



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



In the matter of:)
)
) ISCR Case No. 06-13149
)
)
Applicant for Security Clearance)

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: *Pro Se*

November 13, 2008

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to mitigate criminal conduct, personal conduct, and sexual behavior security concerns. Moreover, he falsified his security clearance application. Eligibility for a security clearance is denied.

Statement of the Case

On May 7, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised.¹ The SOR alleges security concerns under

¹ On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006.

Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline D (Sexual Behavior). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether his clearance should be denied or revoked.

On June 2, 2008, Applicant responded to the SOR allegations (Answer), and elected to have his case decided on the written record in lieu of a hearing (Item 4). A complete copy of the file of relevant material (FORM), dated August 21, 2008, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on August 27, 2008. He failed to provide an answer to the FORM within the 30-day period provided, filed no objections, and provided no additional information. The case was assigned to me on October 24, 2008.

Findings of Fact

In his Answer, Applicant admitted SOR ¶¶ 1.a and 2.a, and denied SOR ¶ 1.b. He failed to specifically admit or deny SOR ¶¶ 2.b, 3.a and 3.b. Based on his Answer's explanations, I considered SOR ¶¶ 2.b, 3.a, and 3.b to be contested. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 49-year-old quality assurance manager working for a government contractor.² He served in the U.S. Air Force on active duty from 1978 to 1998. He retired with the rank of Technical Sergeant, pay grade E-6. His service was characterized as honorable (Answer). In 1995, Applicant received access to classified information at the secret level. Apparently, he has continued to have that same access to classified information until 2008.

He married his wife in 1980. He disclosed no children in his SF 86; however, in his answer to the SOR Applicant indicated he has a teenage son. In 2000, he was hired by his current employer, a defense contractor, and apparently has been working for that same employer since. In 2002, Applicant received a Master's degree.

On April 11, 2001, Applicant was observed by three police officers with his pants down while he was being masturbated by another man in a port-a-potty located in a public park. Applicant was arrested and charged with Engaging in Lewd Act in a Public Place (Item 8). Applicant pled Nolo Contendere to the charge, was convicted, and paid a \$1,200 fine (Item 6, Answer).

² Item 5 is the source for the facts in this paragraph, unless stated otherwise.

On April 13, 2005, Applicant submitted a Security Clearance Application (SF 86).³ Question 26 asked whether in the last seven years Applicant had been arrested for, charged with, or convicted of any offenses not listed in response to other questions in the security clearance application. Applicant answered “No” to question 26, and deliberately failed to disclose his May 2001 arrest, charge, and conviction for Engaging in Lewd Act in a Public Place. Instead of disclosing the May 2001 incident, he disclosed he received a municipal ticket in 2000.

During a follow up background interview in January 2006, Applicant was confronted by a government investigator about his failure to disclose his May 2001 arrest, charge, and conviction. In his statement to the government investigator, Applicant denied ever exposing his genitals or engaging in a lewd act (Item 6).⁴ Applicant explained he went to the park and staged the situation because he wanted to be arrested and placed in jail. Applicant claimed he wanted to be placed in jail so that he could take revenge against a teenager who was in jail for stabbing and assaulting Applicant’s son. Applicant is ashamed of his arrest for Engaging in a Lewd Act, and he has told no one of this incident.

In his June 2008 answer to the SOR, Applicant reaffirmed his January 2006 statement to a government investigator. Applicant specifically admitted he did not fully disclose all the material facts in his response to question 26. He listed the municipal ticket instead of the correct charge because he was embarrassed and did not want his peers or his employer’s administrative personnel to find out he was charged with Engaging in Lewd Act in a Public Place in May 2001. He denied ever exposing his genitals or engaging on a lewd act.

The government alleged in SOR ¶ 1.b that Applicant was a suspect in a September 2003 assault and battery incident. Police crime reports show that in September 17, 2003, two teenagers reported that an unknown man pushed one of the teenagers into the teenager’s car and threatened to “kick his ass” (Item 7). The teenagers reported the incident to the police and provided enough information to track down the assailant’s car. The car was later identified as belonging to Applicant. One of the teenagers identified Applicant as the perpetrator in a photographic lineup conducted by a police officer. According to the police report, the teenager victim filed a complaint against Applicant, which was to be forwarded to the city attorneys. There is no further information about the disposition of the alleged complaint or possible charge. In his answer to the SOR, Applicant denied the allegation and stated he had no knowledge of any assault charge ever filed against him.

³ Item 5.

⁴ Item 6 is the source for the facts in this paragraph unless otherwise stated.

Policies

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.⁵

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 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 controlling adjudicative goal is a fair, impartial and common sense 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 contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"⁶ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁶ See Directive ¶ E3.1.14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).⁷

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 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.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Guideline J, Criminal Conduct

Under Guideline J, the security concern is that 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.

Applicant's arrest, charge, and subsequent conviction for Engaging in Lewd Act/Public Place triggers the applicability of AG ¶ 31(c): “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.”

