



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



In the matter of:)
)
) ISCR Case No. 14-02335
)
)
 Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

07/27/2015

Decision

LYNCH, Noreen, A., Administrative Judge:

On October 2, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns arising under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6. Defense Industrial Personnel Security Clearance Review Program (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) implemented in September 2006.*

Applicant timely answered the SOR and requested a hearing before an administrative judge.¹ A notice of hearing was sent on May 18, 2015, scheduling the hearing for July 10, 2015. The Government submitted three exhibits (GX 1-3), which were admitted into the record. Applicant submitted five post-hearing exhibits (AX A-E) which were admitted into the record without objection. Based on a review of the

¹Initially Applicant requested a decision on the record, but later requested a hearing.

pleadings, submissions, testimony and exhibits, I find Applicant met his burden regarding the security concerns raised. Security clearance is granted.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations under Guideline J (Criminal Conduct) and under Guideline E (Personal Conduct) with explanations.

Applicant is a 51-year-old senior analyst for a defense contractor. Applicant obtained his undergraduate degree in 1986. He attended the Naval Postgraduate School until 1993, receiving a Master's degree in aeronautical engineering. In 2003, Applicant obtained a second master's degree in national security and strategic studies from the Naval War College. He was a commissioned officer in the Navy from 1986 until 2011. He retired from the Navy as a commander. Applicant is separated from his wife and has one adult child. Applicant has worked for his current employer since 2011. He has held a security clearance since 1989. (GX 1)

Criminal Conduct

Applicant was arrested and charged with solicitation of prostitution. In November 2013, he pled guilty and received Probation Before Judgment (PBJ). He was on unsupervised probation for a period of 18 months, which he successfully completed. He also completed 24 hours of community service.

Applicant was overcome with several life events, including marital separation, changing jobs, difficulty with his daughter accepting his pending divorce, and living alone for the first time. (Tr. 20) One evening, he was searching through Craig's list for a kayak and decided to look at the personal section. He saw an ad for meeting single women. Applicant contacted the woman by email for several days and they decided to meet. Applicant was given a phone number to call. Applicant explained that the woman told him when he would call, she would give him a place to meet. After they exchanged emails and she mentioned to bring "green," he became aware that he would have to pay her for sex. When he first saw the ad, he did not have any intention of looking for a prostitute. He decided to go anyway after realizing that she expected money. When he arrived, she asked if he had brought money and to show it to him. As soon as he did, police came out and arrested him. At that point, he realized that she was an undercover police officer. (Tr. 37)

Applicant remembers that this event occurred on a Thursday evening. He went to work the next day with the intention of telling his employer. However, it was a Friday and everyone had taken a flex day. Over the weekend the incident was publicized on the local media. His name was noted. This was part of a larger law enforcement "sting" in the area. By the time that Applicant arrived at work on Monday everyone in his office already knew about the arrest. (GX 3)

Applicant had never solicited a prostitute before in his entire life. He knew that this was wrong and realized that this could affect his security clearance. He realizes it

was stupid. On Monday, Applicant met with his employer and told him what had happened. His employer expressed his confidence in him and did not question his ability to continue to hold a security clearance. (Tr. 22)

Applicant credibly explained that this was truly an isolated event. He understands the serious nature of the event. He has rehabilitated himself by keeping busy. He started a small business working outdoors (firewood cutting) to resolve stressors and to keep physically busy. (Tr. 22) He has had two years to think about this event. He knows this was a serious lapse of judgment. He did not undertake separate counseling because he did not have a good experience with grief counseling when two of his children died. He just did not believe the counseling would help. He has devoted himself to repairing a relationship with his adult daughter. He understands that the incident is common knowledge since it was on radio. (GX 2) He takes full responsibility for the event. He was quite remorseful about the situation, especially since he has an, otherwise unblemished 29- year career.

