



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



In the matter of:)
)
) ISCR Case No. 19-00334
)
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: Mark A. Myers, Esq.

March 2, 2020

Decision

GLENDON, John Bayard, Administrative Judge:

This case involves security concerns raised under Guidelines D (sexual conduct) and J (criminal conduct). For about ten years prior to October 2016, Applicant solicited sexual services with prostitutes and otherwise paid for sexual activities with women while living and working in a foreign country. He ceased this behavior in September 2016 and disclosed his misconduct to his spouse, family members, manager, security officer, and a U.S. Government investigator. Applicant provided significant evidence in mitigation. National security eligibility for access to classified information is granted.

Statement of the Case

On July 21, 2016, Applicant filed a security clearance application (SCA). The Department of Defense Consolidated Adjudications Facility (DOD CAF) sent Applicant a Statement of Reasons (SOR) on April 23, 2019, setting forth allegations under Guidelines D and J. The DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960) as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended

(Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (Dec. 10, 2016), effective for all adjudicative decisions on or after June 8, 2017.

On May 29, 2019, Applicant responded to the SOR. He requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On November 26, 2019, the case was assigned to me. DOHA issued a notice of hearing on December 4, 2019, scheduling the hearing on January 9, 2020.

I convened the hearing as scheduled. Department Counsel presented two proposed exhibits. I marked her exhibits as Government Exhibits (GE) 1 and 2 and I marked her exhibit list as Hearing Exhibit 1. Applicant attached four documents to his SOR answer. I marked these documents as Applicant's Exhibits (AE) A through D. At the hearing, his attorney offered six additional proposed exhibits, which he marked as AE E through J.

Absent any objections, I admitted all exhibits into the record. Applicant testified on his own behalf. DOHA received the hearing transcript (Tr.) on January 21, 2020.

Findings of Fact

Applicant's personal information is extracted from his SCA unless otherwise indicated by a parenthetical citation to the record. After a thorough and careful review of the pleadings, Applicant's testimony at the hearing, and the documentary evidence in the record, I make the following findings of fact:

Applicant, 40, has worked as an IT professional since 2007. He has held a security clearance since about 2011. Applicant earned a bachelor's degree at a U.S. university in 2002, and a master's degree in 2005 from a university in a foreign country. He has lived and worked in that country since he began his graduate studies in 2003. In 2012, he married a woman who was born and raised in that country. Applicant and his wife currently live in that country. She has not become a U.S. citizen or a U.S. registered alien. They have a four-year-old child. Applicant chose to attend the hearing in person and traveled to the United States for that purpose. (AE G; Tr. 13.)

Guideline D (sexual conduct)

In his October 5, 2016 background interview, Applicant fully disclosed derogatory information about his compulsive or impulsive sexual activities since 2005. These activities included paying for the services of prostitutes. On those occasions, he identified through online searches establishments called "soap lands." He would pay the proprietor of the business and be introduced to a woman who bathed him and engaged in sexual activities with him. He did this about ten times over a period of about ten years. (GE 2 at 7; Tr. 18-20, 25, 31-32, 34-36, 38-39.)

On other occasions, Applicant engaged in sexual activities at “orgy parties” and at massage parlors. The orgy parties were organized by a paid “coordinator” and were attended by men and women. Applicant is uncertain whether the women were paid sex workers or voluntary participants. He also paid for sexual services at massage parlors. He engaged in these sexual activities three or four times a year when he was younger and less often after his child was born in 2015. The last time he engaged in any extra-marital sexual activity was in September 2016. (Tr. at 18-19, 28-30.)

Applicant also went to “hostess bars” where female hostesses served him drinks and flirted with him. He had no sexual contact with the hostesses. Sexual activities are not part of the services offered at hostess bars. He met his wife at a hostess bar and started dating her in about 2009. His wife was unaware of his extra-marital sexual activities until he disclosed them to her in September 2016 prior to his background interview. She was upset to learn about his conduct, but has forgiven him. She provided a letter that Applicant introduced into the record. She wrote that “he has deeply reflected on his mistakes and I trust that there will be no occurrence in the future.” She also wrote that “I can attest that he is earnest, a person with morals, and he is a trustworthy individual.” (AE F; Tr. at 26-27.)

In October 2016, Applicant also disclosed his past sexual activities to his parents, manager, facility security officer, and as noted, to a U.S Government investigator. His voluntary disclosure of his activities were important steps for him. He committed to himself to cease these activities and to become a better man, husband, and role model for his child. He has ceased all of this extra-marital sexual behavior. In May 2019, he began seeking therapy for what he considers to be his impulsive desire for sexual pleasure. He wrote in his SOR answer that he wants to “reaffirm that these behaviors are in the past and will not recur.” His therapy is ongoing. Applicant believes he needs the therapy and finds it helpful. (SOR answer; AE B; AE E; GE 2; Tr. at 24, 31-33.)

