



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



In the matter of:	)	
	)	
	)	ISCR Case No. 20-03012
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government:  
Adrienne M. Driskill, Esquire, Department Counsel

For Applicant:  
*Pro se*

August 31, 2022

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**Decision**

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GLENDON, John Bayard, Administrative Judge:

**Statement of the Case**

Applicant submitted his most recent Electronic Questionnaire for Investigations Processing (e-QIP) on October 1, 2016. On December 3, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines J (Criminal Conduct) and E (Personal Conduct). This action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines effective within the Department of Defense (DoD) after June 8, 2017.

Applicant responded to the SOR on December 14, 2021, (Answer) and requested a hearing before an administrative judge. On April 27, 2022, Department Counsel was prepared to proceed. The case was assigned to me on May 5, 2022. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Video Teleconference Hearing on June 7, 2022. The case was heard as scheduled on June 29, 2022.

The Government offered Government Exhibits (GE) 1 through 4, which were admitted without objection. Applicant and his wife testified. He also offered four exhibits, marked as Applicant Exhibits (AE) A through D, which were also admitted without objection. DOHA received the transcript of the hearing (Tr.) on July 8, 2022. (Tr. at 11-15.)

### **Findings of Fact**

Applicant is 30 years old, married, and has three children, ages five, six, and nine. He graduated from high school in 2009 and received a bachelor's degree in November 2016 and a master's degree in 2018. He enlisted in the U.S. Marine Corps in December 2009 and was honorably discharged in September 2013. Applicant was granted a security clearance in connection with his service. He began working for the Marine Corps as a civilian police officer at a camp (the Camp) in September 2016. The Commanding Officer of the Camp's Security and Emergency Services Battalion terminated Applicant's two-year probationary period of employment in September 2018 after determining that Applicant "was not suitable for continued employment with the Federal service." As discussed below, he changed careers and earned a bachelor's degree in IT management in 2020. Since December 2019 Applicant has been employed as an IT technician contractor at the same Marine Corps camp at which he served as a civilian police officer. With contract changes, he is presently working in the same capacity at the same location for a third company. He is seeking to retain his security clearance in relation to his employment. (Answer at 1; Tr. at 16-19, 65; GE 1 at 11-12; GE 4 at 5.)

#### **Paragraph 1 (Guideline J, Criminal Conduct)**

The Government alleged in SOR subparagraph 1.a that in September 2018 there was a probable cause determination was made that Applicant had committed three crimes, specifically Obstruction of a Criminal Investigation, Attempt to Commit a Conspiracy, and Supervising and Aiding a Prostitute. The SOR further alleged in this subparagraph that Applicant's employment as a police officer with the U.S. Marine Corps was terminated following that probable cause determination.

In his Answer Applicant denied having ever been involved in any criminal activity. He wrote that there was "no probable cause as I was never arrested or charged with any crime." He noted that the investigation into his activities was dropped. He explained that his civilian employment with the Marine Corps was terminated "because I was a probationary employee involved in a criminal investigation." (Answer at 1.)

## **Paragraph 2 (Guideline E, Personal Conduct)**

The Government cross-alleged in subparagraph 2.a the allegations set forth in subparagraph 1.a.

### **The Government's Documentary Evidence**

On September 12, 2018, the U.S. Marine Corps Criminal Investigation Division (CID) initiated an investigation of Applicant following receipt of information that he had directed his wife, a Marine Corps sergeant at the time, to delete text messages and other evidence on her personal cellphone to cover up her activities of soliciting herself for prostitution on a specialized "dating" website (the Website). The CID coordinated its joint investigation of Applicant's wife and Applicant, with a Regional Special Assistant United States Attorney (SAUSA) because Applicant worked as a civilian at the Camp. (GE 2 at 2; GE 3 at 2.)

The CID investigated Applicant's wife for violations of the Uniform Code of Military Justice involving Pandering and Prostitution. The CID interviewed a Marine Corps sergeant (the Marine) who was a sex customer of Applicant's wife and identified her in a photographic lineup. In an interview of a civilian at the Camp, the civilian reported to investigators that he overheard Applicant telling others that his "wife goes on dates with rich men for extra money." After hearing this comment, the witness confronted Applicant. Applicant told him that his wife does not have sex for money on her "dates" so it was legal. The CID also conducted a review of text messages between Applicant and his wife. Two of the messages discuss "their infidelity." Other messages between Applicant and his wife contain discussions about the wife's "prostitution activities." (GE 3 at 2-13.)

