



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



In the matter of:)
)
) ISCR Case No. 12-03913
)
)
Applicant for Security Clearance)

Appearances

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

January 10, 2013

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

From 2009 through 2010, Applicant had an unreported, extra-marital relationship with a foreign national who was employed as a “lingerie model” or lap dancer. He continued his relationship in 2011, after he separated from his wife and the foreign national left her dancing job. He currently provides \$3,000 per month to the foreign national. His personal conduct and sexual behavior raise security concerns under Guidelines E and D, which were not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On September 17, 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 E and D. 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 October 19, 2012, and requested a hearing before an administrative judge. The case was assigned to me on November 28, 2012. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 29, 2012, scheduling the hearing for December 14, 2012. The hearing was convened as scheduled. The Government offered Exhibits (GE) 1 through 6, which were admitted without objection. Applicant offered Exhibits (AE) A through E, which were admitted without objection. Applicant testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on December 26, 2012.

Findings of Fact

Applicant admitted to SOR allegations ¶¶ 1.a, 1.b, 1.c, and 2.a, with qualifications. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact. (Answer; Tr. 7.)

Applicant is a 52-year-old employee of a defense contractor. He has been employed with the defense contractor for over 30 years and has risen to the level of a senior executive. He has held a security clearance and special program access since 1989. In March 2011 Applicant separated from his spouse, whom he married in 1989. They have no children. (GE 1; AE A; AE D; Tr. 24-26.)

From 2004 to 2009, Applicant visited a “one-on-one strip club” (club) approximately one-to-three times per month. It was a “discrete” club that did not permit touching. The club was located approximately an hour away from Applicant’s hometown. He traveled to the club in the distant town to avoid being seen by the people with whom he worked and to hide his conduct from his wife. (GE 2; GE 3; Tr. 25, 34-39.)

Starting in July 2009, Applicant only requested dances from his favorite “lingerie model” (Miss X). He customarily paid her \$100 for a dance and tipped her an additional \$100. In spring 2010, Applicant invited Miss X to lunch and they began seeing each other outside of the club. In summer 2010, Applicant became aware Miss X was not a citizen of the United States, but was a citizen of the Czech Republic. He did not report his foreign contact to his security office or report his relationship with a foreign national to any of his special access programs. Applicant asserted that she held a green card, permitting her to work in the United States. Applicant wanted to keep this relationship a secret because he was married at the time and did not want anyone at work to know about their affair. (GE 2; GE 3; GE 4; Tr. 25-30, 34-41, 54.)

Applicant’s relationship with Miss X continued inside and outside of the club, and included sexual intercourse outside of the club. Applicant testified that during this time frame he paid Miss X for her services inside of the club, but that he did not pay her for any activities outside of the club. He considered their meetings outside the club to be “dating.” (Tr. 27-28, 54-56.)

In July or August 2010, Applicant stopped seeing Miss X and began attending marriage counseling with his wife. Applicant claimed that his affair was disclosed to his wife during the counseling sessions. The marriage counseling was unsuccessful and

Applicant separated from his wife in March 2011. No separation agreement has been filed and he stated their divorce is pending. He provided no documentation to substantiate his claims. While his security clearance application reflects that he and his wife physically separated on March 16, 2011, it also states they are “not legally separated.” (GE 1; GE 2; GE 3; GE 6; Tr. 24, 52-53.)

Applicant resumed his relationship with Miss X immediately after separating from his wife. Applicant was still dating Miss X at the time of the hearing. In the spring of 2011, he began to provide Miss X \$3,000 per month (\$36,000 per year) in support. Miss X had left her “modeling” position with the club in the fall of 2010. Applicant testified that since leaving the club, Miss X worked as a “fitness therapist,” although he admitted that she has no license, no place of business, and little income from her work. He believes she has one client. He indicated that she had a naturalization interview scheduled and hoped to become a U. S. citizen. They do not cohabitate. (GE 2; GE 3; GE 6; Tr. 54-58.)

On May 26, 2011, Applicant was notified that he would be scheduled to undergo a polygraph examination for access to a special program. Applicant testified that he knew he would have to disclose the relationship with a foreign national during the polygraph examination, so on May 30, 2011, he went to his Facility Security Officer (FSO) and reported the relationship. On June 6, 2011, he completed a “SAP FORMAT 20” (Form 20). On the Form 20, Applicant indicated Miss X was employed as a “fitness therapist” and that they met “at her place of business July 2009. Began infrequen[t]; casual dating 2/2010; stopped August 2010; started more frequent dating end Mar 2011.” (GE 5; GE 6; Tr. 29, 45-52.)

As a result of Applicant’s relationship with a foreign national and his failure to report it in a timely manner, he was suspended for two weeks off of work without pay in July 2011, was debriefed and terminated from one of his special access programs, and was ineligible for a bonus or raise in 2012. Applicant also received a letter of reprimand. He feels that he has been sufficiently punished. He has lost approximately \$125,000 as a result of his ineligibility for a raise and bonus. (GE 6; Tr. 30-33.)

