



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



In the matter of:)	
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SSN: -----)	ISCR Case No. 08-08637
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: Howard O. McGillin, Jr., Esquire

July 29, 2009

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and transcript, Applicant's request for a security clearance is denied.

On February 21, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to retain a security clearance required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a set of interrogatories¹ regarding information in his background. Based on the results of the background investigation and his response to the interrogatories, DOHA adjudicators were unable to make a preliminary affirmative finding² that it is clearly consistent with the national interest to continue Applicant's

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

access to classified information. On January 30, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise security concerns addressed in the revised Adjudicative Guidelines (AG)³ under Guideline J (criminal conduct), Guideline E (personal conduct), Guideline D (sexual behavior), and Guideline F (financial considerations).

Applicant timely responded to the SOR and requested a hearing. The case was assigned to me on April 6, 2009. I convened a hearing on April 22, 2009, at which the parties appeared as scheduled. The government presented seven exhibits (Gx. 1 - 7), which were admitted without objection. Applicant testified on his own behalf and proffered seven exhibits (Ax. A - G), which were admitted without objection. DOHA received the transcript of hearing (Tr.) on May 11, 2009.

Findings of Fact

Under Guideline J, the government alleged in the SOR that Applicant was arrested in October 2007 and charged with Unnatural and Lascivious Act and with Exposure of a Sex Organ. It was further alleged that, in January 2008, the charges were disposed of through a plea of *nolo contendere* to Disorderly Conduct, adjudication was withheld on his plea, he was placed on probation for six months, and he was assessed fines and court costs. (SOR ¶ 1.a) Under Guideline E, the government alleged in the SOR that Applicant did not tell his employer of his arrest. It was also alleged that he tried to conceal from his employer the details of his arrest and the charges against him. (SOR ¶ 2.a) Under Guideline D, the government cross-alleged the conduct for which he was arrested as alleged in SOR ¶ 1.a. Specifically, it was alleged that he exposed his penis and masturbated in public. (SOR ¶ 3.a) Under Guideline F, the government alleged Applicant owes approximately \$19,319 for four delinquent debts. (SOR ¶¶ 4.a - 4.d)

Applicant admitted all of the facts presented in the SOR allegations. In addition to the facts established through his admissions, and after reviewing the pleadings, the transcript, and exhibits, I have made the following findings of relevant fact.

Applicant is a 47-year-old senior engineering technician, who has been employed by the same defense contractor since September 2001. Prior to that, he had served for 20 years in the U.S. Navy. In 2001, he retired with an honorable discharge as a First Class Petty Officer. (Gx. 1; Tr., 21) Applicant's permanent job site is in another state than where he has lived since April 2007.

Since about 1986, Applicant has had a roommate who, more recently, has had medical issues that prevent the roommate from working. Applicant has supported his roommate financially and medically while they have lived at Applicant's TDY location. When they return to Applicant's permanent residence, the roommate will again have

³ The revised Adjudicative Guidelines were approved by the President on December 29, 2005, and were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, they supercede the guidelines listed in Enclosure 2 to the Directive.

access to his state medical benefits, thus easing Applicant's financial burden. (Gx. 2; Tr., 76 - 79)

On October 5, 2007, Applicant and his roommate, who had been drinking that morning, got into an argument. When Applicant left the house, he decided to go to a nearby public park to relax. While there, Applicant was approached by a man who engaged him in conversation and walked with him down some of the park trails. At some point during their walk, Applicant reached into his own pants and started to masturbate. When Applicant exposed his penis, the other man identified himself as an undercover police officer who was recording Applicant's conduct with a hidden video camera. Applicant was arrested and charged with committing an Unnatural and Lascivious Act and with Exposure of a Sex Organ, both misdemeanor offenses. (Gx. 2 - 6; Tr., 22, 23 - 31)

As part of a plea bargain, Applicant pleaded *nolo contendere* to disorderly conduct, but adjudication was withheld pending successful completion of six months probation. Applicant was also ordered to undergo a psycho-sexual evaluation, which he did on February 5, 2008. The evaluation did not yield a clinical diagnosis, and the Licensed Mental Health Counselor who conducted the evaluation concluded that Applicant "is not at risk for future sex offending behaviors" and that he does not require "any mental health treatment for such behaviors or any other mental health problems." (Ax. A) On May 23, 2008, Applicant successfully completed his probation. However, by order of the sheriff's department of the county where he was arrested, he is permanently barred from entering any of that county's public parks. (Gx. 2; Gx. 3; Tr., 72)

