



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ICSR Case No. 11-12019
)
Applicant for Security Clearance)

Appearances

For Government: Candace Le'i Garcia, Esq. Department Counsel
For Applicant: *Pro Se*

02/12/2014

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings and exhibits, eligibility for access to classified information is denied. Applicant failed to mitigate security concerns for personal conduct and sexual behavior.

Statement of the Case

On June 14, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance for his employment with a defense contractor. (Item 4) An investigation was conducted by the Office of Personnel Management (OPM), consisting of a personal subject interview with Applicant and an affidavit provided by Applicant. (Item 6 and Item 7) After reviewing the results of the background investigation, the Department of Defense (DOD) could not make the affirmative findings required to issue a security clearance. DOD issued Applicant a Statement of Reasons (SOR), dated August 14, 2013, detailing security concerns for personal conduct and sexual behavior. (Item 1) 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 DOD on September 1, 2006.

Applicant answered the SOR on August 28, 2013. He admitted most of the factual allegations concerning personal conduct. He denied some of the facts. He did not answer the sexual behavior allegation. Since the allegation re-alleges the personal conduct allegations, his response to this allegation will be considered the same as his response to the personal conduct allegations. Applicant elected to have the matter decided on the written record. (Item 3) Department Counsel submitted the Government's written case on November 18, 2013. Applicant received a complete file of relevant material (FORM), and was provided the opportunity to file objections and to submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant did not provide additional information in response to the FORM. The case was assigned to me on January 31, 2014.

Findings of Fact

After a thorough review of the pleadings, I make the following essential findings of fact.

Applicant is a 45-year-old software engineer for a defense contractor. He received bachelor's and master's degrees in computer science and has taken post-graduate courses. He is not married. (Item 1, e-QIP)

The SOR alleges that Applicant improperly used his defense contractor employer's computer system and his access to classified information was revoked in 2008 (SOR 1.a). The SOR also alleges that Applicant downloaded pornography on his government computer about 150 times in 1994 (SOR 1.b), and that he had contact with U.S. and foreign national prostitutes on numerous occasions from about 1996 until 2011 (SOR 1.c). The sexual behavior allegation re-alleges the sexual misconduct in SOR 1.b and 1.c (SOR 2.a).

Applicant admitted that his access to classified information was revoked in 2008. He misused his company's computer system by creating a different file while having access to secure Government information. He states that there were no written guidelines in place at the time, but he was aware of the appropriate procedures to be followed. He did not intentionally create the files, but used them as a means of saving time. He deleted all of the files as directed by his security manager. He said he usually follows rules at work. His co-workers know of his violation. As a result of his actions in creating the files in violation of procedures, his company revoked his access to classified information and reassigned him to a position not requiring access to classified information. (Item 6 at 1-3; Item 7 at 4)

Applicant also admitted that he downloaded pornography to his unclassified work computer about 150 times over a few months in approximately 1994. He signed a document admitting that he downloaded pornography to his work computer and to a Government computer. In his response to the SOR, he denies downloading pornography to a Government computer. He states he only signed the document because he felt under duress and was afraid he would lose his job if he did not sign the document. He acknowledged violating both the Government and employer policy

against such action. He agreed to cease this behavior. No further action was taken by his company or the Government. (Item 6 at 3-4; Item 7 at 4)

Applicant admitted that he had contact and sexual activities with U.S. and foreign national prostitutes on numerous occasions from 1996 until at least 2011. He had contact with foreign national prostitutes while overseas as well as in the United States. He usually contacted the prostitutes either at bars, clubs, through escort services, over the internet, or by telephone. He had contact with prostitutes every few months and paid approximately \$200 for each contact. He had contact with prostitutes because he did not have a girlfriend. In 2007, he was notified of a pending polygraph examination for his security clearance, so he ceased his contact with prostitutes. He resumed his activities with prostitutes in 2008 after his clearance was revoked. He ceased contact with foreign national prostitutes in 2009 after realizing that such contact may jeopardize a security clearance. He does not know the name, location, or nationality of the foreign national prostitutes. Since 2009 he has only had contact with U.S. prostitutes about once every four months.