The record includes a CID report, dated September 14, 2018, regarding a search of Applicant's cell phone, which revealed that he supervised his wife as she solicited herself for prostitution on the Website. The CID report also states that on September 14, 2018, the SAUSA concluded that probable cause existed to believe that Applicant committed four Federal crimes in connection with these activities. The personnel security tracking system was updated to reflect that Applicant was the subject of a criminal investigation. In his August 27, 2021 response to DOHA's interrogatories, Applicant confirmed his separation from civilian employment at the Camp in September 2018 during his probationary period due to "allegations of obstructing a criminal investigation, attempt to commit a conspiracy, and supervising or aiding a prostitute." (GE 2 at 2-3; GE 3 at 2; GE 4 at 2, 3.)

A CID report, dated January 11, 2019, reflects that investigators interviewed the Marine, who had paid Applicant's wife \$250 on two separate occasions "for her company which resulted in sexual intercourse." The Marine advised the CID investigators that Applicant met the Marine at the Marine's residence and advised that he and his wife had been questioned by CID investigators. Applicant asked the Marine not to provide law

enforcement any information if he was contacted. Another CID report, dated September 17, 2019, discusses the investigators finding text messages between Applicant and his wife about a violation of a military protective order in place between them and physical abuse by Applicant of his wife. (GE 3 at 4, 13.)

In November 2019 the Marine Corps administratively separated in lieu of trial (SILT) Applicant's wife from the Marine Corps under Other Than Honorable (OTH) conditions. The CID investigation of Applicant's wife was closed on November 27, 2019, following her SILT. All of her property seized during the investigation was returned to her. The investigation of Applicant remained open pending "the adjudication of [Applicant.]" On January 6, 2020, the SAUSA determined that no action would be taken against Applicant, and the investigation was closed later that month. (Tr. at 28-29; GE 3 at 13, 14-15, 16-17, 19, 21; GE 4 at 5.)

### **DOHA Hearing Testimony**

Applicant learned that he was under investigation shortly before his civilian employment with the Marine Corps was terminated in September 2018. He had learned that his wife was under investigation for prostitution a few days before that. The investigation began after Applicant had a conversation with co-workers in which he discussed his wife going out on "dates" with rich men who paid for her company. The dates were arranged through the Website. She had been using the Website to arrange dates for a couple of months prior to the investigation. Applicant believes that his conversation with his co-workers was misinterpreted. (Tr. at 20-22, 26, 34.)

Applicant admitted that he was aware that his wife advertised herself on the Website as available for paid "dates." He denied, however, that he was aware that his wife was having sex with the men who paid her to go out on dates. Applicant spoke with the Marine after Applicant became aware of the investigation. He testified that the Marine told him that prior to his dates with Applicant's wife, there was no agreement that they would have sex on their dates. The sexual intimacy just "happened" between "two consenting adults." Applicant claimed that he cannot remember how he learned about his wife's sexual activities with the Marine. He does recall asking the Marine not to talk to investigators if they asked to interview him. He wanted the Marine to keep the "personal matters" between himself and Applicant's wife. Applicant had developed a friendship with the Marine because Applicant found him to be "very respectful and just a man of great moral character." The Marine was discharged from the Marine Corps under OTH conditions as a result of his patronizing prostitution from an active-duty Marine. Applicant remains in contact with the Marine once or twice a month through social media. (Tr. at 22, 25-26, 32-34.)

The dating activity of Applicant's wife occurred during a period when, according to Applicant, the couple were "in a financial bind." He claimed he took a large pay cut to become a police officer at the Camp. Applicant had previously worked as a car salesman and as a pizza delivery driver. Applicant's wife learned about the Website and the

opportunity to make extra money from the girlfriend of Applicant's co-worker. The girlfriend was active on the Website. Applicant and his wife viewed the dating activity as a way for his wife to earn extra cash by going out "to dinners and get paid and make a couple of hundred dollars an hour just to go out." The plan was for her to develop "Sugar Baby/Sugar Daddy" relationships and earn money on the side of her duties as a Marine Sergeant. Applicant testified that he had discussed this plan with his wife, and they agreed that she would not engage in any "intimacy." He claimed that restriction was specifically stated in her online profile on the Website. He testified, "Unfortunately, one of these dates resulted in intimacy, and that's what landed us here." He claimed that he subsequently learned that his wife had sex with other "Sugar Daddies" during the period when she was going out on dates arranged through the Website. (Tr. at 22-26, 37; GE 1 at 12-13.)

Applicant agreed that he asked his wife "to delete text messages that had personal conversations." He denied, however, that he ever "supervised [his wife] as she solicited herself online." He admitted that he approved or disapproved her dating specific men because he wanted her to limit her dating to older men to avoid a risk of "attraction." He also admitted that he logged on to her webpage on the Website "after the fact, going through the conversations just to verify" that she advised her clients that their dates would not involve "intimacy." (Tr. at 27-28.)

