



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



In the matter of: )  
)  
) ISCR Case No. 23-02032  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Aubrey De Angelis, Esq., Department Counsel  
For Applicant: Ryan Nerney, Esq.

06/25/2024

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**Decision**

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BENSON, Pamela C., Administrative Judge

Applicant failed to mitigate the security concerns under Guidelines. D (Sexual Behavior) and E (Personal Conduct). National security eligibility for access to classified information is denied.

**Statement of the Case**

On February 16, 2023, Applicant submitted a security clearance application (SCA). On November 21, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guidelines D and E. The action was taken under Executive Order (EO) 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) effective within the DOD on June 8, 2017.

Applicant answered the SOR on December 1, 2023. He admitted SOR ¶ 2.b, and he denied the remaining five SOR allegations. (SOR response) Applicant obtained counsel and requested a hearing before an administrative judge. On March 6, 2024, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for April 4, 2024. The hearing was held as scheduled using Microsoft Teams.

During the hearing, Department Counsel offered Government's Exhibit (GE) 1-4, and Applicant offered Applicant's Exhibits (AE) A-J. All proffered exhibits were admitted into evidence without objection. Applicant called two witnesses to testify on his behalf. DOHA received the hearing transcript (Tr.) on April 11, 2024.

### **Findings of Fact**

Having thoroughly considered the evidence in the record, I make the following findings of fact: Applicant is 77 years old. He earned a Ph.D. in 2000. Applicant was married in 1968 and divorced in 1979. He married again in 1988, which ended in a divorce in 2015. He remarried a third time in October 2022. He has five adult children from his first two marriages. Since September 1986, Applicant has been employed as an engineer by a DOD contractor. He first obtained a DOD security clearance in about 1968 while he was employed with a different DOD contractor. (Tr. 33-36, 78-79; GE 1)

### **Sexual Behavior and Personal Conduct**

SOR allegation ¶ 1.a alleges under Guideline D that in approximately August 2022, Applicant was charged with solicitation of prostitution. The charge was dismissed following an agreement between Applicant and the complainant where Applicant paid the alleged victim \$5,000 to "avoid the necessity and embarrassment of a trial." (AE E) He denied this allegation in his December 2023 response to the SOR, and listed,

... this incident was not about sexual behavior. It was about a misunderstanding in communicating with a non-English speaking individual. The incident was as follows. While waiting for the elevator in the lobby of my condominium, a female member of the cleaning crew was mopping the floor. I asked her, "How is your day going?" When the person looked puzzled and responded in Spanish, I tried to use hand gestures to ask my question. The female worker mistook my hand gestures as a sexual advance but that was not my intent. (SOR response)

SOR allegation ¶ 2.c alleges under Guideline E that Applicant falsified material facts on his February 2023 SCA, in response to "Section 22 - Police Record: Have any of the following happened? In the last seven (7) years have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you? [and] In the last seven (7) years have you been charged, convicted, or sentenced of a crime in any court? (Include all qualifying charges, convictions or sentences in any Federal, state, local, military, or non-U.S. court, even if previously listed on this form.)" Applicant answered "no" to both questions and deliberately failed to disclose the criminal charge as set forth in subparagraph 1.a, above.

SOR allegation ¶ 2.d alleges that Applicant deliberately attempted to conceal material facts during a July 7, 2023 background interview with a DOD authorized investigator about his criminal charge as set forth in subparagraph 1.a, above.

Applicant was interviewed by an authorized DOD investigator on July 7, 2023, as part of his background investigation. The triggered interview was required to discuss his

omitted September 2022 arrest for solicitation of prostitution on his February 2023 SCA. He was asked by the investigator if he had ever engaged in any illegal sexual conduct, or engaged in any form of illegal activity, and Applicant answered "no", to both questions. Upon further questioning, he eventually admitted that he had been charged with a misdemeanor, but it had been dismissed in court and it was in the process of being expunged. The investigator asked what specifically he had been charged with, but Applicant stated he preferred not to answer. The investigator told Applicant that he was required to disclose and discuss the criminal charge during his background investigation for a DOD security clearance. (GE 2)

