



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

[NAME REDACTED] ISCR Case No. 18-00757

Applicant for Security Clearance

Appearances

For Government: Andrea Corrales, Esq., Department Counsel

For Applicant: *Pro se*

12/06/2018

Decision

MALONE, Matthew E., Administrative Judge:

Applicant paid for sex with prostitutes at least six times between 1987 and 2015, at times while holding a security clearance, and once while assigned overseas. The information he presented to support his claims of rehabilitation was not sufficient to mitigate the security concerns his conduct raised about his judgment. His request for a security clearance is denied.

Statement of the Case

On March 31, 2017, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain eligibility for a security clearance required for his employment with a federal contractor. Based on the results of the ensuing background investigation, Department of Defense (DOD) adjudicators could not determine that it is

clearly consistent with the interests of national security for Applicant to have a security clearance.¹

On April 20, 2018, DOD issued a Statement of Reasons (SOR) alleging facts that raise security concerns under the adjudicative guidelines for sexual behavior (Guideline D) and personal conduct (Guideline E). Applicant timely responded to the SOR (Answer) and requested a hearing.

I received the case on August 9, 2018, and convened the requested hearing on October 31, 2018. The parties appeared as scheduled. Department Counsel proffered Government Exhibits (GX) 1 and 2. Applicant testified and proffered Applicant Exhibits (AX) A - D. All exhibits were admitted without objection. I received a transcript (Tr.) of the hearing on November 9, 2018.

Findings of Fact

Under Guideline D, the Government alleged that between 1987 and 1989 (SOR 1.a), Applicant paid a woman for oral sex and sexual intercourse; that in 1993 or 1994 (SOR 1.b), he paid a woman for oral sex; that in 2008 or 2009 (SOR 1.c), while holding a security clearance, Applicant visited a massage parlor and paid for oral sex and sexual intercourse; and that in 2013 and 2015 (SOR 1.d), while still holding a clearance, he paid for oral sex from a woman who he had solicited through a website subscription obtained for soliciting prostitution. Under Guideline E, the Government cross-alleged (SOR 2.a) the sexual conduct addressed under Guideline D as adverse personal conduct.

In response to the SOR, Applicant admitted all of the allegations. He also provided explanatory remarks and documents in support of claims made in his response. (Answer; Tr. 9 - 11) Applicant's admissions in response to the SOR establish those allegations as facts. Additionally, I make the following findings of fact.

Applicant is 56 years old and has worked for a defense contractor in a position that requires a security clearance since December 2015. In December 1985, he earned a bachelor's degree. In May 2002 and May 2006, Applicant earned master's degrees. He was commissioned as an officer in the U.S. Army in March 1986, serving on active duty until February 1999. He then affiliated in the Army Reserve, where he served until retiring as a lieutenant colonel in February 2015. (Answer; GX 1; Tr. 66)

Applicant first received a security clearance in 1991 in connection with his military duties. After leaving active duty, he worked for federal contractors and in Army Reserve assignments for which he received top secret clearance. In 2008, he was granted eligibility for access to sensitive compartmented information (TS/SCI). In April 2015, Applicant began work as a contractor at a federal agency that required eligibility for access to sensitive compartmented information (TS/SCI). In July 2015, Applicant was

¹ Required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive), as amended.

administered a polygraph examination to renew his TS/SCI eligibility for that job. During the pre-test interview, Applicant disclosed his use of prostitutes as alleged in the SOR. In October 2015, his SCI eligibility was revoked. Applicant appealed that decision, but his appeal was denied in June 2016. Applicant re-applied for a security clearance when he submitted his March 2017 e-QIP. He had previously not disclosed his use of prostitutes because he had not undergone a full lifestyle polygraph and because the questions in his security clearance applications had asked only if he had been arrested or charged with any criminal conduct, not whether he had engaged in criminal conduct that had not otherwise been known by the government. (Answer; GX 1; GX 2; Tr. 35 – 38)

