



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 23-00317
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government:  
Aubrey De Angelis, Esquire, Department Counsel

For Applicant:  
Ryan C. Nerney, Esquire  
Tully Rinckey, PLLC

03/21/2024

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**Decision**

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ROSS, Wilford H., Administrative Judge:

**Statement of the Case**

Applicant submitted Electronic Questionnaires for Investigations Processing (e-QIP) on January 29, 2015; and February 13, 2019. (Government Exhibits 1 and 2.) On March 28, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines D (Sexual Behavior), J (Criminal Conduct), and E (Personal Conduct). The 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 after June 8, 2017.

Applicant answered the SOR in writing (Answer) on June 15, 2023, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on July 25, 2023. The case was assigned to another administrative judge on August 1, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on August 7, 2023. The case was reassigned to me on August 8, 2023. I convened the hearing as scheduled on September 7, 2023. The Government offered Government Exhibits 1 through 6, which were admitted without objection. Applicant testified on his own behalf, called one witness, and submitted Applicant Exhibits A through K. Applicant's exhibits were admitted without objection. DOHA received the transcript of the hearing (Tr.) on September 21, 2023.

### **Findings of Fact**

Applicant is a 49-year-old lead voice engineer with a defense contractor. He has worked for the company since 2014. He is single with a long-term girlfriend. He has a bachelor of science degree. He is seeking to obtain or retain a security clearance in connection with his work with the DoD. (Government Exhibit 1 at Sections 12, 13A, 17, and 25; Tr. 65-66.)

#### **Paragraph 1 (Guideline D – Sexual Behavior)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in sexual behavior that involves a criminal offense, reflects a lack of judgment or discretion, or may subject the individual to undue influence or coercion, exploitation, or duress. Applicant admitted in part and denied in part all three allegations under this paragraph with explanations.

#### **Paragraph 2 (Guideline J - Criminal Conduct)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because the conduct alleged under Paragraph 1, above, constitutes criminal activity that creates doubts about a person's judgment, reliability, or trustworthiness. Applicant admitted in part and denied in part the single allegation under this paragraph.

1.a. Applicant admitted that he paid for manual sexual acts at massage parlors about five to ten times between approximately 2012 and 2016.

Applicant stated that this conduct began when he was receiving massage therapy for an injury to his back and ankle. When the therapist began making advances that would result in sexual activity he went along with the conduct. He would go to the same massage parlor every few months over the period in question to engage in similar activity. The

massage parlor visits ended about the time Applicant was being considered for a security clearance by another Federal agency. That agency denied his security clearance request on January 24, 2017, based on this activity and the incident discussed in subparagraph 1.b., below. (Government Exhibits 3 and 4 at 11-15; Applicant Exhibit B; Tr. 34-39, 50-51, 62-64, 78-83.)

1.b. Applicant admitted that he was arrested in December 2010 for Solicitation of Prostitution. He denied that he was charged with the offense.

This incident occurred when Applicant stopped his car and began talking to a woman who was an undercover police officer. What may have begun as innocent flirtation eventually became a solicitation for prostitution. Applicant was detained by the police and issued a summons. The FBI identification record confirms that he was only detained. Applicant subsequently reported to court as ordered and found out that no charges were filed. Records from the court confirm this fact. (Government Exhibits 5 and 6; Applicant Exhibit J; Tr. 39-45, 71-78.)

1.c. Applicant admitted that he paid for sexual relations with a female prostitute at a legal brothel in Nevada in about 2009. The Government stipulated on the record that his actions concerning the brothel in Nevada were not illegal under that state's law. (Tr. 45-47, 70-71.)

Applicant has been receiving therapy for his sexual-related issues since 2017. This was after the denial of his clearance by the other agency. He stated that he began therapy because he did not want to continue to do the things he was doing. His therapist has diagnosed Applicant with Post-Traumatic Stress Disorder, Chronic on the basis of a severe childhood trauma (he almost drowned). The therapist submitted a letter on his behalf stating that Applicant has been a consistent participant in treatment and has made progress. She stated, "[Applicant] has been observed to have made better choices to improve his life by this writer." (Applicant Exhibit G; Tr. 48-50, 83-84.)

Applicant received an evaluation dated June 8, 2023, from a psychologist. The report covered the areas alleged in the SOR. (Applicant Exhibit H.) He conducted a thorough examination of Applicant that included an interview, various psychological tests, and review of relevant documentation. The psychologist opined, "It appears he [Applicant] has been effective at resolving past trauma experiences and changing his behavior so that the risk of inappropriate or illegal sexual activity in the future is low. His prognosis is currently very good." (Applicant Exhibit H at 9.)

