



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 17-03583
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Benjamin R. Dorsey, Esq., Department Counsel  
For Applicant: David P. Sheldon, Esq.

08/06/2018

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**Decision**

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MENDEZ, Francisco, Administrative Judge:

Applicant did not present sufficient evidence to mitigate security concerns raised by his conduct in soliciting prostitutes from 1994 to 2017. Clearance is denied.

**Statement of the Case**

On July 4, 2017, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) alleging security concerns under the sexual behavior and personal conduct guidelines. Applicant answered the SOR and requested a hearing.

The hearing was originally scheduled for June 7, 2018, but was rescheduled to July 17, 2018, to allow the parties to resolve preliminary matters. The hearing was held on the rescheduled date. Applicant testified and called several witnesses as character references at the hearing. Government Exhibits 1 – 7 and Applicant's Exhibits A – M were admitted into the administrative record. The transcript of the hearing was received on July 26, 2018, and the record closed on July 27, 2018.

**Findings of Fact**

Applicant, 56, served in the U.S. Navy from 1981 to 2001. Since retiring from the Navy, Applicant has primarily worked as a U.S. Government contractor. He earned a bachelor's degree in 2013 and is currently pursuing a master's degree. He has deployed

overseas on a number of occasions, both while in the military and as a contractor. He was first granted a security clearance while in the military, and was granted eligibility for sensitive compartmented information in 2003.<sup>1</sup>

Applicant revealed during a polygraph-assisted interview with another government agency that he routinely hired hookers and paid workers at massage parlors for sex and sexual acts. He engaged in this conduct both in the United States and while working overseas for the U.S. Government. He told the other agency's investigators that he planned to continue going to massage parlors and paying for sexual acts, as he did not believe such conduct was wrongful. Subsequently, the other government agency revoked Applicant's SCI eligibility based on his admitted sexual conduct.<sup>2</sup>

Applicant testified that he no longer solicits prostitutes or pays masseuses for "happy endings." He went on to testify that he will not engage in such conduct in the future, and noted that he last paid for sex or a sexual act about eight to nine months prior to the hearing. He notes that his conduct was commonplace while he was in the military, and does not believe that any of the persons he paid for sex and sexual acts was underage. His long-time friends, family, and supervisor are aware of his past conduct. Each of these person's provided their favorable opinion of Applicant's character, noting that Applicant is a loyal, trustworthy, and reliable patriot.<sup>3</sup>

Applicant engaged the services of a psychologist for the purpose of his security clearance hearing. Applicant told the psychologist that he stopped soliciting prostitutes and paying masseuses for sexual favors in 2016. Based, in part, on this interview, the psychologist went on to opine that Applicant does not suffer from a psychological disorder, because "[t]he sexual behavior that existed in the past is no longer occurring, and has not occurred for over two years."<sup>4</sup> In response to Department Counsel's questions, Applicant admitted that he lied to the psychologist. He continued to visit massage parlors and pay a "tip" for a "happy ending" up to October or November 2017. He engaged in this conduct after receiving DoD briefings on combatting trafficking in persons and receiving the SOR.<sup>5</sup>

### **Law, Policies, and Regulations**

This case is decided under Executive Order (E.O.) 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 National Security Adjudicative Guidelines (AG), which became effective on June 8, 2017.

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<sup>1</sup> Tr. 39-41; Exhibits 1 – 4; Exhibits A – C; Exhibit H.

<sup>2</sup> Tr. 41-47; Exhibits 1 – 4; Exhibit H.

<sup>3</sup> Tr. 16-38; Exhibits D – G; Exhibit M.

<sup>4</sup> Exhibit H, *Opinion*, ¶ 2.a.

<sup>5</sup> Tr. 47-52.

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information “upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

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

DOHA administrative judges “are creatures of the Directive,”<sup>6</sup> who derive their authority from the Directive. The Directive also sets forth an administrative judge’s responsibilities and obligations, including the requirement that a judge remain fair and impartial, and carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In evaluating the evidence, a judge applies a “substantial evidence” standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive, ¶ E3.1.32.1. See *also* ISCR Case No. 16-03712 at 3 (App. Bd. May 17, 2018).<sup>7</sup>

Any doubt raised by the evidence must be resolved in favor of the national security. AG ¶ 2(b). See *also* Security Executive Agent Directive 4 (SEAD 4), ¶ E.4. Additionally, the Supreme Court has held that responsible officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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<sup>6</sup> ISCR Case No. 17-01213, n. 2 (App. Bd. June 29, 2018).

