



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



In the matter of:)
)
) ISCR Case No. 24-01134
)
)
Applicant for Security Clearance)

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: *Pro se*

08/25/2025

Decision

HYAMS, Ross D., Administrative Judge:

Applicant mitigated the Guideline D (sexual behavior) and Guideline E (personal conduct) security concerns. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on October 17, 2023. On October 2, 2024, the Defense Counterintelligence and Security Agency (DCSA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline D (sexual behavior) and Guideline E (personal conduct). Applicant answered the SOR on October 27, 2024, and requested a decision by an administrative judge from the Defense Office of Hearings and Appeals (DOHA) on the administrative (written) record in lieu of a hearing.

On April 1, 2025, Department Counsel submitted the Government's file of relevant material (FORM), including Items 1-3. A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. He received the FORM on April 10, 2025, and did not provide a response. The case was assigned to me on July 21, 2025. Item 1

is the SOR and Applicant's Answer, which are the pleadings in the case. Items 2 and 3 are admitted without objection.

Reopening the Record

On August 15, 2025, I emailed Applicant and Department Counsel to reopen the record in this case. I requested Applicant answer two questions to ascertain critical information that was ambiguous in the case documentation. This information was needed to properly consider the security concerns in this case, and to ensure a fair and impartial commonsense decision based upon consideration of all relevant and material information (DODD 5220.6 § 6.3). The two questions asked:

1. Was the woman that Applicant had an extramarital affair with a U.S. national?
2. Would Applicant disclose or compromise national security information to keep his 2002 extramarital affair secret from his wife or anyone else?

Applicant replied to the email and answered the two questions on August 15, 2025. I have marked his email response as Applicant's Exhibit (AE) A. On August 18, 2025, Department Counsel objected to reopening the record to obtain this information. That objection is overruled. AE A is admitted into the record.

Department Counsel requested that the case be converted to a hearing if I considered the information in AE A. That request is denied. Under DODD 5220.6 § E3.1.7 Department Counsel has 20 days from the receipt of Applicant's SOR Answer to convert the case to a hearing. Applicant's SOR Answer was from October 27, 2024, and the time permissible to convert the case to a hearing lapsed in late 2024.

Findings of Fact

In his Answer, Applicant admitted the SOR allegations. His answer did not include any narrative or documentation. Based on my review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 58 years old. He married in 1990 and has three adult children. He earned a bachelor's degree in 1989 and a doctorate in 1996. He works in a science field for a government contractor. He has worked for his current employer since 2018. He has not previously possessed a security clearance. (Item 2)

The SOR alleges the following under Guideline D:

SOR ¶ 1.a alleges that Applicant engaged in an extramarital affair in September 2002. SOR ¶ 1.b alleges that no one in Applicant's personal circle, including his wife, is aware of the extramarital affair from 2002, and that Applicant believes the existence of

the affair can be used to blackmail him. The SOR cross-alleges the Guideline D allegations under Guideline E in SOR ¶ 2.a.

The information supporting these allegations appears in one paragraph of the summary report of Applicant's background interview with a government investigator on April 2, 2024. Applicant was sent the report and asked: "Does the report accurately reflect the information you provided during your interview," to which he answered "yes" on September 9, 2024. (Item 3)

The relevant paragraph of the summary report provides the following information: In September 2002, Applicant had an extramarital affair that lasted about 30 days; At that time his marriage was having difficulties; He stated it is very unlikely to happen again in the future, and he no longer pursues extramarital affairs; and No one is aware of the affair, and he does not want his wife to know. (Item 3)

Two sentences in the relevant paragraph of the report state "Subject participated in the activity voluntarily and was aware that it was an issue. This did not contribute to any other issues and subject provided this is very unlikely to occur again in the future." No further information was provided about what "issue" means in these two contexts. The word "issue" was used another time in the paragraph with a different meaning, that would not make sense in the two other uses of this word. (Item 3)

The summary report uses standardized or boilerplate language from the background investigator throughout the report to organize and encapsulate areas of inquiry. This standardized language is in every paragraph of the report, and was not provided by Applicant. (Item 3)

The relevant paragraph in the summary report starts with standardized language: "Subject believes he has engaged in compulsive, self-destructive or high-risk sexual behavior that might make him vulnerable to coercion, exploitation, or duress." The report did not provide any explanation or information about how a 30-day extramarital affair from 2002 was compulsive, self-destructive, or high-risk sexual behavior. Other than the statement that he did not want his wife to know, the report had no further explanation or information about how the extramarital affair from 2002 made him vulnerable to coercion, exploitation, or duress. At the end of the paragraph, the report states: "Subject did provide that this situation can be used against him for blackmail or coercion." No further explanation or information was provided. (Item 3)

In AE A, Applicant reported the woman he had the extramarital affair with in 2002 was a U.S. national. In response to my direct question, he stated that he would not disclose or compromise national security information to keep his 2002 extramarital affair secret from his wife or anyone else. (AE A)

Policies

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

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 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 national security eligibility will be resolved in favor of the national security."

