



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



In the matter of:)	
)	
)	ISCR Case No. 12-04540
)	
Applicant for Security Clearance)	

Appearances

For Government: Philip J. Katauskas, Esquire, Department Counsel
For Applicant: *Pro se*

01/03/2014

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,¹ Applicant’s clearance is denied.

On 19 June 2013, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D (Sexual Behavior), J (Criminal Conduct), and E (Personal Conduct).² Applicant timely answered, requesting a hearing before the Defense Office of Hearings and Appeals (DOHA). DOHA assigned the case to me 6 August 2013, and I convened a hearing 13 September 2013. DOHA received the transcript (Tr.) 20 September 2013.

¹Consisting of the transcript (Tr.), Government exhibits (GE) 1-4, and Applicant exhibits (AE) A-C.

²DoD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; 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 1 September 2006.

Findings of Fact

Applicant denied the SOR allegations. He is a 40-year-old test director employed by a defense contractor since March 2011. He seeks to retain his collateral clearance.

Applicant has an extensive history of questionable sexual behavior. He served in the U.S. military as a commissioned officer from 1994 to 1997. He received an honorable discharge from the military in 1997 because he failed to select for promotion to the next higher rank. However, the underlying reason for his failure to be promoted was mental health issues reflected in the several mental health evaluations he underwent between 1994 and 1997. Adverse conduct included using prostitutes on approximately five occasions (Tr. 125).

While on business travel for a previous employer between 2008 and September 2009, Applicant solicited prostitutes on several occasions. Although he paid for sexual services on these occasions, he claims that he never had sexual relations with the prostitutes (SOR 1.a).

In 2009, Applicant and his wife were undergoing couples counseling, apparently related to otherwise undetailed sexual issues with his wife. Sometime in 2009, while in counseling, Applicant went to a massage parlor and paid for a massage and manual masturbation by the masseuse (SOR 1.b). Applicant reported this incident during counseling.

Applicant and his wife attended couples counseling between July and November 2009, when they stopped because his wife did not want to continue. However, Applicant resumed counseling with a different counselor in June 2010, and attended 15 sessions between June 2010 and January 2011. Applicant received a favorable prognosis from his counselor.

Applicant failed to discuss the misconduct alleged in SOR 1.a and 1.b during an August 2009 interview with a Government investigator (SOR 3.a). Applicant's sexual misconduct later became the subject of a June 2010 denial of Applicant's special access by another Government agency (AGA). Applicant refused to discuss that determination during an August 2010 interview with a Government investigator, citing his pending appeal at AGA (SOR 3.b).

Applicant produced no work or character references who are aware of the SOR allegations. Consequently, the record contains no meaningful whole-person evidence to consider beyond the favorable information already noted above. At hearing, I found his answers evasive.

Policies

The adjudicative guidelines (AG) list factors to evaluate a person's suitability for access to classified information. Administrative judges must assess disqualifying and

mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also show a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(a). The applicability of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific guidelines should be followed when a case can be measured against them, as they are policy guidance governing the grant or denial of a clearance. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guidelines are Guideline D (Sexual Behavior), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the required judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels deciding any reasonable doubt about an Applicant's suitability for access in favor of the Government.³

Analysis

The Government established a case for disqualification under Guideline D, but Applicant mitigated the security concerns. His use of prostitutes from 1994 to 1997, his solicitation of prostitutes between 2008 and September 2009, and his sexual massage in September 2009 constituted sexual behavior of a criminal nature.⁴ However, the misconduct is mitigated by the passage of time and Applicant's successful completion of counseling which suggests that the conduct is not likely to recur.⁵ Accordingly, I resolve Guideline D for Applicant.

The Government established a case for disqualification under Guideline J, by showing Applicant's criminal sexual misconduct between 2008 and September 2009, and his failure to disclose that misconduct during an August 2009 subject interview.

³See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁴¶ 13(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

⁵¶ 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 good judgment;

Applicant only partially mitigated the criminal conduct security concerns.⁶ Applicant mitigated the criminal conduct security concerns regarding his sexual misconduct by the passage of time without recurrence of the misconduct as well as his successful completion of counseling to address the underlying issues that contributed to the misconduct.⁷ However, Applicant's deliberate failure to disclose this sexual misconduct during his August 2009 interview remains disqualifying. Accordingly, I resolve Guideline J against Applicant.

The Government established a case for disqualification under Guideline E, and Applicant did not mitigate the security concerns. Applicant's deliberate failure to disclose his criminal sexual misconduct raises questions about his judgment, reliability, and trustworthiness.⁸ Further, while Applicant may refuse to answer questions of a Government investigator for any reason, such refusal will normally result in an unfavorable clearance action.⁹

None of the Guideline E mitigating conditions apply. The concealed and misrepresented information was relevant and material to a clearance decision. Applicant did not disclose this information until later subject interviews. The Government has an interest in examining all relevant and material adverse information about an applicant before making a clearance decision. The Government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when they perceive disclosure to be prudent or convenient. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the Government relies on to perform damage assessments and limit the compromise of classified information. Applicant's conduct suggests he is willing to put his personal needs ahead of legitimate Government interests. Finally, Applicant cannot reasonably decline to answer questions about other pending security processes within DoD simply because that process is in its appeal stage. Or more properly, Applicant may decline to answer questions for any reason, including assertion of any legal right. However, assertion of that right will not immunize an Applicant from the adverse consequences of

⁶¶ 31(a) a single serious crime or multiple lesser offenses; (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;

⁷¶ 32(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 judgment; (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, . . .

⁸¶ 16(a) deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, . . . [or] determine security clearance eligibility or trustworthiness. . . ; (b) deliberately providing false or misleading information regarding relevant facts to an . . . investigator . . . ;

⁹¶ 15a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing . . . ; (b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personal security or trustworthiness determination.

that assertion regarding any Government-issued clearance. Accordingly, I resolve Guideline E against Applicant.

Formal Findings

Paragraph 1. Guideline D:	FOR APPLICANT
Subparagraphs a-b:	For Applicant
Paragraph 2. Guideline J:	AGAINST APPLICANT
Subparagraph a:	For Applicant
Subparagraph b:	Against Applicant
Paragraph 3. Guideline E:	AGAINST APPLICANT
Subparagraphs a-b:	Against Applicant

Conclusion

Under the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance denied.

JOHN GRATTAN METZ, JR
Administrative Judge