



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



In the matter of:)
)
) ISCR Case No. 16-03690
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: John T. Heaney, Esq., Applicant's Counsel

May 3, 2018

Decision

CEFOLA, Richard A., Administrative Judge:

Statement of the Case

On January 6, 2017, 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.¹ 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 national security eligibility.

Applicant answered the SOR on February 14, 2017, and requested a hearing before an administrative judge. (Answer.) The case was assigned to me on May 1, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 4, 2017, scheduling the hearing for May 24, 2017. The hearing was convened

¹ I considered the previous Adjudicative Guidelines (AG), effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same if the case was issued under the previous AG. Applicant was provided with a copy of the new AG prior to the hearing, and permitted time after the hearing to submit further argument based on the new guidelines. (Tr. 4-6.)

as scheduled. The Government offered Exhibits (GXs) 1 through 3, which were admitted without objection. Applicant testified on his own behalf, and offered Applicant Exhibits (AppXs) A and B, which were admitted without objection. The record was left open until June 23, 2017, for receipt of additional documentation. On June 23, 2017, Applicant submitted an additional exhibit, marked AppX C, which was admitted without objection. The record then closed. DOHA received the transcript of the hearing (TR) on June 5, 2017.

Findings of Fact

Applicant denied the allegations in SOR ¶¶ 1.a. and 2.a.. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 53-year-old employee of a defense contractor. (GX 1 at page 5.) He has been employed with the defense contractor since “the age of 20”. (TR at page 26 line 24 to page 28 line 14.) He has been divorced since 1994, and never remarried. (TR at page 50 lines 4~9.)

Guideline E – Personal Conduct & Guideline D – Sexual Behavior

From about March of 2011 until about February of 2016, Applicant has taken several vacation trips to Thailand. (TR at page 28 line 15 to page 44 line 5, at page 49 line 10 to page 50 line 22, at page 52 line 22 to page 63 line 6, and at page 63 line 13 to page 65 line 5.) He often frequents Thai bars. (*Id.*) If he asks one of the female employees for a date; and she agrees to said date during her normal work hours, the Thai tradition is to pay the bar owner for her lost employment, and to recompense the female for her lost wages. (TR at page 28 line 15 to page 44 line 5, at page 49 line 10 to page 50 line 22, at page 52 line 22 to page 63 line 6, and at page 63 line 13 to page 65 line 5.) Sexual activity often occurs during these dates, but not always. (*Id.*) There is nothing illegal about this dating practice, and it is not alleged as being illegal.

During a 2014 polygraph examination regarding a 2014 Thai date, Applicant “stressed he paid the women for companionship not sex and any sexual contact that did occur was consensual.” (GX 2.) Furthermore, the results of this polygraph examination “indicated no deception pertaining to questions involving the release of classified information to [an] unauthorized person.” (*Id.*) Applicant intends to continue a similar dating practice both in Thailand and the United States, conditioned on said practice being legal. (TR at page 28 line 15 to page 44 line 5, at page 49 line 10 to page 50 line 22, at page 52 line 22 to page 63 line 6, and at page 63 line 13 to page 65 line 5.) Applicant has always reported more than casual meetings with foreign nationals, and said meetings are known by Applicant’s family, friends and coworkers. (*Id.*, and AppX C.)

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 useful 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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 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. Likewise, I have avoided drawing inferences grounded 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, an "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 *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct 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 guideline notes several conditions that could raise security concerns under AG ¶ 16. One is potentially applicable in this case:

(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.

As Applicant has never concealed his dating conduct from family, friends or coworkers, the evidence is insufficient to raise this disqualifying condition. AG ¶ 16(e)(3) is not applicable, as such conduct is legal in several counties in the state of Nevada, thus not "illegal in the United States."

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; reflects a lack of judgment or discretion; or may subject the individual to undue influence of 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 or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

The guideline notes several conditions that could raise security concerns under AG ¶ 13. All are potentially applicable in this case:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) a pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;
- (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 lack of discretion or judgment.

None of these apply. Applicant's dating practice is consensual, freely admitted to, and totally legal. The evidence is insufficient to raise these disqualifying conditions.

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 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(d) were addressed under those guidelines, but some warrant additional comment. Applicant is well respected both at the workplace and in his community. (AppX C.) Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated 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 ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline D:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Richard A. Cefola
Administrative Judge