Applicant then revealed to the investigator that he had been charged with solicitation of prostitution. He explained that on the day of the incident in late 2021, he passed a member of the cleaning staff while he was walking towards the condominium elevator, and he said hello to her. The lady responded in Spanish, and he could not interpret what she said to him. He made a hand gesture, not specifically recalled, but he made it to imply hello. The investigator asked if he had waved his hand, a common hello gesture, but Applicant was uncertain. He then entered the elevator and went about his day. (GE 2)

The investigator confronted Applicant with details from a police report and asked him if he had ever asked the cleaning lady if she wanted to make extra money while making a sexual gesture with his hand. (One hand making a circle and the finger from his other hand poking the circle.) Applicant stated this was a completely false and made-up allegation. He believed she saw him leave from his penthouse condo and saw this as an opportunity to make money from a financially healthy resident. When he and his lawyer went to court to answer the charge, the woman was facing deportation by immigration for unknown reasons. The complainant agreed to dismiss the charge, and the charge was dismissed by the court. Applicant stated that he did not have to pay a fine or any restitution to the woman. The investigator then confronted him about paying the complainant a \$5,000 settlement to have the case dismissed. Applicant agreed he paid the woman \$5,000, but reiterated the court did not require him to pay this money. The case was dismissed and fully resolved. (GE 2; Tr. 80, 82; AE E)

During the hearing, however, Applicant's account of the incident with the cleaning lady which resulted in the charge being brought against him was much different. (Tr. 84-86) He stated,

... it really was a misunderstanding. What happened was I was in my condominium in the elevator lobby, waiting for the elevator. There was a cleaning lady mopping the floor, and I said something to the effect of, *How is it going this morning?* And she looked at me and didn't respond. And then I made an unfortunate hand gesture, which I regret, to get her attention. She got very perturbed about that, immediately asked me what my name was and what unit that I live in. And seeing how agitated she was, I immediately walked away and went down a flight of stairs and took the elevator the rest of the way down. (Tr. 37)

Applicant admitted making the sexual hand gesture as described in the complaint's hand-written police statement, however, he testified that he meant it only as a joke because she did not respond to his question, and he was trying to get her attention. He knew it was an inappropriate gesture. He denied asking her if she wanted to make extra money, and he denied that he had any intent to engage in sexual conduct with the cleaning lady. He admitted that the complainant was offered \$5,000, to avoid the embarrassment of a public trial. She accepted the settlement offer, and the court dismissed the charge on March 7, 2023. Applicant was asked if the settlement was offered because he was worried about his current DOD security clearance, and he agreed that his security clearance was a concern. He thought by settling the matter, the dismissed criminal charge would not adversely impact his current security clearance. He also testified that he had not self-reported the incident to his security office because he did not expect the charge would be discovered by his employer. He also did not disclose this information based on the advice he had received from his attorney. (Tr. 38- 43, 64-72, 82)

Applicant testified that he participated in security refresher training on an annual basis. His employer's security officer contacted him about the unreported criminal charge that was discovered through the DOD Continuous Vetting Program in December 2022, and Applicant was surprised that this information was discovered. He told his security officer that his attorney had advised him that he was not required to report it. At this time, the criminal charge was still pending against him. The security form asked him to provide a description of the specific nature of the charge, and he listed "Falsely charged of a misdemeanor." Based on his years of security training, he was aware that he is supposed to report these types of incidents, however he did not question his attorney's legal advice in this instance. He also acknowledged that he did not check with his security manager to see whether his attorney's guidance was accurate since the legal advice conflicted with his security training. (Tr. 48-53, 83-84 GE 4)

During his July 2023 background interview, Applicant was also asked why he did not disclose his charge for solicitation for prostitution on his February 2023 SCA. Applicant stated he thought he had listed the charge, but in any event, since the charge was going to be expunged from his record soon, it technically was not a part of his criminal record. The investigator asked him if he was intentionally trying to hide this adverse information, and Applicant denied this was the case. He stated that since the charge was going to be dismissed in March 2023, he was not required to list it. (GE 2; Tr. 47)

