



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



In the matter of:)
)
-----) ISCR Case No. 11-14021
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

10/22/2013

Decision

Harvey, Mark, Administrative Judge:

Applicant committed about 100 misdemeanor-level criminal offenses when he hired prostitutes on a bi-weekly to monthly basis from February 2007 until April 2013. In his August 23, 2011 Office of Personnel Management (OPM) personal subject interview (PSI) he honestly described his involvement with prostitutes over the previous ten weeks. Sexual behavior and personal conduct concerns are mitigated; however, criminal conduct concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On July 6, 2011, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (GE 1) On June 5, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) the President promulgated on December 29, 2005.

The SOR alleged security concerns under Guidelines D (sexual behavior), J (criminal conduct), and E (personal conduct). (Hearing Exhibit (HE) 2) The SOR detailed reasons why DOD Consolidated Adjudications Facility (CAF) was unable to find that it is clearly consistent with the national interest to continue a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

On June 27, 2013, Applicant responded to the SOR and requested a hearing. (HE 3) On August 12, 2013, Department Counsel indicated she was ready to proceed on Applicant's case. On August 19, 2013, the case was assigned to me. On August 30, 2013, Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for September 26, 2013. (HE 1) Applicant's hearing was held as scheduled. Department Counsel offered seven exhibits, and Applicant offered six exhibits. (Tr. 19-22; GE 1-7; AE A-F) There were no objections, and I admitted GE 1-7 and AE A-F. (Tr. 19-22) Additionally, I admitted the hearing notice, SOR, and Applicant's response to the SOR. (HE 1-3) On October 10, 2013, I received the transcript of the hearing.

Findings of Fact

Applicant's SOR response admitted with explanations the underlying factual predicate for all of the SOR allegations. (HE 3) He also provided extenuating and mitigating information. (HE 3) He denied that he intentionally made a false statement, and that the allegations established security concerns. (HE 3) His admissions are accepted as findings of fact.

Applicant is a 42-year-old control engineer employed by the same defense contractor for the previous 12 years. (Tr. 7-9; GE 1) He has received several promotions, and his pay has increased over those 12 years. He has never served in the military. (Tr. 7; GE 1) In 1989, he graduated from high school. (Tr. 6) In 1997, he was awarded a bachelor's degree in mechanical engineering, and in 2003, he received a master's degree in mechanical engineering. (Tr. 7) He has never married, and he does not have any children. (Tr. 7; GE 1) He has held a security clearance since 2005 or 2006. (Tr. 8) There are no allegations of security violations.

Criminal Conduct and Sexual Behavior

In 1999, Applicant solicited prostitution services twice. (Tr. 24) Between 2000 and February 2007, Applicant said he did not remember being involved with prostitutes. (Tr. 24) Between February 2007 and June 2011, Applicant hired prostitutes every two to three weeks. (Tr. 24; SOR ¶¶ 1.a, 2.a; SOR response)

On June 8, 2011, Applicant was arrested for soliciting prostitution services. (SOR ¶ 1.b; SOR response; GE 2) He admitted he associated with a prostitute on June 8, 2011. (GE 2) He was not convicted of soliciting prostitution services. (Tr. 38)

From August 2011 to April 2013, Applicant solicited the services of prostitutes about once a month. (Tr. 25; SOR ¶¶ 1.b, 2.a; SOR response) After April 2013, he has not solicited the services of any prostitutes. (Tr. 25)

H, who is a Licensed Marriage and Family Therapist with a master's of arts degree, has been providing therapy services to Applicant about twice a month since February 2012.¹ (Tr. 26) H diagnosed Applicant with alcohol dependence, generalized anxiety disorder, dysthymic disorder, and impulse control disorder not otherwise specified. (Tr. 26-27) H described Applicant as having a sincere desire to address his psychological and emotional issues. Applicant is honest, loyal to his friends, and he wants to overcome his sexual addiction. He needs to continue with his therapy and maintain group therapy for his alcohol and sex addictions. He also recommended that Applicant utilize a 12-step approach "to assure a successful recovery program."

Applicant acknowledged that he is dependent on alcohol. (Tr. 39) He voluntarily enrolled in a 12-week chemical dependence therapy program. (Tr. 40) He attends Alcoholics Anonymous (AA) meetings about every four to six weeks. (Tr. 28) He does not have an AA sponsor. (Tr. 31) He believes AA did not really help him and individual therapy is more therapeutic for him. (Tr. 33) He was sober from April 2, 2012, until January 1, 2013. (Tr. 40) He consumed alcohol in January 2013. (Tr. 40) He was sober in February 2013, and after February 2013, he consumed alcohol about once every four weeks. (Tr. 30, 40) When he drank alcohol, he consumed about five or six drinks. (Tr. 30-31) Applicant's most recent alcohol consumption was approximately four weeks before his hearing, when he drank several beers. (Tr. 30) He does not drive a vehicle after consuming alcohol. (Tr. 41)

In November 2012, Applicant met with a sexual group therapy leader; however, he decided after that meeting that he was not an appropriate fit for that group. (Tr. 28-29) He did not seek out other group therapy opportunities.