Applicant agreed that a SAUSA had found probable cause to believe that Applicant had committed certain crimes, which authorized the investigators to seize and conduct searches of Applicant's electronic equipment, including his Smart Watch. Based upon that finding of probable cause, the investigators also took DNA samples from Applicant and uploaded that to Combined DNA Index System (CODIS), the U.S National DNA database maintained by the FBI. The investigators also took Applicant's fingerprints and "mugshots," which were uploaded to the FBI's National Crime Information Center (NCIC) (Tr. at 29-30, 59-60.)

At the time Applicant was terminated as a civilian police officer, he was just completing his two-year probationary period as a U.S. Navy employee. He appealed his termination, but was unsuccessful. The SAUSA declined to prosecute Applicant for his conduct in relationship to his wife's prostitution activities. Applicant speculates that was because "their probable cause wasn't strong enough." (Tr.at 30-32; GE 4 at 5.)

Applicant's wife also testified. She served in the Marine Corps from 2010 to November 2019. She learned about the Website from another Marine. She discussed the idea with Applicant, and he agreed to her signing up on the Website to offer her services as a "date." Her Website profile did not explicitly mention sex. The discussions about sex came up after she met her dates in person and they had spent some time together. She was only on the Website "a couple" or "a few months" and had about five or six dates, though she cannot remember a "hard number." She had ongoing relationships with two of her dates. On her other dates, she was typically paid about \$200 plus some expenses. She had sex with all of her dates, except the first one. After her first date, she "started to realize like - - okay, this is what it's really about." She claimed that all her husband knew

was that she was “going to hang out with a friend.” She also testified that he was not aware that she was having sex on her dates. (Tr. at 39-49.)

The investigators seized her cellphone as part of the investigation. At the hearing she initially denied that her husband ever asked her to delete messages from her phone. She said it all happened so quickly. She clarified her testimony by stating that she did not recall him asking her to do so. She acknowledged that she did delete messages from her phone. (Tr. at 49-52.)

## **Mitigation**

After his termination from the Navy in 2018, Applicant began his studies in the field of IT Management. He was hired at the Camp as a Federal contractor. He claims that he has “excelled” in his new career and has been promoted twice and that his references praise his work and character. (Answer at 1; Tr. at 32-33, 35.)

Applicant submitted four character reference letters. A former supervisor praised Applicant’s integrity and work ethic. A co-worker from Applicant’s current employment described Applicant as honest and trustworthy. A third letter was written by the Marine, who paid Applicant’s wife for sexual services and was discharged from the Marine Corps. He wrote that he spoke with Applicant after the Marine’s activities with Applicant’s wife became known through the CID investigation. The Marine believes that Applicant was not aware of his wife’s paid sexual activities before they were uncovered by the CID investigation. He wrote that his belief was corroborated by Applicant. The fourth reference letter was prepared by a friend and co-worker of Applicant, who then became Applicant’s supervisor. He described Applicant as a reliable and dependable hard worker. (AE A through D.)

Applicant also testified that he has been found eligible to be granted a permit to carry a concealed weapon (CCW). He believes that this permit constitutes evidence of his trustworthiness. There is no evidence in the record, however, as to what the standard is for a citizen in his state or county to obtain a CCW permit or the nature of the investigation into his background. Moreover, the record contains no evidence that the issuing authority was aware of and weighed Applicant’s criminal actions in connection with his wife’s prostitution activities and the CID investigation. (Tr. at 64.)

## **Policies**

When evaluating an applicant’s suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) 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 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, "Any 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, "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 seeks access to classified information enters 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, "Any 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 *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

## Analysis

### Paragraph 1 (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.

AG ¶ 31 describes a condition that could raise security concerns and may be disqualifying in this case:

(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.

As noted above, the Government is obligated to establish controverted facts such as those Applicant disputes in this case. The applicable standard of proof for the Government's evidence is "substantial evidence." The Appeal Board has defined the term "substantial evidence" as "more than a scintilla but less than a preponderance of the evidence." ISCR Case No. 18-00496 at 3 (App. Bd. Nov. 8, 2019). This standard is less demanding than the probable cause standard applicable in criminal cases. *Id.*

The record evidence supports a conclusion under the "substantial evidence" standard that Applicant engaged in criminal behavior because the evidence uncovered by the investigators was sufficient to establish the higher standard of probable cause for the investigators to seize evidence and to take a DNA sample and fingerprints from Applicant. Accordingly, the record evidence establishes the above potentially disqualifying condition.