Applicant has no other criminal incidents in the record. Applicant submitted a 2015 performance appraisal and letters of recommendation. Applicant has three Meritorious Service Medals, five Navy Commendation Medals, and he served in Desert Storm Operation receiving Strike Flight Air Medals. He also noted the personal commendations that he received while in the Navy. (AX A)

Applicant's current manager wrote a letter, dated July 13, 2015, which attested to the fact that he has known Applicant for four years. He is aware of Applicant's arrest in 2013. He gives concludes that a single mistake is not indicative of a man's character and that a single lapse in judgment may not mean a loss of integrity or personal responsibility. (AX B)

Applicant's executive vice-president, in a letter dated July 13, 2015, notes that the incident that occurred two years ago is indeed an isolated incident, and he does not see a recurrence. He appreciates the steps Applicant has taken on his own to demonstrate commitment to ensuring no further lapse in judgment. He notes that Applicant is an ideal candidate for the special trust and confidence that accompanies a security clearance. Finally, he believes that Applicant's experience, training, and education make him an asset to the nation. (AX C)

Applicant's 2013 supervisor wrote, in a letter dated July 14, 2015, that he has continued confidence in Applicant. He has had numerous discussions with Applicant about the event. He knows that Applicant deeply regrets his indiscretion, has taken ownership of his actions, and has made positive changes in his life. He does not feel that Applicant presents a risk to the nation. (AX D)

Personal Conduct

Applicant admitted the information that was raised under the Criminal Conduct Guideline. The Personal Conduct allegation in SOR ¶ 2.a duplicates and incorporates this same conduct.

Policies

When evaluating an applicant's suitability for a security clearance, an 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. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ² The burden of proof is something less than a preponderance of evidence. ³ The ultimate burden of persuasion is on the applicant. ⁴

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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." ⁵ "The clearly consistent standard indicates that security clearance

² See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

³ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁴ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁵ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

determinations should err, if they must, on the side of denials.”⁶ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁷ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to 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.”

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying:

- (a) a single serious crime or multiple lesser offenses;
- (b) discharge or dismissal from the Armed Forces under dishonorable conditions;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
- (d) individual is currently on parole or probation; and
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant’s admission and the evidence of arrest in 2013 for prostitution, a misdemeanor, is sufficient to raise AG ¶¶ 31(a) and (c).

AG ¶ 32 provides three conditions that are potentially relevant:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment;

⁶ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁷ *Id.*

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life; and

(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 involvement.

After reviewing the mitigating conditions, I find that due to the passage of time and the absence of any other criminal incidents, AG ¶ 32(a) applies. This was an isolated incident in his life. He has no criminal conviction because he successfully completed probation before judgment. It was isolated with respect to his marital separation. Also, Applicant has produced evidence of rehabilitation, including good employment. He expressed his remorse and embarrassment about his conduct. AG ¶ 32(d) applies. I find that he has mitigated the security concern under criminal conduct.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16 describes the following conditions that could raise a security concern and may be disqualifying:

(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 person may not properly safeguard protected information;

(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) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information,

unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

(e) personal conduct, or concealment of information about one's conduct, that creates a 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,....

Applicant admitted in his answer to the SOR that his conduct reflected questionable judgment with regard to the incident in August 2013. His conduct adversely affected his personal, professional, and community standing. AG He takes full responsibility for his actions. He has taken positive steps. There is no vulnerability or possibility of coercion, as the incident was publicized in the local media. Everyone who knows him knows about the arrest.

AG ¶ 17 provides conditions that could mitigate security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant acknowledged his criminal behavior in his answer. This was an isolated incident. Under 17(c), 17(d) and 17(e) there is mitigation. As discussed above, Applicant takes full responsibility for his lapse in judgment. I have no doubts about his judgment and reliability. After considering the mitigating conditions outlined in AG ¶ 17, I conclude Applicant has mitigated the security concern under personal conduct.

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 an 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant has rehabilitated himself with respect to the 2013 arrest. This occurred during a period of stress in his life. He has an outstanding military and professional career. He has held a security clearance since 1989 without incident. He presented favorable reports from his employer. He has no other criminal incidents. This was an isolated incident. This behavior is unlikely to recur. There is no possibility of manipulation or coercions due to the media publications of the arrest. He has mitigated the criminal conduct concerns, as well as the personal conduct security concerns.

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 J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Clearance is granted.

NOREEN A. LYNCH.
Administrative Judge