



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



In the matter of: )  
)  
) ISCR Case No. 18-03017  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Brittany White, Esq., Department Counsel  
For Applicant: Troy L. Nussbaum, Esq.

11/22/2019

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**Decision**

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LYNCH, Noreen A., Administrative Judge:

This case involves security concerns raised under Guidelines) F (Financial Considerations) and E (Personal Conduct). Eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a security clearance application on June 15, 2016. On January 9, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines F and E. The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on April 29, 2019. On July 23, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for October 10, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified, presented two

telephonic witnesses and submitted Applicant's Exhibit (AX) A, which was admitted without objection. At Applicant's request, I kept the record open for additional submissions. Applicant submitted AX B in a timely manner. The exhibit was entered into the record without objection. DOHA received the transcript (Tr.) on October 17, 2019.

### **Procedural Issues**

The Government moved to amend the SOR by withdrawing all of the allegations under Guideline F, and to withdraw Guideline E, ¶ 2.a. The motion was granted without objection. The amended SOR that remained was SOR ¶ 2.b: "On or about May 2, 2016, while holding a security clearance, you were arrested during a prostitution sting operation and charged with soliciting and possessing criminal tools. You pleaded guilty to loitering to engage in solicitation." Applicant admitted the allegation in his answer and provided a detailed explanation.

### **Findings of Fact<sup>1</sup>**

Applicant is a 48-year-old systems analyst for a defense contractor, where he has worked since 2012. He obtained his undergraduate degree in December 1999. He has held a security clearance for approximately 19 years. He is divorced and has two children. His young daughter has multiple, severe health issues. (GX 1, Tr. 12, Tr. 60)

Applicant disclosed the misdemeanor on his security clearance application. (GX 1) He acknowledged that he was sentenced to six months of probation which ended in December 2016. He was arrested during a prostitution sting for solicitation and possession of criminal tools on May 2, 2016. He entered a plea agreement at the advice of his attorney. (Tr. 71) The charge of criminal tools was withdrawn (the criminal tool was a phone), and he was fined. (GX 2, 3 and 4) He explained that he had gone through a difficult, lengthy divorce which caused financial problems which he has resolved. However, the stress of the divorce and the stress of his severely ill daughter left Applicant feeling quite low. He wanted companionship and he had a girlfriend for a while. However, she suddenly left the relationship without a word. (Tr. 65) Understandably, he was depressed, sad and lonely.

Applicant read about a website called backpage.com that was used for solicitation. One evening, while at home, he searched the website and solicited an individual. (Tr. 13) This was the first time he had searched any website of this type. He decided not to go ahead with any meeting with any individual on the site that evening. (Tr. 66) The following day, he received a text from the website, and Applicant decided to pursue the solicitation. When he arrived at the location, a young woman asked him why he was there and Applicant responded "for intercourse." At that point the door opened and two vice police officers were pointing a gun at Applicant. (Tr. 67) He was taken to a holding cell and

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<sup>1</sup> Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

bailed out. Applicant informed his boss the next day. (Tr. 69) He was suspended for three days without pay.

Two witnesses testified by phone on behalf of Applicant. The president and the CEO of the company for whom Applicant works has known Applicant for about 20 years. He knew the reason for the hearing and attested that Applicant informed him of the incident one week after it occurred. (Tr. 22) When he asked Applicant why he had done such a thing, he reported that he just wanted companionship and did not realize what he was getting involved with. (Tr. 23) He also reported the incident to the FSO. The CEO described Applicant as an excellent employee. He noted that this behavior was completely out of character for Applicant. He informed Applicant that there is zero tolerance for this type of behavior. He recommends Applicant for the security clearance. (Tr. 27)

The other witness, who is the contracting officer for the project that Applicant is working on now, testified that she has known Applicant over ten years. At one point in time, she wrote his performance evaluation. She stated that he was a go-to person and his work ethic is strong. She is also aware of the SOR allegation. Applicant told her the day after the incident. She does not believe he would engage in this type of behavior in the future. (Tr. 43) She recommends him for a security clearance.

Applicant submitted numerous character references from employers and colleagues who each attest to his professionalism and reliability. His performance evaluations have been above average or excellent. Applicant has never had a security violation in his entire career. He has never had any criminal incidents of any type before or since May 2016. He completed his probation successfully and attended a court ordered "Johns" class in August 2016. (AX B) He explained that the class educated him and helped him understand the danger to both potential victims and the individual engaging in the solicitation. He was made aware of human trafficking. (Answer to SOR) He testified credibly that this was a bad decision in a stressful time and was a one-time incident. In October 2019, Applicant signed a letter of intent stating that he would never engage in any type of criminal activity in the future. In addition, he consented to an automatic revocation of his security clearance and waiver any due process protections. (AX A) He is truly remorseful about the poor choice and would not want anything to affect his family. (Tr. 80)

Applicant handles stress at this time in his life by helping in the community with soccer games. He also spends a great deal of time with his daughters. He does not drink or smoke. He has sought some counseling for a number of years. He still sees a counselor on a regular basis, and now he has a support group. (Tr. 95,104) He was also encouraged to meditate to help with stress. He is in a long-term relationship and has disclosed the 2016 arrest with his friend.

## Policies

“[N]o 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 applicants 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 § 2.

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, an administrative judge applies these guidelines 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 and 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 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense 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. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition,

and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

## Analysis

### Guideline E, Personal Conduct

The concern under this guideline is set out in AG ¶ 15: “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. . . .” Applicant’s conduct establishes the following disqualifying conditions under this guideline:

AG ¶ 16 (c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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;

AG ¶ 16(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 . . . (2) any disruptive, violent, or other inappropriate behavior; [and] (3) a pattern of dishonesty or rule violations; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing . . . .

The following mitigating conditions are potentially relevant:

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

AG ¶ 17(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

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

All of the above mitigating conditions are established. Applicant's misconduct was in 2016. It was his only criminal incident in his entire life. He completed his probation and a class. He was in a very low place in his life. He acknowledged the incident to his supervisor and friends. He has now resolved other stressful issues in his life. He spends time with his two daughters. He still attends counseling and has a network of support. He does not associate with any characters who have criminal histories. He has learned techniques to handle stress. He was credible in his testimony that he would never do anything to jeopardize his family. He is in a better place. He has been through difficult times and realizes he made a very bad decision. He has been open and candid about the event, thereby reducing any vulnerability to exploitation, manipulation, or duress.

### **Whole-Person Concept**

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An 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.

I have incorporated my comments under Guideline E in my whole-person analysis and applied the factors in AG ¶ 2(d). Applicant was candid, sincere, remorseful, and

credible at the hearing. He has held a security clearance for 19 years. He has excellent references. He is respected by his peers and his supervisors. He is a good father. After weighing the disqualifying and mitigating conditions under Guidelines E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his personal conduct.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial):	WITHDRAWN
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraph 2.a:	WITHDRAWN
Subparagraph 2.b:	For Applicant

### **Conclusion**

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

Noreen Lynch  
Administrative Judge