



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



In the matter of:)
)
) ISCR Case No. 07-16736
)
) SSN:)
)
)
)
) Applicant for Security Clearance)

Appearances

For Government: Emilio Jaksetic, Esq., Department Counsel
For Applicant: *Pro Se*

September 17, 2008

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guidelines D (Sexual Behavior), M (Use of Information Technology Systems), and E (Personal Conduct). Clearance is denied.

Statement of the Case

Applicant submitted a Security Clearance Application (SF-86) on December 15, 2004. On April 9, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines D, M, and E for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on May 13, 2008, and requested a hearing before an administrative judge. DOHA received her response on May 16, 2008. Department Counsel was prepared to proceed on June 5, 2008, and I received the case assignment on June 10, 2008. DOHA issued a notice of hearing on June 23, 2008, scheduling the hearing for July 24, 2008. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 and 2, which were received without objection. The Government also offered a List of Government Exhibits (Ex) I. The Applicant offered Applicant Exhibits (AE) A through J, which were received without objection, and testified on her own behalf. DOHA received the hearing transcript (Tr.) on August 4, 2008.

Procedural Rulings

Amendment of SOR

Department Counsel moved to amend the SOR to reflect Applicant's married name versus her maiden name. Without objection from the Applicant, I granted Department Counsel's motion. Tr. 9-11.

Findings of Fact

Applicant admitted all of the SOR allegations with explanations. Her admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence, I make the following additional findings of fact:

Applicant is a 26-year-old data analyst, who has worked for her defense contractor employer since February 2006. GE 1, Tr. 24, 27. She holds an interim secret clearance, and maintaining a clearance is a condition of her employment. Tr. 24-27.

Applicant graduated from high school in June 2000. While in high school, she participated in basketball, softball and soccer. She was editor of her high school paper, captain of the debate team, a student council member during her senior year, and member of the National Honor Society. AE D, Tr. 21-22, 83-84. After high school, she attended college, and was awarded a bachelor of arts degree in June 2004 with a major in anthropology and a minor in Spanish. GE 1, Tr. 22-23. She married in June 2007, and has one child, a daughter born in November 2007. Tr. 28-29, 73.

After graduating from college in June 2004, she left home in July 2004 and moved away from her home state to a major metropolitan area where she has remained. Tr. 31-33. She held at least two different jobs before accepting a position in July 2005 as a software trainer for a Government contractor. It was while she was employed with this Government contractor that she was arrested for prostitution, discussed *infra*. GE 1, GE 2, Tr. 34-35, 57.

In conjunction with Applicant's background investigation for a security clearance, the Office of Personnel Management (OPM) interviewed Applicant in August 2007.¹ The Investigator conducting that interview wrote in his summary that Applicant volunteered after arriving in major metropolitan area, she met men for sex through an internet dating site an unrecalled number of times. GE 2. (SOR ¶ 1.c.) In her Response to SOR, Applicant stated:

I admit that I have had sex with men that I have met through internet dating sites an unrecalled number of times. I deny that I only met them for the purposes of having sex. Sex with men from dating sites was the result of a series of dates, and what I thought could potentially be a long term relationship. I cannot recall the exact number of times this happened, but I would estimate that it was less than 10 times. Internet dating is a viable way for many busy professionals to meet and date this day in age, and I believe that sex between two consulting adults, after a series of dates does not reflect a personality or mental disorder, nor does it affect my ability to protect classified information. I do not believe this sexual behavior serves as a basis of coercion, exploitation, or duress. I no longer associate with any of these men, or participate with any of these dating sites.

The Investigator wrote in his summary that Applicant stated she met other men for sex through an instant messaging on the internet an unrecalled number of times. GE 2. (SOR ¶ 1.d.) Applicant stated:

I admit that I have met men whom I had sex with, through instant messaging on the internet an unrecalled number of times. Again, the sex that resulted from these instant messaging conversations came after a series of dates, and I believed they could potentially lead to a long term relationship. I do not recall the exact number of times this happened, but I would estimate that it was less than 5 times. Again, I do not believe this behavior reflects a personality or mental disorder, and does not reflect my ability to protect classified information. I no longer associate with any of these men, nor do I meet with people from the internet.

