



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



In the matter of:	)	
	)	
	)	ISCR Case No. 20-03602
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Brian L. Farrell, Esq., Department Counsel  
For Applicant: Annie Stellato, Personal Representative

11/29/2022

\_\_\_\_\_

**Decision**

\_\_\_\_\_

COACHER, Robert E., Administrative Judge:

The Government’s security concerns under Guideline D, sexual behavior, and Guideline E, personal conduct, were not established or were mitigated. Applicant’s eligibility for a security clearance is granted.

**Statement of the Case**

On May 5, 2021, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline D, sexual behavior and Guideline E, personal conduct (Department Counsel amended the SOR to reflect the correct date of issuance, see hearing transcript (Tr. 9-10)). The DOD 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 May 27, 2021, and requested a hearing. Scheduling of this hearing was delayed because of the COVID-19 pandemic. The case was assigned to me on May 17, 2022. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 7, 2022, and the hearing was held as scheduled on July 19, 2022, using video teleconference capabilities. The Government offered exhibits (GE) 1 through 5, which were admitted into evidence without objection. The Government's discovery letter and exhibit list were marked as hearing exhibits (HE) I and II respectively. Applicant testified and offered exhibits (AE) A through C, which were admitted into evidence without objection. DOHA received the Tr. on July 28, 2022.

### **Findings of Fact**

In Applicant's Answer, he denied all the SOR allegations, with explanations. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 60 years old. He is married for the second time. His first marriage was from 1984 until 2011 when he divorced. He married the second time in 2015. He has two adult children from his first marriage and two adult stepchildren from his second. He currently works for a defense contractor for whom he has worked since 2006. He has a bachelor's degree in engineering. He was first granted a security clearance 2012. In 2019, he was denied sensitive compartmented information (SCI) access by an other government agency (OGA) after two days of polygraph interviews and tests in April 2017. The information from the OGA led to the issuance of the SOR here. (Tr. 26-27; GE 3-5)

Under Guideline D, the SOR alleged that Applicant, from 1985 to February 2017, on at least nine occasions, paid women for sexual acts, including after being granted a security clearance in 2012. (SOR ¶ 1.a) This allegation was also cross-alleged under Guideline E. (SOR ¶ 2.a) It was also alleged under Guideline E that Applicant provided material false information during an interview with the OGA on April 25, 2017, by denying he paid for sexual acts during a recent trip to another state. (SOR ¶ 2.b)

In approximately 2017, Applicant was being considered by the OGA for access to SCI information. As a requirement for that access, Applicant was required to undergo interviews and polygraph examinations. These interviews and polygraph examinations with agents from the OGA took place on April 25-26, 2017. As a result of the information compiled by the OGA from the interviews, Applicant was initially denied access to SCI in March 2018, and that decision was finalized in March 2019. The OGA's investigative report and the SCI denial decisions are contained in GE 5. Applicant participated in interviews with Office of Personnel Management (OPM) agents in August 2019 and April 2020, as part of his background investigation for this clearance action. Summarized reports were prepared of those interviews. In January 2021, Applicant was given the opportunity to review the summarized statements and make corrections and/or additions to them, which he did. Those summarized OPM statements and Applicant's responses are contained in GE 4. (Tr. 35-36; GE 4-5)

I have examined all the evidence needed for resolution of this case. Several pieces of evidence require examination in detail and are set forth below.

### **Applicant's Hearing Testimony**

Applicant admitted that when he was in his 20s (mid-1980s) he went to two modeling studios in the state where he was living and received manual stimulation from females on both occasions. He admitted these acts during his April 25, 2017 polygraph interview. He also admitted that a third similar incident happened in another state. He was not arrested for these acts and he did not hold a security clearance at the time. He stated that when he disclosed this information to the OGA agents in April 2017, they told him he was failing the polygraph because of his breathing. (Tr. 24-26)

Applicant's divorce from his first wife was finalized in November 2011. In 2012, he went to Germany on a work trip. He had relatives there so he also incorporated some personal time during that trip. He was feeling lonely because of his recent divorce so he visited a brothel on four occasions while in Germany. He believed prostitution was legal in Germany at that time. He had never been to a brothel before then and has not been back to one. He held a security clearance at the time. He stated that he was not briefed or instructed on disclosing this information to a security officer since he believed his actions were legal. He disclosed this foreign travel on his 2013 security clearance application (SCA). (Tr. 26-29; GE 2, p. 64)

