



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 17-04058
)
Applicant for Security Clearance)

Appearances

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

11/27/2018

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings and exhibits, eligibility for access to classified information is denied. Applicant did not present sufficient information to mitigate sexual behavior security concerns.

Statement of the Case

On December 19, 2016, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to maintain and upgrade his security clearance required for a position with a defense contractor. On March 16, 2017, Applicant was interviewed by a security agent from the Office of Personnel Management (Item 3, Personal Subject Interview (PSI) dated March 16, 2017). He was administered a polygraph examination by an agent from the National Security Agency on January 4, 2016. (Item 4, NSA Clearance Decision Statement, dated July 20, 2016). After reviewing the results of the background investigation and the polygraph examination, the Department of Defense Consolidated Adjudication Facility (DOD CAF) could not make the affirmative findings required to continue a security clearance. On April 20, 2018, the DOD CAF issued Applicant a Statement of Reasons (SOR), detailing security concerns for sexual behavior under Guideline D. The action was taken 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 adjudicative guidelines (AG) effective in the DOD on June 8, 2017.

Applicant answered the SOR on May 21, 2018. He admitted the factual allegations of sexual behavior but denied that the facts raised security concerns. Department Counsel submitted the Government's written case on July 17, 2018. (Item 5) On July 27, 2018, Applicant received a complete file of relevant material (FORM). He was provided the opportunity to file objections and to submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant did not submit any additional material or provide a response to the FORM. I was assigned the case on October 11, 2018.

Procedural Issues

Applicant was advised in the FORM that the summary of the PSI (Item 3) was not authenticated and could not be considered over his objection. He was further advised that he could make any corrections, additions, or deletions to the summary to make it clear and accurate, and could object to the admission of the summary as not authenticated by a Government witness. He was additionally advised that if no objection was raised to the summary, the Administrative Judge could determine that he waived any objection to the admissibility of the PSI summary. Applicant did not raise any objection to consideration of the PSI because he did not respond to the FORM. Since there is no objection by Applicant, I will consider information in the PSI in my decision.

Findings of Fact

After a thorough review of the record, I make the following findings of fact. Applicant is 50 years old. He graduated from high school in 1986, and received a bachelor's degree in March 1993. Applicant has been employed by a defense contractor as a software engineer and project manager since 2014. Prior to that employment, he was employed since 1998 as a network systems analyst and programmer. He married in 1997 and has two children and a step child. (Item 2, e-QIP, dated December 19, 2016; Item 3, PSI, dated March 16, 2017) Applicant was granted eligibility for access to classified information in 1998, and conditionally approved for access to SCI on October 17, 2011. The SOR alleges that Applicant engaged in criminal sexual behavior from the 1990s until the late 2014 or early 2015. (Item 1)

Applicant stated in the PSI, that while in college in the 1990s, he and some friends went to Las Vegas where they became intoxicated. They were approached by some females, and Applicant went to the hotel room and engaged in sexual intercourse with one of the females. He paid her approximate \$80 to \$100 for her services. In early 2000s, Applicant and some family members and neighbors were in Las Vegas and became intoxicated. They attended a bachelor party where Appellant was approached

by some ladies. He accompanied one of the ladies to her room and paid to have sexual intercourse with her. (Item3)

Applicant reported in the polygraph examination conducted on January 4 and 5, 2016, that in the mid-1990s, he and some friends and family members went to a club where they lived. Applicant and a friend went to motel with one of the females they met at the club, and both had sexual intercourse with her both separately and together. He also reported that in 2007 or 2008 he went to a massage parlor and paid to receive a sexual message to include ejaculation from a female. He returned to the massage parlor six months later and paid to receive the same service. He also paid for and received the same service from a different massage parlor in late 2014 or early 2015. He reported that he had no involvement with the females after he received their services. None of the incidents were detected by or reported to police. He stated his wife is unaware that he paid prostitutes for sexual services. He also does not believe he had an active security clearance at the time he paid for and received sexual services from prostitutes. His access to SCI was denied on July 20, 2016, after evaluation of the polygraph examination. He continued to be eligible for access to classified information. (Item 4)

In his response to the SOR, Applicant states that the characterization of his conduct does not define him as a person. He wrote that he values family most and wants to continue to work to provide a good education for his children. He has never been involved in an incident with law enforcement, and he has a clean record. He reported that the incidents with prostitutes were isolated and happened a long time ago. He was not aware that the conduct was considered criminal in nature. If he knew it was considered bad judgment to engage in the activities with prostitutes and it would affect his security clearance, he would not have engaged in the activities. (Response to SOR, dated May 19, 2018)

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 must be considered 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(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 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.

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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion in seeking 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 the 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

Sexual Behavior

The security concern raised by sexual behavior is 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 the 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. (AG ¶ 12)

The information reported by Applicant in the PSI and the polygraph examination shows that Applicant paid for and engaged in sexual activities with prostitutes from the early 1990 until as recent as early 2015. Once the Government has established an adverse financial issue, the Applicant has the responsibility to refute or mitigate the issue.

This available information is sufficient to raise the following Sexual Behavior Disqualifying Conditions under AG ¶ 13:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;

(c) sexual behavior that causes the individual to be vulnerable to coercion, exploitation, or duress; and

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

I considered the following Sexual Behavior Mitigating Conditions under AG 14:

(a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;

(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;

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress;

(d) the sexual behavior is strictly private, consensual, or discreet; and

(e) the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and consistent compliance with the treatment plan, and/or received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

The mitigating conditions do not apply. The available evidence and Applicant's admissions confirms that he paid for sexual conduct with prostitutes, which is criminal conduct, for over 25 years. Only the first incident happened when he was an adolescent college student, but he continued to avail himself of services from prostitute. His paying for sexual activity with prostitutes for over 25 years was continuous, frequent, voluntary, and under normal circumstances. The activities were high risk in that his friends and relatives were involved in the activities with him and his wife was unaware he paid for and engaged in sexual activities with prostitutes. His activities and the fact his wife does not know of his activities make him subject to coercion and exploitation.

The activities were not always private because on at least once occasion a friend was in the same room where the sexual activities took place. Applicant did not present any information that he sought out or received medical guidance to help stop his illicit activities. Applicant's willingness to engage in dangerous, irresponsible, and illicit behavior for over 25 years is a strong indication that he may not protect and safeguard classified or sensitive information.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for access to classified information 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(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 access to classified information must be an overall common-sense 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 considered that Applicant was eligible for access to classified information and SCI for 20 years and without evidence of a security violation. I considered his response to the SOR where he stated that he values family most of all.

I also considered that Applicant recently failed a polygraph examination and lost his eligibility for access to SCI. I considered that Applicant's conduct with prostitutes was potentially dangerous, shows lack of judgment and discretion, and can subject Applicant to undue influence, coercion, exploitation, or duress. Overall, the record evidence and Applicant's actions leaves me with questions and doubts concerning Applicant's judgment, reliability, and trustworthiness. He has not established his suitability for access to classified information and SCI. For all these reasons, I conclude Applicant did not mitigate the security concerns arising from his sexual behavior.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for access to

classified information and SCI. Eligibility for access to classified information and SCI is denied.

THOMAS M. CREAN
Administrative Judge