior and why she is not aware of his sexual activities. (Tr. 51-52; Response to SOR, dated June 22, 2012)

Applicant admits that some of his decisions on sexual behavior were failures in judgment by him. He engaged in the activities because he was affected by this wife's lengthy affair. He does not believe the affair is a counterintelligence threat but he does admit there may be such a potential threat. (Tr. 27-28)

Applicant presented a letter of recommendation from a former coworker and friend. He worked with Applicant for a number of years on counter proliferation missions. The letter states that Applicant has a strong commitment to accomplish the mission. He is hard-working, has vision, and was creative during his career with the other government agency. Applicant is resourceful and a team player. Applicant could be relied on to exercise good judgment in difficult circumstances. Applicant is a strong teacher who highly motivates students to be dedicated and driven in the intelligence field. (App. Ex. A, Letter, dated October 21, 2012)

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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.

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 for 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 protect classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

## **Analysis**

### **Sexual Behavior, Guideline D**

The security concerns raised against Applicant are from the same incidents. The gravamen of Applicant's conduct was inappropriate sexual behavior by extramarital affairs and sexual encounters with prostitutes in foreign countries. The sexual behavior security concerns arise from conduct that indicates a personality or emotional disorder reflects lack of judgment or discretion, or which can raise questions about the individual's reliability, trustworthiness, and ability to protect classified information. (AG ¶ 12) Personal 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) Since the security concerns are based on the same incidents and are similar, the concerns will be discussed together.

Applicant admits that he had sexual encounters with foreign prostitutes in foreign countries from about 1999 to 2006. He admits to a sexual encounter with a foreign national male in a foreign hotel steam room in 2006. He admits to having an extramarital affair starting in 2007 that is still ongoing. His wife, his coworkers, his employer, his friends and acquaintances are not aware of these sexual activities and behavior. This history of sexual behavior raises Sexual Behavior Disqualifying Condition AG ¶ 13(c) (sexual behavior that causes an individual to be vulnerable to coercion,

exploitation, or duress), and AG 13(d) (sexual behavior of a public nature and/or that reflects lack of discretion or judgment). Applicant's admitted sexual activities with prostitutes in a foreign country and an extramarital affair raise questions about the reliability, judgment, and trustworthiness of Applicant. The incidents have the potential to make Applicant vulnerable to coercion, exploitation, and duress.

The Government produced substantial evidence by way of Applicant's admissions and statements to establish the disqualifying conditions in AG ¶ 13(c) and AG ¶ 13(d). Applicant candidly admits to the alleged sexual behavior. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns under sexual behavior.

As noted above, the gravamen of Applicant's conduct causing the security concerns is Applicant's extramarital sexual behavior and his sexual behavior with foreign prostitutes in foreign countries. Sexual Behavior Mitigating Conditions AG ¶ 14(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); Ag ¶14(c) (the behavior no longer serves as a basis for coercion, exploitation, or duress; and AG ¶ 14(d) (the sexual behavior is strictly private, consensual, and discreet) may be applicable as raised by Applicant's testimony. The last sexual activity with a foreign prostitute as reported by Applicant took place over six years ago. The incidents with prostitutes were frequent and voluntary. Future encounters with prostitutes, either overseas or in the United States, could recur when he has the desire to seek their services. His extramarital affair is private, consensual, and discreet, but it is still ongoing. While taken individually, the mitigating conditions can explain away his sexual behavior. However, the extent of his extramarital sexual behavior, whether with prostitutes or an individual, shows a lack of judgment and discretion that raises questions about reliability and trustworthiness. The extramarital affair is still ongoing and thereby can serve as a basis of coercion, exploitation or duress. Applicant has not mitigated the security concerns for sexual behavior.

### **Personal Conduct, Guideline E**

Applicant's sexual conduct also raises personal conduct security concerns. Personal Conduct Disqualifying Condition 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) is applicable.

Personal Conduct Mitigating Conditions AG 17(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), and AG 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress) are applicable based on Applicant's testimony. As noted above, Applicant's sexual behavior was frequent, is still ongoing, and his conduct was voluntary, so there are no unique circumstances causing his conduct. His extramarital sexual behavior can recur. He has taken no steps to stop or eliminate his conduct, so he remains vulnerable to exploitation, manipulation, and duress. Applicant has not mitigated security concerns for personal conduct.

### **Whole-Person Analysis**

Under the whole-person concept, the 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.

Under AG ¶ 2(c), 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered that Applicant successfully served for over 23 years in another government agency. I considered the opinion of his coworker that he is highly regarded and an asset in teaching counterintelligence subjects. The adjudicative process is an examination of an individual's past to determine if he will engage in risky conduct in the future and whether that conduct could affect his judgment, reliability and trustworthiness. Applicant readily and candidly admitted that he engaged in risky sexual behavior over a long period. He had sexual activities with foreign prostitutes in foreign countries. He engaged in a sexual act with a foreign national male in a steam room of a hotel in a foreign country. He is still having an extramarital affair with a college friend that started in 2007. He admits to still having extramarital relations with women while he is traveling for business. Applicant's past sexual conduct indicates that he will continue with such conduct. His pattern of reckless and irresponsible sexual behavior and personal conduct shows poor judgment, a lack of discretion, and a failure to control impulses. His conduct demonstrates poor judgment, unreliability, and untrustworthiness. This pattern of

conduct casts doubt on Applicant's willingness or ability to safeguard classified information.

Applicant believes he is not vulnerable to manipulation, coercion, or exploitation, mainly because his conduct is discrete and private. His wife and others are unaware of his conduct. He no longer has access to information that is highly classified and valuable. However, his conduct is risky and there is a possibility that in the future he may be vulnerable to manipulation, coercion or exploitation. Any doubts must be resolved in favor of the national security. The record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the sexual behavior and 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:	AGAINST APPLICANT
Subparagraph 1.a – 1.c:	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 national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

---

THOMAS M. CREAN  
Administrative Judge