



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



In the matter of:	)	
	)	
	)	ISCR Case No. 14-03306
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Julie R. Mendez, Esq., Department Counsel  
For Applicant: *Pro se*

05/20/2015

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**Decision**

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NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to deny his eligibility for a security clearance. Applicant has failed to mitigate security concerns raised by his use of a government-issued to computer to solicit prostitutes between 2009 and 2012, as well as his January 2013 guilty plea to solicitation charges. Clearance is denied.

**Statement of the Case**

On December 15, 2014, the DOD issued a Statement of Reasons (SOR) detailing security concerns under the criminal conduct, sexual behavior, use of information technology, and personal conduct guidelines.<sup>1</sup> DOD adjudicators were

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<sup>1</sup> This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

unable to find that it is clearly consistent with the national interest to grant Applicant's security clearance.

Applicant answered the SOR and requested a decision without a hearing.<sup>2</sup> The Government submitted its written case on March 24, 2015. A complete copy of the file of relevant material (FORM) and the Directive was provided to Applicant. He received the FORM on April 9, 2015, and submitted one document in response to the FORM. The case was assigned to me on May 1, 2015. I admitted the items attached to the FORM as Government's Exhibits (GE) 1- 6 and Applicant's Exhibit A, without objection from either party.

### **Findings of Fact**

Applicant, 31, has worked for a federal contractor since July 2007. He was initially granted a security clearance in 2005 and was granted access to sensitive compartmented information (SCI) in 2009. He completed his most recent security clearance application in November 2013, wherein he disclosed a January 2013 guilty plea and sentence on a misdemeanor solicitation of prostitution charge and an instance of unlawful use of a government-issued computer that occurred in October 2012. In his January 2014 subject interview, which Applicant verified as being accurate, he provided details about the circumstances of his criminal conduct.<sup>3</sup>

In 2009, Applicant claims that he learned his wife was having an affair. Shortly thereafter, as he attempted to sell an item on a popular classified advertisement website, he discovered the website had a section of ads soliciting prostitution. Applicant decided to post his own ad. Between 2009 and 2012, Applicant chatted with and met at least 10 women through his solicitation ads. He used his personal email to monitor his ad and to chat with the women who responded to it. He admits using his government - issued computer, on average 15 minutes, two to three days a week, to correspond with interested women. Applicant concealed his activity from his wife.<sup>4</sup>

In October 2012, Applicant began communicating with a woman by email. They made plans to meet in the parking lot of a local commuter train station. Applicant described his car to the woman so that she would be able to identify him. Unbeknownst to Applicant, the person with whom he had been chatting was working with law enforcement. When Applicant arrived at the train station, he was stopped by a police officer in an unmarked car. The police officer recorded Applicant's information and told Applicant that he would receive, by mail, a summons to appear in court. He was not arrested. Applicant self-reported the incident to his facility security officer (FSO). Soon after making the report, Applicant's government client audited his computer, locating the email traffic between Applicant and the women he solicited between 2009 and 2012. In January 2013, Applicant pleaded guilty to a misdemeanor solicitation of prostitution

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<sup>2</sup> GE 3.

<sup>3</sup> GE 1, 4.

<sup>4</sup> GE 4.

charge and received one day of unsupervised probation before judgment. Six months later, the government revoked Applicant's SCI access.<sup>5</sup>

Applicant continues to work for a government client. He claims that he has neither solicited women for sex nor misused government information systems since being caught in October 2012. He is remorseful about his behavior and has put measures in place to prevent its recurrence. Applicant has joined a church and he now shares an email account with his wife. In this way, Applicant's wife is able to monitor his email. Applicant also believes the shared email "keeps him honest." Applicant believes that he has learned from and improved his behavior.<sup>6</sup>

While Applicant admits the SOR allegations, he denies that he intentionally solicited prostitutes. According to Applicant, "the ads received and posted were not known to be prostitutes [sic]. Many were women seeking financial assistance."<sup>7</sup>

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines 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 access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence.

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the

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<sup>5</sup> GE 2-4.

<sup>6</sup> GE 1; AE A.

<sup>7</sup> AE A.

applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Sexual Behavior**

An individual’s sexual behavior becomes a security concern when his conduct involves a criminal offense, reflects a lack of judgment or otherwise raises concerns about an individual’s reliability, trustworthiness, and ability to protect classified information.<sup>8</sup> For three years between 2009 and 2012, Applicant solicited and engaged in sex with women he found through a commercial advertising website. Not only was Applicant’s conduct illegal (which will be discussed in the analysis of the criminal conduct guideline below), it also violated DOD Instruction 2202.01: Combating Trafficking in Persons (TIP). The policy, enacted in September 2010, opposes prostitution and any related activities that may contribute to TIP and seeks to deter activities of contract personnel that would facilitate TIP domestically and overseas.<sup>9</sup> In addition, his conduct made him vulnerable to coercion, exploitation, and duress. Using his government-issued computer to facilitate these encounters also raises concerns about his judgment.<sup>10</sup>