Applicant admitted that he has a sexual addiction with prostitution. (Tr. 37) His most recent association with a prostitute was in April 2013. (Tr. 37) He expressed regret and remorse concerning his sexual offenses. All of his associations with prostitutes "have been private, consensual, and very discreet." (Tr. 37) He has been sincerely trying to control his addictions since February of 2011. (Tr. 37)²

¹Unless stated otherwise, the source for the facts in this paragraph is the written statement from Applicant's therapist. (AE E)

²In his closing argument Applicant said he could not do anything about the recency of his involvement with prostitutes. He argued:

and I cannot even guarantee that I'll never see a prostitute again. But I can say that I will remain in therapy as long as I feel -- struggle with my addiction. If for some reason I do retain my clearance at this proceeding, and if I do relapse with a prostitute, I'll voluntarily give it up. (Tr. 47)

Personal Conduct

On August 23, 2011, an OPM investigator completed Applicant's PSI. (GE 2) After Applicant described the circumstances of his arrest for solicitation of prostitution on June 8, 2011, the OPM summary of interview reads, "subject advised that he has had one or two other associations with prostitutes." (GE 2) Later the summary of the interview states, "Subject advises that his contact with prostitutes may be indicative of a pattern of behavior related to a compulsive disorder. However Subject is not sure of this. Subject has no further intent to engage in criminal behavior." (GE 2)

Applicant said he understood the OPM investigator's question to be referring to his conduct with prostitutes after his June 8, 2011 arrest and prior to his August 23, 2011 OPM interview. He said he was actually involved with a prostitute on one occasion between June 8, 2011, and August 23, 2011. (Tr. 25)

On February 1, 2013, Applicant responded to interrogatories provided by the DOHA. (GE 2) As part of the DOHA interrogatory process, Applicant swore that he read the OPM investigator's summary of his interview, and he found the summary to be accurate. (GE 2) He explained that his answer at the interview itself was accurate that he "has had one or two other associations with prostitutes," during the June to August 2011 timeframe; however, he acknowledged the OPM summary was misleading, and he decided not to correct the record because "it just made me sound a little bit better." (Tr. 34-35, 41-42; GE 2)³ He disclosed in the OPM summary that he was receiving therapy from H, but said it was for his "compulsive disorder." When he was completing the DOHA interrogatory, Applicant mentally "debated about whether or not to correct [the summary of interview], and it was not an easy decision to not correct it at that time, but [he] did make [the decision] not to correct it." (Tr. 39) It looked better to say once or

Although argument is not technically evidence, I have credited Applicant with fully admitting his sexual addiction problem, recognizing that he might relapse, and offering revocation of his security clearance, if he should relapse.

³Applicant's SOR does not allege that Applicant intentionally misled DOHA on February 1, 2013, when he responded to DOHA interrogatories about the extent of his involvement with prostitutes. The SOR does not allege that Applicant is alcohol dependent, continues to consume alcohol, and does not comply with his therapist's recommendation that he regularly attend group therapy, such as AA. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). These allegations will not be considered for any purpose because Applicant has not had adequate notice and a full opportunity to collect and present evidence of mitigation regarding these allegations.

twice being involved with prostitutes (Tr. 35), as opposed to about 100 unlawful associations with prostitutes from February 2007 until June 2011.

On April 11, 2013, Applicant responded to DOHA interrogatories. (GE 3) He indicated he signed authorizations for release of his medical and counseling records, and he disclosed the frequency of his associations with prostitutes for sexual activity as being more than 100 times between February 2007 until April 2013. (GE 3-5)

Character Evidence

In a statement dated September 10, 2013, a woman, who has known Applicant for more than 20 years and who knows about his sexual addiction, described him as kind, honest, trustworthy, loyal, and good hearted. (AE B) Applicant told her last summer that “he has been clean of prostitutes and expresses a confidence in overcoming his sexual addiction.” (AE B)

Applicant’s three friends have known Applicant for 20 to 35 years. (AE C, D, F) They are aware of Applicant’s involvement with prostitutes. (AE C, D, F) They lauded Applicant’s trustworthiness, honesty, loyalty, integrity, consideration, high moral values, helpfulness, dedication to the therapeutic process, sincere effort to become rehabilitated, and acceptance of responsibility. (AE C, D, F)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon meeting the criteria contained in the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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. Adverse clearance decisions are made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned.” See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision on any express or implied determination as to applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

The relevant security concerns are under Guidelines D (sexual behavior), J (criminal conduct), and E (personal conduct).

Sexual Behavior

AG ¶ 12 describes the security concern pertaining to sexual behavior:

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.

AG ¶ 13 lists four conditions that could raise a security concern and may be disqualifying including:

- (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.

