



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



In the matter of:)
)
) ISCR Case No. 05-15127
SSN:)
)
Applicant for Security Clearance)

Appearances

For Government: James F. Duffy, Esq. Department Counsel
For Applicant: Pro se

September 29, 2008

Decision

MASON, Paul J., Administrative Judge:

Applicant submitted his Security Clearance Application (SCA) on July 7, 2003. On March 31, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under criminal conduct (Guideline H), personal conduct (Guideline E), and financial considerations (Guideline F). The action was taken pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and made effective within the Department of Defense for SORs issued on or after September 1, 2006.

Applicant's undated answer to the SOR was received on May 12, 2008. DOHA issued a notice of hearing on July 28, 2008, and the hearing was held on August 11, 2008. At the hearing, seven exhibits (GE 1 through GE 7) were admitted in evidence without objection to support the government's case. Applicant testified and one exhibit (AE A) was admitted in evidence to support his case.

On August 14 and August 18, 2008, Applicant presented two exhibits following the hearing. Department Counsel reviewed the exhibits, and did not object to their admission in evidence. AE B contains three money order receipts pertaining to the civil judgment described in SOR 2.b. and referred to in SOR 3.a. AE C describes Applicant's work performance for 2006 and 2007. DOHA received a copy of the hearing transcript on September 19, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

The SOR contains one allegation under the criminal conduct guideline, two allegations under the personal conduct guideline, and five allegations under the financial considerations guideline. Applicant admitted all SOR allegations except for SOR 3.a. and 3.c., which he denied.

Applicant, 45 years old, has been married to his wife for almost 23 years. His current employer hired him in November 2002 as an operator/tester of hazardous materials. Before his current job, Applicant was a truck driver. Before the criminal conduct in July 1999, Applicant was a military police officer from 1990 to 1995. He was a city police officer from 1995 to July 1999. Applicant seeks a security clearance.

Criminal Conduct

On July 26, 1999 (SOR 1.a.), Applicant was a patrolman for a city police department. He forced a woman to conduct fellatio sex with him. He was arrested on October 26, 1999, and charged with (1) felony sex offense 2nd degree, (2) perverted practice, (3) misdemeanor sex offense 4th degree, (4) assault 2nd degree, (5) misconduct in office, (6) felony sex offense 2nd degree, (7) perverted practice, (8) misdemeanor sex offense 4th degree, (9) assault 2nd degree, and (10) misconduct in office. On April 4, 2000, a plea bargain resulted in Applicant pleading guilty to counts 7 and 10. (GE 5) He received a two-year suspended sentence, and two years probation. According to the victim, the fellatio occurred in July, and two months earlier in May 1999 by force. After the July 1999 sexual act, the victim retained as evidence Applicant's semen in a cup. (GE 4, pp. 77-79)

Applicant admitted SOR 1.a. (the criminal conduct allegation) but contended the sex was consensual rather than by force. He also denied he committed a similar act on the victim in May 1999. The prosecutrix had informed her case manager (who taped the conversation) on May 19, 1999 that Applicant had forced her to have oral sex on May 16, 1999. (GE 4, p. 79)¹

¹ The civil complaint (GE 6) identifies May 14, 1999, as the first time the fellatio sexual conduct occurred.

In Applicant's security clearance application (SCA, GE 1) dated July 7, 2003, he admitted the sexual misconduct in 1999. In the remarks section of GE 1, he stated:

THE TWO MISDEMEANOR OFFENSES I HAVE LISTED ARE THE RESULT OF MY HAVING AN AFFAIR WHILE ON DUTY AS A POLICE OFFICER. IN [STATE] IT IS ILLEGAL TO HAVE ORAL SEX WITH ANYONE OTHER THAN YOUR SPOUSE (THIS IS THE PERVERTED PRACTICE CHARGE). THE CIVIL SUIT IS ALSO RELATED TO THAT INCIDENT.²

Personal Conduct

Applicant was suspended (SOR 2.a.) by the police department in approximately July 1999 for the criminal conduct that occurred on July 26, 1999. In October 1999, the suspension was extended without pay. On April 4, 2000, Applicant resigned from the police department.

