



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 16-02536
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

11/28/2018

Decision on Remand

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines D (Sexual Behavior) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on December 4, 2015. On October 27, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines D and E. The DOD CAF acted under Executive Order (Exec. Or.) 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, 2006.¹

¹ Security Executive Agent Directive 4 (SEAD 4) was issued on December 10, 2016, revising the 2006 adjudicative guidelines for all adjudicative decisions issued on or after June 8, 2017. The changes resulting from issuance of SEAD 4 did not affect my decision in this case.

Applicant answered the SOR on November 26, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on January 18, 2017, and the case was assigned to an administrative judge on August 14, 2017. The administrative judge conducted the hearing on September 7, 2017. Government Exhibits (GX) 1 through 2 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibit (AX) A, consisting of five letters attesting to Applicant's trustworthiness, good judgment, and reliability, which was admitted without objection. DOHA received the transcript (Tr.) on September 15, 2017. On April 11, 2018, the administrative judge granted a clearance.

Department Counsel appealed the administrative judge's favorable decision. The appeal focused on GX 2, which consisted of DOHA interrogatories asking Applicant to verify the accuracy of the summaries of a personal subject interview (PSI) conducted on March 17, 2016, and telephonic interviews on April 6, 2016, and April 19, 2016. Applicant responded to the interrogatories on September 4, 2016, stating that the PSI summary was not accurate. He stated, "This report is incomplete, inaccurate and misleading." He pointed out that pages 1-3 of the report were missing. He listed out omissions and inaccuracies on pages 4-9. He ended his comments by stating, "In summary, this report is inaccurate, incomplete and due to numerous instances of the use of subjective and prejudicial comments is gross misleading." However, he answered "Yes" to the final question: "Subject to any additions or deletions made above, do you agree with and adopt the investigator's summaries as accurate reflections of your interviews?"

At the hearing, Applicant initially did not object to the admission of GX 2, but he later objected to it, stating "the whole thing is wrong." The administrative judge adhered to his admission of GX 2 but recognized that Applicant objected to parts of it. After the hearing adjourned, the administrative judge reopened the record for additional evidence or argument regarding GX 2. Neither party submitted additional evidence, and the administrative judge made no additional findings or rulings.

The Appeal Board reviewed the record and concluded that the administrative judge's failure to make specific findings regarding the portions that Applicant did or did not adopt was harmful error. The Appeal Board explained:

It is well settled that a judge has broad discretion in writing a security clearance decision. However, the Judge's decision must be written in a manner that allows the parties and the Board to discern the findings the Judge is making and what conclusions he or she is reaching. [Citation omitted.] Whether an applicant has adopted statements in an interview summary is a question of fact. In this case, despite the prehearing, hearing, and post-hearing exchanges on the admissibility of Applicant's interview summary, the Judge failed to make findings as to which of the key statements in the interview summary Applicant either adopted or did not adopt. In other words, we are unable to discern whether key statements were admitted into, or excluded from, evidence.

The Board remanded the case to the administrative judge for “processing consistent with the Directive.” The Board also ordered that “[i]f another Judge is assigned to this case on remand, each party shall be provided the opportunity to request another hearing.”

As of the date of the Appeal board decision, the original administrative judge was no longer serving as an administrative judge in DOHA. The case was assigned to me on September 11, 2018. On September 12, 2018, Department Counsel requested another hearing.

On September 24, 2018, DOHA notified Applicant that his hearing on remand was scheduled for October 15, 2018. I convened the hearing as scheduled. In Applicant’s answer to the SOR, he denied all the allegations, and he adhered to his denials at the hearing on remand. With the consent of the parties, GX 1, GX 2, AX A, and the testimony of Applicant’s character witness at the first hearing were incorporated into the record of the hearing on remand. Department Counsel presented the testimony of a witness to authenticate the PSI contained in GX 2. DOHA received the transcript of the hearing on remand (Rtr.) on October 22, 2018.

