



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



In the matter of:)
)
) ISCR Case No. 17-02785
)
Applicant for Security Clearance)

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: Troy Nussbaum, Esq.

01/30/2019

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for access to classified information. Applicant presented sufficient evidence to mitigate the security concern about his sexual behavior and his personal conduct. Accordingly, this case is decided for Applicant.

Statement of the Case

On March 14, 2017, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance for a position with a defense contractor. On September 14, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that his circumstances raised security concerns under the sexual behavior guideline and the personal conduct guideline. Applicant answered the SOR on October 27, 2017, and requested a hearing to establish his eligibility for access to classified information.¹

¹ This action was taken under Executive Order (E.O.) 10865, Safeguarding Classified Information within Industry (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program (January 2, 1992), as amended (Directive). In

On July 19, 2018, a date mutually agreed to by the parties, a hearing was held. Applicant testified and called three character witnesses to testify on his behalf. Applicant offered three exhibits, Applicant's Exhibits (AE) A through C, which were admitted without objection. The exhibits offered by the Government were admitted without objection. (Government Exhibits (GE) 1 – 3.) Applicant's Answer to the SOR attached seven documents, which I have marked as Answer Exhibits (Answer Ex) A through G. Six of those are character reference letters. Answer Ex B through G. The transcript of the hearing (Tr.) was received on July 27, 2018.²

Findings of Fact

Applicant is 59 years old, a college graduate, who has a professional engineering degree and is a certified project management professional. He is married (since 1994) and has a son age 13.³

Applicant started his own mechanical contracting company in 1993. He now owns four separate companies, one of which is a secured facility, for which Applicant is a key management person. His companies provide engineering, consulting, and project management services for construction projects, particularly specializing in the construction of computer rooms. Over the years, Applicant's companies have worked for numerous federal government agencies. On those projects, his companies have received a number of "exceptional" ratings, and always "very good" or higher.⁴

Under Guideline D, the SOR alleges that Applicant engaged in prostitution from about the early 1990s through at least 2014. Applicant admitted that allegation, with explanations.⁵ Under Guideline E, the SOR alleges that during an October 31, 2014 polygraph examination, Applicant deliberately omitted that he had an extramarital affair with a female co-worker in 2007. The SOR also alleges that in his March 14, 2017 security clearance application, in explaining his clearance revocation by the Another Government Agency (AGA) in April 2016, he disclosed his activity with prostitution in foreign countries where such conduct was legal but deliberately omitted his conduct in one of the United

addition, the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), effective within the Defense Department on June 8, 2017, apply here.

² Applicant's counsel originally objected to GE 3, a report of three polygraphs of Applicant administered by the National Security Agency. Tr. 10. Counsel for Applicant later withdrew his objection, and GE 3 was admitted into evidence. Tr. 67-68.

³ GE 1; GE 2; Tr. 32.

⁴ Tr. 33-37.

⁵ SOR ¶ 1.a; Answer, pp. 1-3. The SOR's diction is inaccurate. Applicant did not "engage in prostitution." Rather, he solicited or paid for sexual services offered by women. The women are the ones who "engaged in prostitution." Nevertheless, in this Decision, the use of the phrases "engage in prostitution" or "engaged in prostitution" refers to Applicant's conduct that is the subject of SOR ¶ 1.a.

States in which prostitution was illegal. Applicant denied that his omissions were deliberate.⁶

Applicant testified about the frequency with which he engaged the services of prostitutes in the past. He testified about those instances when he was in foreign countries where he believed prostitution to be legal: once in 1998, between 2000 and 2010 (never), from 2011 to 2014 about 11 times. He identified one instance in 2010 or 2011 when he hired a prostitute in the United States. Applicant knew that was illegal but he called it a “lapse in judgment” and did not consider it a “major crime.” The last time he hired a prostitute was in August 2014. The occasions were social trips or conferences with business associates.⁷

Applicant testified that his engagements with prostitutes in those countries where prostitution was legal, was not unsafe, was discreet, personal, and anonymous; he never carried his work or personal identification cards. He had only minimal concerns about to whom those prostitutes might be connected.⁸

In his Answer to the SOR, Applicant discussed a medical condition that his wife has had since he first met her, that is, a life-long glandular disorder that requires daily medications. One of the side effects is that his wife has no sex drive, and their sexual relations have been limited to once every two or three years. She is very loving and caring but has no interest in sex. Applicant and his wife have tried to resolve the issue with counseling, but the results have been limited and short-lived.⁹