Although Applicant admits that he engaged in the conduct, he does not take full responsibility for his actions. Despite Applicant’s ability to describe the women he solicited as being in need of financial assistance, it does not change the fact that he actively participated in prostitution. This characterization makes Applicant’s behavior even more abhorrent. It suggests Applicant preyed on vulnerable women, providing ‘financial assistance’ in exchange for sex. Applicant began soliciting prostitutes to deal with his marital problems. He has not provided any evidence to indicate that his behavior will not recur if confronted with similar stressors in the future. He did not present any evidence of marital or individual counseling. Although he implies that his wife is aware of his misconduct, Applicant did not provide any corroborating evidence. Therefore, he has not established that his misconduct is not a continuing source of coercion, exploitation, or duress. Because his acts were illegal it does not matter if the behavior was strictly private, consensual, or discreet. None of the sexual behavior mitigating conditions apply.

### **Criminal Conduct**

Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.<sup>11</sup> Applicant pleaded guilty to a misdemeanor

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<sup>8</sup> AG ¶ 12.

<sup>9</sup> GE 6.

<sup>10</sup> AG ¶ 13 (a), (c) - (d).

<sup>11</sup> AG ¶ 30.

solicitation charge in January 2013 and was sentenced to probation before judgment.<sup>12</sup> He also admitted engaging in uncharged criminal conduct — soliciting and using prostitutes on at least 10 occasions between 2009 and 2012.<sup>13</sup> Although his last act of criminal conduct occurred over two and a half years ago, this is not enough to mitigate the concerns about Applicant’s ongoing security worthiness. As discussed in the analysis of the sexual behavior guideline, Applicant has not shown that the stressor that ostensibly caused Applicant to seek the services of prostitutes has been addressed, or that his conduct happened under such unusual circumstances that it is unlikely to recur. Nor has Applicant provided evidence of rehabilitation or reform.

### **Use of Information Technology**

Noncompliance with rules, procedure, guidelines or regulations pertaining to the information technology systems may raise concerns about an individual’s reliability and trustworthiness.<sup>14</sup> An internal investigation revealed that between 2009 and 2012, Applicant used his government-issued computer to engage in illegal activity.<sup>15</sup> It has been almost three years since Applicant’s last known misuse of a government computer. However, aside from promising not to engage in similar conduct in the future, Applicant has not provided any evidence to mitigate security concerns raised by his conduct. None of the relevant mitigating conditions apply.

### **Personal Conduct**

An applicant’s personal conduct becomes a concern when his actions show questionable judgment, an unwillingness to comply with rules or regulations, or raises questions about an applicant’s ability to protect classified information.<sup>16</sup> As discussed in the previous guidelines, Applicant’s misconduct creates a vulnerability to exploitation, manipulation, and duress that he has not mitigated.<sup>17</sup> Although Applicant promptly and properly disclosed his misconduct to his employer, it is unclear from the record if Applicant disclosed his misconduct to his wife. Because this remains unclear, it cannot be said that Applicant has taken positive steps to reduce or eliminate the potential area of vulnerability caused by his actions. Even though the legal disposition of Applicant’s criminal acts amounted to nothing more than a slap on the wrist, it does not mitigate the underlying concerns. As stated before, Applicant has not provided any evidence to support a finding of reform, rehabilitation, or that his conduct is unlikely to recur.

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<sup>12</sup> AG ¶ 31(a).

<sup>13</sup> AG ¶ 31(c).

<sup>14</sup> AG ¶39.

<sup>15</sup> AG ¶ 40(e).

<sup>16</sup> AG ¶ 15.

<sup>17</sup> AG ¶ 16(e).

Accordingly, doubts remain about Applicant's ability to protect classified information. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2. Ultimately, Applicant failed to meet his burdens of production and persuasion. In requesting an administrative determination, Applicant chose to rely on the written record. In doing so, however, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts necessary to mitigate the concerns raised by his conduct, or establish evidence of rehabilitation. Because the security concerns raised in the SOR remain, following *Egan*<sup>18</sup> and the clearly-consistent standard, I resolve these doubts in favor of protecting national security.

### **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, Criminal Conduct:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Sexual Behavior:	AGAINST APPLICANT
Subparagraphs 2.a – 2.c:	Against Applicant
Paragraph 3, Use of Information Technology Systems:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Paragraph 4, Personal Conduct:	AGAINST APPLICANT
Subparagraphs 4.a:	Against Applicant

### **Conclusion**

Based on the record, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Nichole L. Noel  
Administrative Judge

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<sup>18</sup> *Navy v. Egan*, 484 U.S. 518 (1988).