<sup>7</sup> However, a judge’s mere disbelief of an applicant’s testimony or statements, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on non-alleged conduct or issue. ISCR Case No. 17-02952 (App. Bd. Aug. 3, 2018); ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Unless an applicant is provided notice that unalleged conduct or issue raises a security concern, it can only be used for specific limited purposes, such as assessing mitigation and credibility. ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017).

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. 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 an 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.<sup>8</sup>

## Analysis

### Guideline D, Sexual Behavior

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 raises a security concern. See AG ¶ 12. In assessing the present case, I considered the sexual behavior disqualifying and mitigating conditions, including:

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

AG ¶ 13(b): a pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;

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

AG ¶ 13(d): sexual behavior . . . that reflects lack of discretion 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.

Applicant solicited prostitutes and frequented massage parlors, paying for sex and other sexual acts for over 25 years. He engaged in this conduct while holding a security clearance and, at times, while working overseas for the U.S. Government, where his conduct and status could have come to the attention of those seeking to exploit perceived personal vulnerabilities of persons with access to sensitive U.S. information. Applicant continued to engage in this highly questionable and destructive behavior after being made aware that it could jeopardize his clearance and it was contrary to DoD policy. He lied

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<sup>8</sup> See generally ISCR Case No. 11-13626 (App. Bd. November 7, 2013) (discussing predictive nature of security clearance adjudications). See also *Palmieri v. United States*, 2018 U.S. App. LEXIS 20477, \* 8 (D.C. Cir. July 24, 2018) ("*Egan* holds that 'the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch.' . . . The idea is that 'an outside non-expert body,' including a court, is institutionally ill suited to second-guess the agency's '[p]redictive judgment' about the security risk posed by a specific person.") (citing to and quoting from *Egan*, 484 U.S. 527, 529).

about his conduct to a psychologist who he retained for the purpose of the security clearance hearing and then submitted a report from the psychologist knowing that the psychologist's favorable opinion in the report was based on false information he provided. AG ¶¶ 13(a) through 13(d) apply. Although AG ¶ 14(c) has some limited applicability, it is insufficient to mitigate the serious security concerns raised by Applicant's conduct. In summary, I am not convinced Applicant will not engage in similar security-significant conduct in the future. Sexual behavior security concerns remain.

### **Guideline E, Personal Conduct**

Applicant's conduct in paying prostitutes and masseuses for sex and "happy endings" raises similar serious concerns under the personal conduct security guideline. See AG ¶ 15. For similar reasons noted under Guideline D, I find that Appellant failed to mitigate the security concerns under the personal conduct guideline. See *generally* ISCR Case No. 11-05685 (App. Bd. July 12, 2013) (affirming denial under Guidelines D and E for an applicant who engaged in similar conduct while holding a security clearance).

### **Whole-Person Concept**

In addition to the specific adjudicative guidelines, a judge must also take into account factors that are applicable to all cases. These factors are grouped together under the all-encompassing umbrella of the whole-person concept.<sup>9</sup> I hereby incorporate my above analysis and highlight some additional whole-person matters.

Specifically, I considered Applicant's honorable military service and work as a U.S. Government contractor. Additionally, Applicant has held a security clearance for years without an incident or violation, and numerous people provided their favorable opinion of his character. However, this and the other favorable record evidence are insufficient to mitigate the serious security concerns at issue. Of note, Applicant was unable to stop the behavior at issue even after another government agency revoked his SCI eligibility and he received the SOR. Overall, the record evidence leaves me with doubts about Applicant's present eligibility for continued access to classified information.<sup>10</sup>

### **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 (Sexual Behavior):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against Applicant

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<sup>9</sup> See AG ¶ 2. See also SEAD-4, ¶ E.4; Directive, ¶ 6.3.

<sup>10</sup> I also considered the exceptions listed in SEAD 4, Appendix C, but none are warranted in this case.

## **Conclusion**

In light of the record evidence, it is not clearly consistent with the interests of national security to grant Applicant initial or continued eligibility for access to classified information. Applicant's request for a security clearance is denied.

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Francisco Mendez  
Administrative Judge