A civil lawsuit (SOR 2.b.) was filed in May 2002 based on the criminal, sexual acts in July and May 1999. The case was settled against Applicant for \$13,750.00. Applicant began paying the judgment at \$100.00 a month in 2004. He estimates he has paid about \$3,700.00 to date. He submitted three \$100.00 payment receipts that are dated October and December 2007, and one dated August 12, 2008, the day after the hearing. (Tr. 44; AE B)³

Financial Considerations

SOR 3.a. Applicant estimates the civil judgment (SOR 2.b.) to be reduced to about \$10,050.00, because of his payments of \$100.00 a month. Applicant intends to increase the payments to \$400.00 a month (from \$100.00 a month) after he pays off the other debts. (Tr. 45-46) There is no agreement or correspondence to describe payment of the civil judgment (SOR 2.b.). Rather, Applicant was instructed by his attorney in 2004 to submit monthly payments of \$100.00. (SOR 2.b.) (*Id.* at 45)

SOR 3.b. A credit card account was opened in 2004. The account was reported delinquent in February 2008 in an amount of \$793.00. Applicant has taken no action on the account, but anticipates he will.

SOR 3.c. The mortgage company debt was paid in July 2008. (AE A) Applicant apparently took out a loan on his house to pay for truck driving school and other bills. The loan became delinquent in 2004. (Tr. 48) Applicant contends that the original loan was \$13,000.00. (Tr. 21-22)

² Under Section 20 of his SCA ("Your Employment Record"), Applicant stated, "I HAD AN AFFAIR WHILE ON DUTY AS A POLICE OFFICER."

³ The exhibit actually contains whole or partial copies of five receipts

SOR 3.c., 3.d. Applicant claims the debts to both creditors (telecommunication companies) became delinquent in 2004. After the two creditors merged, Applicant is confident his wife paid the debts. However, he has encountered difficulty receiving documentation from the creditors. No documentation was provided.

Character Evidence

Applicant testified that he belongs to a financial counseling program that instructs enrollees how "... to make a budget, live within your budget, and pay all your bills, and pay off one at a time, and then you get to the next one, and it's the snowball effect." (Tr. 23) He indicated he paid most of the bills but his wife is having difficulty finding the documentation verifying the bills have been paid. (Tr. 24) Applicant's performance at his current job for 2006 and 2007 has been exceptional.

Policies

When evaluating an applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are flexible rules of law. Recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's ultimate adjudicative goal is a fair, impartial and common sense decision. According to the AG, the entire process is a careful, thorough evaluation 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. If residual doubts still remain concerning personnel being considered for access to classified information, those doubts 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 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, 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 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

is not restricted to normal duty hours. Rather, the relationship is an-around-the-clock responsibility between an applicant and the federal government. 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 the applicant may deliberately or inadvertently fail to protect or 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

Criminal conduct (CC)

30. *The Concern.* “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.” AG ¶ 30

On July 26, 1999, Applicant was a police officer authorized by a city police department to uphold the law. He abused that authority by taking advantage of a female for sexual gratification. I also find there is sufficient evidence to conclude he had engaged in the same conduct in May 1999. Though he complied with the terms of his sentence and probation, and is paying the victim a judgment for the same behavior, I am unable to conclude he accepts full responsibility for his grievous criminal behavior. Applicant’s misconduct falls within CC disqualifying conditions (DC) 31.a. (*a single serious crime or multiple lesser offenses*) and CC DC 31.c. (*allegation of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*).

There are only two of four mitigating conditions that potentially apply to the facts: CC mitigating condition (MC) 32.a. (*so much time has passed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment*) and CC MC 32.d. (*there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community development*). Applicant acknowledged he pled guilty to one count of oral sex in April 2000. However, his denial of the second sexual act in May 1999 is not accepted in the face of credible statements made by the victim to her caseworker in GE 4. Second, when Applicant filled out his SCA (GE 1) he described the criminal conduct as “an affair.” An affair is characterized as a romantic attachment of short-term duration. However, if Applicant had sex with the victim on simply one occasion, it is not reasonable to believe he would have described the single sexual act as “an affair.” Finally, both sexual acts (July 26, 1999, and May 14, 1999) were the gravamen of the civil complaint filed against him in May 2002 that was settled against him for \$13,750.00 in August 2004. Applicant gains no mitigation from CC MC 32.a.

CC MC 32.d. identifies some elements of successful rehabilitation. But, successful rehabilitation hinges on whether the individual fully realizes the consequences of his actions. Applicant's denial that the May 1999 act occurred despite significant countervailing evidence leads to the inescapable conclusion he has yet to appreciate the gravity of his criminal conduct. Rehabilitation is not a mechanical process measured simply by the passage of time. Applicant's good employment record is insufficient to find the CC guideline in his favor.

