



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



In the matter of:)
)
) ISCR Case No. 11-05685
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: *Pro se*

April 30, 2013

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

From 2004 through September 2009, Applicant paid for sexual relations with prostitutes. His personal conduct and sexual behavior raise security concerns under Guidelines D, J, and E, which were not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On November 30, 2012, in accordance with DoD Directive 5220.6, as amended (Directive), the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guidelines D, J, and E. The SOR further informed Applicant that based on information available to the government, DoD adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant's security clearance.

Applicant answered the SOR on January 2, 2013, and requested a hearing before an administrative judge. The case was assigned to me on February 19, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on

March 20, 2013, scheduling the hearing for April 11, 2013. The hearing was convened as scheduled. The Government offered Exhibits (GE) 1 through 3, which were admitted without objection. Applicant offered Exhibits (AE) A through C, which were admitted without objection. Applicant testified on his own behalf and called one witness. DOHA received the transcript of the hearing (Tr.) on April 22, 2013.

Findings of Fact

Applicant admitted to SOR allegations ¶¶ 1.a, 2.a, and 3.a. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact. (Answer.)

Applicant is a 69-year-old employee of a defense contractor. He has been employed with the defense contractor for over 25 years and has risen to the level of a senior executive. He has had a security clearance for over 30 years, beginning during previous employment with a defense contractor. Applicant has been married to his wife since 1988. They have three adult children. (GE 1; Tr. 60-61.)

During an interview with another Governmental agency in September 2009, Applicant admitted that from 2004 to September 2009,¹ he procured the services of prostitutes for sexual relations. He estimated that he used prostitutes approximately 27 times during this period. He met the prostitutes at “massage parlors, strip clubs, and a store, and hand picked them up on the street.” Applicant asserted that his behavior was “always strictly private, consensual, and discrete.” (Answer; GE 2.)

Applicant acknowledged that his actions were wrong. However, he minimized the impact of his actions at his hearing. He stated:

You know people have clearances and people break the laws and people do not report every time they break the laws. It's against the law to drink and drive and I see people that have clearances that drink and drive all the time. I see people that have clearances going places like strip clubs and I don't see them going and reporting because of their clearances. Clearly, I was wrong in this. Clearly I violated the law but I don't think not reporting it is an issue here. (Tr. 40-41.)

Applicant also testified that he could not be subject to coercion because of his involvement with prostitutes. However, he admitted that his wife and children are not aware of his relations with prostitutes. (Tr. 60-61.)

Applicant presented two character reference letters and one witness who attested to his good character and loyalty. His witness, a friend and colleague, knew the details of his relations with prostitutes, and indicated that Applicant is a recognized

¹ The SOR alleged and Applicant admitted that between 2004 and October 2009, Applicant solicited and paid for the services of prostitutes. However, the Government's evidence shows that Applicant did not solicit and/or pay for the services of a prostitute since his interview with another Government agency in September 2009.

leader in their industry and that he is trustworthy. Applicant's performance review for 2012 indicates his performance is "very good." (AE 1; AE 2; AE 3; Tr. 23-39.)

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 to be used 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, administrative judges apply the guidelines 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.

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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 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 EO 10865 provides that adverse 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

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.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

- (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.

Applicant engaged in illegal sexual behavior while possessing a security clearance that makes him vulnerable to coercion, exploitation, or duress, and reflected a lack of discretion and judgment. The evidence supports the application of all three disqualifying conditions.

AG ¶ 14 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (b) the sexual behavior happened so long ago, so infrequently, or under such 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 ceased his sexual activity with prostitutes in September 2009. However, he failed to disclose his illegal activities to his wife and family. While his procurement of prostitutes has reportedly ended, his choice to utilize prostitutes from

2004 to 2009 shows poor judgment. His decision to withhold information about his sexual behavior from his wife and family reflects that Applicant lacks the current reliability, trustworthiness, and good judgment needed to hold a clearance. While he may no longer utilize the services of prostitutes, his past decision to utilize their services still serves as a basis for coercion, exploitation, or duress. Applicant argued the sexual conduct was strictly private, consensual, and discreet, but it was not initially private, when Applicant was soliciting the services of prostitutes in clubs or on the street. None of the mitigating conditions apply.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant admitted he paid women money for sexual relations. He chose to procure sexual relations, knowing that such activity is illegal. The above disqualifying condition was been established.

Two Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's most recent criminal activity occurred in 2009. As noted above, Applicant failed to show that future sexual misconduct is unlikely to recur or that he now demonstrated the reliability, trustworthiness, and good judgment required of those that possess security clearances. Further, Applicant failed to introduce evidence of sufficient rehabilitation. While he demonstrated exceptional work performance, he presented no

evidence to suggest he addressed his misconduct in his personal life. AG ¶¶ 32(a) and 32(d) do not apply.

Guideline E, Personal Conduct

The security concern for the Personal Conduct guideline 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(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.

Applicant is embarrassed about his sexual relations with prostitutes. He has not told his wife or family of his illegal activities. Applicant demonstrated questionable judgment; and that he is vulnerable to exploitation, manipulation, or duress because he engaged in conduct, which if known, could affect his personal and professional standing in the community. AG ¶ 16(e) is disqualifying.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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.

None of the above mitigating conditions apply. Applicant failed to produce sufficient evidence that his wife is aware of his activities and that he has disclosed his relationship to his children. Thus, he continues to demonstrate questionable judgment and has left himself open to coercion.

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 relevant circumstances. 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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. I have incorporated my comments under Guidelines D, E, and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant has a long history of working in the defense industry and is respected by his colleagues and supervisor. He performs well at his job. Those are two facts that weigh in favor of reinstating his security clearance. However, that long history of employment, coupled with his familiarity with security rules and regulations, aggravates the seriousness of his misconduct and weighs heavily against his reinstatement. His embarrassment over his extra-marital sexual relations with prostitutes and his ongoing decision to mislead and hide the details from his wife and family further demonstrate a lack of honesty, reliability, and trustworthiness. He failed to provide evidence of sufficient remedial action that could assure the Government that similar conduct will not occur in the future, or that the potential for coercion or duress is insubstantial.

Overall, the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Sexual Behavior, Criminal 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:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.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.

Jennifer I. Goldstein
Administrative Judge