



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-02582

Appearances

For Government:

Adrienne Driskill, Esquire, Department Counsel

For Applicant:

Cathryn E. Young, Esq.
Griffith, Young & Lass

May 24, 2018

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on September 3, 2014. (Government Exhibit 1.) On December 29, 2016, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines D (Sexual Behavior) and E (Personal Conduct). 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 for Determining Eligibility for Access to Classified Information, effective within the Department of Defense after September 1, 2006.¹

Applicant answered the SOR in writing (Answer) on March 7, 2017, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on April 25, 2017. The case was assigned to me on May 9, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on June 9, 2017. I convened the hearing as scheduled on August 22, 2017.

The Government offered Government Exhibits 1 and 2, which were admitted without objection. Applicant offered Applicant Exhibits A through F, which were admitted without objection. Applicant testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on August 30, 2017.

Findings of Fact

Applicant is 69 years old, and married. Applicant is a retired E-6 in the Navy. He is seeking to retain national security eligibility for a security clearance. (Applicant Exhibit C; Tr. 21-22.)

Paragraph 1 (Guideline D, Sexual Behavior)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he engaged in sexual behavior that reflects a lack of judgment, or may subject Applicant to undue influence or coercion. In his Answer, Applicant admitted this allegation in the SOR with explanations. He also submitted additional evidence to support his request for a finding of national security eligibility.

Applicant and his wife have been married for 48 years. In 2004 Applicant began living permanently outside the United States in Country A. Applicant's wife is a semi-invalid and lives in the United States. Since 2004 Applicant has seen his wife once, in 2009. (Tr. 22-26.)

Beginning in 2006 Applicant employed Miss One as a maid and cook. While she lives and works in Country A, she is actually a citizen of Country B. According to Applicant, beginning in 2009 his relationship with Miss One became sexual. According to Applicant, they had sex on a monthly basis from 2009 until June 5, 2016, the date Applicant received the SOR. (Tr. 26-30, 35.)²

¹ I considered the previous *Adjudicative Guidelines*, effective September 1, 2006; as well as the new *Adjudicative Guidelines*, effective June 8, 2017. My decision would be the same if the case was considered under the previous *Adjudicative Guidelines*.

² The record does not contain a statement from Miss One. All information concerning the extent of the relationship is from Applicant.

During the time of their sexual relationship, Miss One would sleep with Applicant at his apartment on nights when they had sex. According to Applicant, Miss One would sometimes sleep overnight on his couch if it was not an occasion when they had sex. Applicant also testified that Miss One would stay with him about three weeks out of the year, when they were not having sex, because of the extreme weather conditions in Country A. (Tr. 44-47.)

Applicant was interviewed by an investigator from the Office of Personnel Management on June 6, 2016. A Report of Investigation (ROI) was prepared by the investigator memorializing the interview. In that ROI the investigator stated that Applicant admitted, "In November 2013 . . . [Miss One] started to cohabituate with [Applicant] six days a week to present." Applicant denied in his hearing testimony that she lived with him. (Government Exhibit 2 at 8; Tr. 73-74.)

The interviewer went on to state that beginning in approximately November 2013:

[Miss One] and [Applicant] would continue their sexual relations, including going shopping together. When subject was confronted by his co-workers as to the relationship he had with his maid, [Applicant] would lie to them and say it is only a professional relationship. . . . [Applicant] lied to his co-workers fearing if he told the truth it would have a negative impact on his security clearance and his position with his employer. (Government Exhibit 2 at 8.) (See Tr. 64-69.)

Applicant stated that the sexual part of their relationship ended after he was interviewed by OPM in June 2016. Miss One continued to work as Applicant's maid until January 2017. According to Applicant, Miss One continues to work as his cook, preparing meals for him. Applicant also testified that he did not have intimate feelings for Miss One, stating, "That's why I could drop it off immediately." (Tr. 31-34.)

