



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 16-03763

**Appearances**

For Government: Aubrey De Angelis, Esq., Department Counsel

For Applicant: *Pro se*

07/27/2018

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny him eligibility for access to classified information. Applicant's private sexual activity with multiple women during 2013-2016, outside of his primary relationship with his cohabitant, does not rise to a level to justify an adverse clearance decision. Further, it is no longer a concern because such activity ceased in 2016, and he pledged to not engage in such activity in the future. Accordingly, this case is decided for Applicant.

**Statement of the Case**

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on January 1, 2016.<sup>1</sup> This document is commonly known as a security clearance application. Thereafter, on February 1, 2017, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility (DOD CAF), Fort Meade,

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<sup>1</sup> Exhibit 1.

Maryland, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information. The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guidelines known as Guideline E for personal conduct and Guideline D for sexual behavior.

The SOR alleged the following matters: (1) since late 2013, Applicant has engaged in high risk sexual conduct on multiple occasions; and (2) that his sexual conduct is unbeknownst to his cohabitant. The first matter was alleged under both guidelines, while the second matter was alleged solely under the personal conduct guideline. Applicant answered the SOR on February 22, 2017. He denied the SOR allegations without explanation and requested a hearing.

The case was assigned to me on May 1, 2017. The hearing took place as scheduled on July 13, 2017. Both Department Counsel and Applicant offered documentary exhibits, most of which were admitted. Government Exhibits 1, 2, 5, 6, 7, and 8 were admitted, while Applicant's objections, based on lack of authentication, to Exhibits 3 and 4 were sustained. Applicant's Exhibits E-Q were admitted, while Exhibits A, B, C, and D were excluded due to lack of relevance. I note that I initially deferred ruling on the admissibility of Exhibits 8 and P, but I admitted them after the close of evidence before closing arguments.<sup>2</sup> Department Counsel presented no witnesses, and Applicant offered his own testimony and that of one witness. The 190-page hearing transcript was received on July 24, 2017.

### **Findings of Fact**

Applicant is a 56-year-old employee who is seeking a security clearance for his job as an engineer for a company in the defense industry. He has worked for the same company since 1985. He previously held a security clearance for many years until it was revoked (as discussed below) in 2012. His formal education includes a Ph.D. in electrical engineering. His job is considered a high-level non-supervisory position, and he earns an annual salary of about \$178,000. His personal background includes two marriages, both ending in divorce. He met his current cohabitant in 2004, they have lived together since 2005, and they jointly purchased residential real estate in 2011.

Applicant's senior program manager appeared as a witness at the hearing. Overall, he vouched for Applicant's current security suitability. He described Applicant as a very open person who has demonstrated a heightened awareness of his obligation to properly handle and safeguard classified information. Applicant has established himself as a consistently high performer at work as evidenced by performance ratings going back to 2007.<sup>3</sup> Likewise, various people have written letters of recommendation

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<sup>2</sup> Tr. 172-173.

<sup>3</sup> Exhibit G.

on his behalf in which they attest to his reliability, work ethic, conscientious, and trustworthiness, among other favorable character traits.<sup>4</sup>

Besides having a good employment record, Applicant is financially stable and has a sizeable net worth.<sup>5</sup> He is involved in various matters outside of work. He serves as president of his homeowners' association and is otherwise involved in that community's activities.<sup>6</sup> He is the majority owner and manager of the family farm, the income of which benefits his elderly mother.<sup>7</sup> He has both a durable power of attorney and a durable power of attorney for health-care decisions for his mother, and he is involved in overseeing her care in an assisted-living facility, which she entered in 2016.<sup>8</sup>

After a hearing before another DOHA administrative judge, Applicant's eligibility for access to classified information was denied and his then existing security clearance was revoked.<sup>9</sup> The judge reached that decision under multiple security guidelines based on the following: (1) Applicant's wrongful use of computer systems, such as viewing pornographic images while using a company computer; (2) solicitation of prostitutes on more than 50 occasions from about 1990 to August 2008; (3) excessive use of alcohol from about 1979 to 2008, to include a diagnosis of alcohol dependence; (4) he provided his second wife \$30,000 in 2004 after she threatened to expose his illicit sexual activities to neighbors; (5) gambling and losing up to \$1,000 on a single occasion; (6) having his access to sensitive compartmented information (SCI) revoked in 2008 by another government agency;<sup>10</sup> and (7) frequenting topless bars and strip clubs after his SCI access was revoked. Overall, the judge concluded that Applicant's alcohol dependence was longstanding, and although he had been sober for three years, given the extent of his excessive use of alcohol and related activities while he was drinking (soliciting prostitutes, drunk driving), not enough time had passed to establish that similar conduct would not recur. On that point, the judge noted that Applicant's computer-related transgression occurred after he had completed the alcohol-treatment program, and that he also engaged in other types of behavior that raised unmitigated security concerns. None of the matters described above from the 2012 clearance decision, are alleged in the February 2017 SOR, as the Department presumably decided those matters were no longer a concern.

