



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



In the matter of:)
)
-----) ISCR Case No. 08-07439
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government:
Jeff Nagel, Esquire, Department Counsel

For Applicant:
Dominick F. Mills, Esquire

August 30, 2010

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Questionnaire for National Security Positions (SF 86), on April 11, 2006. (Government Exhibit 1.) On March 11, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines D (Sexual Behavior), E (Personal Conduct), J (Criminal Conduct), and F (Financial Considerations) concerning 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), as amended (Directive); and the 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 (Answer) the SOR in writing on April 4, 2009, and requested a hearing before an Administrative Judge. Department Counsel was prepared to

proceed on April 21, 2009. This case was assigned to me on May 12, 2009. DOHA issued the first notice of hearing on May 27, 2009, and I convened the hearing as scheduled on August 5, 2009, and November 23, 2009. The Government offered Government Exhibits 1 through 8, which were received without objection. Applicant testified on his own behalf, and submitted Applicant Exhibits A through W, which were also received without objection. DOHA received the final transcript of the hearing, and the record closed, on December 3, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

The Applicant is 48 and married. He is employed by a defense contractor and seeks to retain a security clearance in connection with his employment. Applicant admitted subparagraphs 1.a., 1.b., 4.a., 4.b., and 4.c. of the Statement of Reasons. Those admissions are hereby deemed findings of fact. He denied subparagraphs 2.a. and 3.a. He also submitted additional information in support of his request for a security clearance.

Paragraph 1 (Guideline D - Sexual Behavior)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in inappropriate or illegal sexual behavior.

Paragraph 2 (Guideline J - Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal conduct, which is related to his sexual behavior.

Paragraph 3 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because his criminal conduct, and related sexual behavior, shows poor judgment, irresponsibility or untrustworthiness.

In addition to his job in the defense industry, Applicant also is a professional photographer. In August 2003 Applicant was involved in an incident where he took semi-nude pictures of a 14 year old girl. Applicant has consistently stated that the incident was accidental. (Answer; Government Exhibit 2; Transcript at 45-49.)

Police were eventually informed of the event and, in May 2004, Applicant was arrested. He was eventually charged with, and plead guilty to, the misdemeanor offense, Annoying or Molesting Children, in September 2004. He was sentenced to serve 30 days in jail, three years probation, fined \$800 and required to register as a sex

offender. This guilty plea was at the recommendation of the Applicant's then-attorney. (Government Exhibits 2, 3 and 4; Transcript at 46-47, 55-57.)

Soon after his conviction, Applicant fired his first attorney and began fighting to have his conviction overturned. His second attorney was also replaced and Applicant has been represented by his current counsel for the duration of the case before DOHA. After many court hearings, the Applicant served 21 days in jail in 2008. (Applicant Exhibits B, C and D.) He successfully served his probation. Pursuant to motion, Applicant's guilty plea was expunged on November 13, 2009. (Applicant Exhibit A.) The state court hearing to remove the Applicant's name from the sexual offender database occurred after the hearing was held in this case. (Transcript at 58-60.)

Paragraph 4 (Guideline F - Financial Considerations)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he is financially overextended and therefore at risk of having to engage in illegal acts to generate funds.

As stated above, Applicant has been involved in a long and costly legal fight since 2003. In addition, from 2003 to 2006, Applicant and his wife were co-owners of a small business. Due to a business downturn, the business failed. Applicant and his wife became personally liable for the business debts, which are the basis for the three allegations in this paragraph. Applicant's current financial situation is stable, and he is able to pay his current indebtedness, resolve his delinquent debts, and maintain savings for the future. (Applicant Exhibit Q.)

4.a. Applicant admits that he was indebted to a loan company in the amount of \$10,133. Applicant made an agreement with the successor creditor to pay \$375 per month starting in February 2009. The payments have been made in a consistent fashion and, as of November 23, 2010, the debt had been reduced to \$5,454. (Government Exhibit 8; Applicant Exhibits S and W; Transcript at 49-51.)

4.b. Applicant admits that he was indebted to a bank in the amount of \$3,455 for a delinquent credit card. Applicant made arrangements to pay this debt off at the rate of \$150 a month commencing in August 2008. This debt was paid in full as of October 2009. (Government Exhibit 8; Applicant Exhibit R; Transcript at 51-52.)

4.c. Applicant admits being indebted to a department store in the amount of \$2,204 for a delinquent account. Applicant made arrangements to pay this debt off at the rate of \$105.66 a month commencing in April 2009. These payments have been made in a consistent fashion and, as of November 23, 2010, the debt had been reduced to \$796. (Government Exhibit 8; Applicant Exhibit T; Transcript at 52.)

Mitigation

Applicant submitted a letter of support from his wife. (Applicant Exhibit F.) In that letter, she discusses her understanding of the Applicant's criminal case, as well as how

she was involved in the business which, after it went under, left them with several debts. Applicant's step-daughter and her boyfriend also submitted letters of support. (Applicant Exhibits G and H.) They say that he is a trustworthy and respectable man.

Several co-workers and friends also submitted letters on the Applicant's behalf. (Applicant Exhibits I, J, K, L, M and N.) He is described as professional, enthusiastic and dedicated. All indicate that they have knowledge of the criminal allegations against the Applicant, believe in him, and recommend him for a position of trust.

