



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



In the matter of:)
)
) ISCR Case No. 21-00525
)
Applicant for Security Clearance)

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: Alan Edmunds, Esq.

02/09/2024

Decision

HYAMS, Ross D., Administrative Judge:

Applicant did not mitigate the criminal conduct and personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 2, 2018. On March 21, 2022, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct. Applicant answered the SOR on May 10, 2022, and requested a hearing before an administrative judge. The case was assigned to me on February 2, 2023.

The hearing convened, as scheduled, on August 24, 2023. Department Counsel submitted Government Exhibits (GE) 1-5, which were admitted in evidence without objection. Applicant submitted Applicant’s Exhibits (AE) A-H, which were admitted in evidence without objection.

Findings of Fact

In his answer, Applicant denied the SOR allegations. Based on my review of the pleadings, evidence submitted, and testimony, I make the following findings of fact.

Applicant is 36 years old. He has never been married. He has one minor child. He has worked for a defense contractor as a power production specialist since 2021. He graduated from high school in 2005. He served on active duty with the Air Force from 2005-2009 and received a general discharge under honorable conditions. He has possessed a security clearance since 2005. (Tr. 18-20; GE 1, 2)

While working for a defense contractor at a U.S. military facility in Country A, Applicant used a popular dating app to meet women. In February 2018, he met a 22-year-old woman from Country B on the dating app. She told him that she and her 17-year-old friend were coming to Country A for work and they were looking for a place to rent a room. He volunteered that he had a room that they could rent and provided her pictures of his apartment. She told him that he needed to talk to their "boss" about having them stay with him. (Tr. 20-48; GE 3, 5)

Applicant was unaware that his interactions on the dating app were with a Naval Criminal Investigative Service (NCIS) undercover agent investigating human trafficking and prostitution in Country A. He claimed that his understanding was that the two women were going to be working as waitresses. However, investigation records show that Applicant understood that these women were coming to Country A to work as prostitutes. The records reveal that he wanted rent money and oral sex if the women stayed with him. (Tr. 20-48; GE 3, 5)

A few days after conversing with the woman, a meeting was arranged with their boss, who was an NCIS undercover asset. A meeting location near the Navy base was recommended, but Applicant suggested a place further away. He claimed that he wanted a more distant meeting location because he did not want to fraternize with military personnel, not because he had anything to hide. (Tr. 20-48; GE 3)

Applicant's meeting was recorded and transcribed by NCIS and is in the record. He was told that the boss brings women from Country B to work in Country A for prostitution. Country B is a well-known location for sex tourism. He was told that the two women coming were the 22 year old with whom he had already met on the dating app, and a beautiful 17-year-old girl. Applicant repeated his offer for them to rent a room in his apartment. Applicant was asked to hold their passports, and make sure that they stay in Country A to make money and repay their travel expenses. He was told that on paper, they would work for a restaurant, but in reality, they would be prostitutes. He was told that he could "test the product". Applicant stated that he was interested in the money. They agreed the girls would come on Friday when Applicant was not working, and Applicant would pick them up from the airport. (Tr. 20-48; GE 3)

After their meeting, Applicant started to get suspicious of the arrangement. He did not show up to the airport to pick up the women. Shortly after, he sent a text message to the boss to apologize and told him that he had a work conflict on that day. He inquired about the status of the women and made arrangements to meet with the boss again and pick up the women. Although the second meeting did not occur, surveillance footage showed that Applicant went to the arranged meeting point. (Tr. 20-48; GE 3, 5)

A few days after these events, Applicant was asked to meet with NCIS. He was told that they were investigating the boss and that he may have been a victim of a crime. He was cooperative and provided information. He claimed not to know the second woman's age. He told NCIS that he was not told the women were prostitutes, but he came to suspect it during his meeting with the boss. He let them review his phone for the investigation, but after turning it over, they provided him with a search warrant. Over six months, NCIS conducted a forensic examination of the phone, the dating app, and a messaging app. The data showed that he was told that these women were prostitutes, and the likely amount of income they would make working as prostitutes five days a week. He was told in writing that the second woman was 17 years old. Data from the phone also revealed that on other occasions he discussed paying for sex acts with four other women, which were unrelated to these events. (Tr. 20-48; GE 3, 5; AE B)

Although this case was investigated pursuant to attempted violations of 18 U.S.C. section §1591 (Sex trafficking of children or by force, fraud, or coercion), the U.S. Department of Justice ultimately decided not to prosecute this case under the Military Extraterritorial Jurisdiction Act. However, a decision was made to bar Applicant from all military installations in Country A over this incident. (GE 3; AE A, C)

In a September 24, 2020 sworn interview about the incident with a government investigator, which applicant signed as true under the penalty of perjury, he stated that there was no mention of the women being prostitutes or underage. At the hearing, he claimed that he made these false statements because he forgot the details two years later. (Tr. 20-48; GE 5)

Applicant submitted three character letters and copy of his request to the U.S. military to remove the debarment order, which contained false factual information. Applicant testified that he had mandatory DoD human trafficking training prior to this incident. (Tr. 43-44; AE G, H)

The SOR alleges the following:

¶ 1.a alleges that in February 2018 Applicant agreed to harbor two nationals of Country B, one being 17 years old, trafficked to Country A for the purpose of engaging in prostitution, in violation of 18 U.S.C. §1591.

