



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



In the matter of:)	
)	
)	ISCR Case No. 22-01155
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah Minster, Esq. Department Counsel
For Applicant: *Pro se*

05/25/2023

Decision

MURPHY, Braden M., Administrative Judge:

During a pre-polygraph interview conducted by another government agency (AGA) in about 2020, Applicant admitted to soliciting escorts for sexual services between 2012 and 2020. He did not provide sufficient evidence to mitigate resulting security concerns alleged under Guideline D (sexual conduct) and cross-alleged under Guideline E (personal conduct). Applicant’s eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 14, 2021, in connection with his employment in the defense industry. On August 31, 2022, following a background investigation, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline D (sexual conduct) cross-alleged under Guideline E (personal conduct). The DOD CAF issued the SOR under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security*

Clearance Review Program, dated January 2, 1992, as amended (Directive); and the Security Executive Agent Directive 4 (SEAD 4) *National Security Adjudicative Guidelines* (AG), which became effective on June 8, 2017.

Applicant answered the SOR on September 20, 2022, and requested a decision by an administrative judge from the Defense Office of Hearings and Appeals (DOHA) based on the administrative (written) record, in lieu of a hearing. On October 17, 2022, Department Counsel submitted the Government's File of Relevant Material (FORM), including documents identified as Items 1 through 4. DOHA mailed the FORM to Applicant on October 19, 2022, and he received it on November 10, 2022. He was afforded an opportunity to note objections and to submit material in refutation, extenuation, or mitigation, within 30 days from receipt of the FORM. Applicant did not respond to the FORM or note any objections to the Government's evidence.

The case was forwarded to the DOHA hearing office on December 15, 2022, and assigned to me on January 30, 2023. Government Items 1 and 2, the SOR and the Answer, are the pleadings in the case. Item 3 is Applicant's SCA, Item 4 is Applicant's Response to Interrogatories from DOHA, in which he adopted the summaries of his 2021 background interviews as accurate once he made corrections, additions, and deletions to them, on July 27, 2022. Items 3 and 4 are admitted without objection.

Findings of Fact

In his Answer to the SOR, Applicant admitted SOR ¶ 1.a with a brief narrative statement. He did not answer the cross-allegation at SOR ¶ 2.a. Applicant's admission is incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 47 years old. He earned a bachelor's degree in 1997 and a master's degree in 1999. He has been married since 2003, and he and his wife have two teenage children. He reported on his SCA that he had a clearance granted most recently in about March 2017. (Item 3)

Applicant also disclosed on his June 2021 SCA that in March 2020, his clearance was denied, suspended, or revoked by another government agency (AGA) due to "engagement in unlawful sexual services on a continuing basis." (Item 3)

Applicant gave additional details in a subsequent background interview, in September 2021. He explained that in March 2020, he was preparing to take a security clearance polygraph exam, and he voluntarily disclosed that beginning in 2012, he sought out escort services online. He would make contact and meet the escorts in their homes, sometimes for massages and sometimes for sex. He said he did this with varying frequency, to include weekly up to March 2020, the time of the polygraph. (Item 4 at 10)

(Note: the unauthenticated interview summary notes a frequency “varying from weekly to one or two times per month.” In the Interrogatory response, Applicant noted that this should be “varying from weekly to as long as six months or more.”) (Item 4 at 4) I interpret this to mean that there were at times gaps of “as long as six months or more” between his uses of escort services, although Applicant’s wording is not entirely clear).

In the interview summary, Applicant attributed his actions to a lack of intimacy in his marriage. He said his wife was unaware of his actions until March 2020, when he disclosed it to her. He said he has not engaged in the activity since March 2020. He said in the interview summary that as a result, his clearance was suspended for one year, and was reinstated in March 2021. (Item 4 at 10)

SOR ¶ 1.a alleges (and SOR ¶ 2.a cross-alleges) that Applicant “solicited escorts for sexual services with varying frequency from approximately 2012 to at least 2020.” In his SOR response, Applicant crossed out the words “at least” and wrote:

I admit to the Statement of Reasons as Amended with the retraction of the phrase ‘at least.’ Since the revocation of my clearance in March 2020, I have discontinued the solicitation of escorts for sexual services as promised in a previous telephone conversation. I will not further engage in said illegal activities. (Item 2)

Applicant did not elaborate. He did not submit any other statement or evidence with his answer to the SOR and he did not respond to the Government’s FORM, so he provided no additional information in mitigation.

