



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



In the matter of: )  
)  
) ISCR Case No. 12-09518  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Julie R. Mendez, Esq., Department Counsel  
For Applicant: Mark S. Zaid, Esq.

03/28/2014

**Decision**

CURRY, Marc E., Administrative Judge:

Between 2007 and 2011, Applicant solicited sexual services from massage parlors. Since then, he told his wife and his employer and attended marriage counseling. Under these circumstances there is no vulnerability to coercion, and the severity of the misconduct is outweighed by the passage of time since the last episode and the presence of rehabilitation. Applicant has mitigated the security concerns. Clearance is granted.

**Statement of the Case**

On November 27, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing allegations under Guideline D, Sexual Behavior, and Guideline E, Personal Conduct, and Guideline J, Criminal Conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the adjudicative guidelines

(AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on December 24, 2013, admitting the allegations set forth in Paragraphs 1 and 3, and denying the allegations set forth in Paragraph 2. He requested a hearing. The case was then assigned to me on February 24, 2014. A notice of hearing was issued on February 21, 2014, scheduling the hearing for March 7, 2014.

The hearing was held as scheduled. I received three Government exhibits (GE 1 to GE 3), four Applicant exhibits (AE A to AE D) and the testimony of Applicant and four character witnesses. At the close of the hearing, I left the record open, at Applicant's request, to allow him an opportunity to submit an additional exhibit. Within the time allotted, he submitted another exhibit, which I received as AE E. The transcript (Tr.) was received on March 18, 2014.

### **Findings of Fact**

Applicant is a 52-year-old married man with three adult children. (Tr. 67) Two children are from his current marriage, and one child is from an earlier marriage that ended in divorce.

Applicant earned a bachelor of science degree in engineering in 1983. Shortly after graduating from college, he took a job with a defense contractor. He has remained in this field since then, performing tasks in various areas including signal processing, hardware development, and systems engineering. Most recently, Applicant has been working in software development. (Tr. 91) He is a senior engineer who leads a team of engineers. (Tr. 90-91)

Applicant is highly respected on the job. According to his supervisor, he is "without a doubt" the number one employee among the 200 people in his division. (Tr. 62) He has a "tremendous track record of success," and he possesses the unique ability to explain complex technical information to lay people. (Tr. 56; AE B at 3)

Applicant is similarly respected in the community. When his children were young, he frequently volunteered to coach their various sports teams, and he taught Sunday school at his church. (Tr. 19) Applicant remains active in his church, coordinating its annual fund-raising campaign, chairing its nominating committee that selects church officers, and serving as a church elder. (Tr. 16)

From 2007 to 2011, Applicant frequented massage parlors where he solicited sexual services in exchange for money. Initially, Applicant went to a legitimate massage parlor and received just a massage. He enjoyed the experience, then began researching, through the Internet, brothels masquerading as massage parlors. Typically, he would pay for the massage at the front desk of the parlor, then leave a tip on the table next to the table where he received the massage. (Tr. 131-132; Answer at 3) The

sexual service he received varied depending on the amount of the tip. He went to these massage parlors two to three times per month. (Tr. 128)

Applicant knew that what he was doing was immoral. However, he deluded himself into believing that he was doing his wife a favor by “taking care of sexual needs elsewhere.” (Tr. 83) Applicant also knew that what he was doing was illegal. However, he deluded himself into believing that if a policeman caught him, he would “be at the ready with his towel,” (Tr. 125) and tell the officer, “hey, I’m just here for a massage, [and] I just put down money for tips.” (Tr. 127)

Applicant took meticulous steps to hide his deception. Each time he visited a massage parlor, he always parked a few blocks away to avoid detection. (Tr. 102, 125) Also, he always left his wallet and identification in the car and carried nothing with him except cash. Having researched online that these establishments typically have security cameras in their front rooms, Applicant always wore a hat and a trench coat, and tried to avoid the security cameras. (Answer, Attachment 3)

