



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



In the matter of:)
)
) ISCR Case No. 09-08213
)
Applicant for Security Clearance)

Appearances

For Government: Kathryn D. Mackinnon, Esq. Deputy Chief Department Counsel
For Applicant: *Pro se*

August 22, 2011

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for a security clearance to work in the defense industry. After being granted a security clearance by another government agency, Applicant routinely solicited foreign prostitutes while on official travel abroad; he also used marijuana one time while on official travel in a foreign country. He repeatedly displayed a disdainful attitude toward securing U.S. embassy security documents in his possession. He falsified two security clearance applications and provided misleading information to background investigators. At the hearing, Applicant continued to be dishonest, evasive, and did not take responsibility for his actions. Clearance is denied.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on November 24, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a statement of

¹ This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to*

reasons (SOR) explaining that it was not clearly consistent with the national interest to grant Applicant access to classified information. The SOR detailed the factual bases for the action under the adjudicative guidelines for Personal Conduct (Guideline E) and Sexual Behavior (Guideline D).

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on April 5, 2011. The hearing was initially scheduled for May 11, 2011, but was rescheduled for June 11, 2007. At hearing, Government's Exhibits (GE) 1 through 9 were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through D, which were also admitted without objection. I received the Transcript (Tr.) on June 15, 2011.

Procedural Matters

In his Answer to the SOR, Applicant did not respond to allegation 1.i., which cross-alleges the two Sexual Behavior allegations under the Personal Conduct Guideline. He admitted the Sexual Behavior allegations that after receiving a security clearance from another government agency (OGA 1), he used prostitutes at least ten times between 2003 and 2008 while on official travel; and that he continued to solicit foreign prostitutes after a second government agency (OGA 2) interviewed him in July 2008 to determine his eligibility for access to sensitive compartmented information (SCI). At hearing, he clarified his Answer also admitting the allegations as cross-alleged under the Personal Conduct guideline.²

Findings of Fact

Applicant is a 48-year-old, married, father of three daughters. Between 2001 and 2008, he worked for OGA 1 as a contractor installing security systems in U.S embassies around the world. This job required a security clearance, which OGA 1 granted him in 2003. The job also required frequent travel that kept Applicant away from home for months at a time. In 2008, he applied for a security clearance with DoD and SCI access through OGA 2. He completed security clearance applications in January and July of that year.³

Over the course of three interviews with OGA 2 between April 2008 and November 2008, Applicant admitted to having three extramarital affairs with foreign nationals he met while on official travel. The women would often accompany him on official travel and stay in his hotel room. Sometimes, he admitted, he would leave embassy security plans in his hotel room with the women when he was not there. Because the documents were not classified, he did not believe any harm was done. He

Classified Information (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

² Tr. 10-11.

³ GE 1; GE 3.

claimed that the women did not know the nature of his employment. When asked, he could not explain why he had such a cavalier attitude for U.S. embassy security plans. Applicant reported that the most serious of these affairs, with Ms. K, began in June 2007 and ended in April 2008, because he was unwilling to leave his wife for her, although he seriously considered the possibility. When not accompanied on official travel by one of his paramours, Applicant solicited prostitutes.⁴

Initially, he reported that he solicited prostitutes on two occasions: once in 2002 and again in March 2008. By the third interview, he admitted to using prostitutes on at least ten occasions, between 2003 and 2008, in various countries, while on official OGA 1 travel. His last solicitation occurred in a foreign country two weeks before his second interview with OGA 2 in July 2008. In the third interview, he also recanted his story about soliciting a prostitute in 2002, stating that he was not truthful in an attempt to conceal the actual number of prostitutes he had been involved with. He also admitted smoking marijuana in 2004 in a bar in a foreign country while on official travel. Based on the disclosures in his three interviews, OGA 2 denied Applicant's eligibility for SCI access.⁵

In investigating Applicant's eligibility for a DoD security clearance, the Office of Personnel Management (OPM) interviewed Applicant three times between April and October 2009. Applicant reported that his relationship with Ms. K, which he did not disclose on his security clearance applications, was ongoing. The two maintained regular contact until February 2009, when she accompanied him on official travel. He stated that his wife was aware of the relationship. The final interview took place after Applicant was terminated from a government contracting job in June 2009 for misuse of his corporate credit card. He used the credit card to pay the outstanding balance on a vacation package for his family. Applicant faults his employer for his actions because the employer purportedly did not issue his paycheck on time.⁶

