



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 08-00500
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert E. Coacher, Esquire, Department Counsel
For Applicant: *Pro se*

July 13, 2009

Decision

CURRY, Marc E., Administrative Judge:

Applicant failed to mitigate the government's security concerns raised under Guidelines J, criminal conduct, and D, sexual behavior. Clearance is denied.

On July 14, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines J and D. 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), 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 August 31, 2008, and requested an administrative determination. On December 31, 2008, department counsel prepared a File of Relevant Materials (FORM). Applicant received the FORM on March 4, 2009,

and prepared a response on April 9, 2009. The case was assigned to me on April 22, 2009.

Findings of Fact

Applicant is a 51-year-old man with one adult child. Two previous marriages ended in divorce. His highest level of education is unknown from the record. He served in the Air Force from 1980 to 1988 (Item 4 at 26). Applicant received a general discharge under other than honorable conditions after being court-martialed for ingesting an illegal substance (*Id.*).

Since at least 1999, Applicant has worked as a commercial truck driver. He has worked for the same trucking company since 2002 (Item 4 at 11-13).

One day on or about December 1, 2000, the phone rang while Applicant was in the shower. He left the shower without clothing himself, and answered the phone in another room. The blinds on his second-story apartment window were open, and he was visible to passers-by (Item 5 at 4-5). Later, after he dressed, a police officer came to the door, and told him that a neighborhood child had seen him standing naked in the window. The officer then arrested and charged him with indecent exposure to a child (Item 6 at 2; Item 5 at 5).

Applicant remained in jail for four to five days after the arrest. His son then posted bail, and he was released. Later, Applicant pleaded guilty to the lesser charge of indecent exposure, a misdemeanor. The FORM contains conflicting evidence concerning whether Applicant was subsequently sentenced. Although Applicant attended counseling after the arrest, it is unclear from the record whether he attended voluntarily or whether he attended as part of a court sentence. The record is also silent as to the nature of the counseling, what Applicant learned from the counseling, and any favorable prognosis resulting from the counseling.

In 1993, Applicant, while at a fast food restaurant, exposed himself to a female customer who was seated at a table (Item 6 at 3; Item 5 at 5). He was arrested and charged with public indecency. Subsequently, he was found guilty. The court deferred adjudication for one year, fined him \$100, and ordered him to attend counseling (Item 6 at 2). It is unclear from the record whether he attended the counseling, as ordered, and if so, the nature of the counseling.

In 1989, Applicant was arrested and charged with indecent exposure. The disposition of the case is unknown from the record.

In 1981, Applicant was the subject of a police investigation concerning indecent exposure incidents that had occurred in his apartment complex. The FORM contains no record of the investigation's outcome. In 1980, Applicant was arrested and charged with indecent exposure (Item 3). The record contains no evidence of the case's disposition.

Applicant acknowledges that he has had sexual behavior problems in the past. He believes that the counseling he attended in 2001 helped him get his problems under control (*Id.*). Since then, he has had no further episodes of exhibitionism (*Id.*).

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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching 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."

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 J, Criminal Conduct

Under this guideline, "criminal activity creates doubt about a person's judgment, reliability, and trustworthiness" (AG ¶ 30). Also, "by its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations" (*Id.*).

SOR subparagraph 1.a merely alleges that Applicant was arrested and charged with indecent exposure. Applicant admits being charged, and the charge is listed in a Federal Bureau of Investigation identification record (Item 5). Absent a police report or any evidence of the disposition of this charge, however, I cannot adequately evaluate whether the underlying crime occurred. SOR subparagraph 1.a is resolved in Applicant's favor.

SOR subparagraph 1.b merely alleges that Applicant was investigated regarding some indecent exposure incidents. The FORM contains neither any evidence of the investigation's outcome, nor any other details about the investigation. Moreover, it contains no evidence of the circumstances surrounding the incident. Given the vagueness of the allegation and its age, I did not draw any negative security inferences from it. SOR subparagraph 1.b is resolved in favor of Applicant.

The government does not have to establish that an applicant was convicted to sustain an allegation of criminal conduct. However, at minimum, the government must support its allegations with some evidence that the alleged crime occurred. SOR subparagraph 1.c, like SOR subparagraphs 1.a and 1.b, does not meet this minimum threshold; therefore, it is resolved in Applicant's favor.

Nevertheless, the remaining episodes of indecent exposure, as set forth in the SOR and admitted by Applicant, are sufficient to trigger the application of AG ¶ 31(a), "a single serious crime, or multiple lesser offenses."

Applicant's most recent offense occurred nearly nine years ago, and the earlier episode occurred nearly 16 years ago. The nature of Applicant's behavior may be indicative, however, of a behavioral disorder. Consequently, absent any comprehensive evidence regarding the counseling he received in 2001, I cannot adequately gauge the possibility of the behavior's recurrence. Also, Applicant provided no evidence of any positive factors demonstrating rehabilitation such as good job performance or community involvement that could conceivably bolster his case. Consequently, despite the time that has elapsed since the last offense, I conclude none of the mitigating conditions are applicable.

Applicant has failed to mitigate the criminal conduct security concern.

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). 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 . . . that reflects a lack of discretion or judgment."

None of the mitigating conditions apply for the same reasons set forth in the criminal conduct paragraph, above. Applicant has not mitigated the sexual behavior 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) 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."

Applicant's criminal conduct was infrequent, and resulted in minor judicial penalties, if any. The most recent offense occurred nearly nine years ago. The nature of the conduct, however, reflects a serious lack of judgment and discretion, and may be indicative of a behavioral disorder. I was particularly troubled by the 1993 episode of indecent exposure which occurred inside a restaurant. Under these circumstances, Applicant's participation in counseling represents a positive effort at rehabilitation, but absent any specific details, does not outweigh the security concerns. After evaluating this case in the context of the whole person concept, I conclude Applicant has failed to mitigate the 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:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.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.

MARC E. CURRY
Administrative Judge