Guideline J (Criminal Conduct)

Applicant believes that his sexual activity described above is legal in his country of residence where they occurred, but he is not certain. His lawyer clarified that the activity is considered to be legal in that country since the parties are introduced at the soap lands establishments and the sexual contact is not anonymous. Department Counsel agreed with this characterization of the law in that country. No evidence was offered to establish that any of Applicant’s sexual behavior was criminal in that country. (Tr. at 34-36, 38-39.)

Character References and Treatment Prognosis

Applicant attached to his SOR answer a letter, dated May 22, 2019, from his supervisor, who has known Applicant for five years. The supervisor describes Applicant as an excellent employee whose work for the U.S. Government “has far exceeded . . . expectations.” He praises Applicant as a trustworthy, “exemplary” individual with sound judgment, who has learned from his “past transgressions” and is committed “to make himself a better person.” (AE A.)

Applicant's therapist saw him on three occasions in May 2019 to complete her evaluation and report. Applicant has continued his therapy with her since that time. She believes he is remorseful for his past conduct, and has made full disclosure to his wife, family, and work supervisors, which has helped him commit to avoid repeating his sexual behavior in the future. She reported that Applicant's wife attended one therapy session and expressed her interest, as did Applicant, in moving forward together. Applicant has expressed his relief and feels liberated that he has nothing to hide. The therapist believes that Applicant's "behavior is not likely to recur." In a December 25, 2019 update, the therapist wrote that Applicant "has faithfully continued his treatment and has complied and implemented all suggested recommendations." She praised his honesty and integrity. She concluded "without reservation that there is absolutely no likelihood of there being any recurrence of the conduct which had been the cause of concern." (AE B; AE E.)

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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 D, Sexual Conduct

The security concern under this guideline is set out in AG ¶ 12 as follows:

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 under this guideline apply:

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

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

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;

AG ¶ 14(d): the sexual behavior is strictly private, consensual, and discreet; 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.

All of the above mitigating conditions apply. Applicant's sexual behavior in question last occurred more than three years ago and was relatively infrequent over the prior ten years or so. The record evidence, including the evidence from his wife and therapist, established that the behavior is unlikely to recur and does not cast doubt upon his current reliability, trustworthiness, or good judgment. With Applicant's full disclosure of his conduct, it no longer serves as a basis for coercion, exploitation or duress. The behavior was private, consensual and discreet, although his participation in orgy parties was not necessarily private or discrete. And significantly, he is currently enrolled in therapy to help him reduce the desires for pleasure that impulsively caused him to engage in the behavior. He has demonstrated ongoing and consistent compliance with the treatment plan and has received a favorable prognosis from a qualified mental health professional indicating that his behavior is readily controllable and unlikely to recur.

The Appeal Board has ruled in a case with facts somewhat similar to, but distinguishable from, the record facts in the instant case. In ISCR Case No. 16-03690 (App. Bd. Aug. 15, 2018), the Board reversed a decision by an Administrative Judge granting a security clearance to a divorced applicant, who disclosed in a polygraph that on a number of occasions, he had travelled to Thailand for sex. On these trips, he paid the owners of bars a "fee" to take their female employees out on "dates" during their normal working hours. The dates usually involved sex with the women. The applicant's family, friends, and co-workers were aware of his behavior. The applicant denied that he had done anything wrong and intended to continue his sexual behavior in future vacations to Thailand. The Appeal Board ruled that the administrative judge erred by concluding that no disqualifying conditions had been established under Guidelines D or E.

In the instant case, there is no dispute that the disqualifying conditions have been fully established. Applicant recognizes that what he did was wrong even if it may have

been legal. His evidence has established the above-quoted mitigating conditions by his voluntary disclosure of his sexual behavior to his wife, family, employer, and a Government investigator, which reduced the risk of coercion. He also accepted responsibility for his actions and sought therapy to help prevent any recurrence of his behavior. His therapist has determined that the therapy has been successful and that he has an excellent prognosis for the future.

Guideline J, Criminal Conduct

The security concern under this guideline is set out in AG ¶ 30 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.

The following disqualifying conditions under Guideline J are potentially applicable:

AG ¶ 31(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; and

AG ¶ 31(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.

The record evidence does not establish that Applicant engaged in any conduct that is criminal under the laws of the country in which the conduct occurred. Neither of the above disqualifying conditions have been established.

Whole-Person Analysis

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 and applying the adjudicative factors in AG ¶ 2(d), specifically: (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 Guidelines D and J in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Some factors have been addressed in my analysis above, but others deserve further comments. I have weighed Applicant's sincere remorse for his past actions and his serious commitment to avoid any further actions that could jeopardize his marriage, his relationship with his child, or his career. He has maturely faced the inappropriateness of his behavior and has taken actions to avoid a repetition of the embarrassing and potentially compromising position of his past actions. He has also received professional help to make sure that he does not slip back into his old pattern pursuing sexual pleasure in a secretive manner.

After weighing the disqualifying and mitigating conditions under Guideline D and the disqualifying conditions under Guideline J, and evaluating all of the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his sexual conduct.

Formal Findings

Guideline D, Sexual Conduct:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Guideline J, Criminal Conduct:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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

John Bayard Glendon
Administrative Judge