



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 23-02695

Appearances

For Government: Jenny Bayer, Esq., Department Counsel

For Applicant: *Pro se*

11/20/2024

Decision

CERVI, Gregg A., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on February 24, 2023. On January 18, 2024, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) (now known as the DCSA Adjudication and Vetting Services (AVS)), sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines D, E, and J. The DCSA CAS acted 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* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR (Ans.) and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written case on April 11, 2024. On April 12, 2024, 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 April 28, 2024, but did not submit a response or object to the Government's exhibits. The case was assigned to me on September 9, 2024. The FORM identified the SOR and Applicant's Answer to the SOR as Government Exhibits (GE) 1 and 2, which are already part of the record. Government Exhibits 3-6 are admitted into evidence without objection.

Findings of Fact

Applicant is a 39-year-old personal computer technician, employed by a defense contractor since February 2023. He has worked in information technology since 2010 and traveled extensively overseas for work assignments. He received an associate degree in 2007 and a bachelor's degree in 2010. Applicant is unmarried and has no children. He was granted security eligibility in 2017.

The SOR alleges under Guideline D that Applicant was arrested in March 2020 and charged with Disorderly Conduct: Prostitution – Compensation for Sex; and that he solicited prostitutes through an online platform, about once per month, from September 2018 to March 2020. The same allegations were cross alleged under Guidelines E and J. Applicant admitted the charge and period of solicitation under Guidelines D and J, but denied the cross-alleged allegations under Guideline E.

In March 2020, Applicant was arrested by undercover police officers after approaching a hotel room where he expected to meet a prostitute. He was charged with misdemeanor solicitation of prostitution and pleaded not guilty. In an apparent plea arrangement, he completed a 16-hour prostitution prevention class, the charge was dismissed, and his arrest record was sealed. Applicant admitted to utilizing a website to solicit prostitutes between September 2018 and March 2020. He met the prostitutes at various hotels and stated that he engaged in the behavior because he was bored and wanted "entertainment." GE 6. Applicant said he does not want anyone to know of his past behavior but believes he is not susceptible to blackmail, pressure, coercion, or duress. *Id.*

Applicant reported his arrest and subsequent dismissal of the charge in his SCA. He stated, "I contacted a lady on a dating site and went to visit her at the hotel. I was arrested for soliciting a prostitute." GE 3. In his Answer to the SOR, he stated that he was arrested four years ago and no longer engages in solicitation activities, and he has taken steps to correct his mistake by enrolling in a prostitution prevention class. Ans. He noted that during the period when he was soliciting prostitutes, he was traveling often for work and became lonely, so he sought companionship online. He asserts that he has been truthful during the security investigation process, has taken responsibility for his actions, and the arrest was the first time he has had legal trouble. He said he is now a more responsible individual with good judgment. *Id.*

Applicant requested a determination on the record without a hearing, so I had no opportunity to evaluate his credibility and sincerity based on his demeanor, or to question him about the circumstances that led to his history of solicitation, arrest, and any action he has taken to change his behavior or show other mitigation. In particular, the record is devoid of evidence of personal counseling except for offering a certificate from the prostitution prevention class he completed for the court, and other evidence in mitigation.

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant Applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the Applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the Applicant that may disqualify the Applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria

listed therein and an Applicant's security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An Applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An Applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue a security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

Analysis

Guideline D: Sexual Behavior

The security concern under this guideline 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 relevant disqualifying conditions under AG ¶ 13 include:

- (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.

The record evidence supporting the SOR allegations and Applicant's admissions are sufficient to establish the disqualifying conditions listed above.

The following mitigating conditions under AG ¶ 14 are 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;

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

(e) the individual has successfully completed an appropriate program or 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.

