



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



In the matter of:)
)
) ISCR Case No. 21-02422
)
Applicant for Security Clearance)

Appearances

For Government: Patricia Lynch-Epps, Esq., Department Counsel
For Applicant: *Pro se*

September 19, 2022

Decision

CEFOLA, Richard A., Administrative Judge:

Statement of the Case

Applicant submitted a security clearance application (SCA) on April 6, 2020. (Item 3.) On February 11, 2022, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines D, J, E and F. (Item 1.) The DOD CAF acted 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) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on February 14, 2022 (Answer), and requested a decision on the record without a hearing. On March 18, 2022, a complete copy of the file of relevant material (FORM) was sent to Applicant, including documents identified as Items 1 through 4. He was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government’s evidence. He responded to the FORM (Response) on April 19, 2022. Items 1 and 2 contain the pleadings in the case. Items 3 and 4, and Applicant’s Response are admitted into evidence. The case was assigned to me on June 21, 2022.

Findings of Fact

Applicant, age 58, is married and has three adult children. (Item 3 at pages 7, and 20~24.)

Guideline D - Sexual Behavior, Guideline J - Criminal Conduct & Guideline E - Personal Conduct

1.a., 2.a., and 4.a. Applicant admits that from about January of 2009 to about January 2014, he hired an escort service four or five times a year for the purpose of engaging in sexual intercourse. Applicant further admits that once in 2019 and once again in 2020, he hired an escort service for the purpose of engaging in sexual intercourse. Applicant's spouse and family are not aware of his use of an escort service.

1.b., and 4.a. Applicant admits that from about 2010 to 2011, he engaged in an extramarital affair with a dancer at a strip club for approximately six months. Applicant's spouse and family are not aware of his extramarital affairs.

1.c., and 4.a. Applicant admits that from about 2012 to 2013, he engaged in an extramarital affair with a dancer at a strip club for approximately nine months. Applicant's spouse and family are not aware of his extramarital affairs.

Guideline F - Financial Considerations

3.a. Applicant was indebted to the Federal Government for back taxes for tax year 2014 in the amount of about \$34,594. He is making monthly payments of \$1,046 towards this tax arrearage, as documented by correspondence with the Internal Revenue Service (IRS). (Response)

3.b. Applicant was indebted to a state taxing authority for back taxes for tax years 2013 and 2014 in the amount of about \$16,266. He is making monthly payments of \$400 towards this tax arrearage, as documented by correspondence with the state taxing authority.

Policies

When evaluating an applicant's suitability for a security clearance, 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 EO 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* 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 standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

The guideline notes several conditions that could raise security concerns under AG ¶ 13. All are potentially applicable in this case:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) a 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 received sexual gratification from female employees of an escort service on multiple occasions over a period of about ten years, ending in 2020. He also had lengthy extramarital affairs with two different strip club dancers in 2010~2011, and again in 2012~2013. Applicant admits that his conduct was criminal and represents a pattern of high-risk sexual behavior that reflects a lack of discretion or judgment. As his spouse and family are still unaware of his sexual behavior, it also creates a vulnerability to coercion, as discussed above under Guideline E. The evidence is sufficient to raise these disqualifying conditions.

AG ¶ 14 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 14 including:

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a 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.

None of the above mitigating conditions apply. Paragraph 1 is found against Applicant.

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.

The guideline at AG ¶ 31 contains five disqualifying conditions that could raise a security concern and may be disqualifying. Two conditions apply, as discussed below:

(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

(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.

Applicant admits that he engaged in illegal sexual conduct over a period of ten years, ending a little more than two years ago. This evidence raises security concerns under these disqualifying conditions, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline in AG ¶ 32 contains four conditions that could mitigate criminal conduct security concerns:

(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;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(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.

Sufficient time has not passed since Applicant's most recent criminal, sexual liaison. Based on those facts, the evidence continues to cast doubt on Applicant's reliability, trustworthiness, and good judgment. The evidence does not establish mitigation under any of the above conditions.

Guideline F - Financial Considerations

The concern under this guideline is set out in AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

Applicant's admissions, as to Federal and state tax delinquencies, establish three disqualifying conditions under this guideline: AG ¶ 19(a) ("inability to satisfy debts"), AG ¶ 19(c) ("a history of not meeting financial obligations"), and AG ¶ 19(f) ("failure to pay annual Federal, state, or local taxes as required").

Applicant remains indebted to the Federal and state taxing authorities, for back taxes, totaling about \$34,000 and about \$16,000, respectively.

The security concerns raised in the SOR may be mitigated by any of the following potentially applicable factors under AG ¶ 20:

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

AG ¶ 20(g) is established. Applicant is addressing his Federal and state tax arrearages. Applicant has met his burden to mitigate the financial concerns set out in the SOR. For these reasons, I find SOR ¶¶ 3.a. and 3.b. for Applicant.

Guideline E - Personal Conduct

The concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to

cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

Based on Applicant's past sexual behavior, the following disqualifying condition could apply 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 individual or group. Such conduct includes:

(1) engaging in activities, which if known, could affect the person's personal, professional or community standing.

Applicant, unbeknownst to his spouse and family, had extramarital affairs and engaged in illegal prostitution. Therefore, AG ¶ 16(e) is established.

The personal conduct security concerns raised in the SOR may be mitigated by the following potentially applicable factor under AG ¶ 17:

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

Applicant is still subject to exploitation, manipulation and duress, as his family is unaware of his sexual behavior. He has not met his burden of proof for his personal conduct.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common-sense judgment based upon careful consideration of the applicable guidelines, each of which is to be evaluated in the context of the whole person. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guidelines D, J, F and E in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines D, J, F and E, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated the security concerns raised by his Sexual Behavior, and related Personal and Criminal Conduct. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline D (Sexual Behavior): AGAINST APPLICANT

Subparagraphs 1.a ~1.c: Against Applicant

Paragraph 2, Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Paragraph 3, Guideline F (Financial Considerations): FOR APPLICANT

Subparagraphs 3.a. and 3.b: For Applicant

Paragraph 4, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 4.a: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for access to classified information. Clearance is denied.

Richard A. Cefola
Administrative Judge