In 2014, Applicant's senior program manager asked Applicant to reapply for a security clearance. He asked because he believes Applicant is uniquely qualified to

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<sup>4</sup> Exhibit F.

<sup>5</sup> Exhibits H and M.

<sup>6</sup> Exhibit I.

<sup>7</sup> Exhibit K.

<sup>8</sup> Exhibit J.

<sup>9</sup> Exhibit 8.

<sup>10</sup> Exhibit 7.

provide support to a particular program, and that Applicant is the best and most qualified person to serve as the technical lead on the program.<sup>11</sup> He explained that he was familiar with the issues and circumstances that led to the revocation of Applicant's security clearance, and he felt confident in recommending Applicant to hold a security clearance at this time.

Applicant reapplied and went through the required process and procedure, to include completing security clearance applications in 2014 and 2016.<sup>12</sup> In September 2016, Applicant responded to a request from the DOD CAF to answer written interrogatories concerning various subjects.<sup>13</sup> Relevant here is the section called sexual conduct interrogatory in which he denied that he continues to solicit the services of prostitutes, either through an informal or formal agreement in which an arrangement is made to pay for sex. In response to the various questions about prostitution, he provided a 12-page handwritten memorandum. In short, he stated that his last engagement with a prostitute was in 2008, and that since late 2013 or early 2014 he has had sexual activity with women other than his cohabitant, but in no case did he solicit sex for money. He stated that sexual activity did not occur during each encounter. When it did, he stated it occurred in a private, one-on-one setting, typically at her place of residence. He stated that he may have paid for a massage from the women, and he sometimes did favors (e.g., ran errands) for the women, but he did not pay money for sex. The only stigma in his mind was that the sexual activity was occurring outside of his primary relationship. He went on at length to describe the nature of his relationship with these women as "friends with benefits."

At the hearing in 2017, Applicant admitted since 2013 engaging in sexual activity with multiple women outside of his primary relationship with his cohabitant.<sup>14</sup> He decided to seek sexual activity outside of his primary relationship because his sex life with his cohabitant was largely nonexistent due to a lack of desire on his part. He stated that his relationship with his cohabitant is based on attachment as opposed to sexual desire or romantic love.<sup>15</sup> He recalls last having sexual intercourse with his cohabitant sometime in 2017 or 2016, and he is certain that there was a three-year period without sexual intercourse between them.<sup>16</sup> He described a number of health and physical issues of his cohabitant that contributed to this circumstance, to include a lack of physical pleasure in sexual intercourse.<sup>17</sup> He described sexual relations with his

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<sup>11</sup> Exhibit P at Enclosure 2.

<sup>12</sup> Exhibits 1 and 2.

<sup>13</sup> Exhibit 6.

<sup>14</sup> Tr. 114.

<sup>15</sup> Tr. 119; Exhibit N.

<sup>16</sup> Tr. 120.

<sup>17</sup> Tr. 115-119, 122-123.

cohabitant as “bad sex.”<sup>18</sup> He also stated they had communication problems that have been difficult and ongoing.<sup>19</sup> He further described his cohabitant as an amazing person, they have lots of fun together, and she is an accomplished teacher and a past employee-of-the-year in a large school district. He has considered ending his relationship with his cohabitant, but has declined to do so.<sup>20</sup> He admitted that he has not told his cohabitant about his sexual activity with other women, but he does not know whether she suspects or intuits that he may be involved with other women.<sup>21</sup>

Concerning the women whom Applicant described as friends with benefits, the sexual encounters usually took place while receiving a massage at their place of residence.<sup>22</sup> This activity involved three to four women over the years 2013-2016.<sup>23</sup> He exercised discretion in his encounters, as he explained in response to the interrogatories as follows:

I refrained from providing detailed, personal information and always steered clear of my work, employer, etc. A mutual concern for personal safety and discretion pervaded. For obvious reasons, I was always attentive for signs of prostitution, escorts, or other activities/situations I wished to avoid.<sup>24</sup>

Applicant denied paying money for sex, and the massages were not an informal, sex-for-money arrangement. He stated that he practiced safe sex by using condoms during the encounters.<sup>25</sup> The frequency of the encounters varied; it occurred about once a month in 2014; it was probably about a dozen times in 2015; it was less than a handful of times in 2016; and it did not occur in 2017.<sup>26</sup> He also pledged in his testimony and in a written statement to cease and desist all sexual encounters with women outside of his primary relationship; and should his primary relationship change, he agreed to inform his security officer or manager before engaging in sexual activity with another woman.<sup>27</sup> As evidence of his ability to keep his commitment, he points to the fact that he committed to stop drinking alcohol and has been sober since 2008. Likewise, he

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<sup>18</sup> Tr. 120-124; Exhibit O.

<sup>19</sup> Tr. 125-126.

