



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



In the matter of:)
)
) ISCR Case No. 14-06163
)
Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

05/19/2017

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On November 17, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, personal conduct. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on December 16, 2015, and elected to have the case decided on the written record in lieu of a hearing. The Government's written case was submitted on March 10, 2016. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant

received the FORM on March 15, 2016. As of May 24, 2016, he had not responded. The case was assigned to me on February 6, 2017. The Government exhibits included in the FORM are admitted in evidence.

Findings of Fact

Applicant is a 51-year-old owner of a company doing business as a defense contractor. He is a graduate of a service academy, and he also has a master's degree. He served on active duty in the U.S. military from 1988 until he was honorably discharged in 1998. He served in the Reserve or National Guard from 1999 until he retired in 2011. He married his third wife in 2004. He was previously married from 1989 to 1997 and from 1997 to 2000. He has one minor child.¹

Applicant engaged in the use of prostitutes, both in the United States and in foreign countries, from about 1986 through at least 2008. He frequented massage parlors, in the United States and foreign countries, from about 1993 through at least April 2010, in which he was masturbated.²

Applicant smoked marijuana on about three occasions in 2002. He held a security clearance while serving in the military. The marijuana use was during a period when he was no longer with his National Guard unit but still technically a part of the Guard. He regrets the use, and it has not been repeated.³

Applicant was interviewed for his background investigation for a government agency in April 2009. He was interviewed again in conjunction with a polygraph in November 2009. He admitted to his marijuana use in 2002 and that he engaged prostitutes and frequented massage parlors for sex. He stated that he last actively solicited a prostitute in about 2002, but on two occasions in about 2008, he had sex with women who asked for money after Applicant had sex with them. He visited massage parlors and was masturbated about six to ten times per year since 1993. The last occasion was about a month before the polygraph. He stated that on one occasion he was in the waiting room when the police raided the establishment. They told him to leave, which he did without incident. There was no other police involvement. He stated that he visited the parlors because it was "one of the joys of life." His wife was unaware of his activities and "would not be too pleased to discover it," but he would tell her instead of placing himself in a position of coercion or blackmail.⁴

¹ Items 3, 4.

² Items 2, 4.

³ Items 2-4.

⁴ Items 3, 4.

Applicant was interviewed for his background investigation in January 2011.⁵ He admitted to soliciting prostitutes on about 15 occasions in the United States and in foreign countries. He stated that the last occasion was in 2003. He did not discuss massage parlors.⁶

Applicant called the interviewer two days after his first interview. He stated that he did not feel comfortable talking about his transgressions with a female investigator, and he requested to speak with a male investigator.⁷

Applicant was interviewed in person a short time later. He stated that he visited massage parlors about three to six times a year from about 1996 to April 2010. He intentionally provided false information when he stated that he did not engage in any sexual acts while visiting the massage parlors. He stated that he had not visited any massage parlors since April 2010, and he did not intend to visit any again in the future.⁸

Applicant submitted a Questionnaire for National Security Positions (SF 86) in March 2014. He reported that he consulted a mental-health professional in August 2010 on the advice of his corporation's security personnel to determine whether he had a sexual addiction. He wrote that after one session, the professional determined that Applicant was not abnormal and that he had a healthy appetite for sex. The professional cautioned that Applicant needed to change his behavior if he wanted to be associated with organizations that scrutinize personal sexual behavior.⁹

Applicant was interviewed for his background investigation in May 2014. He stated that he saw the mental-health professional at the advice of his security officer to determine if he had a sexual dependency. He stated that he had purchased sexual services with prostitutes, escort services, and massage parlors once every three to five years since the 1980s.¹⁰

In his response to the SOR, Applicant wrote the following about the allegation that he proved false information during his background interview:

⁵ The report of investigation (ROI) indicates the interview took place on "11/12/11." After viewing the remainder of the evidence, I am satisfied that the date is a typographical error, and the interview took place in January 2011.

⁶ Item 4.

⁷ Item 4.

⁸ Item 4. This is the only false statement alleged in the SOR. Any other matter that was not alleged in the SOR will not be used for disqualification purposes. It may be used to assess Applicant's credibility, in the application of mitigating conditions, and in the whole-person analysis.

⁹ Item 4.

¹⁰ Item 4.

I was uncomfortable in detailing my sex life to a female investigator. In each of the instances I have detailed my sexual activities, I have done so with male investigators. I contacted the female investigator shortly after our interview and asked for a male investigator. Upon sitting with that male investigator, I immediately detailed my sexual activities with him. (For comparison, even at the airport security checkpoints, women TSA agents deal with women passengers and male agents deal with male passengers.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense 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 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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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 E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(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; and

(g) association with persons involved in criminal activity.

Applicant intentionally provided false information during his background interview when he stated that he did not engage in any sexual acts while visiting massage parlors. AG ¶ 16(b) is applicable to SOR ¶ 1.c.

AG ¶¶ 16(c), 16(e), and 16(g) are established by Applicant's marijuana use and by his frequenting prostitutes and massage parlors for sex.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (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; and
- (g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant's marijuana use, as alleged in SOR ¶ 1.d, was more than 15 years ago. That conduct is mitigated.

Applicant stated in his response to the SOR that he contacted the female investigator shortly after their interview, asked for a male investigator, and that he immediately detailed his sexual activities with the male investigator. If true, that would establish AG ¶ 17(a) as a mitigating condition. However, the facts show that Applicant contacted the female investigator after the first interview and asked for a male investigator. He then lied in the next interview. There is no evidence of another interview

until three years later, and it is questionable whether he told the complete truth in that interview as the information provided was inconsistent with other statements (e.g., that he had purchased sexual services with prostitutes, escort services, and massage parlors once every three to five years since the 1980s, which is inconsistent with 2009 statement that he visited massage parlors and was masturbated about six to ten times per year since 1993).

There is no evidence that Applicant frequented prostitutes or massage parlors for sex after 2010. Had Applicant been completely truthful, the conduct would have been mitigated. However, without complete candor, it cannot be considered mitigated.

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 relevant 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis.

I considered Applicant's honorable military service. However, he engaged in questionable conduct for years and then lied about it.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the personal conduct 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 E:	Against Applicant
Subparagraphs 1.a-1.c:	Against Applicant
Subparagraph 1.d:	For Applicant

Conclusion

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

Edward W. Loughran
Administrative Judge