Applicant regularly exercised and to relieve muscle pain from his workouts he has also regularly got massages afterwards. He has probably had approximately 60 massages over the years. At one time he had a membership to a national massage chain. Sometime after 2013, he sought a massage after a workout and went to a massage parlor. While being massaged, the masseuse began manually stimulating his genitals. Applicant did not seek out this treatment. He did not say yes to this stimulation, but he also did not fight her off. No pay was offered or solicited for this "service." He did pay the massage fee and provided a tip, which is customary in this service business. Applicant never returned to this massage parlor. (Tr. 29-31; SOR Answer)

The second occasion where Applicant experienced an unsolicited sexual advance by a masseuse occurred in late 2016 or early 2017. Applicant was in a different state and was waiting to pick up his wife at the airport. He had several hours before she arrived and decided to get a massage. He randomly selected a massage parlor and went there for a massage. While getting the massage, the masseuse grabbed his genitals and asked him if he liked it, to which he responded "no." She then exposed her breasts to him, which caused him to ejaculate. He did not solicit this action by the masseuse. He paid for the massage and left a customary tip. He later picked up his wife at the airport and told her what happened at the massage parlor. Since this last incident, he has never been back to a massage parlor. He now treats his workout muscle fatigue with regular trips to a chiropractor. (Tr. 31-34, 43-44)

Applicant testified that he did not have to volunteer to take the polygraph in 2017. He held a top secret clearance before the polygraph and his job at that time did not require that he take one. He took the polygraph because passing it would allow him to be involved in new roles for the company. He fully cooperated with the polygraphers and when they questioned his truthfulness, he told them about every embarrassing incident in his past. This was the first time he took a polygraph. Ironically, after the polygraph and the denial of his SCI access by the OGA, he continued to support that agency on other projects as recently as a week before this hearing. (Tr. 35-36, 40; SOR Answer)

Applicant has continued to do classified work for his company in the intervening five years since the polygraph test. He continues to have access to top secret material. He has been his company's facility security officer (FSO) for the past five years and was most recently appointed by his CEO in 2020. He is also a member of the company's insider threat team. (Tr. 40-41; AE A-C)

### **2017 Report of Polygraph Interviews of Applicant on April 25-26, 2017 (GE5)**

It is unclear if the report that is reflected in GE 5 (pp.1-24) is the complete report of Applicant's investigation by the OGA. The handwritten page numbers appear to have been made by Department Counsel and not by the author(s) of the report. The author(s) of the report are not identified. No person identified with creating the report was called as a witness by the Government at hearing.

The report described an interview with Applicant on April 25, 2017. Under a topic heading of "Crime," the report indicated that in 1985 to 1990, Applicant stated that he was with two females on two different occasions at two different massage parlors where he paid \$50 for manual stimulation. The report does not describe or cite to what laws were violated on these occasions. In his response to the OGA's SCI denial action, and while admitting to the conduct, Applicant disputed that these acts occurred at massage parlors, but rather at nude modeling establishments, otherwise known as strip-clubs. The report also described a 1990 trip to a nude modeling place where Applicant paid for and received manual stimulation. He admitted this conduct in his response to the denial action. (GE 5, pp. 20, (Applicant's April 2018, response to the OGA's clearance action comprises pp.29-42 of GE 5))

The report further described the following incidents purportedly disclosed by Applicant during his post-polygraph interview on April 25, 2017:

From 2011 to 2015, on four different occasions at four different brothels, S (subject) paid 50 Euros for vaginal and oral intercourse with nude females appearing in their 20s to 40s. (Incident 1)

In 2015, S was in [State] and went to a massage parlor. S paid \$60 for a massage and received manual stimulation of his penis to the point of

ejaculation. S reported the female appeared to be in her 30s and was topless. (Incident 2)

In 2016, S was in [another state] and went with his wife to get a massage. During the massage S became aroused and the masseuse grabbed S's penis and lifted her shirt. S reported that he felt uncomfortable and told her to stop. S paid \$60 for the massage. (Incident 3)(GE 5, p. 20)

Regarding Incident 1 above, Applicant's April 2018 clearance denial response admitted that he visited the same German brothel four times in 2012. He did not visit multiple brothels over multiple years as described in the report. He described why he visited the brothel (recent divorce), that he believed his actions were lawful because brothels are legal in Germany, and that he has never been back to a brothel since those actions in 2012. He also was unaware of any security reporting requirement because of his actions. (GE 5, pp. 29-30)

Regarding Incidents 2 and 3 above, Applicant's April 2018 clearance denial response admitted that he visited massage parlors in 2013, not 2015, as described in the report and in 2016. He stated that he has visited massage parlors 50-60 times over the years to help him with severe leg and back pain. He did not frequent these places for the purpose of receiving "paid or unpaid sexual favors." He always paid the massage fee and the customary tip. (GE 5, p. 30)