The language in the SCA under "Section 22 - Police Record" is clear and unequivocal. It states, "For this section, report information, regardless of whether the record in your case has been sealed, **expunged** or otherwise stricken from the court record, or the charge was **dismissed**." (Emphasis added) Applicant agreed that at the time he filled out the SCA in February 2023, his criminal charge was pending, and his expungement of the criminal charge was not finalized until February 21, 2024, just over a month before his security clearance hearing. (GE 1; AE A, AE E; Tr. 86-87)

It should be noted that" Applicant did list on the SCA's "Additional Comments" section, "As of this date, 11 February 2023, a misdemeanor charge that had been filed against me has been dropped by the plaintiff. Both parties agree in a statement signed on 10 February 2023 that they wish the charges to be dismissed by the court at upcoming

hearing scheduled in ... court on 7 March 2023." This vague information did put the government somewhat on notice, but he still did not fully comply with his obligation to be candid and straightforward. (GE 1; Tr. 70, 76-77, 86-88)

SOR allegation ¶ 2.b alleges that Applicant's wife is not aware of the August 2022 criminal charge of solicitation of prostitution. He admitted this in his SOR response. At the hearing he said there is no reason to tell his wife about the incident because it has been dismissed and expunged, and it would only upset her. However, in the event someone tried to blackmail him concerning this matter, he would promptly tell his wife about the incident. (Tr. 45-46, 61-62)

SOR allegation ¶ 2.e alleges that Applicant deliberately concealed material facts during an April 12, 1982 interview with a DOD authorized investigator about his September 1980 assault charge. During that interview Applicant told the investigator that he did not wish to discuss the particulars that led to the criminal charge. Applicant testified that after his background interview in 1982, he was granted a DOD security clearance and was never told that he had to discuss the details of his 1980 assault charge. Based on his memory during the early 1980s, security training was inconsistent, and he was unaware that he had a reporting requirement to his employer's security office or to the DOD investigator to fully discuss his 1980 assault charge. (Tr. 54-58)

Applicant provided an email from his criminal attorney, who in turn provided a state law reference explaining that in certain circumstances individuals are not required to disclose an arrest or criminal charge that has been expunged. (AE F) It is important to note, however, the attorney did not admit in the email that he specifically gave legal advice to Applicant to omit the solicitation for prostitution charge on the SCA, or during the July 2023 background interview, or advised him not to self-report the criminal charge to his employer's security office. The reference to the state law is irrelevant because Applicant's criminal charge was not expunged until February 2024. (AE A)

Applicant completed an online behavior modification course on March 5, 2024. He took this class to learn how to better control his impulsivity in public and prevent inappropriate behaviors in the future. Two witnesses found Applicant an intelligent worker and a good candidate for a security clearance. Neither were able to state with specificity the underlying security concerns that necessitated a DOHA judge to make a determination about his continued security eligibility. (Tr. 15-25, 43; AE G)

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG 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(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." 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 avoided drawing 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. 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 as to obtaining 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that 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 D: Sexual Behavior**

AG ¶ 12 sets out the security concerns relating to 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 sets out the conditions that could raise a security concern. Three of them 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.

The record evidence shows that Applicant made an inappropriate sexual hand gesture to a woman in his condominium lobby, and he was later charged with solicitation for prostitution. His current wife is unaware of these details. The evidence establishes the disqualifying conditions listed above.

AG ¶ 14 describes conditions that could mitigate security concerns raised under this guideline. The following conditions potentially apply:

- (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;
- (d) the sexual behavior is strictly private, consensual, and discreet; 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.

There is insufficient evidence to establish mitigation under any of the above conditions. Applicant has provided inconsistent statements throughout the security clearance process. During his July 2023 background interview and in his SOR response, he stated that the cleaning lady spoke Spanish and he made an innocent hand gesture to convey "Hello" or "How is your morning going?" At the hearing he admitted that he made an inappropriate hand gesture that portrayed a sexual connotation, and he also acknowledged the cleaning lady spoke English. Her hand-written account of the incident for the police showed the cleaning lady was proficient in the English language. From the conflicting and contradictory versions of events offered by Applicant, it is impossible to discern the truth in this matter.

