



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



In the matter of: )  
 )  
 ) ISCR Case No. 17-03098  
 )  
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Applicant for Security Clearance )

**Appearances**

For Government: Andrew H. Henderson, Esq., Department Counsel  
For Applicant: Pro Se

05/31/2018

**Decision**

KILMARTIN, Robert J., Administrative Judge:

Applicant mitigated the security concerns under Guideline M (use of information technology), Guideline D (Sexual Behavior), and Guideline E (personal conduct). Applicant's eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on December 22, 2015. On October 27, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline M, use of information technology, Guideline D, sexual behavior, and Guideline E, personal conduct. The DOD CAF acted 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 (AGs) implemented by DOD on June 8, 2017.

Applicant provided a three-page response to the SOR on November 16, 2017, admitting all of the SOR allegations. Applicant also requested a hearing before an administrative judge. The case was assigned to me on December 14, 2017. On March 22,

2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for April 11, 2018. I convened the hearing as scheduled.

The Government's Exhibits (GE) were not available for the hearing.<sup>1</sup> However, they were provided to Applicant before the hearing in discovery. I left the record open until April 25, 2018, for Department Counsel to provide the GEs to Applicant, and for Applicant to provide any post-hearing documents. He did not object and GE 1 through 3 were later admitted into evidence without objection. At the hearing, Applicant testified on his own behalf. Applicant submitted two documents post-hearing including a letter from his former company indicating that it would not release his personnel record without a subpoena, and a strong character reference letter from his current supervisor. These were marked as AE A and AE B, respectively, and admitted without objection. DOHA received the transcript (Tr.) on April 25, 2018.

### **Findings of Fact<sup>2</sup>**

SOR ¶ 1.a alleges under Guideline M that in February 2015, Applicant violated his employer's information protection acceptable use policy by viewing and storing indecent and sexually explicit images on his company's computer. A second allegation at SOR ¶ 2.a asserts that Applicant was arrested and charged with prostitution in Dallas, Texas in June 2002. SOR ¶ 2.b cross-alleges that the same putative misconduct under SOR ¶ 1.a raises a concern under Guideline D, sexual behavior, as well. SOR ¶ 3.a cross alleges the same violation at ¶¶ 1.a and 2.a as concerns under Guideline E, personal conduct. The basis for these allegations is a February 9, 2015 letter of termination from the director of Applicant's company (GE 2), and an FBI criminal history report (GE 3).

Applicant is 57 years old. He graduated from high school in 1979 and had some college courses, but did not obtain a degree. Tr. 10-12 Applicant was married from 1998 to 2005 and he had two children from that marriage, currently attending college. He has now been remarried for six years. Applicant has been employed as a software developer by a federal contractor aboard a military installation since January 2016. Applicant reports no military service, and he has held an interim security clearance since January 2016 (Tr. 9-10.)

Applicant started using his company e-mail account to access dating web sites online because he was having marital difficulties. This included storing images on his work computer (Tr. 17.) He found out that his current wife was cheating on him and he accessed dating websites online out of a desire to retaliate (Tr. 19.) Subsequently, he started receiving unsolicited e-mails and pornographic images on his work computer. He never re-transmitted these photographs of naked women (Tr. 34- 36.) However, Applicant had taken

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<sup>1</sup> Department Counsel's briefcase was sidetracked en route to the hearing. I left the record open for him to submit the GEs, which had already been provided in discovery, to Applicant. I also allowed time for Applicant to object. He did not raise an objection.

<sup>2</sup> Unless stated otherwise, the source of the information in this section is Applicant's December 22, 2015 security clearance application (SCA) (GE 1).

computer-security courses and training and he knew that the company prohibited such use (Tr. 23.) Applicant did not set out to deliberately download pornographic images onto his work computer, but once he inadvertently got onto dating distribution lists, things escalated, and he could not control the email traffic (Tr. 21.)

Applicant did not use his own g-mail account because his wife had access to it (Tr. 35.) He testified that the pornographic images were discovered by his employer because an altercation occurred in another section in his workplace, and his employer was sued. The attorney in that civil litigation subpoenaed all of the e-mail accounts of supervisors at the company, including Applicant's e-mail account (Tr. 20-21.) Since the company had a zero tolerance policy for computer pornography, Applicant was terminated, and he remained unemployed for one year (Tr. 24.) He had to withdraw \$70,000 from his 401 k retirement account to pay living expenses (Tr. 25.) Applicant has never had other problems with pornographic materials or been diagnosed with any addiction (Tr. 37.) He went to counseling with his wife and they are still together despite some rough patches in their marriage (Tr. 37.) Applicant disclosed this termination of his employment on his SCA and testified credibly that it will never happen again (Tr. 38.)