Findings of Fact²

Applicant is 71 years old and has been employed by federal contractors for more than 30 years. He has held a security clearance since about 1970. He served on active duty in the U.S. Air Force from March 1970 to May 1975. He earned a bachelor’s degree in June 1969, a master’s degree in December 1980, and a doctorate in July 1982. He married in September 1973, divorced in September 1988, married again in December 1988, and divorced in February 2012. He has five children, ages 37, 35, 32, 28, and 26.

The PSI at issue in this case was conducted in March 2016. The PSI covered Applicant’s employment history, military service, personal references, family and associates, and financial record. In his response to the inquiries asking him to verify the accuracy of the PSI summary, he pointed out numerous errors and omissions in these portions of the PSI summary.

At the hearing on remand, instead of relying on self-authentication of the PSI summary, Department Counsel presented the testimony of the special agent from the Office of Personnel Management who conducted the interview. The special agent testified that she has a bachelor’s degree and has worked as a special agent for 12 years, during which time she has conducted “thousands” of interviews. Before conducting an interview, she reviews the SCA and checks for omissions or discrepancies that need to be clarified. She described her style of interviewing as “conversational, confrontational.” She uses a friendly, conversational tone during questioning, which becomes “confrontational” if the questioning develops something that is not covered in the SCA. She takes handwritten notes but does not record the conversation. She stated that she does not paraphrase the

² Applicant’s personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

information from the interviewee. She writes down "exactly what they say." After the interview, she types her report of investigation from her handwritten notes. Her handwritten notes are retained for 30 days after the case is "closed," meaning that it is adjudicated by the DOD CAF, at which time her notes are destroyed. (Rtr. 23-28.)

The portion of the PSI summary that is the basis for the SOR and the Appeal Board decision is captioned as "Illegal Activity/Foreign Contacts/Activities/Travel." The special agent testified that, as she went through the information in Applicant's SCA, Applicant stopped her and asked her to go back to a question about contracts with foreign nationals, and at that point he volunteered information about a relationship with Ms. V. (Rtr. 53.)

At the time of the hearing, the special agent had no independent recollection of what Applicant disclosed, except for his disclosure that Applicant asked his daughter to leave his timeshare vacation home because a woman (Ms. V) was coming to the timeshare to have sex with him. The special agent testified that she remembered that disclosure because "it is the only time someone has ever disclosed something like that to me." The special agent had no information about Ms. V because she was not listed anywhere in the SCA. She testified that her interview summary was "100 percent" accurate because it reflects what she had in her notes. (Rtr. 29-33.) She testified that she uses symbols or shorthand for her questions, but she writes down the answers using whatever words the interviewee uses. (Tr. 61.) The subject of the interview is not given an opportunity to review the interview summary after it is typed. (Rtr. 67.)

The PSI summary reflects that Applicant told the special agent that he met Ms. V in November 2014 at an expo where adults in the adult-sex industry have informational booths. Applicant watches live streaming adult pornography at home and has viewed pornography in which Ms. V participates in sexual activity with men. He was interested in Ms. V and looked up more information when he returned home from the expo. He began having contact with Ms. V in November 2015 through social media. He learned that he could join a "fan club" for \$100, which offered live pornographic videos showing Ms. V participating in sexual activity. He learned from Ms V that she was willing to have sex with him. On about five occasions, he paid Ms. V \$1,200 to have sex with him. He has traveled to several cities in several states to meet her. They usually meet for dinner and then go to a hotel room where he pays her for sex. (GX 2 at 10-11.) He told the investigator that he thought Ms. V was 23 or 24 years old, but was not certain. (Rtr. 101.)

Applicant told the special agent that on one occasion, he invited Ms. V to a vacation home where Applicant's oldest daughter and her boyfriend were staying with him. He asked his daughter and her boyfriend to leave the vacation home for a few hours so that he could have it for himself while Ms. V visited. (GX 2 at 10.)