Most of the women that Applicant encountered in these massage parlors were Asian. (Tr. 99) He had no reason to believe that they were not U.S. citizens. (Tr. 100) In April 2010, Applicant travelled with his wife to Australia. (GE 3 at 6) Before leaving, he did some research and discovered that prostitution was legal in Australia. (Tr. 104) While in Australia, he solicited a prostitute and had sexual intercourse with her. (Tr. 105)

The episode in Australia was the first one where Applicant’s illicit sexual behavior extended to sexual intercourse. He realized that he had “gone over the line,” and had to stop. (Tr. 105) Nevertheless, the behavior continued for another year, as Applicant tried to stop, but could not. (Tr. 105) During that time, he engaged in unlawful sexual relations in massage parlors four more times. (Tr. 106)

Ultimately, Applicant stopped soliciting sex at massage parlors in May 2011. (Tr. 106) He stopped out of shame. Specifically, he began to think about his behavior from his wife’s perspective, and he remembered how bad he felt when his first marriage ended after he discovered that his then wife had engaged in an affair. (Tr. 107)

Applicant disclosed his illicit sexual activities to his wife in April 2012, about a year after he stopped. (Answer, Attachment 1) He waited this long to tell her because he wanted to prove to her that he had overcome the behavior before disclosing it. (Tr. 107)

Applicant’s wife was stunned by this revelation. From her perspective, they had a healthy, loving relationship. (Answer, Attachment 1) After much anguished discussion, they “started peeling back the layers on how [Applicant] got to the point that he made the decision to [commit adultery].” (Tr. 72) In April 2012, they enrolled in marital counseling. (Answer at 1) They received counseling through October 2012. At no time during the counseling did Applicant make excuses for this conduct or blame his wife. (Tr. 72-73)

The counseling was productive. Applicant and his wife discovered that over the years, between raising children and both working 50 to 60 hours per week, they were no longer communicating effectively. (Tr. 77) Once the counseling began, they re-focused on their relationship, spending hours talking about the status of their marriage, and communicating concerns that had previously been repressed. (Tr. 77, 118) They initially went to counseling once per week, but scaled back as they began to talk more openly. (Tr. 73) The counselor at no time “ever diagnos[ed] [Applicant] as having any compulsive behavior, addiction, or other psychological condition, nor did [he] ever suspect one.” (AE D) By October 2012, Applicant and his wife concluded that counseling was no longer necessary, and the counselor concurred with their conclusion. (Tr. 118; AE D)

Applicant also shared his transgressions with his pastor. (Tr. 19) According to the pastor, he was very forthright about it, realized that it was a bad mistake, and “took ownership of it . . . looking to find forgiveness.” Applicant “didn’t seem to be making excuses [or] seem to be trying to provide any kind of rationalization for his behavior.” (Tr. 19, 23) Applicant’s pastor still considers him a role model for his other parishioners and believes that he is “truly penitent.” (Tr. 23)

Applicant and his wife work at the same company. She also has a security clearance. Consequently, after Applicant disclosed his misconduct, they agreed that they should both report the misconduct to the security office. (Tr. 111) They completed adverse incident reports on separate occasions. (GE 2) According to the security officer, there was no difference between what they reported. (Tr. 76) Also, the security officer testified that from her experience, employees typically do not report this type of behavior until after they take a polygraph. (Tr. 35)

Applicant and his wife are continuing to rebuild their relationship. They spending an hour a day in the evening walking and talking. (Tr. 74) Per Applicant’s wife, he is restoring trust “one day at a time.” (Tr. 77) He has installed a tracking device on his phone so that she knows where he is at all times. (Tr. 79)

Applicant’s wife will never blindly trust him again. However, given the “pain and agony” of the recovery process, and their improved communication, she does not think that Applicant’s misconduct will ever recur. (Tr. 78)

## **Policies**

In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. 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. 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.

