



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



In the matter of: )  
)  
) ISCR Case No. 23-01840  
)  
Applicant for Security Clearance )

**Appearances**

For Government: David F. Hayes, Esq., Department Counsel  
For Applicant: *Pro se*

02/06/2024

**Decision**

HOGAN, Erin C., Administrative Judge:

This case involves security concerns raised under Guideline J, Criminal Conduct and Guideline D, Sexual Behavior. Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application on January 17, 2023. On August 23, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J and D. The CAS acted 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* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant timely answered the SOR on September 1, 2023, and requested a decision on the written record without a hearing. Department Counsel submitted the Government’s written case on October 26, 2023. On October 27, 2023, a complete copy

of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on November 2, 2023, and did not respond. The case was assigned to me on January 9, 2024. There being no objections, I admitted and considered all of the FORM's evidence, Items 1-5.

### **Findings of Fact**

Applicant is a 45-year-old employee of a DoD contractor. He has worked for a DoD contractor since 2021. He served on active duty in the U.S. Army from 1996 – 2000. He separated with an honorable discharge. He served in the Army National Guard from 2009 – 2015, separating with an honorable discharge. He has held security clearances in the past. His highest level of education is a bachelor's degree. He is widowed and has no children. He currently has a live-in partner. (Item 2; Item 3 at 9)

In his response to the SOR, Applicant admitted to all of the SOR allegations. His SOR admissions are incorporated as findings of fact. (Item 1) After a thorough review of the record evidence, I make the following additional findings of fact:

#### **Guideline J – Criminal Conduct**

SOR ¶ 1.a alleges: On January 27, 2020, you were arrested and charged with Solicitation of a Prostitute, Disorderly Conduct, Attempting to Engage in Prostitution, and Engaging in Prostitution. Applicant pled guilty to Solicitation of a Prostitute. He was ordered to complete a Human Trafficking Course and to complete one year of supervised probation. He completed a four-hour Prostitution Prevention Class on August 15, 2020. (Item 1; Item 4; Item 5; Item 3 at 9)

SOR ¶ 1.b alleges: From October 1998 to January 2020, Applicant solicited prostitutes with varying frequency, likely around 100 times total. He estimates he solicited and hired prostitutes approximately 100 times. (Item 3 at 6-7, 10)

On February 13, 2023, Applicant was interviewed by an investigator conducting his background investigation. During the background investigation interview, he was questioned about his arrest for Solicitation of a Prostitute in January 2020. He responded to an online advertisement from a woman. He was told by the woman to meet her at a hotel. His intent was to pay the woman to have sexual intercourse with him. Once he arrived at the hotel, he texted the woman who provided him the room number where she was located. He agreed to spend 30 minutes with her. As he was taking his coat off, several police officers came into the room and he was arrested and charged with the offenses as alleged in SOR ¶ 1.a. He spent the night in jail and was released the following morning. His girlfriend is aware of the arrest and is not very happy about it. In response to DOHA interrogatories dated July 18, 2023, Applicant reviewed a summary of the interview and indicated that he found it to be accurate after adding some additional information. (Item 3 at 6-10)

Applicant told the background investigator that he searched for and hired prostitutes online approximately 3-4 times a year over the past 10 years. His late wife was aware that he was hiring prostitutes during their marriage and was not pleased with his conduct. He was looking for prostitutes because he was looking for a good time and he wasn't getting what he needs at home. He understands soliciting and hiring prostitutes was illegal. He completed a human trafficking course which was required by his employer. (Item 3 at 10) In his response to interrogatories, dated August 21, 2023, he estimates he solicited and hired prostitutes approximately 100 times. (Item 3 at 6) In his Response to the SOR, he claimed he took a break from soliciting prostitutes during the period of 2008 to early January 2020. (Item 1)

Applicant voluntarily sought counseling with a therapist who is an expert in sexual problems. He met with the therapist once a week. The duration of the therapy sessions is unclear. (Item 3 at 10) He did not provide more details about his therapy. He did not obtain a letter from his therapist explaining the extent of the therapy and whether he made progress during his therapy sessions.

