



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



In the matter of:)
)
-----) ISCR Case No. 15-04716
)
Applicant for Security Clearance)

Appearances

For Government: Andre Gregorian, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

06/07/2016

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for access to classified information. He presented sufficient evidence to explain and mitigate the security concerns stemming from his sexual behavior of a criminal nature (solicitation of prostitution) in June 2014. Accordingly, this case is decided for Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 Format) on August 28, 2014.¹ About a year later on July 25, 2015, after reviewing the application and information gathered during a background investigation, the Department of Defense (DOD)² sent Applicant a statement of reasons

¹ Exhibit 1 (this document is commonly known as a security clearance application).

² The SOR was issued by the DOD Consolidated Adjudications Facility, Fort Meade, Maryland. It is a separate and distinct organization from the Defense Office of Hearings and Appeals, which is part of the Defense Legal Services Agency, with headquarters in Arlington, Virginia.

(SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information.³ The SOR is similar to a complaint. It detailed the reasons for the action under the security guidelines known as Guideline D for sexual behavior, Guideline E for personal conduct, and Guideline J for criminal conduct. With assistance of counsel, Applicant answered the SOR on September 8, 2015, and requested a hearing.

The case was assigned to another administrative judge on December 1, 2015, and then reassigned to me January 11, 2016. The hearing was held as scheduled on January 16, 2016. Department Counsel offered Exhibits 1–4, and they were admitted. Applicant offered Exhibits A–J, and they were admitted. No witnesses other than Applicant were called. The record was kept open until January 21, 2016, to allow Applicant to supplement the record. He made a timely submission, and those documentary matters are admitted as Exhibits K–O. The hearing transcript (Tr.) was received January 22, 2016.

Findings of Fact

Under Guideline D, the SOR alleges that in June 2014 Applicant was arrested and charged with two prostitution-related offenses, and that he subsequently pleaded guilty to one of those charges. That allegation is then cross-alleged under both Guidelines E and J. Also under Guideline E, the SOR alleges that Applicant's spouse was then unaware of his arrest and guilty plea. In his answer to the SOR, Applicant formally denied the allegations, but he then went on to provide additional information in which he essentially admitted the allegations.

Applicant is a 39-year-old employee who is seeking to retain a security clearance previously granted to him. He is employed as a field service engineer in support of military aviation. He has worked for the same company since 2002. He has a good record of employment and favorable recommendations.⁴ He is married and has two young children, ages three and one.⁵ He has volunteered his time to support community organizations.⁶

³ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

⁴ Exhibits B, C, E, and F.

⁵ Exhibit L.

⁶ Exhibit G and H.

In June 2014, while holding a security clearance, Applicant was arrested and charged with two misdemeanor counts of violating his state's prostitution statute.⁷ He was arrested at a hotel after responding to an online advertisement, which was in fact an undercover operation by police. He received a summons in early July 2014.⁸ He reported the incident to his company's security office on July 21, 2014.⁹

In October 2014, Applicant pleaded guilty to the misdemeanor offense of prostitution—general, and the second charge was *nolle prossed* (dismissed). Based on the guilty plea, the state court imposed probation before judgment, also known as deferred adjudication in some jurisdictions. The state court ordered Applicant to pay \$145 in court costs, but otherwise imposed no punishment or conditions (e.g., probation, community service, or counseling). About one year later in December 2015, the state court granted Applicant's request for expungement.¹⁰

In addition to reporting the incident to his company's security office, Applicant disclosed the incident in Section 22 of his security clearance application.¹¹ He provided additional details about the incident, including disposition of the charges, during his April 2015 background investigation.¹² He did not, however, immediately disclose this incident to his spouse, and he delayed doing so until shortly before the hearing.¹³ He described his spouse as "definitely not happy" and "devastated" by the news.¹⁴ Nevertheless, his spouse remains committed to their marriage.¹⁵

Applicant explained that his rationale for delaying disclosure to his spouse was twofold. He initially delayed because his spouse was dealing with an emotional burden stemming from her sister dying from cancer, which eventually came to pass in February 2015. He also delayed during his spouse's recent pregnancy with their second child.

In addition to the June 2014 incident, Applicant admitted additional incidents (three or four times) of responding to online solicitations and engaging the services of a prostitute during the course of his marriage. He has not disclosed those matters to his

⁷ Exhibits 2 and 3.

⁸ Exhibit N at 2.

⁹ Exhibit N at 1.

¹⁰ Exhibit I.

¹¹ Exhibit 1.

¹² Exhibit 4.

¹³ Exhibit J.

¹⁴ Tr. 28 and 35.

¹⁵ Exhibit J.

spouse. But he admitted the conduct during an August 2015 psychological evaluation, which he undertook per the advice of his attorney.¹⁶ He also admitted the conduct during his hearing testimony.