In addition to therapy, Applicant also successfully completed a "Prostitution Prevention Class." (Applicant Exhibit L.)

With regard to all the above conduct Applicant states, "I'm not the same person that I was then. It was very shameful. It was wrong. And I've grown. I've really grown since

then. And I have a lot to lose. And I just - - I mean, it's dirty. And it's not something that I will do." (Applicant Exhibit B; Tr. 39, 60-62.)

### **Paragraph 3 (Guideline E – Personal Conduct)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in conduct that shows poor judgment, untrustworthiness, or unreliability. Applicant admitted in part and denied in part both the allegations under this paragraph with explanations. The allegations concern Applicant's interview with an investigator from the Office of Personnel Management (OPM) on December 11, 2019.

Government Exhibit 4 consists of Reports of Interview (ROI) of investigative interviews with Applicant conducted on May 21, 2015; November 24, 2015; September 27, 2016; and December 11, and December 16, 2019.

During the May 2015 interview with an investigator from the OPM, Applicant fully disclosed the facts of his 2010 arrest for Solicitation of Prostitution. (SOR 1.b.) (Government Exhibit 4 at 24; Tr. 52-54.)

During the November 2015 interview with an investigator from the OPM, Applicant again fully disclosed the facts of his 2010 arrest for Solicitation of Prostitution. (SOR 1.b.) (Government Exhibit 4 at 20-21; Tr. 52-54.)

During the September 2016 interview with an investigator with the other Government agency, Applicant fully disclosed the facts of his 2010 arrest for Solicitation of Prostitution. (SOR 1.b.) He also fully disclosed that he had attended massage parlors for manual sexual stimulation five to ten times. (SOR 1.a.) He also fully disclosed his visit to a legal brothel in 2009. (SOR 1.c.) (Government Exhibit 4 at 12-14; Tr. 51-52.)

As stated, Applicant was interviewed on December 11, 2016, by an investigator with OPM. According to Applicant the investigator did not ask him about the massage parlors, or the brothel visit, and Applicant had to bring the subject up to the investigator. It is also noted that Applicant voluntarily provided the investigator with the letter of denial from the other Government agency. (Government Exhibit 3; Tr. 55-59, 85.)

3.a. The Government alleges in this subparagraph that Applicant falsified facts during his December 11, 2019 interview concerning how many times he had visited massage parlors. According to the ROI Applicant admitted to one incident in a massage parlor during the December 11, 2019 interview. As stated, Applicant provided the investigator with the denial letter from the other Government agency, which completely set forth Applicant's conduct with massage parlors. According to the December 16, 2019 ROI, Applicant subsequently admitted that he had not talked about the additional sexual activity at massage parlors because he was ashamed. However, once again, this statement by the investigator, which may or may not be a direct quotation from Applicant, is contradicted by the fact that the Applicant provided the letter of denial from the other

government agency. (Government Exhibit 3.) That letter, dated February 21, 2017, stated, "You [Applicant] acknowledged you received happy endings after five to ten massages over the last three years."

3.b. The Government alleges in this subparagraph that Applicant falsified facts during the December 11, 2019 interview concerning his visit to a legal brothel in Nevada in 2009. After discussing his 2010 arrest the ROI stated, "Subject has never been involved in this activity prior to or since the arrest for solicitation in Dec 10. The arrest was an isolated incident and not part of [a] pattern or ongoing activity." The ROI does not specify what the specific "activity" was. In other words, did the interviewer, or Applicant, mean soliciting women on the street for prostitution or visiting a legal brothel? Based on the available evidence, I find that the allegation is too vague to find that Applicant falsified this interview on this topic.

Applicant admitted that he had not told his partner about these incidents because they had agreed not to talk about the past. However, he did indicate an intent to tell her about them in the near future. As set forth below, Applicant's supervisor and other co-workers do have knowledge of all the incidents. Accordingly, I find Applicant has vitiated any possible coercion concerns. (Tr. 60, 86-90.)

## **Mitigation**

Applicant's direct supervisor testified on his behalf and provided a written statement. Her evaluations of Applicant were also provided. She has been his supervisor for seven years. She does not hold a security clearance, but is knowledgeable about the allegations in the SOR. She testified that Applicant is a person of integrity and trustworthiness, that he is one of her top performers, and that she continues to have confidence in him. She recommends him for a position of trust. (Applicant Exhibits C at 3 and F; Tr. 20-28.)