Applicant has held a security clearance on and off since 2001. He indicated on his January 2023 security clearance application that his security clearance was suspended in May 2009 after a polygraph. He admitted during a post-polygraph interview that he had conducted illegal activities in the past but has stopped the illegal activities. (Item 2 at 41-44) In his August 2023 response to interrogatories, he mentioned the illegal activities he disclosed during the post-polygraph interview was related to the solicitation and hiring of prostitutes. (Item 3 at 7)

In his response to the SOR, Applicant indicates his probation was terminated after one month because he had no prior arrests or convictions, and he promptly completed his court-ordered human trafficking course. He states he has not solicited prostitutes in three and half years. He is in the process of requesting his arrest be expunged from his records. He does not intend to solicit and hire prostitutes in the future. (Item 1, Response to SOR)

### **Policies**

The SOR was issued under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Eligibility for access to classified information may be granted "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, § 2. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one

has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in National Security Adjudicative Guidelines (Security Executive Agent Directive 4, effective June 8, 2017, or SEAD 4) App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

## Analysis

### Guideline J: Criminal Conduct

AG ¶ 30 articulates the security concern for criminal conduct:

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 includes a disqualifying condition that could raise a security concern 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.” The record

establishes AG ¶ 31(b). Further inquiry about the applicability of mitigating conditions is required.

AG ¶ 32 lists criminal conduct mitigating conditions that are potentially applicable in this case:

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

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant has a long history of soliciting and hiring prostitutes. He admits to hiring prostitutes over 100 times over a ten-year period. While he claims he has not solicited or hired prostitutes in over 3 ½ years, he has a lengthy history of these offenses. He continued to solicit and hire prostitutes after completing a work-related Human Trafficking course. He continued to solicit and hire prostitutes after he lost his security clearance in 2009 for the same conduct. He was aware that soliciting and hiring prostitutes was a criminal offense. Considering his lengthy history of soliciting and hiring prostitutes, not enough time has passed without a recurrence to demonstrate Appellant's successful rehabilitation. His criminal sexual misconduct casts doubt on his current reliability, trustworthiness, and good judgment. Criminal conduct security concerns are not mitigated.

#### **Guideline D: Sexual Behavior**

AG ¶ 12 articulates the security concern for sexual behavior:

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 includes disqualifying conditions that could raise a security concern and may be disqualifying in this case:

(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.

All of the above disqualifying conditions apply. Applicant solicited and hired prostitutes over a 10-year period on at least 100 occasions. He was aware that these acts were criminal offenses. His most recent offense was in January 2020. His conduct lacked discretion and judgment and makes him vulnerable to coercion, exploitation, or duress.

Further inquiry about the applicability of mitigating conditions is required.

AG ¶ 14 lists sexual behavior mitigating conditions that are potentially applicable in this case:

(b) the 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 good 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 enrolled in one, has demonstrated ongoing 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 mitigating conditions apply. While Applicant claims he has not solicited a prostitute in over 3 ½ years, he has a ten-year history of soliciting and hiring prostitutes. He continued to solicit and hire prostitutes after being denied a security clearance after he disclosed during a post-polygraph interview that he solicited and hired prostitutes. Considering his lengthy history of hiring prostitutes, it is too soon to conclude that the behavior is unlikely to recur.

It appears that Applicant's girlfriend is aware of his past solicitation of prostitutes. However, his past behavior could continue to serve as a basis for coercion, exploitation, or duress. His conduct was criminal and risky. I cannot conclude the behavior was strictly private consensual and discreet. He may be subject to coercion, exploitation, or duress if this disturbing information would be made public to his community.

Finally, while Applicant mentioned that he voluntarily sought therapy after his arrest in January 2020, he did not provide additional information about the therapy or a letter from his therapist which outlined the therapist's credentials as well as their opinion about whether Applicant was receptive to and made progress as a result of the therapy – in other words did he receive a favorable prognosis from a qualified mental health professional. Overall, I find that his sexual misconduct casts doubt on his current reliability, trustworthiness, and good judgment. None of the mitigating conditions fully apply. Sexual behavior security concerns are not mitigated.

### **Whole-Person Concept**

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. In applying the whole-person concept, an 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. 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 Guideline H in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). After weighing the disqualifying and mitigating conditions under Guidelines J and D and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his criminal conduct and sexual behavior.

### **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 J:	AGAINST APPLICANT
Subparagraphs 1.a, 1.b:	Against Applicant

Paragraph 2, Guideline D:

AGAINST APPLICANT

Subparagraph 1.a:

Against Applicant

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest of the United States to grant Applicant's eligibility for a security clearance. Clearance is denied.

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ERIN C. HOGAN  
Administrative Judge