



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



In the matter of:

)
)
)
)
)

ISCR Case No. 17-00810

Applicant for Security Clearance

Appearances

For Government: Nicholas T. Temple, Esq., Department Counsel
For Applicant: Wayne Gifford, Esq.

07/19/2019

Decision

HARVEY, Mark, Administrative Judge:

Applicant resolved the delinquent debts listed on her statement of reasons (SOR), and financial considerations security concerns are mitigated. Applicant engaged in a form of prostitution for about 12 months from 2016 to 2017 while holding a security clearance. Her claim that her behavior did not constitute prostitution is not persuasive. Sexual behavior, criminal conduct, and personal conduct security concerns are not mitigated. Access to classified information is denied.

Statement of the Case

On October 9, 2013, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On April 16, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security

clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline F (financial considerations). (HE 2) On May 26, 2018, Applicant responded to the SOR, and she requested a hearing. (HE 3) On August 22, 2018, the DOD CAF issued a replacement SOR setting forth security concerns under Guidelines F (financial considerations), J (criminal conduct), D (sexual behavior), and E (personal conduct). (HE 4)

On September 1, 2018, Applicant responded to the replacement SOR. (HE 5) On January 10, 2019, Department Counsel was ready to proceed. On January 25, 2019, the case was assigned to me. On April 12, 2019, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for July 1, 2019. (HE 1) Applicant's hearing was held as scheduled using video teleconference.

Attached to Applicant's second SOR response were 20 exhibits, which were admitted without objection. (Transcript (Tr.) 12-13, 23-24; Applicant Exhibit SOR response (AE SR) A-AE T) During the hearing, Department Counsel offered nine exhibits; Applicant offered five additional exhibits; and all proffered exhibits were admitted into evidence. (Tr. 15-18, 26-27); GE 1-9; AE A-AE E). On July 11, 2019, DOHA received a transcript of the hearing. Applicant did not provide any post-hearing documents.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript pages.

Findings of Fact

In Applicant's SOR response, she admitted SOR ¶¶ 1.r and 4.b, and she denied the other SOR allegations. She also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is 42 years old, and a DOD contractor employs her as a management specialist in Afghanistan. (Tr. 29, 88, 90) She served in the Army from 1996 to 2000, and she received an honorable discharge. (Tr. 89-90) In 2006, she received an associate's degree. (GE 1)

In 1999, Applicant married, and in September 2016, her divorce was final. (Tr. 89) Her three children are teenagers. (Tr. 89) In August 2014, Applicant filed for divorce. (Tr. 50, 57) She paid "well over \$30,000" to her divorce attorney. (Tr. 51) She received security training in 2012. (AE SR R)

Financial Considerations

While Applicant was deployed to Afghanistan, she believed her husband was paying the family bills, and she was unaware of the delinquent SOR debts. (Tr. 52) After she learned of her delinquent debts, she reduced her expenses, especially her rent. (Tr. 53) She cashed in her 401(k) account to pay her debts. (Tr. 54) She paid all of the SOR debts; however, she noted the debt in SOR ¶ 1.a for \$1,438 is still listed as delinquent on

her current credit report. (Tr. 16, 37, 55) The status and disposition of the debts alleged on the SOR are as follows:

SOR ¶ 1.a alleges a charged-off debt for \$1,438. On June 7, 2018, Applicant paid the creditor \$1,000, and the debt was settled. (AE B; AE SR S) However, on September 1, 2018, Applicant emailed that her credit report had not been updated to reflect resolution of this debt. (SOR response) I have credited her with resolving this debt.

SOR ¶¶ 1.b, 1.h, and 1.l allege telecommunications debts placed for collection for \$783, \$173, and \$783. On May 16, 2018, Applicant paid the SOR ¶ 1.b creditor \$783. (AE C at 1; AE SR D) On May 14, 2018, Applicant paid the debt in SOR ¶ 1.h. (AE SR N; AE C at 26) The accounts in SOR ¶¶ 1.b and 1.l reflect the same debt. (SOR response)

SOR ¶ 1.c alleges a charged-off debt for \$599. On May 18, 2018, the creditor wrote Applicant's debt was paid in full as of January 13, 2016. (AE C at 23-24)

SOR ¶ 1.d alleges an account placed for collection for \$588. On May 24, 2018, the creditor wrote that the debt was resolved, and the balance owed was zero. (AE C at 13)