On the other hand, Applicant admitted that he and Miss One had been in a "relationship." He further admitted that if he and Miss One had both been single at the time they were having sex she would have been viewed as his girlfriend. (Tr. 51-52.)

Applicant's wife and two adult children were recently informed about the affair, and the wife submitted a written statement concerning the situation. Co-workers of Applicant also submitted written letters of recommendation. In their letters, several of the writers indicate that they have been told by Applicant about his affair with Miss One. Applicant testified that he informed all the writers about the affair after the interview with OPM. However, it is unclear from the letters, including the one from Applicant's wife, whether the writers know the long-term extent of the relationship. (Applicant Exhibits A and B; Tr. 30-32, 36-38, 70.)

Paragraph 2 (Guideline E, Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. In his Answer, Applicant admitted subparagraphs 2.a, 2.c, and 2.d. He admitted in part and denied in part subparagraph 2.b.

2.a. The Government alleged in his subparagraph that Applicant's sexual relationship with Miss One, as set forth above, was also cognizable under this guideline.

2.b. As stated, Applicant filled out an e-QIP on September 3, 2014. (Government Exhibit 1.) Section 17 of that questionnaire concerns his marital status. In addition to questions about a spouse, there is a subsection entitled, "Cohabitant." The form states:

A cohabitant is a person with whom you share bonds of affection, obligation, or other commitment, as opposed to a person with whom you live with for reasons of convenience (e.g. a roommate). If applicable, complete the following about your cohabitant, if your cohabitant was born outside the U.S., provide citizenship information.

Applicant answered this question, "No." This was a false answer to a relevant question about Applicant's personal life. Applicant testified that he did not believe he had falsified this answer about his relationship with Miss One since, "Bonds of affection, there wasn't any. Bonds of obligation there wasn't any. Or other commitments." (Tr. 44.)

2.c. Section 19 of Government Exhibit 1 asks the Applicant about his "Foreign Contacts." The question is:

Do you have, or have you had, close and/or continuing contact with a foreign national **within the last seven (7) years** with whom you, or your spouse, or cohabitant are bound by affection, influence, common interests, and/or obligation? (Emphasis in original.)

Applicant answered this question, "Yes," explaining that Miss One, "has been my maid for approximately 8 years." The form goes to state, "Provide the nature of the relationship (check all that apply)." Applicant stated that he had a "Professional or Business" relationship with Miss One. The other options contained on the form were "Personal (Such as family ties, friendship, affection, common interests, etc.); Obligation (Provide explanation); and Other (Provide explanation)." Applicant did not mark any one of those three choices, even though he admitted having a years-long sexual relationship with Miss One, which also included giving her gifts of money, buying a ticket for her to go to her home country for a funeral, shopping together and buying her clothing, and having her cook his meals. This was falsification by omission, in that Applicant chose intentionally

not to tell the Government the complete extent of his relationship with Miss One. (Tr. 61-63.)

Applicant was asked, "You [Applicant] knew you were having sex with her. So why didn't you think we needed to know about it?" Applicant replied, "I have no answer because when I read this question, I chose the one that applied to what she was. She was my maid. . . . And I did not think of the sex." Applicant repeated his statement that he did not have feelings of affection towards Miss One. (Tr. 53-54.)

2.d. This subparagraph alleges that Applicant did not disclose his ongoing sexual relationship with Miss One to his employer, as required. Applicant states in his Answer:

I admit to hiding my relationship when it should have been disclosed. There is no excuse to my conduct and I regret not being honest from the outset. If I could take back my actions, I would. Furthermore, if I would have ever believed that withholding information could have led to issues protection national secrets, I would have made a full disclosure of the relationship.

Applicant testified at the hearing that he felt he failed in his responsibility to report the conduct. (Tr. 69-70.)