The report described the follow-up questioning purportedly disclosed by Applicant during his pre-polygraph interview on April 26, 2017:

During the pre-test interview, S advised that the information that he provided during the previous polygraph interview on 25 April 2017 regarding going to a massage parlor was not correct. S clarified that he traveled to [an out of state city] for work related purposes in February 2017 and he went to a local massage parlor for a massage in his free time knowing that the massage could end in some form of sexual gratification. Towards the end of the massage, the masseuse, who was a 30 to 40 year old female of Asian decent [sic], started to brush his penis with her hand and arm. She asked S if he liked it and he responded "yes." The masseuse then started "flashing" or showing her chest to him which made S become sexually aroused. She then "grabbed" S's penis with her hand and he received manual stimulation to the point of ejaculation. At no time did S resist this touching. S paid approximately \$60 for the massage and gave the masseuse a \$30 to \$40 "tip" for her service.

S previously reported that he went with his wife to get a massage during this incident, however, he stated during this interview that he did not go with his wife. He did, however, tell his wife that the masseuse touched his penis, but that nothing else happened because he did not want to hurt her in anyway....

During Applicant's hearing cross examination by Department Counsel, Applicant denied that he told the polygraphers that he went to the massage parlors for sexual gratification during his April 26, 2017 interview. Applicant believes the polygrapher skewed his answer when Applicant responded to the repeated question of whether he was thinking about being sexually gratified when he went to the massage parlor by maybe subconsciously wanting it to happen. Applicant also denied that he told the polygrapher that he liked what was happening when asked by the masseuse. He also denied his purported statement that he did not resist the touching. (Tr. 50-53)

**Applicant's Background Investigation Interview Conducted in April 2020 and Applicant's Correction, Additions, and Deletions to that Interview submitted in January 2021 (GE 4)**

During his April 2020 background interview, Applicant was asked about the incidents that led to his SCI access denial by the OGA. The interviewer summarized that information as follows:

In 2017, Subject was in [another city and state] and went to a local [massage chain] in order to get a massage for pain related to working out. During the massage, Subject became aroused and the masseuse [sic] while he was falling asleep. The masseuse grabbed his genitals and began to lift her shirt. Subject told her to stop. Subject admitted that he subconsciously might have wanted her to continue but he felt very uncomfortable. Subject paid for the massage and left immediately. He never returned to that massage parlor. Immediately following, Subject told his wife about this incident because she was the one who recommended that he go to [massage chain]. However, she was not present as previously indicated in past interviews. When asked about this incident during the polygraph, he admitted during the polygraph that subconsciously [sic] might have wanted manual stimulation to be performed, but consciously he did not and to him the question did not make sense. He was asked by the polygrapher if he had noticed a sign on the wall that said it was illegal and/or did he report it to anyone in the establishment or to the police, to which he did not. (GE 4, p. 9 (pagination at bottom right of each page))

Applicant made several additions and corrections to the above summarized information when he was first allowed to review it in January 2021. Those corrections are stated verbatim below:

I did not state "[name of massage chain]" but rather had told them at one time I had maintained a membership at [massage chain] over the years. I volunteered that information to show that I had gotten countless massages over the years that did not involve an incident. I was on travel and do not remember the name of the massage parlor I visited in 2017.

I never stated that my wife was present at any time during any of the events listed in the interviews. My wife was flying into [the state] that day and I was on my way to pick her up at the airport. In my interview, I stated that I told my wife what happened at the massage parlor (and not that she was present at the parlor). I have reiterated this fact several times and I am not sure why the topic keeps coming up as I have provided the same correction every time.

After I told the polygrapher that I did not go to the parlor with the intent of receiving manual stimulation, and that I told her no and to stop. [sic] He then repeatedly asked me if I was thinking it. I then said, "maybe subconsciously?" He smiled at me and said yes. I then mentioned the fact that I saw the sign at the entrance when I came into the facility so obviously thinking it subconsciously seemed out of place. This is when the polygrapher became visibly and verbally angry with me. (GE 4, p. 12)

Applicant explained his answers to the polygraphers by pointing out that the polygraphers repeatedly insinuated that he had committed serious crimes such as murder and rape when they told him after his day one polygraph that his breathing was not right and he was failing the test. In an effort to cooperate, Applicant revealed this personal information that was quite embarrassing. (GE 4, P. 14)