SOR ¶¶ 1.e, 1.f, 1.i, 1.j, 1.p, and 1.q allege six delinquent medical debts for \$572, \$360, \$92, \$1,572, \$165, and \$165. SOR ¶¶ 1.e, 1.f, 1.i, 1.j, 1.p, and 1.q do not allege specific creditors seeking payment of the medical debts. On May 14, 2018, Applicant paid a medical collection debt of unspecified amount. (AE SR O; AE C at 12) On May 15, 2018, Applicant paid the creditor in SOR ¶ 1.j \$1,572. (AE C at 7) The creditor provided an undated letter stating the debts in SOR ¶¶ 1.p and 1.q were paid by insurance. (AE SR P; AE SR H; AE C at 25) On May 15, 2018, Applicant received an email indicating her 12 medical debts for \$1,589, \$595, \$1,633, \$91, \$100, \$3,145, \$339, \$83, \$190, \$190, \$85, and \$24, were being paid in full. (AE C at 29-43)

SOR ¶ 1.g alleges a debt placed for collection for \$350. On September 1, 2018, Applicant indicated in an email that the creditor had closed the account and would not accept payment. (SOR response)

SOR ¶ 1.k alleges an account placed for collection for \$1,255. On May 14, 2018, Applicant paid \$1,255 to the creditor. (AE C at 28; AE SR C)

SOR ¶ 1.m alleges an account placed for collection for \$539. On May 24, 2018, the creditor wrote that Applicant's debt was resolved, and the balance owed was zero. (AE C at 10)

SOR ¶ 1.n alleges a charged-off debt for \$486. On May 24, 2018, the creditor wrote Applicant's account was resolved, and the balance owed was zero. (AE SR J)

SOR ¶ 1.o alleges an account placed for collection for \$468. On May 24, 2018, the creditor wrote that Applicant's debt was resolved, and the balance owed was zero. (AE C at 8)

SOR ¶ 1.r alleges Applicant's pay was garnished to address a student loan debt for \$8,777. On May 15, 2018, a student loan creditor wrote a defaulted student loan of unspecified amount was paid in full in August 2012. (AE C at 3) On June 7, 2018, Applicant paid a student loan for \$2,505. (AE C at 6) On July 3, 2018, a student loan creditor wrote that five student loans of \$5,500, \$3,387, \$2,750, \$208, and \$758 were paid in full. (AE C at 15-22) On January 7, 2019, three student loans for \$3,353, \$7,326, and \$5,500 were paid in full. (AE C at 4-5)

Applicant did not include her income of about \$5,000 from customers seeking her time and other personal services on her 2016 federal income tax return. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility;
- (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances;
- (c) to consider whether an applicant has demonstrated successful rehabilitation;
- (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or
- (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See also ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). I limited my consideration of Applicant's admission that she did not declare income from her customers in violation of the Internal Revenue Code to the five purposes listed above.

Criminal Conduct, Sexual Behavior, and Personal Conduct

SOR ¶¶ 2.a, 3.a, and 4.a allege that Applicant was cited in March 2017 for prostitution and operating a business without a city license. SOR ¶ 4.b alleges and Applicant admitted that she failed to timely report this citation to her security officer. (SOR response) Applicant did not report her arrest because her attorney told her not to do so because "it would implicate [her] in a crime." (Tr. 76)

In March 2017, the police arrested Applicant at her residence. (Tr. 71) Applicant said she was not charged with operating a business without a license, and the prostitution charge was dismissed because of lack of evidence that she engaged in prostitution. (Tr. 75; SOR response, Order Dismissing Charge) After her arrest, she stopped seeking customers on a dating website. (Tr. 78, 81) After her Office of Personnel Management (OPM) personal subject interview (PSI), she reported the arrest to her security officer. (Tr. 76-77) Applicant's counsel indicated the prostitution charge was a municipal violation and not a violation of state law. (Tr. 16-17) In Applicant's state of residence, prostitution is a class B misdemeanor, punishable by up to six months in jail and a fine of up to \$500. Under the statute in Applicant's state, § 567.020, "A person commits the offense of prostitution if he or she engages in or offers or agrees to engage in sexual conduct with another person in return for something of value to be received by any person."