As to the specific allegations in this case, available information shows that on one occasion sometime between 1987 and 1989, while Applicant was stationed overseas as an Army officer, he went to a strip club and solicited sex from one of the dancers there. A few years later, sometime in 1993 or 1994, Applicant solicited a prostitute for oral sex on a street near the Army base in the United States where he was stationed. At that time, Applicant held a security clearance as part of his military duties. On another occasion, in either 2008 or 2009, Applicant was at a major unified command in the United States in connection with his civilian employment with a federal contractor. One evening during that assignment, he went to a massage parlor in town and solicited sex from one of the employees there. Applicant held a TS/SCI clearance at the time. (Answer; GX 2; Tr. 38 – 44)

The record also shows that in December 2013, Applicant received sex for money from a prostitute he contacted through a website to which he had subscribed that specialized in effecting such transactions. In April 2015, he contacted the same prostitute and arranged to have sex with her for money, this time at a different location and without the assistance of the aforementioned website. In both 2013 and 2015, Applicant took several precautions, including using a disposable cell phone, providing false employment and other personal information for the website's screening process, and leaving his military identification card at home. He took those steps because he knew his conduct was illegal and that it might subject him to coercion to leverage his access to classified information. (Answer; GX 2; Tr. 44 – 48)

Applicant has told his immediate family and one close friend about his use of prostitutes. He has not yet told his employer about the issues in this case because he is embarrassed about his conduct. (Tr. 52 – 55)

In response to the Government's information, Applicant has acknowledged that his use of prostitutes when he was an Army officer in his mid-20s and early 30s was the product of him being young and stupid. As for his later transgressions, Applicant cited a series of personal and professional challenges as underlying stressors that contributed to his lack of good judgment and discretion. His father, to whom he was very close, died in March 2008. Additionally, Applicant was due to be married to an Air Force officer in June 2008; however, factors related to his father's death and their respective military obligations caused the cancellation of the wedding. For the next seven years, Applicant

and his fiancée tried to continue their relationship in the face of her military transfer overseas, but to no avail. Their relationship ended in 2015. Added to those stressors was Applicant's involuntary termination from a civilian job in 2014 for failing to meet his company's marketing and revenue goals. (Answer; AX A; AX D; Tr. 25 – 30)

In August 2015, Applicant self-referred to his company's employee assistance program (EAP) for counseling or other professional assistance with his behavior. After one meeting, he was referred to a licensed clinical social worker (LCSW) who specialized in sexual behavior issues. Applicant and the LCSW met about four times between September 2015 and April 2016. In October 2015, at the behest of the LCSW, Applicant began attending Sex Addicts Anonymous (SA) meetings. SA is a 12-step program modeled on Alcoholics Anonymous (AA) and based on the premise that one can be addicted to acting on sexual impulses and that group therapy and adherence to a 12-step plan is an effective road to recovery from such an addition. Applicant initially attended SA meetings about three times a month, but had to reduce his attendance in the last year or so because of a long commute after work. He now attends by phone twice a month. Applicant has a sponsor on whom he can rely, along with a lifelong friend in whom he has often confided. Applicant has himself acted as a sponsor for others. He claims to have had no desire to use prostitutes and that he now has insight into his behavior as a mental health issue. The record does not contain any information or diagnosis from the LCSW; nor did Applicant present any references from his sponsor or anyone else with knowledge of Applicant's efforts in recovery. (Answer; AX B; Tr. 55 – 64, 67 – 78)

Applicant also presented information about his participation in a support group for soldiers dealing with the effects of post-traumatic stress disorder (PTSD). Applicant has not been diagnosed with PTSD and it was unclear from his testimony how his involvement in that group related to his own recovery through SA. (AX C; Tr. 61 – 62, 69 – 70)

Policies

This case is governed by the adjudicative guidelines (AG) issued by the Director of National Intelligence on December 10, 2016, and made effective for all adjudications on or after June 8, 2017. Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,² and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(d) of the guidelines. Commonly referred to as the “whole-person” concept, those 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

² See Directive. 6.3.

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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest³ for an applicant to either receive or continue to have access to classified information.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁴ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁵

Analysis

Sexual Behavior

The Government's information about Applicant's solicitation of prostitutes, while serving as an Army officer and, at times, while holding a security clearance, reasonably raised a security concern about his sexual behavior that is articulated at 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

³ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁴ See *Egan*, 484 U.S. at 528, 531.