## **Character Evidence**

During his clearance review with the OGA, Applicant provided a number of character statements from work colleagues and personal friends. Included among those statements were two from his current CEO. He stated that Applicant is honest, trustworthy, forthright, and that his character is beyond reproach. He strongly recommends that he retain his clearance. Two other coworkers attest to Applicant's loyalty, reliability, trustworthiness, and good judgment. A retired Navy captain who has known Applicant for over 40 years also noted his traits for reliability, honesty, and trustworthiness. Two neighbors, who have known Applicant for over 20 years described his honesty, trustworthiness, and reliability. (GE 5, pp. 34-42)

## **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 list potentially disqualifying conditions and mitigating conditions, which are 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, these guidelines are applied in conjunction with the factors listed in 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 careful weighing 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion to obtain a favorable security 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 access to classified information. Decisions include, by necessity, consideration of the possible risk that an 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.

Section 7 of EO 10865 provides that 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



standards 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 in this case. The following are potentially applicable:

(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(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.

There are some inconsistencies with Applicant's prior summarized interview, his polygraph interviews, and his hearing testimony. However, after reviewing all the sources of his prior statements, I conclude that his testimony, subject to cross-examination, and his background interview, which he was allowed to correct, bear more probative weight than the polygraph interview summaries, particularly when the polygraphers were not available to explain their report and be subjected to cross examination.

In the 1980s, when Applicant was in his 20s, single, and before he held a security clearance, he visited three adult modeling studios (strip clubs) and paid for manual stimulation of his genitals. In 2012, after receiving a security clearance, and after he was divorced, Applicant visited a brothel four different times and paid for sex while in Germany. The Government presented no evidence that these acts were illegal in Germany at that time. In 2013 and either late 2016 or early 2017, Applicant visited two different massage parlors and received manual stimulation on both occasions. He claimed that on neither occasion did he solicit these actions by the respective masseuses. They engaged him without his consent. Although the polygraph report conflicts with Applicant's testimony about his intent, I find Applicant's testimony and his statement to his background investigator more credible than the polygraph report, which was not supported by testimony, and therefore not subject to cross examination. AG ¶¶ 13(a), 13(c) and 13(d) apply.

I have also considered all of the mitigating conditions for sexual behavior under AG ¶ 14 and considered the following potentially relevant:

(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; and

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress;

Applicant's three visits to strip clubs occurred almost 40 years ago. He has discontinued that activity. He visited a brothel in a foreign country on four occasions right after his divorce because he was lonely. He believed his actions were lawful in that country. He has not engaged in that activity since 2012. He was an unintentional participant in two instances where masseuses engaged in manual stimulation of his genitals in 2013 and either 2016 or 2017. He did not initiate the action. He no longer goes to massage parlors to treat muscle soreness, but regularly sees a chiropractor instead. AG ¶¶ 14(b) and 13(c) both apply.

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the personal conduct security concern:

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

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(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 the individual may not properly safeguard classified or sensitive information; and

(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

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

As described above in the Guideline D analysis, Applicant's past sexual actions as described by the record call into question his lack of judgment and his vulnerabilities to exploitation. AG ¶¶ 31(c) and 31(e) apply to SOR ¶ 2.a. The Government failed to establish, per the allegation, that Applicant failed to disclose that he paid for sexual acts occurring in February 2017, during his April 25, 2017 polygraph interview. The evidence established that Applicant admitted during both the April 25th and 26th interviews that he paid the massage fee and provided a customary tip. There is no clear admission in the polygraph interview record of the April 26th interview that Applicant intended to pay for sexual acts on this visit or that he paid for such acts during this visit as opposed to paying for the massage service. AG ¶ 31(b) has not been established concerning SOR ¶ 2.b.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

(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; and

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

As stated under the Guideline D analysis above, Applicant's three visits to strip clubs occurred almost 40 years ago. He has discontinued that activity. He visited a brothel in a foreign country on four occasions right after his divorce because he was lonely. He believed his actions were lawful in that country. He has not engaged in that activity since 2012. He was an unintentional participant in two instances where masseuses engaged in manual stimulation of his genitals in 2013 and either 2016 or 2017. He did not initiate the action. He no longer goes to massage parlors to treat muscle soreness, but regularly sees a chiropractor instead. AG ¶¶ 17(c) and 17(e) both apply.

### **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 the 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 the facts and circumstances surrounding this case. I considered Applicant's security duties within the company, his significant support from his CEO, coworkers, and friends, and his lack of similar activity since 2017. I weighed these factors against any disqualifying conduct described by the evidence.

Overall the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude either the disqualifying conduct was not established, or Applicant mitigated the security concerns under Guidelines D and E.

### **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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

---

Robert E. Coacher  
Administrative Judge