Letters of recommendation were submitted by two coworkers. Each of them has known Applicant for about seven years. Each of them has knowledge of the allegations in this case. They both state that Applicant is trustworthy and believable. They find him to be a hard-working person of integrity and recommend him for a position of trust. (Applicant Exhibits C at 1, 2.)

An additional letter of recommendation was submitted by a long-time friend of Applicant who is a healthcare client manager. She has known Applicant for 15 years. She states, "His [Applicant's] character is one of a person who is caring, helpful, and trustworthy." (Applicant Exhibit K.)

## Policies

When evaluating an applicant's national security eligibility 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 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 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.

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

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) 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's admitted sexual behavior in 2009 (SOR 1.c.), 2010 (SOR 1.b.), and between approximately 2012 and 2016 (SOR 1.a.) is cognizable under all four of the disqualifying conditions. Accordingly, the burden falls to Applicant to mitigate them.

The following mitigating conditions are possibly applicable under AG ¶ 14:

- (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; 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.

All three of the mitigating conditions have application in this case. The brothel incident and the attempted solicitation happened almost 14 years ago. Such conduct has not been repeated. The massage parlor incidents were fully discussed with the other Government agency and with me. The last such activity occurred approximately seven years ago.

Applicant has been receiving successful treatment for all the conduct since 2017. This is supported by the written statements of his therapist and the consulting psychologist. The chance of any recurrence is extremely low. This allegation is found for Applicant.

### **Paragraph 2 (Guideline J – Criminal Conduct)**

The security concerns relating to the guideline for criminal conduct are set out in AG ¶ 30, which states:

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

(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.

Appellant was arrested for solicitation of prostitution in 2010. (SOR 1.b.) He attended massage parlors and received manual sexual acts between approximately 2012 and 2016. (SOR 1.a.) Both of the above disqualifying conditions have application to these two allegations.

Applicant frequented a legal brothel in 2010. (SOR 1.b.) That is not a criminal act. As such, it shall not be considered under this guideline.



The guideline includes four conditions in AG ¶ 32 that could mitigate the security concerns arising from Appellant's alleged criminal conduct. Two have possible application to the facts of 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.

Both of the mitigating conditions have application in this case. The arrest for soliciting prostitution occurred 13 years before the record closed and there has been no recurrence of the conduct. The massage parlor visits ended in 2016. Since then Applicant has been successfully participating in therapy and working for his current employer, as confirmed by his therapist, consulting psychologist, and long-time supervisor. This allegation is found for Applicant.

### **Paragraph 3 (Guideline E – Personal Conduct)**

The security concern relating to the guideline for Personal Conduct 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 guideline notes several conditions that could raise security concerns under AG ¶ 16. Two are potentially applicable in this case:

(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 government representative; and

(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.

The following mitigating conditions under AG ¶ 17 are possibly applicable to Applicant's conduct:

(a) the individual made prompt, good faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(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.

Applicant is alleged to have intentionally falsified material information about his sexual history during an interview on December 11, 2019. Any discussion of possible falsification during the interview must begin with the fact that it was **Applicant** who provided Government Exhibit 3, the denial letter from the other Government agency, to the interviewer. Government Exhibit 3 sets forth in detail all the facts set forth under paragraph 1 of the SOR. According to Applicant the interviewer had no knowledge of the letter of the facts involved. Therefore the SOR allegation that somehow Applicant had falsified his interview is, at the very least, contrary to the evidence. In my opinion both of these allegations are not proved by even substantial evidence.

However, assuming that Applicant did falsify his December 11, 2019 interview, any falsification is mitigated for the following reasons. First, and most important, within days of the initial interview Applicant provided Government Exhibit 3 to the investigator. AG ¶ 17(a) applies.

In addition, any alleged false statement must be weighed against Applicant's repeated truthful statements to other investigators, including from the other Government agency, over several years. The Government was knowledgeable of Applicant's past. The alleged conduct, if true, was infrequent and is extremely unlikely to recur given the number of people at his employer who know about it. AG ¶ 17(c) applies.

Based on the foregoing, Applicant has completely mitigated the Guideline E allegations and they are found for him.

## 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 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. Applicant has mitigated his alleged sexual misconduct, associated criminal conduct, and falsification of the same during interviews. He has eliminated the potential for pressure, coercion, or duress. Overall, the record evidence does not create substantial doubt as to Applicant's present 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 D:	FOR APPLICANT
Subparagraphs 1.a through 1.c:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraphs 3.a and 3.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 or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS  
Administrative Judge