



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



In the matter of:)
)
) ISCR Case No. 18-00387
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

02/25/2019

Decision

Curry, Marc E., Administrative Judge:

Applicant mitigated the security concerns related to his illegal, extramarital sexual activity. Clearance is granted.

Statement of the Case

On March 15, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guidelines D, sexual behavior, E, personal conduct, and J, criminal conduct, explaining why it was unable to find it clearly consistent with the national interest to grant security clearance eligibility. The DOD CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; and DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive) and the National Security Adjudicative Guidelines (AG), effective June 8, 2017.

On April 26, 2017, Applicant answered the SOR, admitting the allegations and requesting a hearing, whereupon the case was assigned to me on September 12, 2018. On November 9, 2018, the Defense Office of Hearings and Appeals issued a notice of

hearing, scheduling Applicant's case for November 28, 2018. The hearing was held as scheduled. I received five Government exhibits (GE 1 – GE 5) and five Applicant exhibits (AE A - AE E). I also incorporated a copy of the discovery letter that Department Counsel mailed to Applicant (Hearing Exhibit I). At the close of the hearing, I left the record open to November 28, 2018 for Applicant to submit additional documents. Within the time allotted, he submitted three additional exhibits that I received as AE F through AE H. The transcript (Tr.) was received on December 7, 2018.

Findings of Fact

Applicant is a 43-year-old married man with two children, ages seven and four. He has both an undergraduate and a master's degree in computer engineering. Since 2014, he has been working for a defense contractor as a computer programmer.

Applicant is a naturalized U.S. citizen. He immigrated here in 1997 shortly after graduating from college. The culture of the United States is more socially permissive than the culture of the country where he immigrated from. Shortly after immigrating, Applicant had few close friends. Bored, he began to frequent strip clubs. In 1999, he purchased sex from a stripper while visiting a strip club. (Tr. 27; Answer at 1)

In 2002, Applicant began frequenting massage parlors and paying the *masseuses* for various sexual activities, and in 2003, he began retaining escort services for sexual intercourse. (Answer at 1) Between 2002 and 2005, he paid for sexual services on multiple occasions.

Applicant stopped paying for sex and frequenting massage parlors after he married in 2005. In 2015, however, he again went to a massage parlor, where he paid his masseuse for various sexual activities. When he engaged in this activity, he possessed a security clearance, which had been granted in 2014, and a re-investigation for a higher-level clearance was pending. (Tr. 25)

During a polygraph, pretest interview in September 2015, Applicant disclosed his sexual misconduct. (GE 3 at 27) Subsequently, in August 2016, his application for a higher-level clearance was denied. (GE 3 at 1)

In February 2018, Applicant enrolled in a sexual addiction (SA) counseling program. (AE F; Tr. 20) Since then, he has been attending once per week. (Tr. 31) He has been working with a sponsor since September 2018. Typically, he meets with his sponsor after the general meeting has concluded. (Tr. 67)

Through SA, Applicant is working on managing lust and curbing his sexual desires. (Tr. 32, 74-75) Similar to Alcoholics Anonymous, it has a 12-step program. Applicant recently graduated to Step 1. When Applicant first began attending SA, he spoke with his sponsor daily, in addition to their weekly meetings. As he has advanced through the program, he now speaks to him two or three days per week outside of the weekly meetings. (Tr. 60)

Applicant's wife is aware of his transgressions. They "have talked a great deal about what happened and [she] feel[s] [they] have only come out stronger" as a result of this marital crisis. (Answer, Attachment 1) Applicant and his wife practice meditation together, and recently began attending marital counseling. (AE H) His wife characterized their relationship as happy and trusting. (Tr. 14)

Applicant is respected on the job. Per his employer, he brings a creative approach to solving software problems and works well with his teammates. (AE B at 4) According to a client, he possesses "vast technical knowledge and expertise," and is a valuable asset to his employer. (AE A)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 overall 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." 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, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by 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 that 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. 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).

Under the whole-person concept, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d).¹

Analysis

Guideline D: Sexual Behavior

The security concerns about sexual behavior are set forth in AG ¶ 18:

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 . . . may raise questions about an individual’s judgment, reliability, trustworthiness, and ability to protect classified or sensitive information.

Applicant’s history of paying for sexual services from prostitutes, masseuses, and strippers triggers the application of AG ¶¶ 13(a), “sexual behavior of a criminal nature, whether or not the individual has been prosecuted; and 13(c), “sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.” Applicant enrolled in SA to address his issues, and he has been attending once a week for the past year. His wife is aware of his sexual misconduct. They have addressed the strain it caused in their relationship through meditation. Moreover, they have recently enrolled in marital counseling. Applicant testified that he has internalized the lessons learned from SA and understands how to manage his lust. In conjunction with his wife’s testimony that this crisis has ultimately strengthened their marriage, I conclude Applicant’s testimony was credible. AG ¶ 14(c), “the behavior no longer serves as a basis for coercion, exploitation, or duress,” and AG ¶ 14d, “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

¹ The factors under AG ¶ 2(a) are as follows:

- (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.

qualified mental health professional indicating the behavior is readily controllable with treatment,” applies. Applicant has mitigated the sexual behavior security concerns.

Guideline E, Personal Conduct

Under this guideline, “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.” (AG ¶ 15) Applicant’s conduct triggers the application of AG ¶ 16(e), “personal conduct . . . that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group.”

Applicant’s most recent episode of sexual misconduct occurred nearly four years ago, he told his wife about it, and he enrolled in SA counseling. Under these circumstances, AG ¶ 17(e), “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress,” and AG ¶ 17(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur,” applies. I conclude Applicant has mitigated the personal conduct security concern.

Guideline J, Criminal Conduct

Under this guideline, “criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness, [and] by its very nature . . . calls into question a person’s ability or willingness to comply with laws, rules, and regulations.” (AG ¶ 30) Applicant’s sexual misconduct was illegal. Consequently, AG ¶ 31(b), “evidence . . . of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted,” applies. In addition to the passage of time and the engagement in counseling, as discussed in the previous sections, Applicant has a good employment record. The criminal conduct is mitigated by AG ¶¶ 32(a), “so much time has elapsed since the criminal behavior happened . . .,” and 32(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,” apply.

Whole-Person Concept

By soliciting prostitutes and seeking sexual services from brothels masquerading as massage parlors, Applicant immersed himself into a criminal underworld of illegal activity. As such, these are serious transgressions. Moreover, although Applicant stopped this behavior after getting married in 2005, it recurred ten years later. Conversely, Applicant has now addressed the problem, confessing to his wife and enrolling in counseling. Given the length of time since the recurrence and the length of time he has been attending counseling, I am persuaded that the possibility of recurrence is minimal. In sum, I conclude that the length of time since the last episode of misconduct, the minimal vulnerability to

coercion, and the robust presence of rehabilitation outweighs the nature and seriousness of the conduct. Applicant has mitigated the security concern.

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:

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|---------------------------|---------------|
| Paragraph 1, Guideline D: | FOR APPLICANT |
| Subparagraphs 1.a – 1.d: | For Applicant |
| Paragraph 2, Guideline E: | FOR APPLICANT |
| Subparagraph 2.a: | For Applicant |
| Paragraph 3, Guideline J: | FOR APPLICANT |
| Subparagraph 3.a: | For Applicant |

Conclusion

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

Marc E. Curry
Administrative Judge