DOHA issued a set of interrogatories to Applicant seeking clarification on his contacts with foreign nationals and his use of prostitutes while on official travel. In response to the interrogatories, Applicant reported that he last solicited a prostitute while on official travel to a foreign country in March 2008. He revealed continuing contact with Ms. K, reporting that she accompanied him on official travel to a foreign country in October 2009.⁷

Based on the investigative record, DOHA issued an SOR detailing disqualifying conduct under Guidelines E (Personal Conduct) and D (Sexual Behavior). He admits both Guideline D allegations. He admits, albeit with qualification, that he used prostitutes while on official travel after being granted a security clearance by OGA 1. He

⁴ GE 6, GE 7.

⁵ GE 3; GE 6; GE 7.

⁶ GE 4; GE 9.

⁷ GE 5.

disputes the number of times. He also admits he demonstrated poor judgment by soliciting prostitutes while being investigated for eligibility for SCI access. He did so because he thought he was on his last assignment abroad. He vows not to solicit prostitutes while on official travel in the future. Applicant admits one of the Guideline E allegations, also with qualification. In response to the allegation that he left foreign national women alone in his hotel room with U.S. embassy security plans, he admits only that he had embassy plans in his bag that could be viewed by anyone handling his checked luggage. He denies the remaining Guideline E allegations.⁸

Applicant denies that he used marijuana in 2004 because he only took one puff on the marijuana cigarette. He denies that he was terminated by a former employer for using his corporate credit card to pay for a personal vacation in 2009. He avers that he was terminated for using his corporate credit card for \$2,000 of personal charges. He also denies that he falsified his January and July 2008 security clearance applications. In response to Section 24(b), which seeks information on illegal drug use while holding a security clearance, he answered in the negative. He decided not to list his use of marijuana in 2004 because, he claims, a one-time incident does not constitute illegal drug use as contemplated by the question. He claims he inadvertently omitted his relationship with Ms. K in response to Section 14, which seeks information about any foreign national to whom an applicant is bound to by obligation, affection or close continuing contact.⁹

At hearing, Applicant testified about his relationships with foreign nationals, his use of prostitutes while on official travel abroad, his 2004 use of marijuana, and his misuse of his corporate credit card in 2009. He continued to provide inconsistent and contradictory testimony. He offered an explanation for his decision to use marijuana while on official travel to a foreign country in 2004. Despite a security briefing admonishing him not to use illegal drugs, Applicant explained that he was acting on his security officer's advice to blend into the local population. Concluding that his physical appearance made it impossible to blend in, he figured that refusing the marijuana cigarette being passed around the bar would make him look even more suspicious. He admitted that he was not thinking about the consequences of his actions.¹⁰

Applicant admitted using prostitutes after receiving security briefings forbidding the practice. He was warned of the potential dangers, specifically about incidents involving other contractors who became victims of crimes while attempting to solicit prostitutes. Contrary to the information provided in his security briefing, he concluded using prostitutes was a safer practice than an ongoing relationship with a foreign national. Furthermore, he found it difficult to reject the advances of the women he met while traveling abroad. He found himself overwhelmed by the attention he received, which boosted his ego. Despite the prohibition, he admitted to using prostitutes to

⁸ Answer.

⁹ Answer.

¹⁰ Tr. 29 - 30.

combat the loneliness he felt while being separated from his family and stress of his job.¹¹

Applicant believes that none of his past behavior can be used as a source of exploitation, coercion or duress. He claims to have reported each of his girlfriends to his security officers as well as his contacts with foreign prostitutes. He testified that his wife is aware of his three extramarital affairs and his use of prostitutes while traveling overseas. She provided a letter confirming her knowledge of two of Applicant's extramarital affairs, referring to the women by name. Her letter does not indicate any knowledge of the third affair or her husband's use of prostitutes.¹²

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 are used in evaluating an Applicant's eligibility for access to classified information.

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." 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 to obtain 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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).

¹¹ Tr. 101 – 103.

¹² Answer; AE A.

Analysis

Guideline D, Sexual Behavior

The concern regarding an applicant's sexual behavior is explained 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 the Guideline may be raised solely on the bases of the sexual orientation of the individual.