Applicant admitted that he was arrested for prostitution in Dallas in 2002, as alleged in SOR ¶ 2.a. Applicant testified that he stopped at a service station to fill his automobile with gas. Some ladies driving by catcalled to him and then asked Applicant if he would like to go someplace and party? (Tr. 26-27) He understood the word party to mean sex and he was told the price would be \$10. He had to go to the nearby ATM to withdraw the \$10 (Tr. 27.) Applicant was arrested in a sweep by Dallas police. He hired a local attorney who advised him to plead guilty and move on with his life (Tr. 28.) Applicant pled no contest and he was fined \$700 and placed on probation for two years. This was the only time Applicant was arrested in his life (Tr. 30.)

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, these guidelines are applied 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(a), the adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is 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 national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to 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.

## **Analysis**

### **Guideline M, Use of Information Technology**

The Concern. Failure to comply with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology includes any computer-based, mobile, or wireless device used to create, store, access, process, manipulate, protect, or move information. This includes any component, whether integrated into a larger system or not, such as hardware, software, or firmware, used to enable or facilitate these operations.<sup>3</sup>

In assessing Applicant's case, I considered the following pertinent disqualifying conditions in AG ¶ 40:

(e) unauthorized use of any information technology system; and

(f) introduction, removal, or duplication of hardware, firmware, software, or media to or from any information technology system when prohibited by rules, procedures, guidelines, or regulations or when otherwise not authorized.

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<sup>3</sup> AG ¶ 39.

Applicant has admitted in his response to the SOR that he improperly downloaded pornography onto his work computer without authorization. This meets the government's burden in establishing application of the above-mentioned disqualifying conditions, and shifts the focus to potentially mitigating conditions.

AG ¶ 41(a) could potentially mitigate the use of information technology concerns:

so much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

Applicant did not start out intending to download pornographic images into his e-mail account on his work computer. Instead, he made the mistake of accessing dating websites online, and the situation escalated when he received unsolicited images of naked ladies. He did not further disseminate these images. Applicant testified credibly that he is remorseful for his actions and he has been punished by this former employer when he was terminated and unemployed for one year. He has resolved the friction with his wife and they are together and happy. I am convinced that this violation was a onetime lapse in judgment and it is not likely to ever recur in the future.

#### **GUIDELINE D: SEXUAL BEHAVIOR**

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

Conditions that could potentially raise a security concern and may be disqualifying are set out in AG ¶ 13 and include:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted; and
- (d) sexual behavior of a public nature or that reflects lack of discretion or judgment.

Applicant candidly admits that he was arrested for prostitution in a sting operation 16 years ago. The arrest implicates AG ¶13(a) and 13(d), requiring an examination of applicable mitigating conditions.

Any sexual behavior security concerns would be mitigated by AG ¶ 14(b):

(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.

Considering the evidence as a whole, I find that the allegations of sexual impropriety are corroborated, but have been mitigated by the passage of time and no recidivism. Applicant is a married father helping two children through college. The risqué e-mails in his account were a reaction to his marital distress. The prostitution arrest was for a misdemeanor 16 years ago. Thus, the mitigating condition under AG ¶ 13 (b) applies.

#### Guideline E, Personal Conduct

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

The Concern. 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following normally will result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

I find that the evidence and testimony presented, implicate AG ¶16(f). Applicant acknowledges having computer training with the company and being aware of his company's zero-tolerance policy for downloading pornography on company computers, and he admits to violating it. Moreover, Applicant was terminated by his employer for this behavior.

Conditions under AG ¶ 17 that could potentially mitigate security concerns include:

(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 contributed to 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.

My analysis under adjudicative guidelines M and D above, is the same under this administrative guideline E and is herein incorporated by reference. Applicant pled no contest to a misdemeanor charge of prostitution in 2002. He disclosed his 2015 termination in his SCA. He has been candid and forthright throughout the security clearance process. He and his wife had counseling and remain living together. Applicant has taken positive steps to repair his marriage and eliminate the stressors that caused him to turn to pornography. He had only the one arrest in his 57 years. Neither the prostitution arrest or termination from his employment is likely to recur, and the mitigating conditions above apply.

#### 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(d):

(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 Guidelines M, D, and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines. Notably, Applicant has a demonstrated record of over 20 years of superb service in the workforce as a software developer and project manager. He is a father of two children. Most importantly, Applicant disclosed his transgressions in the SCA and he is remorseful and determined not to re-commit the security violations alleged in the SOR. He has met his burden of persuasion.

There is sufficient evidence to conclude that Applicant has violated the company's rules, regulations, policies or procedures pertaining to use of information technology, and that he was arrested for prostitution 16 years ago. He has met his burden of persuasion. I am convinced that these were isolated incidents. The record evidence leaves me with no questions or doubts as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has refuted the security concerns arising under Guidelines M, D, and E.

### **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 M:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline D:	FOR APPLICANT
Subparagraphs 2.a: - 2.b:	For 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 clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is granted.

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Robert J. Kilmartin  
Administrative Judge