The Investigator wrote in his summary that Applicant stated from about July 2004² to November 2005 in MMA, she frequented nightclubs every weekend and would have sex three to four times a month with the men she met there. (SOR 1.e.) Applicant stated:

¹ The August OPM Interview is a summary of interview prepared by the Investigator. On January 4, 2008 in her Response to Written Interrogatories, Applicant indicated the summary of that Interview does not accurately reflect the information that she provided to the Investigator. GE 2.

² The SOR alleged Applicant's visits to nightclubs began in July 2003 versus July 2004, which is not the date reflected in the summary of interview.

I admit that I went to nightclubs frequently on the weekends here in [city name] from July 2004-November 2005 here in the [city name] area. I deny that it was every weekend. I deny that it started in July 2003, as I was still in college in [home state] at that time. I admit that I would have sex with men I met at these clubs 3-4 times a month. When I moved to the [city name] area in July of 2004, I came from a small town in [home state] to a Large Metropolitan area like [city name]. I was intrigued by the nightlife in this area, and having spent my 4 years in college working full time and working on a double major, I had not been to bars or out to nightclubs before. The men that I met at these nightclubs and bars, and eventually had sex with, were men that I thought I could potentially date, and lead to a relationship. I was naïve in my trust of those men, that they would not take advantage of me. Again, I came from a very small town and did not have much worldly experience, and perhaps got taken advantage of in some ways, although I do take responsibility for my actions. I do not believe that my vulnerability and naivety as this age, and stage of my life affects my ability to protect classified information. I no longer visit any of these night clubs, nor do I associate with any of the above referenced men. I do not believe this sexual behavior serves as a basis for coercion, exploitation, or duress.

As noted *supra*, Applicant was previously employed as a software trainer by a Government contractor from July 2005 to December 2005. While employed by this contractor, she held a security clearance. In November 2005, her then employer sent her on an off-site five-day temporary duty (TDY) assignment to a major metropolitan area to provide software training to federal law enforcement support personnel. Tr. 56-58, 76-77.

Upon arrival at her TDY site, using her company's laptop computer, she posted an ad on an open classified internet site advertising her desire to meet someone for the purpose of having sex for pay. (SOR ¶¶ 1.a., 2.a.) GE 2, Tr, 35, 38-40. When asked why she placed an ad for sex for pay, she answered:

Honestly, I can't give you an exact reason why I did that. I was – I guess I was lonely, and I wanted to meet someone there. And I had seen other ads on there asking for compensation for time or escorting, however you want to put it. And I just made a bad decision.

And I mean at that point in my life, I really felt like sex was all I was worth anyway, and that's all anyone was interested in anyway. So I just made a bad decision. Tr. 46.

Several people responded to Applicant's ad for sex; however, she only responded to one individual because of his persistence. After discussing particulars through a series of e-mails and instant messages on her company computer, the individual and Applicant agreed to meet at her hotel room on November 11, 2005 between 1:00 p.m. and 2:00 p.m. A man (undercover police officer) arrived at the

agreed time and place. Applicant and the man had a discussion about what was to occur and the price. After the man placed \$400 on the table, he asked Applicant to get undressed while he made a telephone call. Shortly after the man made the telephone call, four to six vice squad policemen accompanied by the hotel manager entered her room. Applicant was placed under arrest for prostitution, taken into custody, and transported to the city jail where she was processed and held overnight. On November 12, 2005, she was arraigned and released on her own recognizance. Applicant was ordered to appear for trial in municipal court on January 6, 2006. GE 2, Tr. 46-52. (SOR ¶ 1.b.)

On January 6, 2006, Applicant's attorney appeared on her behalf and entered a request for her acceptance into the Advanced Rehabilitative Disposition (ARD) Program. In February 2006, Applicant appeared in court and was accepted into the ARD Program. (SOR ¶ 1.b.) She successfully completed the ARD Program and submitted a letter dated August 25, 2006 from her probation officer stating in part:

You have completed the ARD (Accelerated Rehabilitative Disposition) Program. You have honored all of the Court Orders, and now your record will be expunged. This expungement will take up to three months.