AG ¶ 13 delineates the conditions that could raise a security concern and may be disqualifying. Two of the disqualifying conditions are relevant to this case.

(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.

Both disqualifying conditions apply. Applicant, after being granted a security clearance, solicited prostitutes at least ten times over a five year period while on official travel abroad. He did so in willful disregard of the proscription by OGA 1 and after being made aware of the inherent danger of the practice. He acted without any thought to the security implications of his conduct. That he continued to engage in the behavior during his investigation for eligibility to SCI access is troubling. He was put on notice that his behavior raised security concerns, yet he continued to solicit prostitutes while on official travel. Either he could not control himself or he did not care to. His behavior shows a pattern of poor judgment and a disregard for security rules and regulations.

None of the mitigating conditions available under AG ¶ 14 apply. Applicant's habit of soliciting prostitutes occurred in his forties, not as an immature adolescent. His behavior occurred frequently under circumstances common to official travel – being separated from one's spouse. Because he has shown repeatedly that his personal needs trump security concerns, I find that if presented with similar circumstances, he may continue to solicit prostitutes. His claims that he is not vulnerable to coercion, exploitation, or duress because he reported all of his contacts with foreign national women, including the prostitutes, to his security manager and his wife do not mitigate the security concerns. It is unlikely that Applicant reported each contact with foreign prostitutes to his security officer because his flagrant disregard of security protocols would have resulted in multiple security violations. Also, I doubt his wife is fully aware of his use of prostitutes. There is no indication in the letter that she wrote on his behalf to support this claim. Finally, given the prohibition given to Applicant on the use of foreign

prostitutes while on OGA 1 travel, it does not matter if the solicitations were private, consensual, or discreet – the conduct was prohibited.

Guideline E, 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.

The guideline notes several disqualifying conditions that are relevant to this case under AG ¶ 16:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar for used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibility;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(c) credible adverse information in several adjudicative 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 indication that the person may not safeguard protected information; and

(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.

I find that Applicant intentionally falsified his January and July 2008 security clearance applications. Accordingly, AG ¶ 16(a) applies. The language of Section 24(b) is plain. His contention that a single use is not use as contemplated by language of the

question is illogical and amounts to nothing more than a convenient parsing of words. His claim that he inadvertently failed to report his relationship with Ms. K is disingenuous. Applicant maintained contact with her in the months preceding each security clearance application. Furthermore, his relationship with Ms. K was not casual; Applicant considered ending his then 22-year marriage to be with her. It is implausible that a relationship of this magnitude slipped Applicant's mind.

In addition to falsifying multiple security clearance applications, Applicant also provided false and misleading information to OGA 2 investigators about the extent of his use of prostitutes while on official travel in foreign countries, which is disqualifying under AG ¶ 16(b). His piecemeal and conflicting disclosures over three interviews with OGA 2 investigators are evidence of the depth of his dishonesty and evasiveness. An applicant is expected to provide full, frank, and candid answers throughout the investigative process. Applicant failed to do so.

I conclude that Applicant engaged in a series of behaviors disqualifying under AG 16(c), specifically: using marijuana after being grated a security clearance; leaving OGA 1 documents unattended in his hotel rooms with foreign nationals present; and using his corporate credit card for personal travel. These incidents reveal repeated lapses in Applicant's judgment. Even more disconcerting is his inability to appreciate the wrongfulness of his actions and his inability to take responsibility for his poor decisions. Through these actions, he has demonstrated a repeated disregard for rules and regulations, which he bends to justify his purposes.

Finally, AG ¶ 16(e) applies to his use of prostitutes while on official travel in foreign countries between 2003 and 2008, for the reasons identified in the discussion of AG ¶¶ 13(c) and (d), above.

None of the mitigating conditions available under AG ¶ 17 are applicable. During each phase of the adjudication, Applicant continued to provide untruthful and contradictory statements to government officials. He even admitted to being dishonest in an attempt to conceal the true extent of his conduct. He continues to minimize his conduct and rationalize his behavior.

I have significant reservations about Applicant's current reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2 and have incorporated my comments in the discussion of the applicable guidelines. Ultimately, Applicant failed to mitigate the security concerns raised in this case.

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 - 1.i:	Against Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraphs 2.a -2.b.:	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. Clearance is denied.

Nichole L. Noel
Administrative Judge