Applicant told the investigator that he knew Ms. V was born in a South American country but he did not know if she was a dual citizen. He told the investigator that he admires Ms. V's business and enterprising spirit and that he had provided her suggestions for improving her website. He told the investigator that he considers himself Ms. V's customer and friend. (GX 2 at 10.)

The special agent asked Applicant if he knew that prostitution was illegal and he responded, "not in all states." The investigator asked if he knew that prostitution was a crime, and he answered, "yes." He told the investigator that he contacts Ms. V only when he has extra money and can afford her \$1,200 fee. (GX 2 at 11.) The special agent testified that the reference to prostitution was in her report because Applicant mentioned it. (Rtr. 56-57.)

On cross-examination by Applicant, the special agent testified that she did not remember him. She knew from retrieving the interview records that they had one personal interview and two telephone conversations. She did not remember receiving a telephone call from Applicant. (Tr. 36-37.)

When Applicant responded to DOHA interrogatories and commented on the accuracy of the PSI in GX 2, he described Ms. V as "one of my NY dear friends." (GX 2 at 4.) At the first hearing, he testified that he told the investigator that he had a "superficial relationship" with Ms. V and he denied that he had sex with her at any time. (Tr. 30, 32.) At the hearing on remand, Applicant testified that he and Ms. V were "friends, acquaintances." He explained that he believes "friends" and "acquaintances" are "about the same." He testified that Ms. V was not a "close friend." He explained: "She didn't know my birthday. She didn't know my address, didn't know anything about my work. Those kind of things did not come up." (Rtr. 76-77.) However, he admitted that he was open to the possibility that they were "moving toward the path of having a friendship, a relationship, maybe boyfriend and girlfriend." (Rtr. 105.) He admitted that he gave Ms. V "a few hundred dollars" and gifts of nominal value, but denied paying her for having sex with him. (Rtr. 78.) He testified that the relationship ended about two and a half years ago when "she just stopped" after she lost her phone and did not provide Applicant with her new contact information. (Tr. 48; Rtr. 105.)

Applicant admitted in the PSI and at the hearing on remand that he and the investigator discussed the fact that prostitution is illegal. However, he insisted at the hearing that the investigator introduced the topic, and he denied that he solicited prostitution. (GX 2 at 11.)

Applicant's 37-year-old daughter, who holds a security clearance, submitted a letter describing him as a reliable, responsive, and wise parent. She has worked with Applicant professionally and attests that he is respected and trusted in the workplace. She considers her father one of the most honest, trustworthy, and reliable people she knows. She has observed his good judgment, respects him, and aspires to be like him. (AX A at 5.) She was staying in Applicant's timeshare vacation home when Ms. V visited him, and, according to the PSI summary, she was asked by Applicant to leave so that he and Ms. V could be alone. However, she submitted no testimonial or documentary evidence regarding the accuracy of the PSI summary. Applicant testified his children, all of whom are older than Ms. V, were aware of his relationship with Ms. V. His oldest daughter advised him to look for older friends, but his three other children "have not been quite so expressive." (Rtr. 114.)

A retired member of the senior executive service and a current federal contractor testified at the initial hearing and submitted an affidavit attesting to Applicant's trustworthiness, good judgment, prudence, and reliability. The witness bases his evaluation of Applicant on working closely with him on sensitive projects since 1993. (Tr. 60-65; AX A at 1.) He believes that the security concerns in this case are based on Applicant's social relationship with a woman involving "dinner and pleasantries and nothing more than a normal social relationship." (Tr. 66.) I have considered this witness's testimony and affidavit in my decision.

Three other affidavits were received during the initial hearing, and I have considered them in my decision. The affiants have known Applicant for many years, and they have attested to his honesty, trustworthiness, reliability, and good judgment. These affiants did not indicate whether they were aware of the allegations in the SOR. (AX A at 2-4.)