Remember that your ARD Probation was not a conviction or an admission of guilt. Therefore, when applying for a job, do not state that you had a conviction. Please retain this letter for you records. AE I.

In addressing this allegation in her Response to SOR, Applicant stated:

I admit that I placed an ad on [open classified internet site] in November of 2005 for a meeting with someone with the intention of having sex. I admit that I agreed to be paid for sex with the person in response to the ad. This was a mistake and a huge lapse in my judgment, but in no way was or is, this a pattern of behavior. I had never considered sex for money before this, but saw other ads online where people were doing it, and made a horrible decision. As soon as I placed the ad I began to regret it, and did not answer any emails regarding it other than the officer's, due to his persistency. I told the officer no several times, but he was very persistent and eventually I agreed to meet him. I never thought I would end up hurting anyone by my actions. I have never done anything like that before, nor have or would I ever do anything similar in the future. I learned from my mistake and have completely changed my life over the past 3 years. I am now a loving, faithful wife and mother to a baby girl, and blessed to be pregnant with our second child.³ I do not believe that one momentary lapse in judgment should reflect my ability to protect classified information. Everyone in my life, including my husband, family, employer and friends know what happened in [city name], so I do not believe the information

³ At her hearing, Applicant stated she had a miscarriage shortly after she mailed in her Response to SOR. Tr. 28-29.

could be used to coerce or exploit me. I feel I have taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

I admit that I was arrested in November 2005 [city name] and charged with prostitution. I admit that I was placed in an Accelerated Rehabilitative Disposition Program. I completed this program successfully and have since been completely expunged of any criminal record. The decision to put me in this program was based on the fact that I have no criminal past or record of any kind.

Upon her return to work, Applicant immediately informed her employer about her arrest. In December 2005, her employer advised her that allowing her to continue working on their Government contract was too risky and offered her the opportunity to resign in lieu of being involuntarily terminated. Applicant claimed her employer told her she would be eligible for rehire. Applicant resigned with her last day being December 18, 2006. GE 2.

Applicant reiterated in her testimony that her behavior was a thing of the past and her arrest for prostitution was a real “wake up” call. Other than conferring with her family and friends, she has not sought any professional help in addressing her past behavior. Tr. 86-88.

Applicant submitted eight reference letters from various individuals to include employer representatives, family members, and her baby sitter. All of the letters cast Applicant in a favorable light and speak of her as being trustworthy and possessing high integrity, among other things. AE A – H. To further demonstrate her trustworthiness, Applicant submitted a copy of her contractor identification card expiring in September 2007 that was issued to her during a two month TDY to a service academy. She claims her arrest and past conduct was vetted by the facility security officer (FSO) from the service academy and the FSO “granted me full access to their facilities, as well as their information systems as he did not see me or my previous behaviors as a threat.” AE J, Tr. 19.

Policies

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s eligibility for access to classified information.⁴

When evaluating an Applicant’s suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant’s eligibility for access to classified information.

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

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 controlling adjudicative goal is a fair, impartial and common sense 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 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."⁵ 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. 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. . . ." The applicant 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 the Applicant may deliberately or inadvertently fail to protect or 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 Executive Order 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

Under Adjudicative Guideline ¶ 12, the Government's concern is:

⁵ *Egan, supra*, at 528, 531.

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. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

Applicant admitted the conduct alleged under this guideline, clarifying that she did not go to nightclubs every weekend beginning as alleged in SOR ¶ 1.d. in July 2003, but rather July 2004. She provided explanations for these allegations, which are provided *supra*. Her admissions and evidence submitted by the Government substantiate the allegations under this concern.

AG ¶ 13 sets out four conditions that could raise a security concern and may be disqualifying in this case:

- (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 lack of discretion or judgment.

Applicant engaged in high risk sexual behavior for a documented period of 16 months from July 2004 to November 2005. This behavior consisted of meeting numerous men through the internet and having brief sexual encounters with them. This conduct continued until Applicant was arrested for prostitution in November 2005. Particularly troubling is the fact that, while holding a security clearance, she engaged in conduct leading to this arrest after placing an ad for sex for pay on an open classified internet site while using her company's laptop computer. She did not provide any evidence that she sought professional help or counseling regarding her past behavior. Applicant claims she has informed her family members and her employer and is not subject to blackmail. It is difficult to glean from her reference letters to what extent the authors of the letters are aware of Applicant's history. Her parents and brother use terms such as "compromising position" and "past transgressions," but do not elaborate on those terms. The facts of this case warrant application of AGs 13(a) through 13(c).