I also find that Applicant falsified his security clearance application (See discussion under Guideline E, *infra*). The Government did not allege the falsification under Guideline J. Thus, the falsification of the security clearance cannot be used as grounds to deny Applicant's application under Guideline J. However, I am required to consider Applicant's overall questionable behavior when evaluating the seriousness of the conduct alleged in the SOR to determine factors such as the extent to which his behavior is recent; the likelihood of recurrence; Applicant's explanations concerning the circumstances of the incidents alleged; and his rehabilitation.⁸

⁷ “The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

⁸ ISCR Case No. 04-09959 at 3 (App. Bd. May 19, 2006).

Concerning SOR ¶ 1.b (assault in September 2003), I find the government produced substantial evidence to support this allegation. AG ¶ 31(c): “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted,” applies. However, the security concern is mitigated under AG ¶ 32(c): “evidence that the person did not commit the offense.” No other mitigating conditions apply.

Personal Conduct

Under Guideline E, 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 omitted relevant, material information in his answer to Question 26 of his security clearance application. Considering the record as a whole, I am convinced Applicant deliberately omitted the information. Numerous factors weighed in my analysis to reach that conclusion, including: Applicant's age, his level of education, and his years of military service and in his current job. More importantly, Applicant admitted he was so embarrassed about his May 2001 sexual behavior, that he falsified his SF 86 to prevent his peers and employer's administrative assistant from finding out about his behavior.

I also find Applicant made a false statement to the government investigator in January 2006. Applicant denied ever exposing his genitals or engaging in a lewd act. The April 2001 police report indicates three police officers observed Applicant while he was being masturbated. He pled Nolo Contendere to the charge of Engaging in a Lewd Act/Public Place. Applicant's explanation -- that he staged the situation because he wanted to be arrested and placed in jail to take revenge against a teenager who attacked his son -- is not credible. Applicant falsified his SF 86 to cover his embarrassment for the May 2001 charge. It is difficult to believe someone of his age, level of education, and military service experience would have chosen such an embarrassing charge (to him) to get arrested.

Disqualifying conditions AG ¶ 16(a): “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire;” AG ¶ 16(b): “deliberately providing false or misleading information concerning relevant facts to an . . . investigator;” and AG ¶ 16(e): “personal conduct, or concealment of information about one's conduct, that creates vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing,” apply.

I considered all seven mitigating conditions under AG ¶ 17, and find that none applies. Applicant's sparse favorable information fails to justify the applicability of any of the mitigating conditions.

Sexual Behavior

Under AG ¶ 12 the government concern is that:

Sexual behaviour that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

Applicant engaged in a lewd act in a public place. He was prosecuted and pled Nolo Contendere to Engaging in a Lewd Act/Public Place. He is so embarrassed about the charge that he has told no one about it. Moreover, he falsified his SF 86 to prevent his peers and others from finding out about the charge.

Applicant's behavior triggers the applicability of three sexual behavior disqualifying conditions: AG ¶ 13(a): "sexual behavior of a criminal nature;" AG ¶ 13(c): "sexual behavior that causes an individual to be vulnerable to coercion, exploitation, of duress;" and AG ¶ 13(d): "sexual behavior of a public nature and/or that reflects lack of discretion or judgment."

I considered all four mitigating conditions under AG ¶ 14, and find that none applies. Applicant's sparse favorable information fails to fully justify the applicability of any of the mitigating conditions. I specifically considered AG ¶ 14(b): "the sexual behavior happened so long ago, so infrequent, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, and good judgment," and AG ¶ 14(c): "the behavior no longer serves as a basis for coercion, exploitation, or duress," and I find they do not apply.

Applicant's questionable sexual behavior occurred seven years ago, and could be considered temporally remote. However, his falsification of the SF 86 brings to the forefront the security concerns raised under the sexual behavior guideline. It shows Applicant is still vulnerable to coercion, exploitation, or duress because of his embarrassment. Moreover, considering Applicant's behavior as a whole, it casts doubts on Applicant's current reliability, trustworthiness, and good judgment.

Concerning SOR ¶ 3.b, I find for Applicant in the decretal paragraph of this decision because SOR ¶ 3.b duplicates the allegation in SOR ¶ 3.a.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's

conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. AG ¶ 2(c).

Applicant receives favorable credit for his 20-years of honorable service to his country, his educational achievements, and his years of employment by a government contractor. Applicant was convicted of a misdemeanor seven years ago, and his behavior, if among consenting, discrete adults would not have been considered as a security concern.⁹

The evidence against mitigating Applicant's conduct is more substantial. His sexual behaviour was of a public nature and reflects lack of discretion and judgment. He aggravated his situation by omitting information from his SF 86 and his statement to the government investigator. Applicant's falsification is directly related to his desire to hide his embarrassing 2001 sexual behaviour. Because he is embarrassed and afraid that any of his peers or co-workers find out about his past behaviour, the potential for pressure, coercion, exploitation, or duress exists and it is likely it would continue to exist. His statement about why he staged his arrest is not credible and this failure to be candid raises additional security concerns.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to criminal conduct, personal conduct, and 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:

⁹ See Executive Order 12968, *Access to Classified Information*, dated August 2, 1995, Subsections 3.1(c) (The U.S. Government does not discriminate on the basis of . . . sexual orientation), and 3.1(d) (No inference . . . may be raised solely on the basis of the sexual orientation of the employee).

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a & 2.b:	Against Applicant
Paragraph 3, Guideline D:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	For Applicant

Conclusion

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

Juan J. Rivera
Administrative Judge