<sup>20</sup> Tr. 127-128.

<sup>21</sup> Tr. 133.

<sup>22</sup> Tr. 139.

<sup>23</sup> Tr. 139-158.

<sup>24</sup> Exhibit 6.

<sup>25</sup> Tr. 158.

<sup>26</sup> Tr. 163-168.

<sup>27</sup> Tr. 134-136; Exhibit Q.

committed to his employer to not engage in further computer misuse, and similar conduct has not recurred.

### Law and Policies

This case is adjudicated under Executive Order (E.O.) 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.<sup>28</sup>

It is well-established law that no one has a right to a security clearance.<sup>29</sup> As noted by the Supreme Court in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>30</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.<sup>31</sup> The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.<sup>32</sup>

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>33</sup> An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>34</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>35</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>36</sup> An

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<sup>28</sup> The 2017 AG are available at <http://ogc.osd.mil/doha>.

<sup>29</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

<sup>30</sup> 484 U.S. at 531.

<sup>31</sup> 484 U.S. at 531.

<sup>32</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>33</sup> Directive, ¶ 3.2.

<sup>34</sup> Directive, ¶ 3.2.

<sup>35</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>36</sup> Directive, Enclosure 3, ¶ E3.1.14.

applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>37</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>38</sup>

## Discussion

Because the SOR allegations are factually interrelated, the Guideline E personal conduct and Guideline D sexual behavior matters are discussed together. Under Guideline E, the central concern is conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations may raise questions about a person's reliability, trustworthiness, and ability to protect classified of sensitive information.<sup>39</sup> Likewise, Guideline D has similar judgment concerns, in that sexual behavior that involves a criminal offense, reflects a lack of judgment or discretion, or may subject a person to undue influence, coercion, exploitation, or duress may raise questions about a person's reliability, trustworthiness, and ability to protect classified of sensitive information.<sup>40</sup>

Given the evidence here, I have considered the following disqualifying and mitigating conditions under both guidelines:

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

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

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

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

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;

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<sup>37</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>38</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>39</sup> AG ¶ 15.

<sup>40</sup> AG ¶ 12.

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, in known, could affect the person's personal, professional, or community standing; and

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

To start, two observations are appropriate. First, the security clearance process does not exist to make moral judgments about an applicant's behavior. Rather, the aim is to make a common-sense determination that the person is or is not an acceptable security risk.<sup>41</sup> Second, this case is remarkable due to Applicant's willingness to give full, frank, and candid responses to questions posed to him on a subject that most people would consider to be highly private matters. He did so both in response to written interrogatories and during his hearing testimony.

This case has two main issues. The first is whether Applicant's sexual activity during 2013-2016 with multiple women outside of his primary relationship poses undue security concerns under Guidelines E and D. The second is whether Applicant's sexual activity, which is unbeknownst to his cohabitant, poses undue security concerns under Guideline E.

The former is mitigated because Applicant's sexual activity with other women during 2013-2016 was private, casual, consensual behavior in which he exercised caution (e.g., use of condoms) and discretion (e.g., it took place at private residences and he was attentive to signs of prostitution). It is further mitigated because his sexual activity with other women ceased in 2016, and he has pledged to not engage in similar behavior. Accordingly, the behavior no longer serves as a basis for coercion, exploitation, or duress.

The latter is mitigated because, although Applicant has not disclosed his sexual activity to his cohabitant, by stopping the behavior in 2016 and pledging to not engage in similar behavior, he has taken sufficient positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress. In reaching this conclusion, I note Applicant's willingness to disclose to the Department matters of a highly personal nature. His willingness to voluntarily and fully disclose such matters suggests that he will voluntarily self-report any potential security infraction or violation or other matter related to his eligibility for access to classified or sensitive information.

Following *Egan* and the clearly-consistent standard, I have no doubts or concerns about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified or sensitive information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also considered the whole-person concept. In doing so, I considered his good employment record, the favorable recommendations,

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<sup>41</sup> Directive, Enclosure 2, ¶ 2(a).



his financial stability, his community involvement with his homeowners' association, and his social responsibility as shown by his role in overseeing the care of his elderly mother, all of which demonstrate maturity, responsibility, and trustworthiness. Applicant is a flawed and imperfect person, as we all are, and he was not an acceptable security risk when his previous case was decided in 2012.<sup>42</sup> But there has since been a substantial change of circumstances, and he is now an acceptable security risk. Accordingly, I conclude that he met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

### **Formal Findings**

The formal findings on the SOR allegations are:

Paragraph 1, Guideline E:	For Applicant
Subparagraphs 1.a – 1.b:	For Applicant
Paragraph 2, Guideline D:	For Applicant
Subparagraph 2.a:	For Applicant

### **Conclusion**

It is clearly consistent with the national interest to grant Applicant access to classified information.

Michael H. Leonard  
Administrative Judge

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<sup>42</sup> Exhibit 8.