Applicant elaborated on that issue in his testimony. His wife’s medical condition creates a problem with her sex drive. There is much intimacy between them but no sex. The longest lapse of sex with his wife has been about three years. In about 2010, his wife’s condition worsened, and her doctors tried to adjust her medications. That was unsuccessful, and surgery was required. At the time, Applicant and his wife were in joint and individual counseling. They continued that until 2011, when Applicant was assigned to a project in another state. He was unable to keep their counseling appointments. Since the SOR, he and his wife have been attending counseling. Applicant believes their

⁶ SOR ¶¶ 2.a -2.b; Answer, pp. 3-4. The AGA administered three polygraphs to Applicant, in October 2014, March 2015, and April 2015. Those polygraphs revealed that sometime in the 1990s and from 2000 (or 2001) until 2014, Applicant hired prostitutes in foreign countries where he believed prostitution was legal, except for one occasion when he hired a prostitute in one state in America where it was illegal. As a result, Applicant’s Sensitive Compartmented Information clearance was revoked effective July 28, 2016. GE 3. Except for pointing out that prostitution was illegal in that one American state, the Government has not contended that prostitution was illegal in the foreign countries where Applicant engaged prostitutes.

⁷ Tr. 38-40, 71-72.

⁸ Tr. 75-76, 79, 93. Applicant’s wife does not know about today’s hearing. Tr. 83.

⁹ Answer, p. 2.

relationship is now very strong, as strong as it has ever been. The counseling has had a positive effect, and they plan to continue it indefinitely.¹⁰

Applicant testified that he has never told his wife about his history of using prostitutes, because it would hurt her feelings. Applicant is not sure his wife would leave him, but he could not be blackmailed. Applicant has not told his son, because he is 13 and would not understand. Applicant has not told his parents or his three siblings, but he is not be afraid to do so. He said they would probably be surprised, but it would not jeopardize his relationships with them. Applicant would not be afraid to inform anyone if “push came to shove.” There are probably eight to ten friends and professional associates, including his FSO, whom he has told about his history of using prostitutes. Applicant expressed remorse, because it was “selfish and senseless.” Applicant testified that he will never engage in prostitution again.¹¹

Applicant addressed the SOR allegation that during his October 31, 2014 polygraph he deliberately omitted that he had an extramarital affair with a female co-worker in 2007. He testified that the affair was in 2007 to 2008, lasted about six months, and that his wife found out about the affair in that time frame. As a result, Applicant and his wife underwent joint and individual counseling. Since his wife knows about the affair, Applicant contends that he could not be blackmailed.¹² Applicant also explained that he did not disclose this affair, because the focus of the October 31, 2014 polygraph was on his activities with prostitutes. He was trying to make sure he listed all the instances of prostitution. In the post-test interview after his March 3, 2015 polygraph, it appears that Applicant volunteered the information about his affair and the reasons he did not disclose it during the October 2014 polygraph. Applicant testified that he was never asked directly or indirectly about any affairs in that first polygraph. He denies that he deliberately omitted the information about his one affair.¹³

Applicant addressed the SOR allegation that on his March 14, 2017 security clearance application he deliberately omitted that he engaged in prostitution in a state where it was illegal. The SOR selectively quotes Applicant’s response to Section 25- Investigations and Clearance Record. A more complete response is as follows:

In 2014 I applied for a TS-SCI with full scope polygraph. During my initial polygraph I disclosed my activity with prostitution on several occasions in foreign locations where the activity was not a criminal offense. I learned at that time that the US Government treats all prostitution as a serious crime (emphasis added).

¹⁰ Tr. 44-47, 81-83.

¹¹ Tr. 47-51, 96.

¹² Tr. 49, 52-53, 84, 89, 93-95.

¹³ Tr. 56, 58-59; GE 3; Answer, p. 3.

The italicized portion was not quoted in the SOR. In the October 31, 2014 polygraph, Applicant expressly listed his engagement of a prostitute in a state in America where he knew it was illegal. Applicant testified that having made that disclosure to AGA in 2014, he believed that the disclosure was part of his clearance record. He claimed that he did not intentionally omit that information.¹⁴

Applicant submitted a January 11, 2018 Summary Report of Psychological Evaluation by a licensed psychologist. The psychologist has been licensed to practice since 1985 and has his doctorate in Clinical Psychology from a prestigious university. The dates of the evaluation were in October and November 2017 and in January 2018. The conclusions were that Applicant is a “fundamentally sound individual who appears to be free from any major psychological diagnosis or difficulties.” It found further that: “His testing indicates that he does not have any major psychological problems and that he does not warrant a psychological diagnosis.” The report concludes: “There is no indication that this illicit behavior will reoccur, and he appears to be fully capable of holding a position of trust as he has successfully done for many years prior.”¹⁵

Applicant called three character witnesses. Each witness had known Applicant professionally and personally for ten years or more. They were aware of the SOR’s allegations. Each witness attested to Applicant’s reliability, honesty, and trustworthiness.¹⁶ Three other individuals who did not testify submitted character reference letters which also praised those qualities.¹⁷

Law and Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individuals are eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2; SEAD-4, ¶ E.4.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. SEAD-4, Appendix A, ¶¶ 2(c), 2(d).

