



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



In the matter of:)
)
) ISCR Case No. 20-03498
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: Pro se

June 29, 2021

Decision

Lokey Anderson, Darlene D., Administrative Judge:

Statement of the Case

On July 2, 2019, Applicant submitted a security clearance application (e-QIP). (Government Exhibit 1.) On February 10, 2021, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline D, Sexual Behavior; Guideline J, Criminal Conduct; and Guideline E, Personal Conduct. The action was taken under Executive Order (EO) 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) effective within the DoD after June 8, 2017.

Applicant answered the SOR on February 17, 2021, and requested a hearing before an administrative judge. The case was assigned to me on March 24, 2021. The Defense Office of Hearings and Appeals issued a notice of hearing on April 7, 2021, and the hearing was convened as scheduled on May 13, 2021. The Government

offered four exhibits, referred to as Government Exhibits 1 through 4, which were admitted without objection. The Applicant offered no exhibits. Applicant testified on his own behalf. The record remained open until close of business on May 27, 2021, to allow the Applicant the opportunity to submit additional documentary evidence. Applicant submitted one documentary exhibit, consisting of five performance evaluations from his employer, referred to collectively as Applicant's Exhibit A, which was admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on May 26, 2021.

Findings of Fact

Applicant is 40 years old. He is unmarried and has no children. He has a Bachelor's degree in Computer Engineering and Computer Science. He is employed by a defense contractor as a Software Engineer. He is seeking to retain a security clearance in connection with his employment.

Applicant has a history of sexual misconduct extending over a period of twelve years. (Government Exhibits 3 and 4.) He began working for his current employer in July 2002, and has held a security clearance since about 2003 or 2005. (Government Exhibit 1, and Tr. p. 49.) Applicant admits in part and denies in part the sole factual allegation set forth in the SOR. (Applicant's Answer to the SOR.)

Applicant was born in Burma, Myanmar. He came to the United States at the age of four. He grew up in the United States, and obtained his college degree here. After graduating from college, he was hired by his current employer with whom he has worked for the past nineteen years. He possessed a security clearance for fifteen years without incident. He has a favorable work history. Over the years, he has received salary increases and promotions for good performance. (Tr. p. 23.)

In May 2017, during an interview with a polygraph examiner as part of a security clearance background investigation conducted by another agency, Applicant disclosed that he paid prostitutes for sexual intercourse and other sexual services, both in the United States and overseas on at least 27 occasions between 2008 and 2016. In 2017, Applicant was denied his security clearance by another agency as a result of the investigation. Following this denial, Applicant continued to engage in sexual misconduct on at least three more occasions, the most recent time occurred in 2019. He estimates that over the years, he has spent approximately \$6,500 for sexual services. Applicant states that he paid prostitutes for sex in the United States and in foreign countries while on vacation. Applicant further stated that he knew soliciting prostitution was illegal in the United States. He also acknowledged that it was dangerous. Despite this, he stated that he never picked up a random prostitute. He figured that since he did not pick the girls up off of the street, but, instead went to a massage parlor to obtain their services, in a country where he believed it to be legal, it was less risky. To him, it appeared to be like official business in those places. (Tr. pp. 29-42.) Applicant has never reported any of this sexual misconduct to his security officer or to anyone at his company. (Tr. p. 29.)

Applicant further explained that when he was in a foreign country and sought out sexual services from a prostitute, he did not know that it could have an impact on his security clearance. He believed it to be legal in the foreign country he was visiting and so he did not give it any further concern. During his interview on May 2017, Applicant stated that he did not see anything wrong with this type of behavior. He adds that his sexual activities have always been private, consensual and discreet. He has never sought treatment for sexual addiction nor does he believe he has a problem in this area. Applicant has not hired a prostitute for sex since 2019.

Five performance evaluations of the Applicant for the periods from 2016 through 2020 are all favorable. Applicant has been rated as either an “Excellent Performer” or a “Top Performer” during these rating periods. (Applicant’s Exhibit A.)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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.

Directive ¶ E3.1.14, requires the Government to present evidence that establishes 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person who applies for access to classified information 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 access to classified information. 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 information.

Section 7 of EO 10865 provides that adverse 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).

Analysis

Guideline D, Sexual Behavior

The security concern relating to the guideline for Sexual Behavior is set out in AG ¶ 12:

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 standard in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted; and
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

The guideline at AG ¶ 14 contains conditions that could mitigate security concerns. One is potentially applicable.

- (b) The sexual behavior happened so longer 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.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (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 judgement, reliability, or trustworthiness; and
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matter of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted or convicted.

AG ¶ 32 describes conditions that could mitigate security concerns including:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and
- (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

Guideline E- Personal Conduct

The security concern for Personal Conduct 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. Three are potentially applicable in this case:

(c) 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 while-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;

(d) personal conduct, or concealment of information about one's conduct, that creates 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;

(2) while in another country, engaging in any activity that is illegal in that country: and

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

(g) association with person involved in criminal activity.

There are conditions mitigating security concerns under AG ¶ 17. However, none of them are applicable here:

(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;

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

(g) association with person involved in criminal activities was unwitting, has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant's twelve-year history of sexual misconduct, criminal conduct, and poor personal conduct demonstrates poor judgment, immaturity, and a total disregard for the law. These violations of the law give rise to serious concerns about Applicant's judgment, reliability and trustworthiness, both because of the nature of the offenses, and the circumstances surrounding the offenses. Applicant engaged in this conduct in the United States in violation of the law, and in foreign countries without concern or regard for the fact that he possessed a DoD security clearance. It is noted that Applicant has not engaged in this sexual misconduct for the past two years, however, given his long history of misconduct, any doubt about a person's eligibility for access to classified information will be resolved in favor of national security. The before-mentioned disqualifying conditions have been established and are not mitigated.

Whole-Person Concept

Under the whole-person concept, the 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. 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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. I have incorporated my comments under Guidelines D, H, and E, in my whole-person analysis. Based upon the facts and analysis set forth above, Applicant has failed to provide sufficient evidence to demonstrate that he meets the qualifications for a security clearance.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Sexual Behavior, Criminal Conduct 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 the Directive, are:

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| Paragraph 1, Guideline D: | AGAINST APPLICANT |
| Subparagraph 1.a. | Against Applicant. |
| Paragraph 2, Guideline H: | AGAINST APPLICANT |
| Subparagraph 2.a. | Against Applicant. |
| Paragraph 3, Guideline E: | AGAINST APPLICANT |
| Subparagraphs 3.a | Against 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 grant Applicant national security eligibility for a security clearance. Eligibility for access to classified information is denied.

Darlene Lokey Anderson
Administrative Judge