



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



In the matter of:)
)
) ISCR Case No. 15-04759
)
)
Applicant for Security Clearance)

Appearances

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

March 24, 2017

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

From January 2010 through November 2011, Applicant paid women for sexual relations while holding a security clearance. At least two of the women were Chinese foreign nationals. He did not report these relations as foreign contacts on his Electronic Questionnaire for Investigations Processing (e-QIP); to his Facility Security Officer; or during an interview with government investigators. His personal conduct raises security concerns under Guideline E, which were not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On August 25, 2016, the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline E. The SOR further informed Applicant that based on information available to the government, DoD adjudicators could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue Applicant's security clearance. The action was taken under Executive Order (EO) 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 September 1, 2006.

Applicant answered the SOR on September 26, 2016, and requested a hearing before an administrative judge. The case was assigned to me on November 1, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 2, 2016, scheduling the hearing for December 1, 2016. The hearing was convened as scheduled. The Government offered Exhibits (GE) 1 and 2, which were admitted without objection. Applicant offered Exhibit (AE) A, which was admitted without objection. Applicant testified on his own behalf. The record was left open for receipt of additional documentation. On December 15, 2016, Applicant submitted eight pages of additional information, marked as AE B. Department Counsel had no objection to AE B, and it was admitted. DOHA received the transcript of the hearing (Tr.) on December 12, 2016.

Findings of Fact

Applicant admitted to SOR ¶¶ 1.a, 1.b, and 1.c. He denied SOR ¶¶ 1.d, 1.e, and 1.f. (Answer.) After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 51-year-old employee of a defense contractor. He has been employed with the defense contractor for over 19 years. He has held a security clearance for over 28 years, beginning during previous military service in the Air Force. He retired from the Air Force after serving ten years on active duty and ten years in the National Guard. He achieved the rank of technical sergeant. Applicant has been separated from his wife since 2008 and is in the divorce process. They have two adult children. (GE 1; Tr. 21-23, 41.)

Between January 2010 and November 2011, Applicant frequented massage parlors in the United States. During those visits he paid for oral sex with women, at least two of whom he knew were Chinese foreign nationals. He reported that he paid for sexual stimulation on approximately 50 occasions over that time frame. He was aware that engaging in this behavior was illegal, and in violation of security rules and regulations. Applicant did not report his contacts with foreign nationals to his Facility Security Officer (FSO). He has not visited a massage parlor or paid for sexual relations since November 2011. (Tr. 23-26, 31-33.)

Applicant attributed his poor personal judgment to a series of events including: finding out his wife had an affair; the loss of his mother to cancer; and caring for his grandchildren. He testified that he has since found a church that has helped him see the “blessings” he has. (Tr. 34-40.)

In May 2011, Applicant was subject to a polygraph examination in relation to special program access. During that polygraph examination, Applicant disclosed sexual relations with two specific female Chinese nationals. On approximately 15 occasions

between January and April 2011, Applicant paid one Chinese woman between “\$100 to \$120 for a massage and oral sex.” Between January and May 2011, Applicant paid a second Chinese national “\$60 for a massage, and would tip her between \$40 to \$60 for the oral sex” on approximately five different occasions. He paid \$100 to approximately ten other females at three different establishments for massages and oral sex between January 2010 and November 2011. He did not know of the citizenship status of those ten women. (AE A.) Applicant admitted at hearing that he should have reported his contact with the Chinese nationals to his FSO in 2011. (Tr. 30.)

Applicant testified that, at the conclusion of the polygraph examination, the polygrapher told him that he “could not report or discuss that investigation activity.” As a result, Applicant did not include any information about his foreign contacts with the Chinese nationals on his February 24, 2013 e-QIP, or during his April 18, 2013 interview with a government investigator. Applicant claimed he was following the guidance of the polygrapher when he omitted mention of his contacts with the two Chinese foreign nationals to the Government in 2013. (GE 1; GE 2; Tr. 19-21, 27-29.)

Applicant presented documentation to show he received many awards and decorations during his military service, including three Air Force Commendation Medals; two Air Force Outstanding Unit Awards; and three Good Conduct Medals. Applicant’s 1995, 1996, and 1997 enlisted performance reports reflected that he was “absolutely superior in all areas.” He is rated as a “high contributor” by his current employer and “significantly exceeded” his performance goals in 2016. (AE B.)

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 Executive Order 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* Executive Order 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 intentionally omitted information concerning his relationships with two Chinese foreign nationals from his 2013 e-QIP and during his 2013 interview with an investigator for the Department of Defense. AG ¶¶ 16(a) and 16(b) are disqualifying.

Further, Applicant's extramarital sexual relations with massage parlor employees from January 2010 to November 2011, while holding a security clearance, demonstrated questionable judgment; and made him 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:

(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's admission of questionable, illegal sexual conduct came only after he was subject to a polygraph examination in 2011. Further, he continued to engage in the

conduct after the polygraph. He failed to report his illegal conduct with foreign nationals to his FSO prior to, or after, the polygraph, as required by security regulations. He failed to make “prompt, good-faith efforts to correct the omission, concealment, or falsification.” AG ¶ 17(a) does not provide mitigation.

Applicant asserted that AG ¶ 17(b) should mitigate his omissions on his e-QIP and to the investigator, because the polygrapher instructed him not to disclose the investigation activity. However, he had a duty to disclose all foreign relationships to his FSO prior to the polygraph. Further, he did not cease having sexual relations with potentially foreign women at massage parlors until six months after the polygraph. Even applying Applicant’s logic that he was not permitted to disclose the information obtained during the polygraph, his subsequent contacts would not have been subject to the same restriction and should have been reported on the e-QIP and during the interview. AG ¶ 17(b) does not provide mitigation.

Applicant’s sexual indiscretions with known foreign nationals and potential foreign nationals occurred over almost a two-year period. His illegal sexual conduct ceased in late 2011. However, his poor judgment and questionable conduct continued when he elected to falsify information to the government. Applicant’s conduct continues to cast doubt on his reliability, trustworthiness, and judgment. He produced little evidence of rehabilitation, counseling, or recent good conduct. He failed to provide sufficient evidence to support application of AG ¶¶ 17(c), 17(d), or 17(e).

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 pertinent facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant has a long history of working in the defense industry and is highly rated on his annual reviews. He performs well at his job. Those are two facts that weigh in favor of renewing his security clearance. However, that long history of employment, with his resulting familiarity with security rules and regulations, also aggravates the seriousness of his misconduct and weighs heavily against clearance eligibility. His embarrassment over his extra-marital sexual relations with foreign nationals caused him to omit disclosing those contacts to his FSO, on his 2013 e-QIP, and during a security clearance interview. His repeated failure to report required information demonstrates a lack of honesty, reliability, and trustworthiness. He failed to provide sufficient evidence of remedial action to assure the Government that similar conduct will not occur in the future, or to show 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 Personal Conduct security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ 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
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	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