¹⁴ Tr. 58-62.

¹⁵ AE B.

¹⁶ Tr. 23-30, 102-04, 110-13. Those witnesses also submitted character reference letters. Answer Ex C, D, and F.

¹⁷ Answer Ex B, E, and G.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). In resolving the ultimate question regarding an applicant’s eligibility, “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” SEAD-4, Appendix A, ¶ 2(b). See also SEAD-4, ¶ E.4. Moreover, the Supreme Court has held that officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an 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.

Discussion

Guideline D, Sexual Behavior

The SOR alleges that from about the early 1990s through at least 2014 Applicant engaged in prostitution (SOR ¶ 1.a). The concern under this guideline 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. . . .

The following potentially disqualifying conditions are relevant:

AG ¶ 13(a): sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

AG ¶ 13(b): a pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;

AG ¶ 13(c): sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

AG ¶ 13(d): sexual behavior of a public nature or that reflects lack of discretion or judgment.

By his own estimates, Applicant has used prostitutes 13 times since 1998. On one occasion he hired a prostitute in a state where doing so was illegal. AG ¶¶ 13(a), 13(c), and 13(d) are established.

AG ¶ 13(b) is not fully established. Applicant engaged in high-risk sexual behavior over the span of 16 years. But after his first episode in 1998, he did not engage in prostitution until 2010. Moreover, the psychologist's report and Applicant's abstinence since August 2014 tend to negate the element of this disqualifying condition that he is unable to stop his behavior. The next inquiry is whether any mitigating conditions apply.

The following mitigating conditions are potentially applicable:

AG ¶ 14(b): the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment;

AG ¶ 14(c): the behavior no longer serves as a basis for coercion, exploitation, or duress; and

AG ¶ 14(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.

Applicant last engaged in prostitution in August 2014, more than four years ago. It appears that Applicant has informed his closest personal and professional friends of his history of using prostitutes. He has told them of his intention never to engage prostitutes again. Applicant's psychologist is convinced that this conduct will not recur. Applicant testified credibly that he would not be blackmailed if his parents or siblings learned of that history. Applicant testified plausibly about why he believed it was unnecessary to disclose his history to his spouse or son. Applicant also testified credibly about his remorse for his past conduct and that he and his spouse are committed to continue marital counseling indefinitely. I find that AG ¶¶ 14(b), (c), and (e) apply.

Guideline E - Personal Conduct

In assessing an allegation of deliberate falsification, I consider not only the allegation and Applicant's answer but all relevant circumstances. Under Guideline E for personal conduct, the concern is that "[c]onduct 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."¹⁸ A statement is false or dishonest when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if, for example, the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, reasonably did not know the information, or genuinely thought the information did not need to be reported.

The SOR alleged that during his October 31, 2014 polygraph examination Applicant deliberately omitted that he had an extramarital affair with a female co-worker in 2007. Applicant denied that allegation. Applicant testified credibly that during that polygraph he was never asked directly or indirectly about any affairs. He also testified that the focus of the questioning was his history of hiring prostitutes, about which he was trying to give as complete a response as possible. I find that Applicant reasonably believed that he need not disclose that affair.

The SOR also alleged that on his March 14, 2017 security questionnaire he deliberately omitted that he hired a prostitute in a state where that was illegal. Applicant denied that allegation. Applicant testified credibly that he disclosed that incident during his October 31, 2014 polygraph and believed it did not need to be disclosed in that questionnaire because it was already part of his clearance record. I find that Applicant reasonably believed that he need not disclose that incident again.

The record does not raise doubts about Applicant's current reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.¹⁹ Accordingly, I conclude that Applicant met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

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:

¹⁸ AG ¶ 15.

¹⁹ AG ¶ 2(a)(1)-(9). Applicant's character witnesses and character reference letters were given positive weight.

Paragraph 1, Guideline F (Financial Considerations):	For Applicant
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E (Personal Conduct)	For Applicant
Subparagraphs 2.a-b:	For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant access to classified information.

Philip J. Katauskas
Administrative Judge