Personal Conduct (PC)

15. *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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process." AG ¶ 15

Applicant's suspension from the police department in July 1999 and the civil judgment rendered against him in August 2004 are cognizable under PC DC 16.d. *(credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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 person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; and (3) a pattern of dishonesty or rule violations).* When Applicant forced the victim to have oral sex, he was not an ordinary person, but a police officer sworn to make certain that persons do not become victimized by unlawful conduct. The criminal and civil judgments rendered against him establish the basis for application of PC DC 16.d.

Though Applicant has acknowledged some of his criminal conduct, his decision not to take full responsibility for his behavior forecloses PC MC 17.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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur)* from consideration. Applicant's compliance with the terms of probation weighs in his favor. But, agreeing that he only committed a portion of the criminal conduct that could be independently established is not mitigated by the passage of time and successful compliance with the terms of his probation. The PC guideline is resolved against Applicant.

Financial Considerations (FC)

18. *The Concern.* “Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable acts.” AG ¶ 18

Applicant’s indebtedness of approximately \$10,000.00 from the civil judgment (SOR 2.a.), plus the credit card debt, and the telephone debt total about \$11,000.00. Applicant’s financial difficulties invoke FC DC 19.a. (*inability or unwillingness to satisfy debts*) and FC DC 19.c. (*a history of not meeting financial obligations*) Applicant has yet to act on SOR 3.b. Though he claims he paid the telephone debts in SOR 3.d. and 3.e., he provided no documentary evidence to substantiate the debts were paid. Though he has paid off the debt to SOR 3.b. in July 2008, he conceded the debt had become delinquent in 2004. Applicant claims he has been paying \$100.00 month on the civil judgment since 2004. Yet, his money order receipts show he has made three payments to the SOR 3.a. judgment creditor in 2007 and the first eight months of 2008. His exhibits reflect that his payments have been sporadic at best, with the most recent payment occurring a day after the hearing.

The only three mitigating conditions that are potentially applicable here are: FC MC 20.a. (*the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness and good judgment*); FC MC 20.b. (*the conditions that resulted in th financial problems were beyond the person’s control*); FC MC 20.c. (*the person has received or is receiving counseling for the problem and/or there are clear indications the problem is being resolved or is under control*); and, FC MC 20.d. (*the individual initiated good-faith effort to repay overdue creditors or otherwise resolve debts*). Applicant still owes three creditors on four accounts. The lack of supporting documentation of his claim of having paid SOR creditor 3.a. \$100.00 a month for the past four years is hard to believe based on the production of only three receipts in four years. Applicant’s purported payoffs of the creditors in SOR 3.d. and 3.e. are not believable because of the lack of supporting documentation. Applicant exercised good judgment in paying off SOR 3.c., however the debt had been delinquent since 2004. Applicant provided no evidence to demonstrate his participation in financial counseling. There is no evidence to indicate the financial problems were the result of matters outside Applicant’s control, and inside the purview of FC MC 20.b. The lack of documentation weighs heavily against Applicant’s claim he has his financial house in order. Applicant has not met his burden under the FC guideline.

Whole Person Concept (WPC)

The AG indicates the ultimate determination of whether to grant a security clearance must be an overall common sense judgment based upon careful consideration of the whole person concept. Nine general policy factors define the WPC. They 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) extent to which the participation is voluntary; (6) the presence or absence of rehabilitation; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and, (9) the likelihood of continuation or recurrence.

Considering all available evidence, Applicant's favorable evidence is outweighed by the unfavorable evidence. Applicant has not mitigated the CC, PC and FC guidelines. At the age of 36 while employed as a police officer, Applicant violated his fiduciary duty to citizens of his employer by engaging in criminal misconduct, and then not being entirely forthright and remorseful about his behavior. He claimed he was engaged in financial counseling, yet provided no documentation of responsibly handling finances. His mitigating evidence falls short of overcoming the negative evidence under the CC, PC and FC guidelines.

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, Guideline J): **AGAINST APPLICANT**

Subparagraph 1.a. Against Applicant

Paragraph 2 (Personal Conduct, Guideline E): **AGAINST APPLICANT**

Subparagraph 2.a. Against Applicant

Subparagraph 2.b. Against Applicant

Paragraph 3 (Financial Considerations, Guideline F) **AGAINST APPLICANT**

Subparagraph 3a. Against Applicant.

Subparagraph 3.b. Against Applicant

Subparagraph 3.c. For Applicant

Subparagraph 3.d. Against Applicant

Subparagraph 3.e. Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Paul J. Mason
Administrative Judge