Applicant submitted documentary evidence showing that he is a highly respected employee. (Applicant Exhibits O and P.) Evidence was also submitted showing that the Applicant kept his employer fully and promptly informed of the proceedings in this case. (Applicant Exhibit E.)

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. In addition, the Administrative Judge may also rely on his own common sense, as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned 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.

Finally, as emphasized by President Eisenhower in Section 7 of Executive Order 10865, "Any determination under this order . . . shall be a determination 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

Paragraph 1 (Guideline D - Sexual Behavior)

Paragraph 2 (Guideline J - Criminal Conduct)

Paragraph 3 (Guideline E - Personal Conduct)

The security concern relating to the guideline for Sexual Behavior is set out in AG ¶ 12:

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. No adverse inference concerning the standards of this Guideline may be raised solely on the basis of the sexual orientation of the individual.

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubts 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.

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The Applicant was involved in a single act of taking a photograph of a 14 year old girl partially disrobed, which resulted in the Applicant being arrested, and convicted of a misdemeanor. AG ¶ 31(a) under Guideline J applies to this case, stating that a disqualifying condition is “a single serious crime or multiple lesser offenses.”

Two of the mitigating conditions also apply and have been considered. They are AG ¶ 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”; and AG ¶ 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.”

The Applicant’s alleged sexual misconduct occurred over four years before the record closed. His probation has been terminated and the conviction expunged. Without minimizing the Applicant’s culpability, the conduct is mitigated by the passage of time and the favorable recommendations of his family, friends and co-workers, which indicate he is rehabilitated and the concerns raised are no longer an issue.

Turning to Guideline D, I find that one of the disqualifying conditions applies to this case. Specifically, AG ¶ 13(a), “sexual behavior of a criminal nature, whether or not the individual has been prosecuted.”

I have examined the mitigating conditions and find that several apply. AG ¶ 14(b) states it may be mitigating when “the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.” In addition, AG ¶ 14(c) applies, “the behavior no long serves as a basis for coercion, exploitation or duress.” My Guideline J analysis applies to this Guideline as well. The Applicant has kept his employer, and through them the Government, fully informed of the progress in his case. In addition, family, friends and the community at large know about his criminal conviction and the reason behind it.

Finally, concerning the Personal Conduct allegation, Paragraph 3. AG ¶ 16 sets forth potentially disqualifying conditions, none of which are independently supported by this record. However, to the extent that Appellant’s sexual misconduct and criminal offense involved questionable judgment, or unwillingness to comply with rules and regulations, they can also be considered to support security concerns under AG ¶ 15. As discussed above, Applicant’s sexual and criminal conduct arguably involves questionable judgment and unwillingness to comply with criminal laws.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. For the same reasons that the equivalent mitigating conditions under Guidelines J and D were established, as discussed above, Applicant demonstrated mitigation under one Guideline E mitigating condition, ¶ 17(e), “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.”

Based on all of the evidence presented, Applicant has mitigated the security concerns of his single misdemeanor conviction of Annoy/Molest Child, and the factual circumstances behind it. Paragraphs 1, 2 and 3 are found for the Applicant.

Paragraph 4 (Guideline F, Financial Considerations)

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Applicant, by his own admission, and supported by the documentary evidence, had approximately \$15,000 in past-due debts, which have been due and owing for several years. The evidence is sufficient to raise these potentially disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where “the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.” AG ¶ 20(b) states that the disqualifying conditions may be mitigated where “the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances.” Finally, AG ¶ 20(d) states it is mitigating where “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Applicant’s financial difficulties arose in about 2006, in relation to his criminal case, and the failure of a family owned small business. Both of those situations have been resolved. He has paid, or is paying, all of the three past due debts and his current financial situation is stable. These mitigating conditions apply to this case. Paragraph 4 is found for the 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 relevant circumstances. 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. The administrative judge must 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's criminal conduct, involving an underage girl, occurred over four years ago. Under AG ¶ 2(a)(3), Applicant's conduct is not recent. Based on the state of the record, and as discussed in depth above, I find that there have been permanent behavioral changes under AG ¶ 2(a)(6). This is in regards to the allegation of criminal conduct, with the related allegations of sexual behavior and personal conduct; and his ability to handle his financial affairs. Accordingly, at the present time, I find that there is no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is no likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his criminal conduct, sexual behavior, personal conduct, and financial considerations. The evidence supports his request for a security clearance. Accordingly, Paragraphs 1, 2, 3 and 4 are found for the Applicant.

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 THE APPLICANT
Subparagraph 1.a:	For the Applicant
Subparagraph 1.b:	For the Applicant

Paragraph 2, Guideline J:	FOR THE APPLICANT
Subparagraph 2.a:	For the Applicant
Paragraph 3, Guideline E:	FOR THE APPLICANT
Subparagraph 3.a:	For the Applicant
Paragraph 4, Guideline F:	FOR THE APPLICANT
Subparagraph 4.a:	For the Applicant
Subparagraph 4.b:	For the Applicant
Subparagraph 4.c:	For the 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.

WILFORD H. ROSS
Administrative Judge