Mitigation

Applicant is a highly respected employee and co-worker. Applicant Exhibit B contains eight letters of recommendation from his supervisor and co-workers. As stated, most of them indicate general knowledge of the affair with Miss One. None of them state that Applicant told them about his false answers on Government Exhibit 1. However, he did testify he told them that as well. All of his correspondents recommend him for a continued security clearance. (See Applicant Exhibits E and F.)

Policies

When evaluating an applicant's suitability for national security eligibility and a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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, “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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 national security eligibility. 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 or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order adverse to an applicant shall be a determination 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

Paragraph 1 (Guideline D, Sexual Behavior)

The security concerns relating to the guideline for sexual behavior are set out in AG ¶ 12, which reads in pertinent part:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence or coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual’s judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person . . .

Applicant engaged in a years-long sexual relationship with his foreign national maid while he was married to another person. Applicant would lie about this conduct when confronted by co-workers about his relationship with Miss One, and also did not tell his wife about it during the entire period of the sexual relationship. He continued this conduct from approximately 2009 until at least June 2016.

The following disqualifying conditions apply to the facts of this case under ¶ 13:

(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

(d) sexual behavior of a public nature or that reflects a lack of discretion or judgment.

Applicant supplied a letter from his wife indicating that she now has knowledge of the affair. In addition, Applicant's co-workers, including his supervisor, submitted letters indicating that they also have knowledge of the affair. However, as stated, the letters do not set forth how much the writers know of the extent of the affair, which Applicant took affirmative steps to falsely deny and conceal while it was taking place because, among other reasons, he was aware of the adverse security implications.

Applicant has testified that the affair ended in approximately June 2016. As further described below, I have concerns about his credibility, and cannot find that this is the truth.

The following mitigating conditions have been considered in this case under 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 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 was vulnerable to coercion during the time of his relationship with Miss One. Though his wife, children and co-workers now know some part of it, he has not completely mitigated the security significance of this conduct given his prevarications about the extent of his conduct. Applicant has not mitigated the Government's security concerns under this guideline. Accordingly, Paragraph 1 is found against Applicant.

Paragraph 2 (Guideline E, Personal Conduct)

The concern under this 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and
- (b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The following disqualifying conditions are applicable under AG ¶ 16:

- (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 national security eligibility or trustworthiness, or award fiduciary responsibilities; and
- (e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:
 - (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant had a long-term sexual relationship with his maid, who is a citizen of another country. He also lied about that relationship when confronted by his co-workers, and concealed it from his wife. In addition, he falsified a Government questionnaire that specifically asked him about the nature of his relationships with foreign persons.

The following conditions are not mitigating under 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 it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant was intentionally deceptive with the Government when he severely understated the extent of his relationship with Miss One on Government Exhibit 1. His excuse is basically, "It was just sex." That may be true, but he knew that the Government had a valid security interest in knowing the extent of his relationship with foreign nationals, especially if, "It is just sex." In order to find that Applicant has mitigated the security concerns related to his falsifications in 2014, I must find that he is credible now with regard to his past relationship with Miss One, his current relationship, and any future one. I cannot do so. This is different than finding that he has told people about the affair, including his wife. Applicant read the questionnaire (Government Exhibit 1) in the way most conducive to him. He filled it out in September 2014, and continued to have a sexual relationship with Miss One for more than a year and a half, after knowing of the Government's concern. For him to say that he did not have a personal relationship with Miss One, while having sex with her for years, is simply nonsensical. Yet that was, and continues to be, his story.

It is the Applicant's burden to show that he has overcome the security significance of his relationship with Miss One, as well as his past falsifications, and that he is truthful now. He has not done so. Paragraph 2 is found against Applicant.

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(d):

(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 national security eligibility 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. Applicant has not mitigated the concerns regarding his sexual behavior with regard to Miss One, and his personal conduct with regard to his falsifications about his relationship with her. Overall, the record evidence does create substantial doubt as to Applicant's present suitability for national security eligibility, and a security clearance.

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 D:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	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 or continue Applicant's national security eligibility. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge