



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



In the matter of:)
)
) ISCR Case No: 18-00944
)
Applicant for Security Clearance)

Appearances

For Government: Andre Gregorian, Esquire, Department Counsel
For Applicant: *Pro se*

12/10/2018

Decision

DAM, Shari, Administrative Judge:

Applicant mitigated the foreign influence security concerns, but not the sexual behavior and personal conduct security concerns. Based upon a review of the pleadings and exhibits, national security eligibility for access to classified information is denied.

Statement of Case

On May 18, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guidelines D (sexual behavior) E (personal conduct) and B (foreign influence). Applicant answered the SOR on June 14, 2018, and requested that his case be decided by an administrative judge on the written record without a hearing.

On July 30, 2018, Department Counsel submitted the Government's written case. A complete copy of the File of Relevant Material (FORM), containing four Items, was mailed to Applicant on August 10, 2018, and received by him on August 13, 2018. The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. The Government's evidence is identified as Items 1 through 4. Applicant timely submitted four

exhibits in response to the FORM that I marked as Applicant Exhibits (AE) A through D.¹ In that response, he did not object to the Government's documents. The Government did not object to Applicant's exhibits. Items 1 through 4 and AE A through D are admitted into evidence. The Defense Office of Hearings and Appeals (DOHA) assigned this case to me on October 29, 2018.

Findings of Fact

Applicant is 54 years old and has been married for 29 years. Applicant and his wife have three boys, ages 26, 24 and 20. All three of his sons serve in the Air Force. Applicant earned a bachelor's degree in 1986 and a master's degree in 1991. He served in the Air Force from 1986 to 1995, and then transferred to the Air Force Reserve in 1996. He retired in 2007 as a major and was honorably discharged. He has worked for federal contractors since 1999 and his current employer since 2009. He has held a security clearance from approximately 1988 until July 2016. (Item 2; AE B)

As part of the security clearance eligibility investigation, Applicant participated in a polygraph on May 5, 2016. During that examination, he disclosed that while on a business trip to Australia in 2004, he engaged in sexual intercourse with a prostitute on two separate occasions. Those encounters took place in brothels. In 2014 and 2016, while visiting his father in Austria, Applicant hired prostitutes for sexual intercourse. Both of those incidents took place at the same brothel. Prostitution is legal in Australia and Austria. (Item 3)

Applicant paid the prostitutes in cash on each occasion. He never disclosed his name or information about himself to the women. He did not attempt to establish communication with the women after the encounters. (Item 4)

During the May 2016 polygraph, Applicant acknowledged that longstanding marital issues and his wife's previous two affairs contributed to his decision to hire a prostitute on those four occasions. As of the date of the polygraph, he had not disclosed the incidents to his wife. He had not informed his employer of his actions because prostitution is legal in both countries, and he did not believe he broke a law which required disclosure. (Item 4)

Applicant was unaware that engaging in prostitution, which is legal in another country but illegal in the United States, is a violation of the Federal government's policy regarding Combating Trafficking of Persons. He takes full responsibility for his actions, and did not realize the potential negative effect his behavior could have on his security clearance and employment. He knew that it could have a negative effect on his personal

¹ The exhibits are as follows: AE A is a transmittal letter; AE B is an additional Response to the FORM; AE C is a letter of recommendation; and AE C consists of three ISCR cases pertinent to similar cases.

life. (Item 4) After receiving the SOR in 2018, he disclosed his behavior to his employer's lawyer, his security officer, and some good friends in his field.² (Item 1)

On June 12, 2018 (after the SOR issued on May 18, 2018), Applicant told his wife that he had hired prostitutes in the past.³ He said that he and his wife are resolving this issue and remain committed to their marriage. (Item 1)

Applicant repeatedly stated that he is not a security risk as a consequence of his behavior. He has never betrayed this country that he has successfully served for 32 years. He continues to play a critical role in his work for a U.S. agency. (Item 1; AE A)

Applicant submitted six letters of recommendation from former military and professional colleagues and supervisors. All of the authors have held or hold security clearances and have known Applicant for many years and highly recommend his security clearance be reinstated. They attest to Applicant's impressive record of trustworthiness and honesty; work ethic; loyalty and ties to the United States; reliability; and professional competency. It is not clear whether all of them are aware of the underlying facts in this investigation. (Item 3: a through g; AE C)

In his answer to the SOR and response to the FORM, Applicant expressed remorse and embarrassment over his misconduct and sadness regarding the pain he has caused his wife. He has no intention to repeat his behavior. (Item 1; AE A)

Policies

This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 6220.6, *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 national security eligibility, the administrative judge must consider the pertinent AG. In addition to brief introductory explanations of the security concern, the guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's

² Applicant's disclosure to his employers appears to have occurred after he received the May 18, 2018 SOR. (Item 1)

³ Applicant's disclosure to his wife occurred on June 12, 2018, two days before he signed his answer to the SOR. (Item 1)

overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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. I have not drawn inferences based on mere speculation or conjecture.

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

A person applying for national security eligibility seeks to enter 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information.