Policies

"[N]o 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 applicants 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 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and 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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance 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. 15-01253 at 3 (App. Bd. Apr.20, 2016).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline D, Sexual Behavior

The concern under this guideline is set out in AG 12:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. . . .

The issue underlying the remand order has been resolved by the testimony of the investigator who prepared the PSI summary. The PSI summary has been authenticated in accordance with Directive ¶ E3.1.20, and I have admitted it in its entirety. While I have some doubts about the special agent’s claim of virtual 100% accuracy, I am not persuaded that the entire recitation of Applicant’s relationship with Ms. V is a fabrication, as he has claimed. “Government officials are entitled to a presumption of regularity and good faith in the discharge of their official responsibilities.” ISCR Case No. 15-07539 at 5 (App. Bd. Oct. 18, 2018). Applicant has not rebutted that presumption. The PSI summary is sufficient to establish that Applicant paid for sexual relations with Ms. V on several occasions in multiple states, thus raising the following disqualifying conditions under this guideline:

AG ¶ 13(a): sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

AG ¶ 13(c): sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

AG ¶ 13(d): sexual behavior of a public nature or that reflects lack of discretion or judgment.

The following mitigating conditions are potentially relevant:

AG ¶ 14(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 judgment;

AG ¶ 14(c): the behavior no longer serves as a basis for coercion, exploitation, or duress; and

AG ¶ 14(d): the sexual behavior is strictly private, consensual, and discreet.

AG ¶ 14(b) is not established. Applicant's relationship was recent, frequent, and did not occur under unusual circumstances making recurrence unlikely. His relationship with Ms. V was continuing as of the date of the PSI. He testified that it ended about two and a half years ago. However, he did not affirmatively stop the relationship; it ended when Ms. V stopped responding to his attempted contacts and changed her contact information without telling him.

AG ¶ 14(c) is not established. Applicant testified that his children are aware of his relationship with Ms. V, but there is no evidence that he has otherwise disclosed it. To the contrary, he continues to deny having a sexual relationship with Ms. V.

AG ¶ 14(d) is established. According to the facts recited in the PSI, Applicant's conduct was private and consensual, and there is no evidence that it was not discreet.

Guideline E, Personal Conduct

The SOR cross-alleges Applicant's sexual conduct under this guideline. It does not allege any falsifications during the security-clearance process. The concern under this guideline is set out in AG ¶ 15:

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 or sensitive information. . . .

Applicant's sexual conduct establishes the following disqualifying conditions under this guideline:

AG ¶ 16(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 individual may not properly safeguard classified or sensitive information;

AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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 individual may not properly safeguard classified or sensitive information. . . ;

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing . . . ; and

AG ¶ 16(g); association with persons involved in criminal activity.

The following mitigating conditions are potentially applicable:

AG ¶ 17(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;

AG ¶ 17(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

AG ¶ 17(g): association with persons involved in criminal activities was unwitting, 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.

AG ¶ 17(c) is not established for the reasons set out in the above discussion of AG ¶ 14(b). AG ¶¶ 17(d) and 17(e) are not established, because Applicant has not acknowledged his behavior or taken any steps to reduce his vulnerability to exploitation, manipulation, or duress. AG ¶ 17(g) is established, but its mitigating effect is diminished because Ms. V, not Applicant, terminated the relationship.

Whole-Person Concept

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. In applying the whole-person concept, an 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 and applying the adjudicative factors in AG ¶ 2(d).³

I have incorporated my comments under Guideline D and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment. I have considered Applicant's long history of service in support of national defense, while holding a security clearance without incident. I have considered the testimony and affidavits of experienced and respected members of the defense community regarding Applicant's good judgment, trustworthiness, honesty, and reliability. However, this evidence is outweighed by the evidence of Applicant's poor judgment in his relationship with Ms V. After weighing the disqualifying and mitigating conditions under Guidelines D and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his sexual conduct and personal conduct.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline D (Sexual Behavior):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

³ The factors are: (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.

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge