



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 08-00632
)
 SSN:)
)
)
 Applicant for Security Clearance)

Appearances

For Government: Fahryn E. Hoffman, Esq. Department Counsel
For Applicant: Pro se

December 23, 2008

Decision

MASON, Paul J., Administrative Judge:

Applicant submitted his Security Clearance Application (SCA), on February 27, 2007. On May 14, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under criminal conduct (Guideline J). The action was taken pursuant to 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 made effective within the Department of Defense for SORs issued on or after September 1, 2006.

Applicant furnished his answer to the SOR on May 30, 2008. DOHA issued a notice of hearing on August 19, 2008, and the hearing was held on September 9, 2008. At the hearing, five exhibits (GE 2 through GE 5) were admitted in evidence without objection to support the government's case. Applicant objected to GE 1 (security clearance application (SCA)) because there was incorrect information in the exhibit about the type of military discharge he received. His objection was overruled. The incorrect information affects the weight to be assigned to the exhibit, but does not

preclude the exhibit's admissibility in evidence. Applicant testified. Applicant's exhibits (AE) A through F were admitted in evidence without objection. After the hearing, Applicant submitted a character statement from his supervisor (AE G). On October 2, 2008, the government indicated they did not object to AE G. DOHA obtained a copy of the hearing transcript on September 18, 2008. The record in this case closed on October 2, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Rulings on Procedure

Applicant's exhibits have been reorganized as follows:

- AE A: 2007/2008 performance evaluation
Five year certificate of Recognition, undated
Threat System team award, March 21, 2006
- AE B: Two character statements, dated January 17, January 23, 2006
- AE C: Bachelor of Science degree, May 12, 2006
Associate of Science degree, May 12, 2006
Dean's List, January 20, 2006
Dean's List, (twice in 2002)
Honor Roll, April 20, 1999
- AE D: Certificate of recognition to position of Deacon, July 27, 2008
A religious play (one page)
Certificate of Appreciation for membership with Team, 2007
Service Award for church Team Leader
Certificate of Training, April 15, 2007
- AE E: DD 214, August 31, 2000
USAF, Certificate of Appreciation, February 18, 1998
Letter of recognition, November 27, 1995
Certificate of Appreciation, September 14, 1995
Certificate of Achievement, May 8, 1995
AF Commendation Medal, 32 month period ending in November
1991

Findings of Fact

Applicant admitted both criminal conduct (Guideline J) allegations. Applicant is 41 years old. In September 2000, Applicant received an Honorable discharge from the United States Air Force (USAF) (AE D). He has been employed as a field engineer for a defense contractor since November 2000. He married his current wife in February 1989, and has one child. His nephew lives with him too.

During the months of May and June 1987, Applicant was 26 years old, and in the USAF. On two or three occasions (Tr. 51) during those two months, he entered the shower area of the female barracks (SOR 1.a.) for the purpose of secretly watching women take showers. On September 13, 1987, Applicant received non-judicial punishment as follows: (1) reduction in grade to Sergeant; (2) forfeiture of \$200.00 in pay for 2 months; (3) 30 days correctional custody effective August 31, 1987. Applicant recalled taking a battery of tests following this non-judicial punishment, but never received therapy (Tr. 89).

On October 24, 2005, Applicant was arrested for invasion of privacy and resisting arrest, after entering a military installation about 6:30 A.M., and looking in the window of a female's guestroom, unbeknownst to the female (GE 3). Applicant had some difficulty providing a chronological account of his conduct before the offense. He did recall the offense occurred about 6:30 A.M. because he had just dropped his nephew at the airport, and was on his way to the dining facility (Tr. 71). He estimated he was at the window from three to five minutes when the building manager surprised him, and asked him for identification. (Tr. 67-68). Not wanting to show his identification, Applicant began to run away, but then stopped, and the police placed him under arrest.

Applicant pled guilty to invasion of privacy and the second charge was dropped (Tr. 61). On May 1, 2006, Applicant was fined \$375.00 (*Id.*).

Some time after Applicant was fined, he participated in two-month fellowship sponsored by his church, with meetings once a week. The fellowship had nothing to do with Applicant's May 2006 conviction. Rather, the church leaders decided to sponsor the program. The topic of discussion was sexual contact temptations (Tr. 73), and the situations in which temptation can arise. The fellowship did not specifically deal with voyeurism. Later in the meetings, the topic switched to ways to avoid temptation.

The solutions to the sexual temptation included promising not to look at something a person is not supposed to look at, reading the bible, and praying more (Tr. 74). Applicant prays more and reads the bible more (Tr. 74-75).

Applicant agreed that voyeurism involves the act of looking at unsuspecting female strangers in some stage of undress (Tr. 77). Applicant claims he never engaged in sexual gratification, i.e., masturbating, while watching these women because he was always on his way somewhere (Tr. 78). He also claimed he never thought about the women later to arouse sexual excitement because he was again on his way somewhere (*Id.*). Later in his testimony, he was asked whether he deferred sexual gratification of the incident to a subsequent time, He stated:

It wasn't so much that, you know, saying that I didn't have time like I was oh I don't have time to do this no it's just I was, I would do what I was doing and then keep on going, it wasn't, so much later on that I was by myself or anything because I had, because I was not in a room by myself I was, you know, I had a roommate (Tr. 107).

Applicant surmised that his voyeurism in 1987 was triggered by his military lifestyle at his temporary duty location during the period. A substantial part of the time he and other soldiers were involved in sexual activity characterized by gathering at bars and picking up women (Tr. 80), and an activity that was not a part of his teenage years in his religious household.

The activity in 2005 was the only other time Applicant claimed he engaged in the voyeuristic behavior. He blamed the 2005 offense on his lifestyle with his wife becoming too routine (Tr. 81, 126).

Applicant's testimony about informing other members of the two-month fellowship is confusing. He initially stated that one person became aware of his conviction in 2005 (Tr. 82), but then he testified that he explained the activity generally to the group in the last week of the fellowship. He stated, "I didn't describe a conviction, I just told them about the incident as far as voyeuristic type of behavior stuff like that, I didn't talk about court cases or anything like that (Tr. 84)." Applicant did not feel he had to tell the entire group about his behavior because he was satisfied that his accountability partner knew the full details. There is no additional information in the record about what he told his accountability partner.

When asked again to explain why he did not provide the whole story to the fellowship participants rather than a general account of his behavior, Applicant stated:

I don't remember the exact wording but I did talk about, I wouldn't say general, I'd just say I talked about two incidents that happened in my life and I didn't talk about, you know, what happened in, you know, like a particular day or anything like that I didn't go into that much detail. I just talked about the two incidents that had happened in my life (Tr. 86).

Applicant regrets he engaged in the sexual activity. He is also remorseful for his conduct (Tr. 87).

Applicant considers that he does not meet the diagnosis of voyeurism because he is not having significant stress in social, occupational or other areas of functioning, as demonstrated by his excellent performance evaluations (Tr. 95-96).

Character Evidence

Applicant's performance rating for 2007 to 2008 is 3.85 on a 4-point rating system. He received a monetary reward in April 2008 for his support of the a project. He also received a certificate for five years of service with his employer.

A, Applicant's friend of 12 years, stated that while in the military, Applicant was recognized for his leadership ability. According to A, Applicant's competence in trouble shooting and monitoring of telecommunications make him a real asset. A was not aware of Applicant's behavior in 2005 when he wrote this character statement in January 2006 (Tr. 93).

B, Applicant's immediate supervisor, who has known him for five years, believes Applicant does good work in programming life saving equipment used in the USAF aircraft. B believes Applicant is a devoted family man and very active in his church. The character statement does not indicate whether B was aware of Applicant's behavior in 2005 when he wrote his character statement in January 2006.

Applicant received his Bachelor of Science and Associate of Science degree in May 2006. Applicant's scholarship has been recognized. Applicant's contributions to his church on July 27, 2008 were recognized with his appointment as deacon. Applicant received several acknowledgments for his contribution to the church drama production, and in completing certain religious courses.

Between 1991 and February 1998, Appellant received five letters and/or awards from the military appreciating his job performance and service.

Having weighed and balanced the entire record, including Applicant's demeanor at the hearing, I find his confusing testimony describing his fellowship experience undermines his overall credibility.

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 flexible rules of law. Recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's ultimate adjudicative goal is a fair, impartial and common sense decision. According to the AG, the entire process is a careful, thorough evaluation 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. Reasonable 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 is not restricted to normal duty hours. Rather, the relationship is an around-the-clock responsibility between an applicant and the federal government. 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.

Analysis

30. *The Concern.* “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.”

If the offense in August 1987 and the one in October 2005 had been two completely different types of crimes, whatever security concerns that were generated by the 1987 conduct may have been mitigated by the passage of 18 years. However, Applicant committed the same offense in October 2005 by secretly viewing a woman at some state of undress. Applicant’s commission of the two offenses falls within the scope of Criminal Conduct (CC) disqualifying condition (DC) 31.a. (*a single serious crime or multiple lesser offenses*) and CC DC 31.c. (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*).

There are two mitigating conditions (MC) potentially applicable to the circumstances of this case. CC MC 32.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*). Applicant’s criminal behavior in 1987 generates continuing security concerns because he employed the same *modus operandi* in the 2005 offense. In each offense, Applicant viewed women in different stages of undress. The recency of the 2005 offense engenders continuing concerns about his judgment, reliability and trustworthiness. CC MC 32 a. is not applicable.

CC MC 32.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*) In assessing the significant evidence in rehabilitation, I find most of the Applicant’s favorable evidence is directed at his military performance, job performance and his church affiliation. Though Applicant talked at length about how the fellowship was an illuminating experience for him in terms of how to avoid sexual

temptations, he equivocated about what he told the fellowship participants and his accountability partner.

Applicant's apparent inability to be forthright with members of his church about his criminal behavior is important because it suggests that he has not come to grips with his criminal conduct. His lack of frankness discredits his assertions of remorse for the criminal behavior. The limited mitigation Applicant receives under CC MC 32.d. is insufficient to prevail over the disqualifying evidence under CC DC 31.a. and 31.c.

Whole Person Concept (WPC)

The AG indicates the ultimate determination of whether to grant a security clearance must be an overall common sense judgment based upon careful consideration of the whole person concept. Nine general policy factors define the WPC are: (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 the participation is voluntary; (6) the presence or absence of rehabilitation; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and, (9) the likelihood of continuation or recurrence.

While Applicant presented an abundance of evidence showing a praiseworthy military and civilian job career, and impressive contributions to his church, his claim of having modified his criminal conduct is not supported by the record. Though friend A furnished a great character statement for Applicant, friend A was not aware of Applicant's 2005 criminal behavior when he wrote the statement. Applicant's ambiguous explanations for his conduct in 1987 and 2005, together with his lack of forthrightness with fellow parishioners during the fellowship and at the hearing, preclude successful mitigation in this case. I cannot say with complete confidence there will be no recurrence of his adverse conduct in the future. Upon consideration of this case in light of the whole person model, Applicant's security clearance application is denied.

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 (Criminal Conduct, Guideline J): **AGAINST APPLICANT**

Subparagraph 1.a. **Against Applicant**

Subparagraph 1.b. **Against Applicant**

Conclusion

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

Paul J. Mason
Administrative Judge