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court has noted, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

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 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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline D: Sexual Behavior

AG ¶ 12 expresses the security concern for sexual conduct:

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. The following disqualifying conditions are applicable to Applicant's admitted conduct:

(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.

AG ¶ 14 sets forth the potentially applicable mitigating conditions for sexual conduct:

(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 actions which occurred while he held a security clearance and while working in the defense industry, put him in a position where he might have been subject to coercion, exploitation, or duress. He disclosed his engagement with escorts during a pre-polygraph interview, on his most recent SCA, and in the subsequent background interview. He also says he disclosed the matter to his wife. AG ¶ 14(c) applies. However, the extended nature of his activity as well as its relative recency weighs against application of AG ¶ 14(b). The fact that he held a security clearance, while not a disqualifying factor, further weighs against mitigation. I cannot conclude that Applicant's actions happened so long ago, so infrequently, or under such unusual circumstances, and no longer cast doubt on his current reliability, trustworthiness, or judgment. AG ¶ 14(b) does not apply.

Guideline E: Personal Conduct

AG ¶ 15 details the security concern regarding personal conduct:

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

(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;

(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.

SOR ¶ 2.a is a cross-allegation of Applicant's conduct under Guideline D, discussed above. SOR ¶ 1.a is "sufficient for an adverse determination," under Guideline D, so AG ¶ 16(c) does not apply to it. However, engaging the services of prostitutes satisfies both AG ¶¶ 16(e)(1) and 16(g). It also satisfies the general personal conduct security concern of AG ¶ 15 due to Applicant's repeated instances of poor judgment and failures to comply with rules and regulations that are clearly established.

AG ¶ 17 details the personal conduct mitigating conditions. The following warrant discussion:

(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;

(f) the information was unsubstantiated or from a source of questionable reliability; 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.

AG ¶ 17(c) does not apply to Applicant's engagement with escorts under Guideline E for the same reasons AG ¶ 14(b) does not apply under Guideline D. Similarly, AG ¶ 17(e) applies for the same reasons as set forth in AG ¶ 14(c).

Applicant has not established that AG ¶ 17(d) should fully apply. While he has acknowledged the behavior and represented that he has ceased it, he did so in a blanket statement in his SOR response, without any corroborating or supporting evidence. He has not indicated that he has participated in counseling regarding his behavior, or that circumstances have otherwise changed. As with AG ¶ 17(c), it also does not fully apply because he did not provide sufficient evidence to establish that his conduct will not recur.

AG ¶ 17(f) does not apply. Applicant did not establish that the information was unsubstantiated or from a source of questionable reliability.

AG ¶ 17(g) applies because Applicant's engagement with prostitutes has ceased. It was not unwitting, however, and, as addressed above, his actions occurred under circumstances that cast doubt upon his reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

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 the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines D and E in my whole-person analysis. Since Applicant elected a

decision on the written record, in lieu of a hearing, I did not have the opportunity to ask him questions about his conduct and his efforts towards rehabilitation. I also had no opportunity to observe Applicant's demeanor, and thus, to assess his credibility. Applicant has engaged in a pattern of extremely poor judgment and did so while in possession of a security clearance. He did not provide sufficient evidence to establish that he has mitigated the security concerns in this case. He has not shown that it is clearly consistent with the national interest to grant him eligibility for access to classified information. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility for access to classified information.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

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

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the interests of national security to grant Applicant access to classified information. Eligibility for access to classified information is denied.

Braden M. Murphy
Administrative Judge