The sexual behavior alleged in the SOR occurred between 2018 and 2020, including possibly in locations outside of the United States based on Applicant's explanation that he was often traveling and lonely during the time he participated in this behavior. The record does not clearly establish that Applicant was involved in solicitation activities while overseas. Applicant was arrested for solicitation during commission of the last offense in the U.S. in 2020. Although there is no evidence that the behavior has been repeated since 2020, the pattern of illegal sexual conduct that occurred monthly for two years before he was caught, casts doubt on his judgment, discretion, honesty, and personal responsibility. Of note, Applicant disclosed his arrest in his 2023 SCA but downplayed his involvement in solicitation of a prostitute, rather he implied by the language he used to describe the event that he was using a legitimate dating site and was surprised that it turned out to be a prostitution site. In his Answer to the SOR, he claimed that this arrest was the first time he has had legal trouble, but apparently ignores his admitted two years of illegal, sexual activity before being caught.

Applicant has successfully completed a prostitution prevention class in order for his charge to be dismissed but has not completed any other personal counseling or treatment, nor has he shown that his lifestyle and personal conduct has changed such that recurrence is unlikely. Applicant has not submitted sufficiently persuasive evidence in mitigation to show that he now holds the requisite judgment expected of a cleared individual and additional illegal sexual behavior will not recur. I am not persuaded by Applicant's expressions of responsibility or trustworthiness. Regardless of whether some of the solicitation activities occurred overseas or solely in the U.S., Applicant has failed to proffer sufficient evidence to fully apply any mitigating condition.

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 ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying condition is applicable:

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

Guideline E includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 but find that none are fully applicable. As discussed above and incorporated herein, the record establishes Applicant's history of illegal conduct that eventually resulted in an arrest. The sexual behavior alleged in the SOR occurred between 2018 and 2020, including possibly in locations outside of the United States based on Applicant's explanation that he was often traveling and lonely during the time he participated in this behavior. However, the record does not clearly establish that Applicant was involved in solicitation activities while overseas. Therefore, AG ¶ 16(e)(1) is the applicable disqualifying condition.

Cumulatively, Applicant's conduct raises doubts about his judgment and personal responsibility. Insufficient mitigation evidence was submitted to persuade me that he now possesses the responsibility or judgment expected, and as stated earlier, I had no opportunity to question Applicant about his conduct and potential mitigation because he elected to have a decision without a hearing. I am not persuaded that Applicant's conduct will not recur and that he has expressed appropriate contrition, sought personal treatment, taken positive steps to alleviate stressors or circumstances related to his conduct, or has shown that similar behavior has not continued or is unlikely to recur.

Guideline J, Criminal Conduct

The Security concern under this guideline is set out in AG ¶ 30:

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

(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.

Applicant's admissions, testimony, and the documentary evidence in the record concerning his criminal conduct are sufficient to establish the above disqualifying condition.

Conditions that could mitigate criminal conduct security concerns are provided 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.

The discussion above under Guidelines D and E are incorporated herein. Applicant's criminal behavior occurred four years ago and there is no evidence that it has been repeated. However, Applicant's conduct was hidden for two years before it was discovered during a police sting operation. Although he acknowledged the wrongfulness of his conduct in his Answer to the SOR and successfully completed a court-sanctioned prostitution prevention class, his SCA entry that apparently minimizes his knowledge of the wrongfulness of his conduct remains concerning. Applicant has not met his burden of proof to show the offenses have been mitigated by a showing of no recurrence of criminal activity or other persuasive evidence in mitigation.

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 Guidelines D, E, and J in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). I have considered Applicant's claims that he no longer engages in solicitation activity and that his judgment is rehabilitated, but I find that his statements are unsupported by persuasive evidence. Since he requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor, or to question him about the circumstances that led to his past behavior, arrest, his current lifestyle, and any action he has taken to change his behavior. Applicant failed to carry his burden of proof on each of the allegations, and I am not persuaded by his admissions and denials.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person, including exceptions available under Appendix C of SEAD 4. I conclude Applicant has not mitigated the security concerns raised by his conduct.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Guideline D (Sexual Behavior): Subparagraphs 1.a and 1.b:	AGAINST APPLICANT Against Applicant
Guideline E (Personal Conduct): Subparagraph 2.a:	AGAINST APPLICANT Against Applicant

Guideline J (Criminal Conduct):
Subparagraph 3.a:

AGAINST APPLICANT
Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for access to classified information. Clearance is denied.

Gregg A. Cervi
Administrative Judge