Applicant believed her husband called the police and alleged she was engaged in prostitution. (Tr. 80; SR) Applicant criticized the credibility of a police officer involved in the investigation of her prostitution charge. (Tr. 17-19) Her counsel cited a 2015 Eighth Circuit decision that named the police officer as having omitted information from an affidavit used to obtain a search warrant. (AE D) The magistrate noted information was omitted; however, the magistrate concluded that “the officer did not act intentionally or recklessly to mislead the issuing judge.” (AE D at 2) The district court judge agreed with the magistrate. (AE D at 2-3) The Eighth Circuit found the omissions were negligent but otherwise agreed the omissions were not made with deliberate falsity or reckless disregard, and declined to suppress the product of the search. (AE D at 4, 6) Applicant also provided a copy of a 2014 deposition of the same police officer relating to an alleged stalking incident the police officer investigated in 2012. (AE D) Applicant asserted the police officer admitted in the deposition that he made a false statement in his investigation of the stalking allegation. (Tr. 17-20) Applicant and her former husband were not involved in the alleged stalking incident. (AE D)

Applicant’s concerns about the officer’s credibility have low relevance because Applicant did not contest most of the material facts in the police report. The only information Applicant challenged were the allegations, as summarized by the police officer, of the two witnesses who said Applicant provided sex to them in exchange for their payments of the amounts specified on Applicant’s Internet advertisement. (SOR Report) Written statements from the two witnesses were not included in the file. The two witnesses were soldiers at a nearby military base, and Applicant’s counsel said he was unable to locate them. Applicant’s admissions at her hearing, and the advertisement and pictures from the website are sufficient to establish the allegation of prostitution under the substantial evidence standard.

SOR ¶¶ 3.b, 3.c, 3.d, and 4.a allege Applicant engaged in sex with strangers that she met on websites, including a dating website with a history of being involved with prostitution. Her website posting indicated she charged \$80 for 30 minutes and \$150 for 60 minutes. At least one man that she met online paid her \$80 following sex.

For about one year from 2016 to 2017, Applicant’s semi-nude photographs and contact information were placed on a dating or escort website. (Tr. 60-63, 68-70; GE 5) Her time was available for \$80 for 30 minutes and \$150 for 60 minutes. (Tr. 61-63) She offered conversation, warmth, massage, dance, and a special event to her customers. (Tr. 61-62, 74) In April 2018, the Department of Justice (DOJ) issued a press release indicating the website Applicant was using to solicit customers was seized, as it was “the dominant marketplace for illicit commercial sex, a place where sex traffickers frequently advertised children and adults alike.” (Tr. 77; GE 9)

On March 11, 2017, the police stopped a vehicle that had just left Applicant’s residence. (GE 4) The driver was a soldier at a nearby military installation. The driver said he had just paid Applicant \$80 for sex. He said he also paid her \$150 for sex on March 8, 2017. (OPM ROI at 17) The police went to Applicant’s residence and asked for the money the witness paid her, and she provided four \$20 bills. *Id.* Applicant told the police that she was not engaging in prostitution. The police interviewed another witness who was a

soldier at a nearby military installation, and he said he paid for sex about four times at Applicant's residence. *Id.* (police report) Applicant's lawyer said he was unable to locate the two witnesses cited in the police report to challenge their credibility. (Tr. 45-46) When Applicant was questioned by the police, she "was concerned about the charge of prostitution as it would affect her security clearance." (GE 4)

Applicant had difficulty estimating how many people paid her for her time; however, she estimated "at least see[ing] 40 or more." (Tr. 64-66) She estimated that she had sex with about 20 men. (Tr. 66-67) She was vague about how many of them paid after having sex with her. (Tr. 67-68) Some of the customers may have asked her for drugs; however, she always refused to give them drugs. (Tr. 88) Applicant did not have anyone to protect her if the date with her customers became violent. (Tr. 87)

Applicant consistently denied that she engaged in prostitution. (Tr. 43, 47-48) She denied that there was a direct relationship between the payment of funds and the sexual activity. (Tr. 82; SR; GE 2) The purpose of the semi-nudity on her webpage was to encourage men to call her to go out with her. (Tr. 70) After the first date, some men continued their relationships with her and continued to pay her, and some did not pay her. (Tr. 71, 82) As for whether she was soliciting prostitution, Applicant explained, in an advertisement a girl holding a soda may be wearing a bikini, "but that doesn't mean she's a prostitute." (Tr. 93) Applicant held a security clearance in the 2016 to 2017 time period when her webpage advertised her time to customers. (Tr. 75)

