



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-16403
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel
For Applicant: *Pro se*

September 5, 2008

Decision

CURRY, Marc E., Administrative Judge:

On February 20, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D and E. 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on March 19, 2008, admitted all of the allegations and requested a hearing. The case was assigned to me on July 9, 2008. DOHA issued a notice of hearing on July 24, 2008 scheduling it for August 13, 2008. During the hearing, I received five government exhibits, 18 Applicant exhibits, and Applicant's testimony. At department counsel's request, I took administrative notice of DoD 5220.22-M, the operating manual governing the National Industrial Security Program (NISPOM). DOHA received the hearing transcript (Tr.) on August 25, 2008. Based on a

review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

Applicant is a 48-year-old single man with no children. He has lived with his domestic partner for 16 years. He served in the U.S. Army from 1980 until his honorable discharge in 1984 (Tr. 33). He was promoted to the rank of E-5 within 36 months of being enlisted (Tr. 34). While in the Army, he attended night school, earning a bachelor's degree in business administration (Tr. 18).

Since leaving the Army, Applicant has worked for various contractors developing software, drafting engineering change proposals, and writing computer code (Tr.16-17). The senior vice president of the company where he works characterizes him as "one of the most knowledgeable design developers, and regulatory experts available in the entire development community" (Exhibit F). According to his immediate supervisor, he is the best employee who has ever worked for him (Exhibit G). A coworker described him as someone with the "utmost integrity in performance of his job, dealings with personnel supervisors, and Government counter parts" (Exhibit E).

Applicant spends his spare time serving on the board of directors for his neighborhood community association, and working with the homeless (Exhibit I). Also, he runs a successful retail business with his domestic partner (Exhibit K). According to a neighbor who has lived next to Applicant and his partner for six years, he is a man of integrity and a "model neighbor" (Exhibit I).

In 1990s, Applicant frequented a public park where gay men congregated, looking to have sexual relations (Tr. 37). This behavior led to a 1990 charge for solicitation, and a 1992 charge for indecent exposure (Answer). He pleaded guilty to both charges, and was fined. He stopped going to the park to engage in this behavior after the second charge (Tr. 39).

In May 2003, Applicant was arrested in the bathroom of a local retail store after an undercover police officer observed him standing in front of another man and masturbating (Exhibit 5 at 3). Subsequently, Applicant was charged with indecent exposure. In October 2003, he pleaded guilty, and was fined, sentenced to one year in jail, suspended, ordered to perform 40 hours of community service, and to serve three years of probation (Answer). He complied with the requirements of the court order (Tr. 53). Before the May 2003 incident, Applicant had attempted to engage in sexual activity with strangers on five to six other occasions earlier that year (Tr. 40, 42). He has not engaged in such conduct since the 2003 arrest (Tr. 53).

Applicant attributes his behavior in the early 1990s to the struggle he experienced as a closet homosexual in "coming out" (Tr. 19). After the 1992 arrest, he disclosed his homosexuality to his friends and family, and the behavior ceased.

Applicant attributes the recurrence of this behavior to the emotional and psychological trauma experienced when a major illness precipitated the removal of one of his testicles (Exhibit A at 2; Tr. 21). Realizing that he was on a “downward spiral” after the 2003 arrest, Applicant consulted a therapist, and began treatment in August 2003.

Applicant met with the therapist through November 2003 (Exhibits M and N). At that time, the therapist concluded no additional therapy was necessary (Exhibit M). According to the therapist, Applicant was “traumatized by the sudden need to have his testicle removed and did not fully appreciate the impact this had on him and his overall emotional functioning,” and this led to “maladaptive decision making” (Exhibit N at 1, 2). Applicant was remorseful, interactive, and responsive to therapy (*Id.*). The therapist concluded that his prognosis was good, and that his risk of re-offending was “exceptionally low” (*Id.* at 1).

Applicant met with the therapist again in July 2008. After evaluating Applicant, and noting that no additional incidents had occurred since 2003, he concluded that his mental status was well within normal limits, and his “risk of re-offending is even lower now than it was five years ago” (Exhibit A). In reaching this conclusion, he noted that “the best predictor of future behavior is one’s recent behavior” (*Id.*).

Applicant did not report the 2003 arrest to his employer (Tr. 46). He was aware that he had a responsibility to report adverse information, but was ashamed and embarrassed (Tr. 48).