AG ¶ 14 lists four potential mitigating conditions to the disqualify conditions *supra*:

(a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;

(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.

Applicant receives partial credit under AG ¶ 14(b) because there is no evidence that any of the conduct alleged has occurred since her November 2005 arrest for prostitution. Applicant's conduct since her arrest appears exemplary, and she clearly has the support of family members and employer representatives. However, given the 16-month period Applicant engaged in high risk sexual behavior involving the internet, use of an open classified internet site to advertise sex for pay, and the circumstances surrounding her arrest while on company time to include the use of a company laptop computer while holding a security clearance, demonstrates a severe lack of judgment, which leaves me with remaining doubts about Applicant's present suitability to receive a security clearance. Accordingly, I am unable to apply any of the other mitigating conditions under this concern and the partial credit Applicant received under AG ¶ 14(b) is outweighed by the disqualifying conditions.

Guideline M (Use of Information Technology Systems)

Under Adjudicative Guideline ¶ 39, the Government's concern is:

Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.

AG ¶ 40 sets out one condition that could raise a security concern and may be disqualifying in this case:

(e) unauthorized use of a government or other information technology system.

Applicant admitted she used her company's laptop computer to place an ad for sex for pay and coordinate the logistics for her sexual encounter while TDY.

One mitigating condition under AG ¶ 41 is potentially mitigating under this condition:

(a) so much time has elapsed since the 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.

I am unable to apply this mitigating condition given relative recency of Applicant's behavior and the serious nature of her conduct. She demonstrated a significant breach of the trust and confidence her company placed in her by using their laptop computer for illegal and improper purposes while holding a security clearance.

Guideline E (Personal Conduct)

Under Adjudicative Guideline ¶ 15, the Government's concern is:

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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 sets out one condition that could raise a security concern and may be disqualifying in this case:

(e) 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, or (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.

Although Applicant claims that her past history is well known by her employer, family members, etc., notably absent in her evidence is any direct reference by any of the authors citing any specific knowledge of her arrest for prostitution and related behavior. The process does not permit me to extrapolate such knowledge nor does it allow me to go beyond the evidence presented.

Two mitigating conditions under AG ¶ 17 are potentially applicable to this disqualifying condition:

(d) 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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant receives partial credit under AG ¶¶ 17(d) and (e) for taking responsibility for her actions and making positive life style changes. She has sought support through her family and friends, but has not sought professional help. A professional assessment indicating Applicant's behavior is no longer a concern would have been helpful and as noted the process does not allow me to go beyond the evidence presented.

Under the totality of the circumstances, I find Applicant's behavior is recent and not isolated. Considering her behavior, the nature and seriousness of her misconduct, her exercise of repeated poor judgment culminating in her arrest for prostitution, her misuse of her company's laptop computer, and other factors identified *supra*, I find her favorable information is not sufficient to mitigate Guideline D, M and E security concerns. Her conduct raises questions about her ability and willingness to follow the law, and ultimately, to protect classified information. Her conduct also raises serious doubts and questions about her judgment. Further time and additional evidence is needed before I can overcome my concerns/doubts regarding Applicant's questionable judgment, reliability and trustworthiness.

To conclude, Applicant presented insufficient evidence to explain, extenuate, or mitigate the sexual behavior, use of informational technology systems, and personal conduct security concerns. Applicant did not meet her ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole person concept was given due consideration and that analysis does not support a favorable decision.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"⁶ and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the Government's case. For the reasons stated, I conclude she is not eligible for access to classified information.

⁶ See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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
Subparagraphs 1.a. – 1.e.:	Against Applicant
Paragraph 2, Guideline M:	AGAINST APPLICANT
Subparagraphs 2.a.:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Clearance is denied.

ROBERT J. TUIDER
Administrative Judge