Applicant's spouse was vindictive towards her because of her conduct. Her husband placed her pictures on a bad website to damage her reputation. (Tr. 38-42, 61; SOR response; GE 5) In 2016, he called her a prostitute at a basketball game their children were attending. (Tr. 39-40) He threatened to seek her conviction and sentencing to jail for prostitution. (Tr. 39) He sought an order barring her from seeing her children; however, the judge denied his motion, and he had to pay her attorney fees. (Tr. 40) Her husband encouraged the police to investigate Applicant for engaging in prostitution. (Tr. 41)

Applicant conceded that she "presented [herself] in the wrong manner as far as that [she] may have been doing an illegal action." (Tr. 80) At the time Applicant was utilizing the webpage to solicit customers, she had full-time employment and earned \$53,500 annually. (Tr. 84) In 2016, she made a little more than \$5,000 from the website. (Tr. 85) She did not include the income from the customers on her federal tax return for tax year 2016. (Tr. 85-86)

Character Evidence

In 2018, Applicant received two promotions and a certificate of appreciation from her employer. (Tr. 50) She served in Afghanistan in 2014, and she was serving in Afghanistan at the time of her hearing. (Tr. 48)

Applicant's program manager has known her since 2000. (Tr. 28-29) He described her as an excellent employee who is conscientious, reliable, and responsible. (Tr. 30-31)

She did not commit any security or rule violations. (Tr. 36) He supported her for positions of greater responsibility and a security clearance. (Tr. 32-33)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

Failure to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified or sensitive information. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant’s financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant’s self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant’s security eligibility.

AG ¶ 19 includes three disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability to satisfy debts”; “(b) unwillingness to satisfy debts regardless of the ability to do so”; and “(c) a history of not meeting financial obligations.” The record establishes AG ¶¶ 19(a), 19(b), and 19(c).

Five financial considerations mitigating conditions under AG ¶ 20 are potentially applicable in this case:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

The DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

A debt that became delinquent several years ago is still considered recent because "an applicant's ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions." ISCR Case No. 15-06532 at 3 (App. Bd. February 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sep. 13, 2016)).

The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the “good faith” mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant’s debts. The Directive does not define the term “good-faith.” However, the Board has indicated that the concept of good-faith “requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.” Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the “good faith” mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

Applicant had an expensive divorce, which is a circumstance outside of her control that adversely affected her finances. She showed her good faith, and she resolved all of the SOR debts. There is sufficient assurance her financial problems are resolved, under control, and will not recur in the future. Under all the circumstances, she established that financial considerations security concerns are mitigated.

Sexual Behavior

AG ¶ 12 contains the security concern for sexual behavior:

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.

AG ¶ 13 includes conditions that could raise a security concern and may be disqualifying:

- (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.

Applicant advertised for her services from 2016 to 2017 using her semi-nude photographs to encourage customers to call her. Some of her customers engaged in sexual activity with Applicant, and then some of them paid her \$80 for 30 minutes, or \$150 for 60 minutes. Each time she engaged in sexual activity and received payment afterwards at this hourly rate from her customers, she committed a form of the prostitution offense.

In a recent Appeal Board case, the Appeal Board assessed the security implications of an applicant's claim that his behavior did not constitute prostitution as follows:

[He and his friend] each dated a couple of different women on this trip, they paid their bar fees, went to dinner and/ or dancing, and engaged in consensual sexual activity. [He] engaged in sex with at least one to two women while on this trip. When they pay the bar fee, it does not mean they are paying for sex, sex is never discussed, and the women are not obligated to sleep with the men who pay their bar fee to take them out. Prostitution is illegal in Thailand. The women that they engaged in sexual activity with were adults, and it was always consensual sex (no other details recalled).

* * *

Applicant's contention that he is not participating in prostitution brings to mind a Latin phrase, "*res ipsa loquitur*," i.e., the thing speaks for itself. He paid money to engage in casual, sexual encounters. Despite his claim to the contrary, the routine practice of paying a fee to remove random women from bars and then later on that same occasion engage in sexual activity with them is a form of prostitution. In the above indented quote, Applicant admitted that prostitution is illegal in Thailand. Disqualifying Condition 13(a) was established.