Applicant and his spouse participate in a local church. Applicant was formally baptized in November 2015.¹⁷ More recently, Applicant reached out to his pastor seeking marriage counseling.¹⁸

Applicant submitted a signed statement of intent in which he averred that he would never again engage in criminal activity, nor would he associate with anyone who engages in criminal activity.¹⁹ He also consented to the automatic revocation of his security clearance should he engage in criminal conduct. After the hearing, Applicant submitted a more detailed written statement affirming his commitment to not engage in further criminal conduct.²⁰

Law and Policies

It is well-established law that no one has a right to a security clearance.²¹ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²² Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.²³ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²⁴

¹⁶ Exhibit D.

¹⁷ Exhibit K.

¹⁸ Exhibit O.

¹⁹ Exhibit A.

²⁰ Exhibit M.

²¹ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

²² 484 U.S. at 531.

²³ Directive, ¶ 3.2.

²⁴ Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²⁵ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²⁶ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁷ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁸ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁹ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.³⁰

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.³¹ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

The SOR allegations are largely factually interrelated and will be discussed together. Applicant's misconduct and lack of judgment raise serious concerns about his suitability for access to classified information. The evidence establishes that he engaged in self-destructive, high-risk criminal conduct when he solicited the services of a prostitute on more than one occasion. And his delay in disclosing his June 2014 arrest to his spouse created a potential vulnerability. These circumstances are disqualifying per AG ¶¶ 13(a), (c), and (d) under Guideline D for sexual behavior; AG ¶ 16(e) under Guideline E for personal conduct; and AG ¶¶ 31(a) and (c) under Guideline J for criminal conduct.

²⁵ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²⁶ Directive, Enclosure 3, ¶ E3.1.14.

²⁷ Directive, Enclosure 3, ¶ E3.1.15.

²⁸ Directive, Enclosure 3, ¶ E3.1.15.

²⁹ *Egan*, 484 U.S. at 531.

³⁰ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

³¹ Executive Order 10865, § 7.

Those same guidelines contain various conditions that may serve to mitigate the concerns raised by Applicant's misconduct and lack of judgment. In particular, I considered the mitigating conditions as set forth in AG ¶ 14(d) under Guideline D for sexual behavior; AG ¶¶ 17(c) and (e) under Guideline E for personal conduct; and AG ¶ 32(d) under Guideline J for criminal conduct.

Based on the totality of evidence, I am persuaded that Applicant presented sufficient evidence to explain and mitigate the security concerns stemming from his sexual indiscretions and his delay in disclosing his arrest to his spouse. I reach that conclusion for the following reasons. First, he self-reported his arrest to his company security office, he disclosed the arrest in his security clearance application, and he was truthful and complete in responding to questions during the security clearance process. His willingness to do so shows he is willing to subordinate his own self-interests to complying with security rules and procedures.

Second, his misconduct, while a serious matter in his marriage, was viewed as a minor offense by the state court. That is shown by the disposition of probation before judgment and \$145 in court costs and nothing more. The state court's disposition of the prostitution charges amounted to an admonition to not engage in such misconduct again. Likewise, the fact that state court granted Applicant's request for expungement so soon in December 2015, about 14 months after the disposition, shows the state court viewed Applicant's case as a minor offense.

Third, Applicant impressed me during the hearing as genuinely contrite and remorseful. He was certainly not nonchalant about his situation. I am persuaded that he has learned a hard lesson from the entire episode. I am also persuaded that he has demonstrated an ability and willingness to hold himself accountable for his past mistakes, although he still has some work to do concerning disclosing his past sexual indiscretions to his spouse.

Fourth, concerning his spouse, which is undoubtedly a difficult situation, Applicant delayed but eventually did the right thing by telling her about his arrest. He should have done so sooner, but his reasons for delaying were not frivolous or specious. With that said, it is not the purpose of a clearance decision to make moral judgments on an applicant's marriage. Applicant has been forthcoming to the Defense Department about his marital failures. His willingness to do so is sufficient to significantly degrade if not eliminate the potential vulnerability to coercion, exploitation, or duress.

Fifth, his evidence of reform and rehabilitation includes the passage of time since the June 2014 arrest without recurrence, a good employment record, involvement in volunteer activities, and participation with a church. Accordingly, for all the reasons discussed above, I am persuaded that Applicant will not engage in similar conduct in the future, and that this episode is safely in the past.

Applicant's misconduct and lack of judgment stemming from his June 2014 arrest for prostitution charges no longer raise doubts about his judgment, reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I considered the whole-person concept,³² and I gave due consideration to Applicant's favorable evidence. I also weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. Accordingly, I conclude he met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline D:	For Applicant
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraphs 2.a and 2.b:	For Applicant
Paragraph 3, Guideline J:	For Applicant
Subparagraph 3.a:	For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for access to classified information.

Michael H. Leonard
Administrative Judge

³² AG ¶ 2(a)(1)–(9).