



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



In the matter of:)
)
) ISCR Case No. 14-06458
)
)
Applicant for Security Clearance)

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

11/21/2015

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline D, sexual behavior, and Guideline E, personal conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On January 28, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines D and E. DOD acted 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 within the DOD on September 1, 2006.

Applicant answered (Answer) the SOR on February 23, 2015, and requested a hearing before an administrative judge. The case was assigned to me on May 27, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 12, 2015, and the hearing was convened as scheduled on July 15, 2015. The Government offered exhibits (GE) 1 through 4, which were admitted into the record without objection. Department Counsel's exhibit index is marked as Hearing Exhibit (HE) I. Applicant testified, but did not offer any exhibits at the hearing. The record was held open to allow Applicant to submit post-hearing evidence. He submitted exhibits (AE) A-E, which were admitted into the record without objections. DOHA received the hearing transcript (Tr.) on July 23, 2015.

Findings of Fact

In Applicant's answer to the SOR, he admitted SOR ¶¶ 1.a, 1.d, 1.e, 2.a, 2.e, and 2.g. He denied SOR ¶¶ 1.b, 1.c, 2.b – 2.d, 2.f, and 2.h. The admissions are incorporated as findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following additional findings of fact.

Applicant is 43 years old. He is seeking a position with a defense contractor. He has been employed by a state government agency since March 2014. He worked as a federal employee for approximately 20 years, including for another federal agency (federal agency) from 2008 until he was fired for misconduct in August 2013, as explained below. He is married and has five children. He has a bachelor's degree. He has no military experience, but held a security clearance in the past.¹

Applicant's conduct raised in the SOR includes: (1) engaging in a sexual relationship with witnesses or victims of crimes he investigated as a federal agent (admitted); (2) lying about the relationship he had with one of the female witnesses/victims to federal agency management (denied); (3) continuing contact with a female witness/victim after being ordered by his superiors to cease contact (denied); (4) using his government vehicle to visit women for personal reasons, and having sexual relations while on-duty in his government vehicle (admitted); (4) all the above-described conduct was also alleged under Guideline E (denied); (5) having his security clearance suspended by a federal agency due to his misconduct (admitted); (6) deliberately falsifying information on his security clearance application from February 2014 by not revealing that his security clearance had been revoked and not disclosing his medical-psychiatric treatment information (denied); (7) deliberately falsifying his answers to defense investigator's questions concerning the reason he was terminated from a federal agency during his interview in March 2014 (denied); (8) being removed from his job at a federal agency for misconduct (admitted); (9) falsifying time and attendance records at a federal agency (denied); and (10) misusing his government-provided cell phone at a federal agency (admitted).

¹ Tr. at 161; GE 1, 2.

Applicant was working for a federal agency in 2013. During the course of an internal investigation by a federal agency, Applicant was removed from his job and his security clearance was suspended because he engaged in sexual relationships with two women who were connected to the federal agency's cases; he lied about his relationship with one of the women to federal agency management; he continued to contact one of the women despite being ordered by his supervisor to cease all contact with her; he used his government-issued vehicle for personal purposes, including transporting unauthorized passengers; he visited women for personal reasons while on duty, but failed to reflect his absence from work on his time and attendance records; he misused his government-issued cell phone; and he had consensual sexual relations with one of the federal agency-connected women while on-duty using his government vehicle.²

During his hearing testimony, Applicant admitted that he had a physical relationship with one woman while a case was pending, but his relationship with a second woman did not occur until the case she was involved with was over. He admitted he did not disclose the full nature of his relationship with the second woman to his supervisor, but he stated he was not asked specific questions, so he did not volunteer any information. He admitted contacting the woman when he was ordered not to do so. He also admitted that he used his government vehicle and cell phone for personal purposes. He did not remember if he had sexual relations while on duty in his government vehicle. He denied falsifying his time and attendance records. He admitted failing to list his security clearance suspension and his mental health treatment on his security clearance application, but he claims his actions were not deliberate and he did not intend to deceive when he forgot to list this information. During his security clearance interview, he told the investigator that when he was ordered by his supervisor to cease his contact with the women, he complied with the order. In his later testimony, he admitted he failed to comply with the order when he contacted her.³

Applicant stated that in addition to counseling through his church, he received counseling from a licensed therapist before he was terminated from his previous position. He volunteered for the therapy and it lasted about six months before he terminated the therapy. He did not offer any records from the therapy sessions.⁴

Applicant presented character letters from two former supervisors and his pastor. His supervisors described him as a "diligent worker" who "performed his duties well, and was able to manage his caseload with little supervision." His pastor commented that Applicant has a strong work ethic and was appointed a security team leader for the church. He also stated Applicant accepted responsibility for his mistakes and sought personal counseling from the church. Applicant also offered a copy of his current job

² GE 2-3.