All of the disqualifying conditions apply. Applicant engaged in sexual activity with prostitutes more than 100 times from February 2007 until April 2013. Although he has never been convicted of solicitation of prostitution, he admitted commission of these criminal offenses. He has a strong urge or compulsion to engage in sexual activity with prostitutes; however, he may not have fully committed to end his involvement with prostitutes. His sexual involvement with prostitutes does not make him vulnerable to coercion, exploitation, or duress because he has disclosed this sexual activity to security officials and his friends. His sexual activity with prostitutes reflects a lack of discretion and judgment.

AG ¶ 14 provides four conditions that could mitigate security concerns including:

- (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.

AG ¶ 14(c) applies. Applicant has disclosed his involvement with prostitutes to security officials and his friends. Because of his disclosure, his conduct with prostitutes does not serve as a basis for coercion, exploitation, or duress.

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.”

AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying in this case, “(a) a single serious crime or multiple lesser offenses,” and “(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

AG ¶¶ 31(a) and 31(c) apply. From February 2007 until April 2013, Applicant engaged in sexual activity with prostitutes on more than 100 occasions. Although he has never been convicted of a criminal offense, each time he paid a prostitute for sex, he committed a misdemeanor-level criminal offense.⁴

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

- (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 good judgment;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person’s life;
- (c) evidence that the person did not commit the offense; and
- (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.

Although none of the mitigating conditions fully apply, there are important mitigating factors. Applicant’s therapist described Applicant as having a sincere desire to address his psychological and emotional issues. He is honest, loyal to his friends, and desires to overcome his sexual addiction. He has been continuously employed for 12 years by the same employer. He has received several promotions and pay raises over those 12 years. He expressed regret and remorse concerning his sexual offenses.

Significant factors weighing against mitigating criminal conduct concerns remain. From February 2007 until April 2013, Applicant engaged in sexual activity with prostitutes on more than 100 occasions. Applicant’s therapist noted Applicant has a

⁴ Applicant did not engage in sexual activity with prostitutes in a state where such conduct is legal.

compulsive desire to engage in sexual activity with prostitutes, and he needs to continue with his therapy and maintain group therapy to control his sex addiction. His most recent offense occurred in April 2013, and is recent. In 2011, he told the OPM investigator that he did not intend to engage in sexual activity with prostitutes in the future. More time must elapse before there is enough assurance that criminal conduct raising security concerns is unlikely to recur. Applicant is not ready to be entrusted with access to classified information at this time.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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 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.

One personal conduct disqualifying condition under AG ¶ 16 is potentially applicable. AG ¶ 16(b) provides, "deliberately providing false or misleading information concerning relevant facts to an . . . investigator . . ." ⁵

AG ¶ 16(b) does not apply. On August 23, 2011, Applicant told an OPM investigator during his PSI that he "advised that he has had one or two other associations with prostitutes." Later the summary of the interview states, "Subject advises that his contact with prostitutes may be indicative of a pattern of behavior related to a compulsive disorder. However Subject is not sure of this." Applicant said he understood the OPM investigator's question to be referring to his conduct with prostitutes after his arrest and prior to his OPM interview. There is no evidence to contradict Applicant's understanding of the context of the OPM summary. He said he was actually involved with a prostitute on one occasion between June 8, 2011, and August 23, 2011. The allegation that Applicant intentionally provided false information to the OPM investigator is not substantiated. Personal conduct concerns are mitigated.

⁵The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

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(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 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 have incorporated my comments under Guidelines D, J, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) warrant additional comment.

There are some facts supporting mitigation of security concerns under the whole-person concept; however, they are insufficient to fully mitigate security concerns. Applicant is a 42-year-old control engineer employed by the same defense contractor for the previous 12 years. He has received several promotions and pay increases. He was awarded bachelor's and master's degrees in mechanical engineering. He has held a security clearance since 2005 or 2006, and there are no allegations of security violations. Applicant's character witnesses have known him for decades, and they describe him as responsible, reliable, conscientious, diligent, and trustworthy among numerous positive attributes. He received therapy to address his urges to engage in sexual activity with prostitutes. He is an intelligent person, who understands the importance of compliance with security rules. His acknowledgement of his involvement with prostitutes, admission of having a sexual addiction, and his evident remorse are important steps towards rehabilitation and mitigation of security concerns.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant committed about 100 misdemeanor-level criminal offenses when he hired prostitutes on at least a monthly basis from February 2007 until April 2013. His criminal conduct is recent and continued after he began therapy in February 2012. In August 2011, he told the OPM investigator that he did not intend to engage in future sexual activity with prostitutes, nevertheless, he did so. There are unresolved questions about Applicant's reliability, trustworthiness, and ability to protect classified information because of his pattern of criminal conduct over a six-year period. More time without criminal conduct is necessary to fully mitigate security concerns.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude sexual behavior and personal conduct concerns are mitigated; however, criminal conduct concerns are not mitigated. For the reasons stated, I conclude he is not eligible 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:	FOR APPLICANT
Subparagraphs 1.a to 1.c:	For Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

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

Mark Harvey
Administrative Judge