Another matter of concern is that Applicant failed to fully disclose that he paid a \$5,000 settlement to the woman to have the solicitation for prostitution charge dismissed

against him. This information was not divulged until he was confronted with it during his background interview. It is clear that his failure to mention this information was to demonstrate that either the cleaning lady voluntarily sought to have the charge withdrawn, or the court dismissed the charge, because there was no legal basis or evidence to support the underlying charge. The Adjudicative Guidelines highlight that a security concern may arise from "evidence . . . of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted." AG ¶ 31 (b). It is well-established under Appeal Board precedent that a failure to prosecute is not tantamount to a determination of innocence and does not resolve the Government's security concerns about the underlying conduct.

Applicant is adamant that he is innocent of any sexual misconduct, and he provided explanations why the entire incident was just an unfortunate misunderstanding. However, he continues to withhold this information from his current wife. As a result, I find that this incident of sexual misconduct continues to serve as a basis for coercion, exploitation, or duress. He also did not present evidence of counseling, or a favorable prognosis from a qualified mental health professional indicating that his behavior is under control.

#### **Guideline E: Personal Conduct**

AG ¶ 15 expresses the security concern for 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 provide truthful and candid answers during national security investigative or adjudicative processes ....

AG ¶ 16 describes conditions that could raise a security concern and be disqualifying. The following are potentially applicable under the established facts in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, ... in making a recommendation relevant to a national security eligibility determination, and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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. This includes, but is not limited to:

- (2) any disruptive, violent, or other inappropriate behavior; and
- (3) a pattern of dishonesty or rule violations.

The record evidence establishes the disqualifying conditions listed above. The information alleged under Guideline D was cross-alleged under Guideline E. Although AG ¶ 16(d) may not be a perfect fit to the facts of this case, the underlying guidance it provides with all available information concerning Applicant is still applicable.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. The following mitigating conditions under AG ¶ 17 are potentially applicable:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor or so much time has passed, or the behavior is so infrequent, or 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 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.

Applicant failed to self-report, as required, at his employer's security office following his arrest warrant for solicitation of prostitution. When Applicant was asked by security to report information about the discovered pending charge, he was intentionally vague about listing a "false misdemeanor charge" that had been dismissed against him. He also deliberately omitted and/or misrepresented relevant and material information when he completed his February 2023 SCA, and during his July 2023 background interview because he was afraid of the adverse consequences this could have on his current security clearance. He never once mentioned "solicitation for prostitution" until he was informed that he was required to disclose this information during his July 2023 background interview. Applicant first held a DOD security clearance in about 1968. He has worked for

his current employer for the past 37 years. He is highly educated with a Ph.D. degree, and he has attended numerous security training sessions. His explanations for concealing, minimizing, and providing inconsistent details about his behavior cast doubt on his reliability, trustworthiness, and good judgment.

Applicant claimed that he did not accurately report the solicitation of prostitution charge to security officials based on the advice of his attorney. He did not provide sufficient evidence from his attorney to corroborate this claim. The email from the attorney referenced a state law that does not apply in the context of this case because Applicant's criminal charge was not expunged until late February 2024. Even though the legal advice was contrary to his security training, Applicant never met with a security manager to discuss these discrepancies, especially when he discovered that he was required to self-report the adverse information. He has minimized his behavior; his explanations are self-serving and demonstrate that Applicant continues to struggle to be honest and forthright with the government regarding his conduct.

I did not find Applicant's testimony credible. He has not made prompt, good-faith efforts to correct omissions, misconceptions, or falsifications until confronted. He made deliberate choices to keep the government and his employer in the dark regarding his behavior, raising the concern that he is untrustworthy and calling into question his willingness to comply with security rules and regulations. Personal conduct security concerns are not mitigated.

### **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 the 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. This SOR highlights offenses that provide insight to Applicant's character and integrity. He is not remorseful for his misconduct or deceit. His explanations are self-serving and inconsistent. I conclude that Applicant has not mitigated security concerns raised by his sexual behavior and personal conduct. Accordingly, Applicant has

not carried his burden of showing that it is clearly consistent with the national interest to continue his 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-2.d:	Against Applicant
Subparagraph 2.e:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national security to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Pamela C. Benson  
Administrative Judge