Additionally, Applicant's conduct is at the very least high-risk sexual behavior that calls into question his judgment. Such behavior establishes disqualifying conditions under Guideline E that address conduct involving questionable judgment.

ISCR Case No. 16-03690 at 3 (App. Bd. Aug. 15, 2018) (footnotes omitted). Applicant's conduct established AG ¶¶ 13(a), 13(c), and 13(d).

AG ¶ 14 lists conditions that could mitigate security concerns:

(a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;

(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;

(d) the sexual behavior is strictly private, consensual, and discreet; and

(e) the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and consistent compliance with the treatment plan, and/or has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

None of the mitigating conditions fully apply. Applicant refused to admit that she engaged in the offense of prostitution. Taking responsibility for one's conduct is often considered the first step on the road to rehabilitation. Her multiple misdemeanor-level criminal offenses of prostitution are relatively recent. She remains vulnerable to prosecution for the offenses until the statute of limitations runs. She is also vulnerable to coercion for her conduct. She did not receive any therapy or counseling. She failed to declare her income on her 2016 federal income tax return from customers meeting her based on her webpage advertisement. Guideline D security concerns are not mitigated.

Criminal Conduct

AG ¶ 30 described the concern relating to criminal conduct as follows:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 31 includes conditions that could raise a security concern and may be disqualifying include:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted;

(c) individual is currently on parole or probation;

(d) violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program; and

(e) discharge or dismissal from the Armed Forces for reasons less than “Honorable.”

As discussed in the sexual behavior section, *supra*, AG ¶¶ 31(a) and 31(b) are established.

AG ¶ 32 lists conditions that could mitigate security concerns:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

As indicated in the sexual behavior section, *supra*, none of the mitigating conditions fully apply.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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 includes two conditions that could raise a security concern and may be disqualifying include:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse

determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: . . . (3) a pattern of dishonesty or rule violations; 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 engaged in multiple misdemeanor-level acts of prostitution, which are violations of the rules or statutes. Such conduct adversely affects her professional and community standing. She failed to timely report that the police cited her for prostitution to her security officer, which is violation of a security rule.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant's delay in reporting her citation by the police for prostitution to her security officer was based on the advice of counsel. AG ¶ 17(b) applies, and SOR ¶ 4.b is mitigated. None of the mitigating conditions apply to Applicant's conduct as described in the sexual behavior section, *supra*. SOR ¶ 4.a is not mitigated. Personal conduct security concerns are not mitigated.

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(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), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guidelines F, D, J, and E are incorporated 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 42 years old, and a DOD contractor employs her as a management specialist in Afghanistan. She served in the Army from 1996 to 2000, and she received an honorable discharge. In 2006, she received an associate's degree.

Applicant mitigated the allegations under Guideline F. She made diligent and effective efforts to establish her financial responsibility. She resolved all of the debts listed on her SOR.

In 2018, Applicant received two promotions and a certificate of appreciation from her employer. She served in Afghanistan in 2014, and she was serving in Afghanistan at the time of her hearing. Her program manager has known her since 2000. He described her as an excellent employee who is conscientious, reliable, and responsible. She did not commit any security or rule violations. He supported her for positions of greater responsibility and a security clearance.

Applicant advertised for her services from 2016 to 2017 using her semi-nude photographs to encourage customers to call her. After her customers engaged in sexual activity with Applicant, they sometimes paid her \$80 for 30 minutes, or \$150 for 60 minutes. Each time she engaged in sexual activity and received payment of her hourly fee afterwards from her customers for such services, she committed a form of the prostitution offense. She continues to be vulnerable to prosecution for prostitution until the statute of limitations runs. Applicant did not include the income she received for her services on her federal income tax return.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Unmitigated sexual behavior, criminal conduct, and personal conduct security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted.

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 F:	FOR APPLICANT
Subparagraphs 1.a through 1.r:	For Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline D:	AGAINST APPLICANT
Subparagraphs 3.a through 3.d:	Against Applicant
Paragraph 4, Guideline E:	AGAINST APPLICANT
Subparagraph 4.a:	Against Applicant
Subparagraph 4.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge