



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR No. 11-03433
)
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn Hoffman, Esquire
For Applicant: *Pro se*

December 15, 2011

Decision

LYNCH, Noreen A., Administrative Judge:

On July 13, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) alleging security concerns arising under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct). The actions 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) implemented tin September 2006.

Applicant timely answered the SOR and requested a decision on the record. The Government requested a hearing pursuant to proper procedure. A notice of hearing was issued on October 28, 2011, and I heard the case on December 6, 2011. Department Counsel offered four exhibits (GE) 1-4, which were admitted without objection. Applicant submitted three exhibits (AE) A-C and testified on his own behalf. He also presented the testimony of one witness. DOHA received the transcript of the hearing (Tr.) on December 14, 2011. Based upon a review of the pleadings, exhibits, and testimony, I find Applicant has not met his burden to mitigate the security concerns raised. Security clearance is denied.

Findings of Fact

Applicant is 41 years old. He received his undergraduate degree in 2007. He is currently completing a master's degree in information systems management. (AE A) He has held a security clearance, including top secret since 1998. He has worked for his current employer since 1997. He is married and has two children. (GE 1)

Applicant's employer sponsored him for an SCI upgrade in August 2008. He completed his security clearance application and was interviewed by OPM in October 2008. During the interview, Applicant admitted to engaging in solicitation of prostitutes "less than once a month from 2003 until 2008." Applicant was denied the SCI upgrade based on the involvement with prostitution from 2003 until 2008. He appealed the decision and believed that the decision was overturned, but he does not have the documentation to support his belief.

Applicant admitted that he solicited prostitutes from December 2003. He continued this activity until 2008. He spent approximately \$10,000 for this activity. (Tr. 36) Applicant met them at their home or in a hotel room. He explained that he started the activity when he was on work travel by going online and looking for massage services. He met a prostitute during his work trip.

He told the investigator that he would surf web sites for postings that advertised, "massage services," and contained key words such as "consenting adults." He paid \$100 to \$300 for massage services, oral sex, and vaginal sex. He at first stated that he engaged in this activity when he had a "day off." When he spoke to the investigator in 2008, Applicant stated he would like to discontinue the "bad habit", but he believed that there was the possibility that he would solicit them in the future when he had a "day off." (GE 2)

During a series of polygraphs dating from 2003, Applicant did not discuss his use of prostitutes when asked questions about his lifestyle. He notes that he was given a polygraph six times. During his 2008 polygraph, Applicant recalls that the polygrapher believed that Applicant was not disclosing something that had to do with criminal activity. At that point, Applicant responded that for several years, he contacted various agencies via the internet and made appointments to meet women at a hotel or residence. Applicant referred to the services as "massage services."

Applicant did not disclose his activity with prostitutes to his wife until after he received the SOR in July 2011. Applicant's wife testified that they sought marriage counseling to heal the relationship. However, after calling one number and not getting the correct contact information, they decided to seek "spiritual healing." They became members of a church. (Tr. 61) After their 2011 baptism, they will have access to counseling services from the church. (AE C) Applicant explained that she understood that her husband of 20 years was soliciting services from escort services from 2003 until 2008.

At the hearing, Applicant stressed that he has never had a security violation in 14 years. He believed his activity was not a major crime, and it was against his marriage and not really a concern for his security clearance. He elaborated that he has taken his work seriously since 1997 and has operated in a professional manner. He takes his responsibilities seriously. Applicant has worked for numerous agencies as a contractor. He now realizes that the guidelines that he has violated are serious in nature. At the time of the misconduct, he did not believe he was putting his clearance in jeopardy. He believes that he has mitigated the concern because he told the truth about the prostitution in 2008 and his wife now knows about the situation. Applicant believes this eliminates any vulnerability. He discussed the SOR with his current security officer. He states that he has not engaged in activities of this nature since 2008. He apologizes for his actions, and vows to protect the confidentiality, integrity, and sensitivity of classified information.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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 objective of the security clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed the adjudicative process is a careful weighing of a number of variables in considering the "whole-person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. No unfavorable personnel security clearance or access determination may be made without granting the individual concerned the procedural benefits set forth in the Regulation.

In all adjudications the protection of the national security is the paramount consideration. Therefore, any doubt concerning personnel being considered for access to classified information is 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, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel" An 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 an 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

Guideline D, Sexual Behavior

AG ¶ 12 expresses the security concern as:

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 a security concern and may be disqualifying:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;
- (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.

Applicant admitted that he engaged the services of prostitutes from 2003 until 2008. At the time he held a security clearance. Applicant was actively engaged in

soliciting prostitutes when he was on work trips. He did not tell his wife until after he received the SOR in July 2011. His wife did not know about his activity with prostitutes from 2003 until 2008.

AG ¶ 14 provides conditions that could mitigate security concerns:

(a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;

(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 behavior is not mitigated. He has only recently acknowledged the behavior. He has not received counseling. His wife has just learned about the activity, but there are others who do not know. The behavior was not isolated in nature. He did not believe it was a major crime that affected his security clearance.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

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

(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 issue 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 indicating that the person may not properly safeguard protected information;

(d) 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:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

(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;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

Applicant's behavior and misconduct have been addressed under the sexual behavior guideline. The SOR alleged personal conduct security concerns based on Applicant's use of prostitutes from 2003 until 2008. Applicant used poor judgment and questionable behavior that is criminal in nature. He did not disclose the behavior until

after a series of polygraphs in 2008. AG 16(e) and (g) apply. He was not certain that he would not continue his “bad habit.” The security concern under personal conduct is not mitigated. He has minimized the seriousness of the conduct. He recently expressed sorrow because he needs his security clearance. He told his wife after receiving the SOR in 2011. Although he has attempted to heal his marriage, he does not seem aware that he has violated a government trust. I have doubts about his reliability and judgment. None of the mitigating conditions apply under these circumstances.

“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 must 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. Applicant is a married man with two children. He has held a security clearance since 1998. He worked as a contractor for numerous government agencies. From 2003 until 2008, he engaged in the use of prostitutes. He even did this while on a work trip. He did not disclose this behavior until after a series of polygraphs in 2008.

Applicant acknowledges that he violated his marriage vows. He is trying to heal his marriage. He and his wife go to church. They have recently been baptized. They plan to attend counseling. He states now that what he did was wrong. He believes he is a trustworthy individual who has upheld the responsibilities of his profession. However, given the fact that Applicant held a security clearance for so many years, I have doubts that he did not understand the seriousness of his activities.

Overall, the record evidence leaves me with questions about Applicant’s eligibility and suitability for a security clearance and access to classified information. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the above referenced guidelines.

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:	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 national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

NOREEN A. LYNCH
Administrative Judge