When information of security concern becomes known about an individual who is currently eligible for access to classified information, the adjudicator should consider whether the person took the following steps, as set forth under AG ¶ 2(e):

- (1) voluntarily reported the information;
- (2) was truthful and complete in responding to questions;
- (3) sought assistance and followed professional guidance, where appropriate;
- (4) resolved or appears likely to favorably resolve the security concern;
- and,
- (5) has demonstrated positive changes in behavior and employment.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of 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 applicant or proven by Department Counsel. . . .” Applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

## **Analysis**

### **Guideline D, Sexual Behavior**

Under this guideline, “sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.” (AG ¶ 12) For four years between 2007 and 2011, Applicant, a married man with a security clearance, received sexual services in exchange for money at brothels masquerading as massage parlors. By 2010, he realized that he needed to stop this activity, but was unable, ultimately soliciting prostitutes at massage parlors four more times before stopping in April 2011. All of the disqualifying conditions under AG ¶ 13 apply, as set forth below:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

(d) sexual behavior of a public nature and/or that reflects a lack of discretion or judgment.

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

(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;

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

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

The most recent misconduct was no more than three years ago. At its peak, Applicant indulged in this behavior up to three times monthly, including once in a foreign country. AG ¶ 14(b) is inapplicable. The private, discreet, and consensual nature of the sexual activity is outweighed by its illegality. AG ¶ 14(d) does not apply.

Nevertheless, Applicant confessed to his wife, informed his employer, and attended counseling, both with a licensed social worker, and his family pastor. His unsuccessful effort at attempting to stop in 2010 certainly indicates that he may have had an underlying personality disorder or pathology. However, assuming that such a problem existed, it must have resolved by the time Applicant met the counselor because the counselor opined that Applicant at no time during his treatment exhibited any such symptoms. Ultimately, the counselor concluded after seven months of therapy that no further intervention was necessary.

Applicant's wife, his pastor, a supervisor, and his company's security officer testified. All characterized Applicant as forthcoming and contrite. Applicant's wife's testimony about their efforts at restoring their relationship was particularly compelling. Each witness wholeheartedly testified that Applicant remains worthy of a security clearance. AG ¶ 14(c) applies.

### **Criminal Conduct**

Under this guideline, "criminal activity creates doubt about a person's judgment, reliability, and trustworthiness [and] by its very nature, . . . it calls into question a person's ability or willingness to comply with laws, rules, and regulations" (AG ¶ 30). Despite Applicant's self-delusion during the years that he was engaging in sexual activity with prostitutes, his behavior was illegal. AG ¶ 31(a) applies.

Applicant is remorseful. He took full responsibility, never attempting to blame his wife. He remains a stellar employee, and continues to volunteer at his church. Although the amount of time elapsed since the last episode of sexual misconduct is not that long

considering the severity of the misconduct, when considered together with the aforementioned favorable factors, it is sufficient to trigger the application of AG ¶ 31(d), “there is evidence of successful rehabilitation; including, but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.”

## **Personal Conduct**

Under this guideline, “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 information.” (AG ¶ 15) As discussed in the Sexual Behavior section, above, Applicant’s misconduct generated a vulnerability to coercion, exploitation, or duress. Applicant’s misconduct was compounded when he chose to solicit a prostitute in a foreign country. Under these circumstances, both prongs of AG ¶ 16(e), apply as set forth below:

personal conduct, or concealment of information about one’s conduct that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing, and (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country, but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

The mitigating conditions set forth under AG ¶¶ 17(d)<sup>1</sup> and 17(e)<sup>2</sup> apply for reasons set forth in my evaluation of the Sexual Behavior and Criminal Conduct security concerns.

## **Whole-Person Concept**

Under the whole-person concept, the administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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

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<sup>1</sup>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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

<sup>2</sup>The individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Applicant's sexual misconduct was serious. Not only was he deceiving his wife, he was breaking the law. This conduct was frequent and lasted for approximately four years. Conversely, after stopping this behavior, Applicant told his wife and his employer. He underwent marital counseling both from a social worker and his pastor. Both individuals provided favorable character recommendations. His employer still holds him in high regard, and most importantly, his wife is convinced that this behavior will not recur. Under these circumstances, I conclude that the nature and seriousness of the behavior is outweighed by the absence of any vulnerability to coercion, the amount of time elapsed, and the presence of rehabilitation, rendering the likelihood of recurrence minimal. Applicant has mitigated the security concerns.

### **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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline J:	FOR APPLICANT
Subparagraph 3.a:	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 Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MARC E. CURRY  
Administrative Judge