



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



In the matter of:	)	
	)	
	)	ISCR Case No. 19-01840
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Kelly Folks, Esq., Department Counsel  
For Applicant: *Pro se*

04/22/2020

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**Decision**

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RIVERA, Juan J., Administrative Judge:

Applicant’s evidence is insufficient to mitigate the sexual behavior (Guideline D) and personal conduct (Guideline E) security concerns. Clearance is denied.

**Statement of the Case**

Applicant, a federal contractor employee, requested an upgrade of his clearance to work for a federal agency (Agency) in 2016. Based on information he disclosed during an interview with an Agency investigator, his clearance upgrade was denied in June 2016. He submitted his most recent security clearance application (SCA) on August 25, 2017, requesting the continuation of his DOD secret clearance. He was interviewed by a government investigator in October 2017, and answered a set of interrogatories from the Defense Office of Hearings and Appeals (DOHA) in July 2019.

After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) on August 15, 2019, alleging security concerns under Guidelines D (sexual behavior) and E (personal conduct). Applicant answered the SOR on September 20, 2019, and

requested a decision based on the record. Department counsel requested a hearing before a DOHA administrative judge.

DOHA assigned the case to me on October 28, 2019, and issued a notice of hearing on February 28, 2020, setting the hearing for March 5, 2020. At the hearing, the Government offered nine exhibits (GE 1 through 9). GE 1 - 7 were admitted into the record without any objections. Applicant's objections to GE 8 and 9 (that the documents were irrelevant and immaterial) were overruled, and I admitted the documents. However, after evaluating the documents in light of the record evidence, I considered the documents to have little probative value.

Applicant testified on his own behalf and submitted no additional evidence. I marked the Government's discovery letter, dated October 10, 2019, as Hearing Exhibit 1. DOHA received the hearing transcript (Tr.) on March 13, 2020.

### **Procedural Issue**

On February 28, 2019, Applicant waived his right to 15-day advance notice of his hearing. (HE 2) At his hearing, he stated that he had sufficient time to prepare for his hearing, was ready to proceed, and affirmatively waived his 15-day advance notice of his hearing. (Tr. 14-15)

### **Findings of Fact**

Applicant denied the two SOR allegations (¶¶ 1.a and 2.a) and submitted mitigating comments. After a thorough review of the record evidence, I make the following findings of fact:

Applicant is a 61-year-old employee of a federal contractor. He enlisted in the Army in 1976, served honorably on active duty for three years, and was discharged as a sergeant (E-5) in 1979. He held a secret clearance while in the service. He received his bachelor's degree in 1986, and completed the equivalent of a master's degree in 1991. He married his wife in 1986. They have four children, ages 29, 28, 22, and 20.

Applicant has been working for different federal contractors since 1986. He has held a secret-level clearance during most of his employment with federal contractors. In 2014, he was hired by his current employer and security sponsor, a large federal contractor. In 2016, Applicant requested an upgrade of his clearance eligibility to work for a federal Agency. Based on information he disclosed during a polygraph-assisted interview (GE 4), the Agency denied his clearance upgrade in June 2016. (GE 3) He unsuccessfully appealed the denial twice. (GE 5, 6, and 7) Applicant's DOD secret clearance was not impacted by the Agency's denial of his clearance upgrade, and he continued working for his federal contractor employer.

In his answers to Section 25 (Investigations and Clearance Record) of this 2017 SCA, Applicant disclosed that the Agency denied his clearance upgrade in 2016. The subsequent background investigation addressed and revealed the pending security concerns. Under Guideline D, the SOR alleged that from 2015 to 2016, Applicant solicited prostitutes on multiple occasions while possessing a clearance, and that his wife, family, and employer are unaware of his behavior. Under Guideline E, the SOR cross-alleged the same questionable behavior.

During his 2016 interview with an Agency investigator, Applicant was asked whether he had any clandestine contact with any foreign nationals. He told the interviewer that in the fall of 2015, and six months prior to the interview (December 2015-January 2016), he visited massage parlors where he paid Asian women \$40 for a massage and an additional \$80 to manually stimulate his penis to ejaculation. He also disclosed that in the summer of 2015 and in March 2016, he rented hotel rooms and had on each occasion an Asian masseuse meet him there. He found the masseuses by searching web sites in the Internet. He paid the masseuses \$130 each for a massage that include manual stimulation of his penis to ejaculation.