Finally, as emphasized in Section 7 of Executive Order 10865, “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *a/so* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline D: Sexual Behavior

AG ¶ 12 sets out the security concerns relating to 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 sets out a condition that could raise a security concern and may be disqualifying in this case:

(a) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

Applicant solicited and engaged the sexual services of prostitutes in 2004, 2014, and 2016, while he was visiting Australia and Austria. His actions violated DOD standards and the DOD policy articulated in the Combating Trafficking of Persons program. Engaging in prostitution is a criminal offense in most U.S. states. However, there is no evidence that this conduct is subject to the extraterritorial jurisdiction of the United States. Thus, his conduct in Australia and Austria is not a crime. Nevertheless, his sexual misbehavior causes him to be vulnerable to coercion, exploitation, or duress, and demonstrated a lack of good judgment. The evidence established the above disqualifying condition.

AG ¶ 14 describes two conditions that could mitigate security concerns raised under this guideline:

(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; and

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress.

Although Applicant's initial two encounters with prostitutes occurred in 2004, he again hired prostitutes in 2014 and 2016, with his most recent misconduct occurring about two years ago. Those more recent incidents cast sufficient doubt on his good judgment such that he failed to establish mitigation under AG ¶ 14(b). Applicant revealed his misbehavior to his wife, employer, and possibly one colleague after he received the SOR, thereby reducing some potential for exploitation. AG ¶ 14(c) partially applies in his favor. This conduct cannot be fully mitigated because release or disclosure of information about his involvement with prostitutes can further damage his professional and community reputation.

Guideline E: Personal Conduct

AG ¶ 15 explains the security concerns relating to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes a condition that could raise a security concern and may be disqualifying in this case:

(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; and

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

The evidence establishes the above disqualifying condition. Applicant engaged in prostitution, which is a type of activity, if known, could adversely affect his personal, professional, and community standing. Although prostitution is legal in Australia and Austria, where he hired prostitutes, that behavior is illegal in almost all jurisdictions in the United States. His conduct is also contrary to the Combating Trafficking of Persons program.

AG ¶ 17 provides three conditions that could mitigate security concerns under this guideline. They are as follows:

(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

Applicant's most recent contacts with prostitutes occurred in 2014 and 2016, which indicate insufficient time has passed from which to conclude his past misbehavior does not cast doubt on his current judgment. Applicant acknowledged his past misconduct, but did not present evidence of counseling to address or resolve the underlying factors, which he said contributed to his conduct, which initially took place in 2004, and then in 2014, about 14 years later, and again two years later. The evidence does not establish mitigation under AG ¶¶ 17(c) or (d). There is some evidence that he has taken steps to reduce his vulnerability to exploitation based on his recent disclosure to his wife and employer in 2018, albeit after he received the SOR. AG ¶ 17(e) applies minimally. Personal conduct security concerns are not mitigated for the reasons discussed in the previous section on Sexual Behavior.

Guideline B: Foreign Influence

AG ¶ 6 describes the security concerns regarding foreign influence:

Foreign contacts and interests, including, but not limited to, business, financial and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

AG ¶ 7 describes a condition that could raise a security concern and may be disqualifying in this case:

(i) conduct, especially while traveling or residing outside the U.S., that may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country.

Applicant engaged the sexual services of prostitutes while traveling to Australia and Austria in 2004, 2014, and 2016. That conduct could create a vulnerability to exploitation by the foreign women and their employers. AG ¶ 7(i) applies.

AG ¶ 8 provides conditions that could mitigate security concerns raised under this guideline. One may apply:

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

Applicant has not had contact with the four foreign women with whom he engaged in sex after his one-time encounter with them. He did not disclose his name when he hired them or discuss himself during the time spent with them. He paid cash for their services and did not use a credit card. The likelihood that his one-time contact with each of the four women could create a risk of foreign influence is minimal. The evidence establishes mitigation under AG ¶ 8(c).

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. I have incorporated my comments under Guidelines D, E, and B, and in my whole-person analysis.

Applicant has a long history of honorable service to DOD on active duty and as a contractor. He has established a successful career, as demonstrated by impressive letters of recommendation from supervisors and peers, attesting to his loyalty and good character. While those factors weigh in his favor, his involvement with prostitutes and failure to timely disclose that information to his wife and employer create serious security concerns, given his status as a federal contractor and former Air Force major. In 2004, he hired prostitutes on two occasions. Ten years later, in 2014, he hired another prostitute. In early 2016, he again hired a prostitute. On May 5, 2016, he disclosed his behaviors during a polygraph test. On May 18, 2018, two years later, DOHA issued an SOR alleging security concerns based on his past sexual indiscretions. After receiving the SOR, he spoke to his employer about the matter. About a month later, he told his wife about his conduct. Additional disclosure would damage his professional and community reputation and he continues to be vulnerable to exploitation and coercion. Applicant's

failure to responsibly and timely address his personal behaviors raises unresolved security concerns.

Overall, the evidence leaves me with questions about Applicant's eligibility and suitability for a security clearance. He mitigated the foreign influence security concerns, but he did not mitigate the sexual behavior and personal conduct security concerns.

Formal Findings

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

Paragraph 1, Guideline D:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline B:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to continue Applicant's access to classified information. National security eligibility is denied.

SHARI DAM
Administrative Judge