



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



In the matter of:)
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-----) ISCR Case No. 12-07958
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)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

June 6, 2013

Decision

MOGUL, Martin H., Administrative Judge:

On September 20, 2012, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines E, J, G and D for Applicant. The action was taken under 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) (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On November 13, 2012, Applicant replied to the SOR (RSOR) in writing, and he requested a decision to be issued without a hearing on the written record. On December 6, 2012, Department Counsel requested a hearing in this case. The case was assigned to this Administrative Judge on April 1, 2013. DOHA issued a notice of hearing on April 2, 2013, and I convened the hearing as scheduled on May 3, 2013. The Government offered Exhibits 1 through 5, which were received without objection. Applicant testified on his own behalf and submitted Exhibit A, which was also admitted without objection. DOHA received the transcript of the hearing (Tr) on May 14, 2013. The record was left open until May 17, 2013 to allow Applicant to submit additional evidence into the record.

Applicant did not submit any additional document. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is denied.

Findings of Fact

After a complete and thorough review of the evidence in the record discussed above, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 53 years old. He is divorced, but was married from 1985 to 2003, and he has no children. He is a high school graduate with some college. Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he engaged in conduct that exhibited questionable judgement, unreliability, unwillingness to comply with rules and regulations, and untrustworthiness.

1.a. It is alleged in the SOR that Applicant was arrested and charged with Exposure of Sexual Organs, and that Applicant pled nolo contendere and was found guilty. He was fined and ordered to undergo a psychological evaluation and any follow up treatment required, to have no contact with any of the witnesses and not to return to the location of the offense.

In his RSOR, Applicant denied this allegation, but during his testimony, he stated that the only parts of the allegation that he was denying were that he was not to have contact with any of the witnesses indefinitely He contended it was only for one year; and he was ordered not to return to the location of the offense indefinitely; he contended it was only for one year. He did admit that he was found guilty, fined \$300, and he was ordered to undergo a psychological evaluation, which he did for a few sessions of approximately five hours each. (Tr at 31-34, 39-40.)

Applicant testified that this incident occurred while he was on business related travel. He began to masturbate in his hotel room, which was on the first floor. Applicant contended that unbeknownst to him, his blinds were partially opened, and people could look inside his room and see him. He stated that later that evening the police entered his room and accused him of masturbating in front of the window. He testified that he ultimately pled nolo contendere as a plea bargain at the advice of his counsel, even though he claimed it had not been his intention to masturbate in front of people. (Tr at 35-39.)

Applicant testified that he was consuming a beer at the time when the police officers entered his hotel room after the masturbation, which he estimated occurred

approximately between 7 and 9 PM. He did concede that he had been consuming other drinks earlier in the day. (Tr at 60-61.)

Applicant denied that he intended for anyone to see him masturbating. (Tr at 75-76.) However, Exhibit 2 included the Sheriff's report for this incident, which was described as alcohol related, and in which it was reported:

[Applicant] would open the room blinds and would masturbate when females were present in the courtyard/common area of the complex. [Applicant] would look at the females and begin his activity. [Applicant] was on the first floor/ground floor and was clearly visible from the courtyard. This was witnessed by a female guest and by a female staff member. This was also witnessed by law enforcement. No other persons were present in [Applicant's] room. He had the strong and distinct odor of alcoholic beverages on his person.

1.b. The SOR alleges that in February 2009, Applicant was charged with (1) Aggravated Driving While Intoxicated, (2) Speeding, (3) Unsafe Lane Change, and (4) No Signal Prior to Lane Change. Applicant refused to perform field sobriety tests and the charges were dismissed, but Applicant lost his driving privileges in the state for one year.

In his RSOR, Applicant denied this allegation. During his testimony, Applicant stated that there were only three charges against him, and that charge 3, Unsafe Lane Change, and charge 4, No Signal prior to Lane Change, were actually combined together as charge 3. He admitted all of the other charges in this SOR allegation. Applicant stated that he refused to take the field sobriety tests because that was his right. He did concede that he had consumed three drinks in the previous three and a half hours, but he claimed he was certain he had not been driving under the influence of alcohol. As a result of Applicant refusing to take the field sobriety test, he did lose his driving privileges in the state for one year. (Tr at 44-49, 65-68.)

1.c. The SOR alleges that in April 2003, Applicant was arrested and charged with Reckless Driving. Applicant was fined, placed on 1 year probation, and ordered to attend 14 hours of self improvement classes.

In his RSOR and during his testimony, Applicant admitted this allegation. He estimated that his fine was under \$300, and he satisfactorily completed his one year probation. Applicant also attended the required 14 hours of self improvement classes for individuals found guilty of alcohol related driving. (Tr at 49-51.) Applicant conceded that he had consumed four alcoholic drinks prior to this incident. (Tr at 63-65.)

1.d. The SOR alleges that in October 1982, Applicant was arrested and charged with Driving Under the Influence. Applicant was fined, had his license suspended for 90 days, was placed on 3 year probation, and was ordered not to have a repeat offense.

In his RSOR and during his testimony, Applicant admitted this allegation. He explained that he was allowed to drive his vehicle to and from work for the 90 days, and that he was placed on informal probation for three years, which he completed without further incident. (Tr at 51-53.)

Paragraph 2 (Guideline J - Criminal Conduct)

The SOR alleges that Applicant has engaged in criminal acts, which create doubt about a person's judgement, reliability, and trustworthiness. As reviewed above, Applicant admitted all of these allegations in his RSOR and during his testimony at the hearing.