¶ 2.a alleges that in February 2018 Applicant agreed, in exchange for money, to provide lodging to two women, including a 17 year old, whom he believed were being trafficked to Country A from Country B for prostitution.

¶ 2.b alleges that in May 2018, Applicant was barred from military installations in Country A for the conduct alleged in ¶ 2.a.

¶ 2.c alleges that Applicant falsified material facts in a sworn affidavit with a government investigator on September 24, 2020 by stating that there was no mention of the women from Country B being prostitutes or underage.

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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 to be 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, administrative judges apply the guidelines 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(c), 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."

Under Directive ¶ E3.1.14, the Government must 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." The applicant 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.

Section 7 of EO 10865 provides that adverse 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 J, Criminal Conduct

AG ¶ 30 expresses 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 31. The following are potentially applicable 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.

Post hearing, the parties made arguments about application of the trafficking statute alleged under Guideline J. In Hearing Exhibit (HE) 2, Applicant argued that 18 U.S.C. §1591 (Sex trafficking of children or by force, fraud, or coercion) or the statute prohibiting prostitution or solicitation (25 CFR § 11.453) does not apply in this case because Applicant's focus was on helping the women find a place to stay, and not engaging in illicit or illegal activities. He asserts that his behavior was altruistic and limited to a standard rental agreement, and he had no knowledge of illicit or illegal activities they would be committing. In HE 3, Department Counsel argued Applicant negotiated for sex acts as part of the payment for housing women that he that knew were going to engage in prostitution, one being under 18 years old, and he took several substantial steps in furtherance of this act.

The investigation records in evidence (GE 3) do not support Applicant's assertion that he was simply being altruistic, this was a standard rental agreement, and that he had no knowledge of illegal or illicit activities. Applicant's version of events are not credible. In this case, Applicant's acts fall under 18 U.S.C. §1349 – Attempt and Conspiracy:

Any person who attempts or conspires to commit an offense under this chapter shall be subject to the same penalties as those prescribed for the

offense, the commission of which was the object of the attempt or conspiracy.

The allegations in ¶ 1.a are established by the investigation records, Applicant's testimony, and the sworn statement. AG ¶¶ 31 (a) and (b) apply.

I have considered the mitigating conditions under AG ¶ 32. The following are potentially applicable:

(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.

AG ¶ 32(a) does not apply. Applicant continues to maintain a false narrative about the incident. The record showed that Applicant had corresponded on other occasions with women about paying for sex acts. There is insufficient evidence to find there is mitigation by the passage of time, that it is unlikely to recur, and does not cast doubt on his reliability, trustworthiness, and good judgment.

AG ¶ 32(d) does not apply. Applicant did not provide sufficient evidence to find that there has been successful rehabilitation, mitigation by the passage of time, or good employment record, job training, or constructive community involvement that mitigates the criminal conduct concerns. Other factors are not applicable.

Guideline E, Personal Conduct

AG ¶ 15 details 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...

I have considered the disqualifying conditions for drug involvement under AG ¶ 16 and the following is 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.

(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;

(2) while in another country, engaging in any activity that is illegal in that country;

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

SOR ¶ 2.a largely cross-alleged the allegations in ¶ 1.a, which were established under Guideline J. The allegation in ¶¶ 2.a, 2.b, and 2.c are established by the investigation records, Applicant's testimony, and the sworn statement. AG ¶¶ 16 (b) and (e) apply.

I have considered the mitigating conditions under AG ¶ 17. The following are potentially applicable:

(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

(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.

AG ¶ 17(c) does not apply. The attempted offense was not minor and was criminal in nature. Applicant lied about material facts in a sworn statement in September 2020, and he continues to maintain a false narrative about the incident. His version of events and reason why he provided false information in the sworn interview with a government investigator are not credible. There is insufficient evidence to find there is mitigation by the passage of time, the behavior is infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on his reliability, trustworthiness, and good judgment.

AG ¶ 17(d) does not apply. Applicant did not provide sufficient evidence to find that he has obtained counseling to change his behavior or taken the necessary steps to alleviate stressors, circumstances, or factors that contributed to his untrustworthy, unreliable, and inappropriate behavior. He did not provide sufficient evidence to find that such behavior is unlikely to recur.

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 considered his military service and character letters. I have incorporated my comments under Guidelines J and E in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility for a security clearance. He did not mitigate the security concerns under Guidelines J 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 J:	AGAINST APPLICANT
Subparagraphs 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.c:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Ross D. Hyams
Administrative Judge