He was never asked any question about his work or asked to divulge classified information. None of the prostitutes were aware he was being considered for a national security position. He did not list the contact with foreign national prostitutes on his security clearance application because he was ashamed of his actions, afraid they would affect his personal and professional reputation, and such actions may cost him his job. He has attempted to keep his sexual behavior secret because he is not proud of his actions and they could cause him acute embarrassment. (Item 6 at 3-14, Item 7 at 4-6)

Applicant now admits his personal conduct even though he feels ashamed, and was afraid it would affect his personal and professional reputation. He anticipates it may cost him his position as a chief systems engineer. He kept the behavior secret because he was not proud of the behavior. He admits that the exposure of his conduct with prostitutes may cause acute embarrassment. He believes his conduct could leave him vulnerable to legal action. He is not sure if he violated any local or foreign national laws by engaging in sexual behavior with U.S. and foreign national prostitutes. He is not currently being threatened or coerced because of his behavior. He considered seeking treatment for his sexual behavior but he has not done so. No one has ever expressed an interest in his position or work. (Item 6 and 10-12; Item 7 at 5-6)

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.

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

Analysis

Personal Conduct

Personal conduct is a security concern because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified and sensitive information. (AG ¶ 15). Personal conduct is always a security concern because it asks whether the person's past conduct justifies confidence the person can be trusted to properly safeguard classified or sensitive information.

Applicant violated Government and company policy by creating different files on a secure computer in 2008. His access to classified information was revoked by his company in 2008. He downloaded pornography to his Government computer about 150 times in 1994. He had contact with foreign national and U.S. prostitutes from 1996 until 2011. These offenses go directly to the question of his reliability, trustworthiness, and good judgment. His conduct raises Personal Conduct Disqualifying Conditions:

AG ¶ 16(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);

AG ¶ 16(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: (3) (a pattern of dishonesty or rule violations);

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); and

AG ¶ 16(g) (association with persons involved in criminal activity).

I considered 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 is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment);

AG ¶ 17(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);

AG ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress); and

AG ¶ 17(g) (association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations).

These mitigating conditions do not apply.

Applicant violated company and Government policy by downloading pornography to his work and Government computers in 1994. He was told to cease such activity. He then violated Government and company procedure by creating different files on a secure computer. He continued his personal conduct of security concern by engaging in sexual activities with foreign national and U.S. prostitutes from 1996 until 2011. His personal conduct of security concern is recent, ongoing, frequent, and likely to recur. His conduct was of such concern to his company that the company revoked his access to classified information in 2008. There are no indications of any positive steps taken to change his behavior and reduce or eliminate his vulnerability to exploitation, manipulation, or duress. In fact, he states he has not taken any action to seek help even though he believes he must change his ways. His misconduct is not minor since he was actively engaged in fraudulent and deceitful conduct. Applicant has failed to present sufficient information to mitigate the security concerns based on his personal conduct.

Sexual Behavior

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. (AG ¶ 12) As noted above, 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) The security concerns are based on the same incidents and are similar.

Applicant candidly admits to sexual encounters with foreign and U.S. prostitutes from about 1996 until at least 2011. He admits to downloading pornography in 1994. Applicant's history of risky sexual behavior questions his reliability, judgment, and trustworthiness. The incidents have the potential to make Applicant vulnerable to coercion, exploitation, and duress. This history of sexual behavior raises Sexual Behavior Disqualifying Condition AG ¶ 13 (a) (sexual behavior of a criminal nature, whether or not the individual has been prosecuted): AG ¶ 13(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; and (AG ¶ 13(c) (sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress).

I considered 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); and Ag ¶14(c) (the behavior no longer serves as a basis for coercion, exploitation, or duress). The downloading of pornography occurred about ten years ago, and the last sexual activity with a foreign prostitute as reported by Applicant took place about five years ago. His latest encounter with a U.S, prostitute was less than three 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. While taken individually, the mitigating conditions can explain away his sexual behavior. However, the extent of his risky sexual behavior with prostitutes shows a lack of judgment and discretion that raises questions about reliability and trustworthiness. His actions with prostitutes can serve as a basis of coercion, exploitation or duress. Applicant has not mitigated the security concerns for sexual behavior.

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 the 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 access to sensitive information 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 carefully considered all of the circumstances discussed above in regard to disqualifying and mitigating conditions as well as the following factors in light of the whole-person concept. The "whole-person concept" requires consideration of all available information about Applicant, not a single item in isolation, to reach a commonsense determination concerning Applicant's security worthiness.

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 had encounters with U.S. prostitutes less than three years ago. 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, and demonstrates unreliability, and untrustworthiness. This pattern of conduct casts doubt on Applicant's willingness or ability to safeguard classified information. 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. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for access to classified information. For all these reasons, I conclude Applicant has not mitigated the sexual behavior and personal conduct security concerns. Applicant is denied access to classified information

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.c:	Against Applicant
Paragraph 2, Guideline D;	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 security to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is denied.

THOMAS M. CREAN
Administrative Judge