In September 2007, a security clearance investigator interviewed Applicant and prepared a written summary of the interview (Exhibit 3 at 2-3). In approximately November 2007, the government propounded interrogatories to Applicant (Exhibit 3). He was asked, among other things, to verify the accuracy of the investigator’s interview summary, and to add any additional information that may be relevant to his security clearance worthiness. In response, he voluntarily disclosed the incidents from the 1990s (*Id.* at 5-6).

Applicant’s immediate supervisor and the senior vice president of the company where he works are both aware of the 2003 incident (Tr. 50). It is unclear from the record whether Applicant’s employer knew about the early 1990s incidents. Before hiring him in 1996, his employer conducted a full background check (Tr. 49).

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 not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied together with the factors listed in the adjudicative process. According to AG ¶ 2(c), the entire process is a 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. 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.

Analysis

Guideline D, Sexual Behavior

Under this guideline, “sexual behavior 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” (AG ¶ 12). Here, Applicant’s behavior triggers the application of AG ¶¶ 13 (a), “sexual behavior of a criminal nature, whether or not the individual has been prosecuted,” 13(c), “sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress,” and 13(d), “sexual behavior of a public nature and/or that reflects lack of discretion or judgment.”

Applicant’s episodes of deviant sexual behavior were limited to the early 1990s and the spring of 2003. After the 2003 arrest, Applicant sought therapy. After treating him for approximately three months, the therapist diagnosed the problem, commended Applicant’s progress, and rendered a favorable long-term prognosis. He reiterated his prognosis five years later, when Applicant again consulted him, and emphasized that the passage of time without a recurrence further minimized the possibility of recurrence.

Applicant lives with his domestic partner. His sexual preference is not a secret, as it was in the early 1990s. Although his immediate supervisor and his upper-level supervisor are aware of the 2003 incident, they both wrote strong recommendations. AG ¶¶ 14(b), “the sexual behavior happened so long ago . . . that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment, and 14(c), “the behavior no longer serves as a basis for coercion, exploitation, or duress” apply.

Applicant has mitigated the sexual behavior security concern.

Guideline E, Personal Conduct

Applicant's conduct represented a severe lapse of judgment. Consequently, the concern set forth in AG ¶ 15, the introductory paragraph of the Personal Conduct Guideline, applies.¹ Also, Applicant's failure to report the 2003 arrest to his employer triggers the application of AG ¶ 16(e), "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal professional, or community standing."

Applicant obtained counseling and received an unequivocal recommendation from his counselor after successfully completing it. Applicant's supervisor and his company's senior vice president are aware of Applicant's 2003 sexual offense. During the 2007 investigative process, he volunteered information about the offenses that occurred in the 1990s, comprehensively addressing them in his interrogatory responses. AG ¶¶ 17(c), ". . . so much time has passed . . . that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment," 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," and 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress," apply.

Applicant has mitigated the personal conduct security concern.

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."

By participating in high-risk sexual activity in public places, Applicant demonstrated a serious lack of judgment and discretion. The 2003 incident was

¹Conduct 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.

particularly troubling because Applicant demonstrated a disregard not only for the law, but for the propriety of any other department store patron who may have walked, by chance, into the bathroom when he was exposing himself. His conduct also generated a potential for pressure, coercion, or exploitation that was augmented after he failed to report the 2003 conduct to his employer.

After the 2003 incident, Applicant sought treatment from a therapist, who later provided a favorable prognosis. His immediate supervisor, his company's senior vice president, and his domestic partner are aware of the 2003 incident, and all unequivocally recommend his application for a security clearance. During the investigative process, he has been forthcoming about the 2003 incident and the incidents that occurred in the early 1990s. The nature, extent, and seriousness of the conduct, and the potential for pressure, coercion, or exploitation is outweighed by the presence of rehabilitation, and the length of time that has elapsed since the last episode of bad conduct. Upon considering the relevant disqualifying and mitigating conditions in the context of the whole person concept, I conclude Applicant's request for a security clearance is granted.

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 D:	FOR APPLICANT
Subparagraphs 1.a - 1.c:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a - 2.b:	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 eligibility for a security clearance. Eligibility for access to classified information is granted.

MARC E. CURRY
Administrative Judge