Applicant stated that he had other massages where no masturbation was included before, and some in between, the four massages described above that included stimulation of his penis. He has not been to any massage parlors or had any massages after his June 2016 interview with an Agency investigator. The Agency denied Applicant's clearance upgrade because of security concerns under Guidelines J and E, because he engaged in prostitution, was not candid during the interview, and his actions demonstrated lack of judgment, trustworthiness, honesty, and an inability to abide by laws. (GE 3)

In his two appeals to the Agency's denial decision, Applicant attempted to "clarify his testimony and correct discrepancies" by claiming that: 1) none of his encounters with the masseuses were set up with the intent to participate in illegal or morally objectionable activity; 2) he did not rent the hotel rooms, that was the location from where the masseuses were working; 3) the fees he paid were for massages, not for sex; and 4) he did not believe he was engaging in prostitution because there was no intercourse involved. Applicant also argued that his questionable behavior was a personal choice and a discrete interaction between two consenting adults and not prostitution. He strongly expressed his regret for his misconduct, and promised never to engage in similar behavior.

In his second appeal, Applicant stated: ". . . in my mind I did not think of what I did as an act of prostitution since there was no intercourse. It was a regrettable event that I only realized was an act of prostitution when I received the initial letter informing me of the denial of the clearance." Applicant highlighted his professional positions of responsibility, and his believe that he has been a key contributor to many of the sensitive and important programs he has worked.

Applicant considers himself to be extremely reliable and dependable as shown by his work attendance, his promotions, and the positions he has held. He stated that he holds high ethical and quality standards in his work. Applicant believes that, on balance, when his professional accomplishments and contributions to the United States are considered against his questionable behavior, his good behavior and accomplishments should outweigh the security concerns. Applicant requested an opportunity to demonstrate that he has learned from his mistakes, and that he will never engage in similar criminal behavior again.

At his hearing, Applicant stated that what he did was unacceptable, and wrong from a moral point of view, but claimed that he did not solicit prostitution. (Tr. 17-18) He disputed the accuracy of the Agency's report of his June 2016 polygraph interview. In the report, the interviewer stated that Applicant told him that he paid \$40 per massage and tipped \$80 for the manual stimulation of his penis, and that Applicant had rented two motel rooms on different occasions to schedule his massages. In his October 2017 interview with a DOD investigator and at his hearing, Applicant claimed that he paid \$80 per massage and tipped \$40 on each of the four occasions. He claimed that the masseuse rented the hotel room, not him.

Applicant repeatedly claimed that he never asked any of the four masseuses for the manual stimulation of his penis. He averred that he did not go to the massage parlors or schedule the massages with the intent or purpose of being sexually stimulated. He claimed he was surprised every time they started their "flirty" behavior and manually stimulated him, but he allowed himself to become "a victim of their flirty behavior" and did not stop the masseuse. (Tr. 36) He further claimed that his massages' fees did not include compensation for the stimulation of his penis.

At his hearing, Applicant stated that in hindsight, it had been obviously a bad choice - poor judgment on his part to allow himself to be stimulated. (Tr. 49) He averred that during the last massage in March 2016, he specifically remembered feeling uncomfortable about it, because the masseuse asked him whether he was married. (Tr. 34-35) He acknowledged his lack of judgment and expressed guilt and remorse for his behavior. Applicant testified that at that point he decided never to engage again in the same behavior. He promised himself never to go back to any massage parlor.

Applicant has not told his wife, or any other person at home or at work, about his questionable behavior with the masseuses. He explained that he is embarrassed to admit that he was that weak. He stated:

"I see no value in, at this point, all it would do is hurt her. That being said, if someone were to try to blackmail me and say, I'm going to tell your wife, it would not put me in a vulnerable position, because, in that case, I would go to my security officer at work, inform them of what was going on, and I would work with them to put that to an end." (Tr. 76-78)

Applicant presented no character testimony. He also presented no evidence that he has received sexual behavior counseling or treatment.

### **Policies**

The SOR was issued under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch 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).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance

decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

## Analysis

### Guideline D: Sexual Behavior

AG ¶ 12 sets forth the security concern 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. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

On at least four occasions from 2015 to 2016, Applicant solicited acts of prostitution while possessing a security clearance. He arranged and paid for masseuses to manually stimulate his penis to ejaculation. He has not disclosed his sexual behavior to anyone, including his wife, family, and employer.

AG ¶ 13 provides conditions that could raise a security concern and may be disqualifying:

- (a) sexual behavior of a criminal nature; whether or not the individual has been prosecuted;
- (b) pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and
- (d) sexual behavior of a public nature or that reflects lack of discretion or judgment.

Applicant's soliciting and engaging in a sexual acts in exchange for money is illegal in both states where his behavior took place. The four known incidents constitute a pattern of compulsive, high-risk sexual behavior that caused him to be vulnerable to coercion, exploitation, or duress. I find his sexual behavior reflects a lack of discretion and poor judgment. AG ¶¶ 13(a) through (d) are established by the evidence.

AG ¶ 14 provides the following possible mitigating conditions:

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of similar nature;
- (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;
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress;
- (d) the sexual behavior is strictly private, consensual, and discreet; and
- (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.