Applicant presented four character reference letters attesting to his professionalism, good character, and loyalty. Of those who wrote letters, only one knew the details of his relationship with Miss X. (Tr. 51.) Applicant’s supervisor, who was aware of the details of his relationship with Miss X, indicated that Applicant is a trusted member of management and stated that the company considers this matter closed after Applicant’s reprimand. In fall 2012, Applicant was awarded a prestigious award “in recognition of his outstanding accomplishments and [omitted] achievements.” (AE A; AE B; AE C; AE D; AE E.)

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 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 conditions are potentially applicable:

(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; 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.

Applicant is embarrassed about his relationship with Miss X and how it began while he was married. He drove an hour away from his home to find the club, as he did not want his wife or his work associates to know of his activities there. He failed to disclose his relationship with Miss X, a foreign national he met at the club, until he faced a polygraph examination. When he disclosed their relationship, he stated that she was a fitness therapist on the Form 20 and indicated they met at her place of business, thereby intentionally falsifying the Form 20 and misleading the FSO about the true nature of their initial introduction and interactions. Further, there is little evidence that Miss X actually works as a fitness therapist, but instead she appears to be supported solely by Applicant. His concealment of his past conduct and choice to deliberately provide misleading information on his Form 20 demonstrate that Applicant has 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(a), 16(b), and 16(e) are disqualifying.

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

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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.

Applicant failed to provide evidence that any of the above mitigating conditions apply. Applicant has had a security clearance since 1989 and is familiar with the rules and regulations. He blatantly disregarded the rules when he had the opportunity to satisfy his own interests. Applicant's disclosure on the Form 20 occurred several years after his affair with Miss X began, and it was prompted by his upcoming polygraph examination, not a voluntary decision to disclose his misconduct. Further he omitted and distorted relevant facts on the Form 20. Hence, AG ¶17(a) does not apply because his admission was neither prompt nor in good faith.

His poor decisions were not based upon the advice of another, but instead were attributable to his intentional unwillingness to comply with security rules and regulations. Thus AG ¶17(b) is inapplicable.

His affair with the foreign national began in 2009 and is on-going. He pays her \$3,000 per month in support and has a close bond of affection for her. His failure to timely and truthfully disclose the relationship until his scheduled polygraph cannot be construed to be minor offense and does cast doubt on his trustworthiness and good judgment. AG ¶17(c) does not apply.

Applicant acknowledged that his failure to report his relationship with a foreign national in a timely manner was improper. He has been reprimanded at work and believes he has been sufficiently punished. However, he failed to produce sufficient evidence of other positive steps he has taken that make it unlikely he would act in an inappropriate and self-serving manner in the future. Applicant placed his own personal satisfaction above the security regulations and he has not presented evidence to mitigate this behavior. AG ¶17(d) does not apply.

Applicant testified that his supervisor was the only one of his character references that knew of his relationship with Miss X. He presented no documentation from his wife demonstrating the depth of her knowledge of Applicant's affair or the nature of their present marital status. While he testified that he is in the process of filing for divorce, he presented no documentation to support this claim. He failed to establish that he has reduced his vulnerability to exploitation, manipulation, or duress in the future, as required for AG ¶17(e) to apply.

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:

- (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 sexual behavior that makes him vulnerable to coercion, exploitation, or duress, and reflected a lack of discretion and judgment. He admitted his extra-marital affair with Miss X and his attempts to hide his activities from his wife, his co-workers, and his FSO. While neither the affair nor his decision to frequent the club were illegal, his embarrassment over his previous and repeated sexual behavior in a public setting reflects his lack of discretion and judgment. The evidence supports the application of both 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 private, consensual, and discrete.

None of the above mitigating conditions apply. AG ¶ 14(b) does not apply because Applicant's extramarital relationship with Miss X is ongoing and casts doubt on his reliability and judgment. AG ¶ 14(c) does not apply because Applicant's continuing relationship with Miss X could potentially subject him to exploitation, coercion, or duress, as evidenced by his ongoing efforts to hide and minimize it. Applicant failed to produce sufficient evidence that his wife is aware of the affair and that he has disclosed his relationship to his coworkers. AG ¶ 14(d) fails to mitigate Applicant's conduct. While Applicant asserted that the sexual relationship with Miss X is private, consensual, and discrete, this alone cannot mitigate the concerns raised above. First, it was not initially private, when Applicant was soliciting her services in the club. Second, it was because he hid the details of his relationship with a foreign national that he was found to be vulnerable to coercion. Applicant's choice to keep private the details about his foreign national sexual partner led to his discipline and reprimand. Applicant admitted that, of those who wrote letter on his behalf, only his supervisor knows the exact nature of the beginning of his relationship with Miss X. His other colleagues and references are unaware of his conduct. Other than Applicant's testimony, there was no proof that Applicant's wife knows of the affair. Thus, he could still potentially be subject to coercion regarding the details of his relations with Miss X and her ongoing financial support.

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 E and D 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 recently won a prestigious award for his work. 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 relationship with a foreign national and his ongoing decision to mislead and hide the details from the government, his wife, and his FSO 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.

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 Personal Conduct and Sexual Behavior 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 E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 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 the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Jennifer I. Goldstein
Administrative Judge