⁵ See *Egan*; AG ¶ 2(b).

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.

More specifically, Applicant's conduct was, at least in the locations here in the United States where it occurred, criminal in nature, and he knew at the time he engaged in that conduct that he was breaking the law. His conduct was impulsive and reflected a gross lack of judgment and discretion. The precautions he took when he solicited a prostitute in 2013 and 2015 show that he was aware of the potential for coercion and manipulation that could result from his actions; nonetheless, he succumbed to his impulses. Finally, his conduct in this regard involved a high degree of risk, in that he did not know the women he hired for sex, and he did not take into account the potential link between prostitution and human trafficking. All of the foregoing requires application of the following AG ¶ 13 disqualifying conditions:

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

In response to the Government's *prima facie* case against granting access to classified information in this case, Applicant produced information regarding his participation in SA, his LCSW counseling on about four occasions, and his changed circumstances. Based on that information, and the fact that he has not engaged in any misconduct since 2015, Applicant argues he is unlikely to repeat his misconduct and that the Government's concerns should be resolved in his favor. The foregoing requires consideration of the following AG ¶ 14 mitigating conditions:

- (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; 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 has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

Applicant's information is not sufficient to support these mitigating conditions. As to passage of time or infrequency, only three years has passed since Applicant's last use of prostitutes. Between four and six years passed between the events of SOR 1.a and 1.b; another 15 years passed between the events of SOR 1.b and 1.c; and the events of SOR 1.d occurred between five and seven years thereafter. Additionally, although Applicant cites personal events as triggers for his conduct, those events, while significant and stressful, were not so unusual as to explain or justify his misconduct. AG ¶ 14(b) does not apply.

As to Applicant's counseling and SA participation, there is no information in this record about the LCSW's observations or evaluation of Applicant. Nor did Applicant present information from any corroborating source about his participation in SA, including, but not limited to, his progress in the 12-step process or record of attendance. He did not establish how or if his interest in a PTSD support group was contributing to his own rehabilitation, and there is no clinical finding or prognosis that would support a finding of mitigation here. AG ¶ 14(e) does not apply. Applicant did not meet his burden of overcoming the security concerns raised under this guideline.

Personal Conduct

The Government's information also reasonably raised a security concern about Applicant's judgment that is addressed, in relevant part, as follows at 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

More specifically, Applicant's use of prostitutes evokes the disqualifying condition at 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.

Applicant's conduct was sufficient to disqualify him under Guideline D. Accordingly, AG ¶ 16(c) cannot apply here. Nonetheless, Applicant's conduct still requires application of the general security concern at AG ¶ 15. As to application of the AG ¶ 17 mitigating conditions, the following are pertinent to these facts and circumstances:

(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.

I conclude that, for the same reasons AG ¶¶ 14(b) and 14(e) are not supported by this record so, too, the record does not support AG ¶¶17(c), 17(d), or 17(e). Applicant's offenses were not minor; they occurred on multiple occasions under a variety of circumstances; and they occurred several years apart over the past 30 years. Although he has acknowledged his misconduct and received counseling, there is not sufficient information about that counseling or about his ongoing recovery through SA to show that his conduct will not recur. Finally, Applicant remains embarrassed about his conduct (which he knew at the time to be illegal and a potential source of coercion) and has not disclosed these issues to his current employer. On balance, the general security concerns about his judgment persist and Applicant carry his burden of persuasion to show they are mitigated.

I also have evaluated this record in the context of the whole-person factors listed in AG ¶ 2(d). Applicant is a decorated career Army officer who has a strong record of service in both his military and civilian careers. However, without more detailed information about his counseling and his efforts in recovery, those factors and the passage of time since his last transgression are not enough to resolve the doubts about his suitability for clearance that were raised by the Government's information. Because protection of the national interest is the principal focus of these adjudications, any remaining doubts must be resolved against the granting of access to classified information.

Formal Findings

Formal findings 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

Subparagraphs 1.a – 1.d: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraphs 2.a: Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the interests of national security for Applicant to have access to classified information. Applicant's request for a security clearance is denied.

MATTHEW E. MALONE
Administrative Judge