Considering the evidence as a whole, I find that none of the above mitigating conditions fully apply, and they do not mitigate the sexual behavior security concerns. AG ¶ 14(a) is not raised by the facts of this case. I considered AG ¶ 14(b) from the perspective that the sexual behavior occurred in 2015-2016 (about four years ago), and there is no evidence of any additional sexual behavior of concern. As such, the offenses could be considered remote. Notwithstanding, I find that these offenses did not occur under unusual circumstances. Applicant solicited prostitution and engaged in sexual behavior with women for money four times during a period of two years.

Applicant disclosed his criminal sexual behavior only after a polygraph-assisted interview in 2016. Since then, he has consistently attempted to minimize his criminal sexual behavior at every stage of the security clearance process. He has disputed the statements he provided to the Agency investigator. He has portrayed himself as the naive victim of flirty behavior from four different masseuses. According to him, four different masseuses voluntarily, and without his encouragement or expectation of remuneration, proceeded to stimulate his penis to ejaculation. I carefully considered Applicant's assertions and I find his contentions not persuasive or credible.

Notwithstanding Applicant's alleged surprise after he was stimulated by the first masseuse, he scheduled three additional massages and never stopped any of the flirty masseuses from sexually stimulating him. Applicant contended that he did not know his sexual stimulations constituted a sexual act, that he was engaging in prostitution, and that he did not pay for his sexual stimulations. Considering the record as a whole, his contentions are not credible

Because of Applicant's efforts to minimize his sexual behavior, his lack of candor, and his implausible and unpersuasive excuses, I cannot find that his offenses are unlikely to recur. Moreover, I find that his overall behavior continues to cast doubt on Applicant's reliability, trustworthiness, and judgment.

Applicant failed to inform his wife, family, friends, facility security officer, and his employer of his criminal behavior. It is understandable that he does not want to hurt his wife or damage his marriage by disclosing his questionable behavior. Notwithstanding, for those same reasons, Applicant's sexual behavior continues to be a basis for coercion, exploitation, or duress.

AG ¶ 14(d) is not applicable because the sexual behavior was not strictly private or discrete. He attended massage parlors wherein one woman scheduled his massage, another collected his money, and the third gave him the massage. Under these circumstances, I do not find his sexual behavior strictly private or discreet. Applicant presented no evidence of sexual behavior counseling or treatment. AG ¶ 14(e) is not applicable. He failed to mitigate the sexual behavior security concerns.

Under Guideline E, the SOR cross-alleged the same sexual behavior alleged under Guideline D. For the sake of brevity, the findings of fact, analysis, and conclusions discussed under Guideline D are hereby incorporated in my Guideline E analysis.

### **Guideline E: Personal Conduct**

AG ¶ 15 sets forth the security concern as follows:

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 a national security investigative or adjudicative process . . . .

Applicant solicited prostitutes while possessing a security clearance between 2015 and 2016. He arranged and paid for masseuses to manually stimulate his penis to ejaculation. Applicant's behavior raises the following disqualifying conditions under 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 record established the above disqualifying condition, requiring additional inquiry about the possible applicability of the mitigating conditions. I considered the following mitigating condition set forth by AG ¶ 17 as partially raised by the evidence:

(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.

After analyzing the above mitigating condition in light of the record evidence as a whole, I find that it is not applicable to this case and it does not mitigate the personal conduct concerns. Considering Applicant's age, education, military service, and professional experience, I cannot find his behavior is a minor offense. Moreover, his lack of candor and trustworthiness, and his efforts to minimize his sexual behavior diminish the value and credibility of any mitigating evidence he presented.

Similarly, I consider Applicant's questionable behavior recent and frequent (although there is no evidence of similar behavior after 2016). His continued efforts during the recent security clearance hearing to minimize his past sexual behavior bring to the forefront the Guideline E security concerns – that Applicant continues to be vulnerable to exploitation, manipulation, and duress. Applicant's questionable behavior continues to cast doubt on his reliability, trustworthiness, and good judgment. Applicant has not participated in sexual behavior related counseling. AG ¶ 17(d) is not applicable. Considering the evidence as a whole, I find that the Guideline E allegations continue to raise concerns under AG ¶ 16(e), which is not mitigated.

### **Whole-Person Concept**

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶¶ 2(a) and 2(d). I have incorporated my comments under Guidelines D and E in my whole-person analysis. Some of these factors were addressed under those guidelines, but some warrant additional comment.

Applicant, 61, honorably served in the U.S. military. He has been employed with federal contractors since 1986. He has held a clearance, at least between 1986 and 2019, without any security incidents of concern, except for the SOR allegations.

Although Applicant presented no character testimony, his position with a large federal contractor attests to his professionalism, skills, knowledge, and that he is considered a productive member of the company. Nevertheless, it is well settled that

once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. Unmitigated security concerns lead me to conclude that granting a security clearance to Applicant is not warranted.

### **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:

Paragraph 1, Guideline D:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for a security clearance. Clearance is denied.

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JUAN J. RIVERA  
Administrative Judge