³ Tr. at 34-36, 39, 41, 44-49; GE 1-4.

⁴ Tr. at 27, 30-31.

performance appraisal, which indicated an overall rating of three out of five, which means the employee “meets performance standards.” His current position requires him to comply with a code of ethics. He also offered a copy of his current job description and a certificate of appreciation from his current employer.⁵

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, 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, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 that an applicant may deliberately or inadvertently fail to 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.

⁵ AE A-E.

Section 7 of Executive Order 10865 provides that 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 D, Sexual Behavior

AG ¶ 12 expresses the security concern:

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.

I have considered all of the sexual behavior disqualifying conditions under AG ¶ 13 and the following are potentially applicable:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (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 inappropriate sexual relationships with two women who were associated with his federal agency cases, potentially compromising those cases. He lied to his supervisor about the relationships and failed to obey an order to cease contact with one of the women. He used government resources (vehicle) to facilitate these relationships. His actions were potentially criminal, reflected a lack of judgment, and caused him to be vulnerable to coercion, exploitation, or duress. All the above listed disqualifying conditions apply to SOR ¶¶ 1.a, and 1.e. However, SOR ¶¶ 1.b, 1.c, and 1.d do not allege sexual-related behavior and I find for Applicant on those allegations.

I have considered all of the sexual behavior mitigating conditions under AG ¶ 14 and the following are potentially applicable:

- (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;

(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 fired for his actions in August 2013. Although the record does not reflect the dates the inappropriate sexual activity took place, the discovery of it and investigation is recent enough to make it still a concern. His overall action in maintaining these relationships, lying about them, and failing to obey an order to cease a relationship, reflects unreliability, untrustworthiness, and poor judgment. AG ¶ 14(b) does not apply. He no longer is in the job and therefore there is no longer a basis for coercion, exploitation, or duress. AG ¶ 14(c) applies. His sexual activity with women associated with cases involving federal agency was not discreet. AG ¶ 14(a) does not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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 in this case. 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 engaged in inappropriate sexual relationships with women associated with cases of a federal agency causing his removal from that agency and the suspension of his security clearance. In February 2014, when completing his security clearance application he failed to list his security clearance suspension or his mental health therapy. I do not find credible his claim that these mistakes were unintentional. AG ¶ 16(a) applies. Likewise, during his interview with a defense investigator he falsified that he stopped having contact when ordered to do so. He admitted in his testimony that he continued contact despite the order. AG ¶ 16(b) applies. His overall conduct of engaging in inappropriate sexual relations with women associated with his cases and his unauthorized use of government resources while doing so made him vulnerable to exploitation, manipulation, and duress and affects his professional standing in the community. AG ¶ 16(e) applies. I find for Applicant on SOR ¶¶ 2.a and 2.e because the underlying conduct that led to those results (suspension of his security clearance and removal from employment) is already alleged.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and the following are potentially applicable:

(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 engaged in unlawful and inappropriate sexual behavior while in a position of trust with a federal agency that calls into question his good judgment. Although the last reported behavior was in 2013 and Applicant received six months of counseling to modify his behavior, it is too early to determine whether that counseling will have the desired impact. His acceptance of responsibility for his actions is a positive step in reducing his vulnerability to exploitation, manipulation, or duress. AG ¶ 17(c) does not apply. AG ¶ 17(d) partially applies. AG ¶ 17(e) applies.

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 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 the facts and circumstances surrounding this case. I have considered Applicant's current position and his supportive character evidence. However, I also considered that Applicant's actions involved unprofessional, deceitful, and untruthful behavior when he worked for a federal agency. Although Applicant has made some positive strides toward his rehabilitation, it is too early to determine whether those efforts will ultimately prove successful. Applicant failed to provide sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline D, Sexual Behavior, and Guideline E, Personal Conduct.

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 D:	AGAINST APPLICANT
Subparagraph: 1.a:	Against Applicant
Subparagraphs: 1.b – 1.d:	For Applicant
Subparagraph: 1.e:	Against Applicant

Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph: 2.a:	For Applicant
Subparagraphs: 2.b – 2.d:	Against Applicant
Subparagraph: 2.e:	For Applicant
Subparagraphs: 2.f – 2.h:	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.

Robert E. Coacher
Administrative Judge