This evidence shifts the burden to Applicant to establish mitigation. AG ¶ 32 sets forth four mitigating conditions under Guideline J. The following three mitigating conditions have possible application to the facts in this case:

(a) so much time has passed 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;

(c) no reliable evidence to support that the individual committed the offense;  
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.

None of the above mitigating conditions apply. The criminal behavior did not happen so long ago or under any unusual circumstances to support a conclusion that it is unlikely to recur and does not cast doubt on Applicant's reliability, trustworthiness, and judgment. The fact that Applicant's criminal conduct occurred when he was employed as a U.S. Navy police officer raises serious questions about his judgment.

Applicant claimed that he confronted the Marine about his sexual activity with Applicant's wife. He admitted at the hearing, however, that he asked the Marine to refuse to be interviewed by investigators. He also asked the Marine to keep his sexual activities with Applicant's wife private as a personal matter. It is reasonable to conclude that Applicant's real purpose in meeting with the Marine was to obstruct the investigation of his wife and himself, not to confront the Marine. Applicant's criminal conduct of attempting to obstruct a criminal investigation seriously undercuts his credibility and shows poor judgment.

There is no reliable evidence that Applicant did not engage in the criminal behavior alleged in the SOR. Neither his testimony nor his wife's testimony regarding his lack of awareness of his wife's activities as a prostitute was credible. I base this credibility assessment upon the demeanor of both Applicant and his wife and the discrepancies in some of the specifics of their testimony. Also, the reference letter from the Marine who paid for the wife's sexual services is inherently unreliable and untrustworthy.

Applicant's evidence of rehabilitation is limited to his success in his new career in the IT field. The absence of any criminal behavior in the record since the CID investigation closed in 2020 carries limited weight since so little time has passed. Such evidence merely means that no new investigations or charges have been brought against Applicant. Moreover, Applicant's failure to accept responsibility for his criminal conduct undercuts any claim of reform and rehabilitation. ISCR Case No. 20-00331 at 8 (App. Bd. Aug. 2, 2021).

It should be noted that the absence of criminal charges brought by the SAUSA does not preclude a finding that Applicant engaged in criminal conduct. ISCR Case No. 17-00810 at 3-4 (App. Bd. Sep. 26, 2019) (sustaining judge's finding that the applicant engaged in prostitution even though the citation was dropped). In DOHA proceedings, a finding of criminal conduct can be made even if an applicant has not had criminal charges brought against him. ISCR Case No. 02-00500 at 3, n.2 (App. Bd. Jan. 16, 2004). The disqualifying condition quoted above specifically makes this point, stating that evidence of criminal conduct raises potentially disqualifying security concerns "regardless of whether the individual was formally charged, prosecuted, or convicted." AG ¶ 31(b).

## Paragraph 2 (Guideline E, Personal Conduct)

The security concerns relating to the guideline for personal conduct are set out in AG ¶ 15, which states:

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 four conditions that could raise security concerns and may be disqualifying in this case:

(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 that individual may not properly safeguard classified or sensitive information;

(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;

(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

(g) association with persons involved in criminal activity.

The record evidence establishes all of the above potentially disqualifying conditions. This evidence shifts the burden to Applicant to establish mitigation. AG ¶ 17 includes three conditions that could mitigate the security concerns arising from Applicant's personal conduct:

(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;

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

(g) association with persons 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.

None of the above mitigating conditions have been established. Applicant's offenses were not minor, infrequent, or happened so long ago that they are unlikely to recur and do not cast doubt on Applicant's reliability, trustworthiness, and judgment. Applicant has not taken any positive steps to reduce or eliminate his vulnerability to exploitation, manipulation, or duress. He has not even admitted his role in his wife's criminal conduct. He also still associates with his wife by continuing his marriage and living with her. Overall, he has not mitigated the security concerns arising from his personal conduct or his vulnerability to exploitation, manipulation, or duress resulting from that conduct.

### **Whole-Person Concept**

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

Under AG ¶ 2(c), the ultimate determination of whether to grant national security 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 pertinent facts and circumstances surrounding this case. Further comments are warranted. Applicant seeks to deny charges of criminal conduct and inappropriate personal conduct by stating that he was unaware that his wife’s “dating” activities involved payments for having sex with the men she “dated.” His testimony generally and specifically about his claimed lack of knowledge about her prostitution activities was not credible. His actions reveal a serious lack of judgment. Moreover, he has not minimized the potential for exploitation, coercion, or duress. Overall, the record evidence leaves me with serious questions and doubts as to Applicant’s suitability for national security eligibility and a security clearance.

### **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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.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 or continue Applicant’s national security eligibility for a security clearance. Eligibility for access to classified information is denied.

JOHN BAYARD GLENDON  
Administrative Judge