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." The applicant 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 D, Sexual Behavior

The security concern 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:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) 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.

An extramarital affair is not criminal behavior. The affair occurred over about 30 days and it has been 23 years since Applicant ended the affair. There is no evidence in the record that he engaged in other extramarital affairs. There is insufficient evidence in the record to find that this extramarital affair is compulsive, self-destructive, or high-risk behavior that he is unable to stop. Nor was it of a public nature or a reflection of a lack of discretion or judgment. AG ¶¶ 13(a), 13(b), and 13(d) do not apply.

In the FORM, Department Counsel argues that AG ¶ 13(c) applies because his wife and personal circle are unaware of the 2002 extramarital affair, and this makes

Applicant vulnerable to coercion, exploitation, or duress. Since Applicant admitted the Guideline D allegations in his Answer, I will apply AG ¶ 13(c).

Conditions that could mitigate the sexual behavior security concerns are provided under AG ¶ 14. 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 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.

AG ¶ 14(b) applies. The extramarital affair occurred 23 years ago, for about 30 days. This is infrequent. There is no evidence in the record that Applicant engaged in other extramarital affairs. Applicant reported it happened under unusual circumstances and is unlikely to recur. It does not cast doubt on his current reliability, trustworthiness, or judgment.

AG ¶ 14(d) applies. The extramarital affair was private and consensual. No record evidence shows otherwise. Applicant demonstrated discretion in not telling anyone about the affair, and he demonstrated candor by telling the background investigator about it.

AG ¶ 14(c) applies. The 30-day extramarital affair from 23 years ago no longer serves as a basis for coercion, exploitation, or duress. The summary report contained no information about how Applicant could be vulnerable to coercion, exploitation, or duress, other than saying that he did not want his wife to know. It is reasonable to surmise that Applicant does not want his wife to find out because he does not want to hurt her feelings. There is clearly no legal or reputational jeopardy after so much time has elapsed. Applicant affirmed that he will not disclose or compromise national security information to keep his 2002 extramarital affair secret from his wife or anyone else.

In addition to findings under AG ¶ 14 above, it is important note that the information in the record that supports Department Counsel's assertion that Applicant would be vulnerable to coercion, exploitation, or duress, is the background investigator's standardized language in one relevant paragraph of the summary report. Standardized language that is aligned with questions asked in the SCA, appears throughout the report, and was not provided by Applicant. The report's failure to include any detailed information about the purported vulnerability supports this premise.

Guideline E, Personal Conduct

AG ¶ 15 details the personal conduct security concern:

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...

I have considered the disqualifying condition for personal conduct under AG ¶ 16:

(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;
- (2) while in another country, engaging in any activity that is illegal in that country;
- (3) while in another country, engaging in any activity that, while legal there, is illegal in the United States.

The Guideline D allegations are cross-alleged under Guideline E. In the FORM, Department Counsel argues that AG ¶ 16(e)(1) applies because his wife and personal circle are unaware of the 2002 extramarital affair, this makes Applicant vulnerable to coercion, exploitation, or duress. AG ¶¶ 16(e)(2) and (e)(3) do not apply because the extramarital affair occurred in the United States, and an extramarital affair is not criminal behavior. Since Applicant admitted the Guideline E allegation in his Answer, I will apply AG ¶ 16(e)(1).

I have considered the mitigating conditions under AG ¶ 17. The following is 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.

AG ¶ 17(c) applies. I found for Applicant under Guideline D and the same reasoning applies under Guideline E. It is a minor issue, infrequent, and over two decades have since passed. There is no evidence in the record that he engaged in other extramarital affairs. Applicant reported it happened under unusual circumstances and is unlikely to recur. It does not cast doubt on his current reliability, trustworthiness, or judgment.

The relevant paragraph in the summary report contained no information about how Applicant could be vulnerable to coercion, exploitation, or duress, other than saying that he did not want his wife to know. It is reasonable to surmise that Applicant does not want his wife to find out because he does not want to hurt her feelings. There was no other likely way a 30-day extramarital affair from 2002 could impact Applicant's personal, professional, or community standing. Applicant affirmed that he will not disclose or compromise national security information to keep his 2002 extramarital affair secret from his wife or anyone else.

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 the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines D and E in my whole-person analysis.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility for a security clearance. There is sufficient evidence to mitigate the security concerns under Guidelines D and E.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR as amended, and as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline D: FOR APPLICANT

Subparagraphs 1.a-1.b: For Applicant

Paragraph 2, Guideline E: For APPLICANT

Subparagraph 2.a: For Applicant

Conclusion

It is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

Ross D. Hyams
Administrative Judge