2.a. It is alleged in the SOR that Applicant's conduct, reviewed above in Paragraph 1.a., through 1.d., above, constitutes criminal behavior. Applicant denied this allegation in his RSOR.

Paragraph 3 (Guideline G - Alcohol Consumption)

The Government alleges that Applicant is ineligible for clearance because he has engaged in excessive alcohol consumption, which leads to the exercise of questionable judgement or the failure to control impulses. The following allegations as they are cited in the SOR tend to show that:

3.a. It is alleged in the SOR that from approximately 1974 to at least 2011, Applicant consumed alcohol at time to excess and to the point of intoxication. Applicant denied this allegation in his RSOR. Applicant testified that he first consumed significant alcohol in 1973, when he was in junior high school. Currently, he continues to consume alcohol, and estimated that he has about one drink each day. He testified that in the last year there were five to 10 occasions when he consumed as many as three alcoholic drinks at one time. Upon cross examination, Applicant did concede that over the years from 1974 to 2011, there were times when he consumed alcohol to the point of intoxication. (Tr at 62-63.)

Upon further cross examination, Applicant conceded that it would be best for him if he abstained completely from consuming alcohol in the future. He did aver that he plans to stop consuming alcohol in the future. (Tr at 70-72.)

3.b. It is alleged in the SOR that Applicant's conduct, reviewed in Paragraph 1.a., through 1.d., above, constitutes excessive alcohol consumption. Applicant denied this allegation in his RSOR.

Paragraph 4 (Guideline D - Sexual Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in sexual behavior that is either criminal, indicates a personality or emotional disorder, reflects lack of judgement or discretion, or which may subject an individual to undue influence or coercion.

4.a. It is alleged in the SOR that Applicant's conduct, reviewed in Paragraph 1a, above, constitutes sexual behavior that is either criminal, indicates a personality or emotional disorder, or reflects lack of judgement or discretion. Applicant denied this allegation in his RSOR.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the 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 over-arching 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 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 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

(Guideline E - Personal Conduct)

With respect to Guideline E, the evidence establishes that Applicant engaged in conduct, which considered as a whole, exhibits questionable judgement, unreliability, unwillingness to comply with rules and regulations and a lack of candor. In reviewing the disqualifying conditions, I find that disqualifying condition AG ¶ 16(d) applies, “credible adverse information . . . which when considered as a whole, supports a whole-person assessment of questionable judgement, untrustworthiness, unreliability, . . . or other characteristics indicting that the person may not properly safeguard protected information.”

Because of the seriousness of Applicant’s conduct, and the recency of the conduct reviewed in 1.a., above, I do not find any mitigating condition under ¶ 17 is applicable. I, therefore, resolve Paragraph 1 Guideline E against Applicant.

(Guideline J - Criminal Conduct)

The Government has established that Applicant engaged in multiple acts of criminal conduct that occurred from 1982 to 2011. Among the disqualifying conditions, I find that ¶ 31(a), “a single serious crime or multiple lesser offenses,” applies in this case. ¶ 31(c), “allegations or admissions of criminal conduct, regardless of whether the person was formally charged,” is also applicable to this case.

Because of the seriousness of the criminal conduct, including the most recent that occurred in 2011, I do not find “there is evidence of successful rehabilitation;” Therefore, mitigating condition ¶ 32(d) is not applicable. I also do not find any other mitigating condition applicable in this case. Paragraph 2 Guideline J is found against Applicant.

(Guideline G - Alcohol Consumption)

Applicant had a long history of alcohol consumption for many years. Applicant's alcohol consumption was involved in the criminal conduct and convictions listed under paragraph 1, subparagraphs a. through d. The Government established that Applicant was involved in “alcohol-related incidents away from work,” and “binge consumption of alcohol to the point of impaired judgement.” Disqualifying conditions AG ¶ 22(a) and (c) apply to this case.

In reviewing the mitigating conditions, I do not find that ¶ 23(a) or 23(b) are applicable because of the multiple alcohol-related incidents, including the most recent in 2011, and because Applicant continues to consume alcohol. I also do not find that any of the other mitigating conditions are applicable in this case. Therefore, I find Paragraph 3 Guideline G against Applicant.

(Guideline D - Sexual Conduct)

The Government has established that Applicant engaged in the kind of sexual behavior that is of concern to the Government, as it is criminal conduct, and it exhibits a lack of discretion and good judgement.

In reviewing the disqualifying conditions, I find AG ¶ 13 (a) “sexual behavior that is of criminal nature, whether or not the individual has been prosecuted” applies to the facts of this case. AG ¶ 13(d) also applies because Applicant “engaged in sexual behavior that reflects lack of discretion or judgement.” No mitigating condition under AG ¶ 14 can be found to apply here. Paragraph 4 Guideline D is found against Applicant.

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.

Under AG ¶ 2(c), 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Based on all of the reasons cited above as to why the disqualifying conditions apply under all of the guidelines alleged and why the mitigating conditions do not apply, I find that the record evidence leaves me with significant questions and doubts as to Applicant’s eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the security concerns under the whole-person concept.

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 E:	AGAINST APPLICANT
Subparagraphs 1.a.-1.d.:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Paragraph 3, Guideline G:	AGAINST APPLICANT
Subparagraphs 3.a.-3.b.:	Against Applicant
Paragraph 4, Guideline D:	AGAINST APPLICANT
Subparagraph 4.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 a security clearance. Eligibility for access to classified information is denied.

Martin H. Mogul
Administrative Judge