Applicant was interviewed for his clearance by a government investigator in April 2008. The summary of that interview (Gx. 2) represents that Applicant "hired an attorney in an effort to prevent his employer from learning of the incident and the arrest, and in essence, to save his job." Applicant denied that he said this during the interview (Tr., 69), but he also testified that he was too embarrassed by his conduct to discuss the details of his arrest with the investigator. (Tr., 35)

Applicant has not yet disclosed the original charges to his employer despite being aware that he was obligated to do so. Three months after his arrest, he disclosed in his e-QIP that he was charged with disorderly conduct. Applicant waited until after the charges had been disposed of through the court system before he told his supervisor that he had been arrested, but, to date, he has only disclosed that he was arrested for disorderly conduct and has not disclosed to his company the details of his conduct. Applicant interpreted his e-QIP disclosure as fulfilling his obligation to tell inform employer. But he has acknowledged that this interpretation was erroneous and that it was the product of his embarrassment about his conduct. (Tr., 93 - 94) Applicant has further acknowledged that he was concerned he would be fired if his employer knew the details of what happened. The fact of his arrest and his identity were made public in newspaper stories and television news reports around the time he was arrested. (Gx. 1; Gx. 2; Tr., 32 - 34, 41, 68 - 70)

Two of Applicant's work associates submitted letters of support and recommendation for him. (Ax. D and E) Both authors praise Applicant's character and trustworthiness, with emphasis by both on his generosity and professionalism. One of the associates expressed knowledge of the fact that Applicant experienced financial problems, but insisted that these resulted not from irresponsibility but from his efforts to help others. Neither associate indicated any expressed or implied knowledge of Applicant's arrest, or the details thereof.

In 1996, Applicant's mother died. However, before she passed away, she executed a quitclaim deed which transferred ownership of her house to Applicant and his brother. As Applicant was serving in the Navy at the time, he agreed that his brother and some friends who would pay rent could occupy the house. His brother died in 2001 after having been fully supported by Applicant for about two years. Thereafter, Applicant allowed the friends to stay in the house as tenants. Unfortunately, they did not pay rent as agreed and, over time, caused a great deal of damage to the house. Applicant had the tenants evicted and spent about \$45,000 to repair the house so he could sell it. However, he could not sell the house because his late brother had adult children who based a claim of ownership of the house on a defect in the quitclaim deed. Applicant eventually received about \$7,500 as a settlement in which he forfeited his interest in the house. (Gx. 2; Tr. 43 - 47)

While Applicant was trying to salvage his mother's house for sale, he was also maintaining another residence near his Navy duty station. He sold that house and used the proceeds to help pay for the repairs to his mother's house. Nonetheless, he gradually fell behind on a number of personal credit accounts. (Tr. 47 - 52) As alleged in the SOR, he became delinquent on four debts totaling \$19,319. One debt was for an American Express credit card, for which he owed \$1,684. (Gx. 7) After making minimal payments to that debt since October 2008, Applicant paid \$842.03 in March 2009 to settle the debt. (Ax. F) Another debt was for a delinquent cable television account, for which he owed \$370. The account went unpaid when Applicant moved after selling his house. As of December 2008, it was paid in full. (Ax. G) In March 2009, Applicant also settled in full a \$5,113 delinquent account with a large hardware chain store. Applicant's largest delinquent debt was for a line of credit totaling \$12,403. (Gx. 7) With interest and fees, this account, which has been referred to a collection agency, now totals about \$13,953. (Ax. B) Applicant has been in communication with this creditor and, after paying \$25 each month through the end of 2008, he has been paying \$100 each month, and he hopes to increase that payment to \$300 when he finishes paying other obligations. (Gx. 2; Ax. B; Tr. 51 - 52)

In 1987, Applicant had just re-enlisted in the Navy as a Second Class Petty Officer. He spent his bonus on a \$22,000 sports car, but it was soon damaged in a car accident. His insurance company would not declare the car a total loss and the policy did not pay enough to properly repair it. Applicant incurred costs of trying to repair the car and, eventually, buying another car. As he found himself unable to meet his obligations, he filed for Chapter 7 bankruptcy and his debts were discharged. (Gx. 2; Tr. 60 - 62)

In April 2009, Applicant began using a financial counseling service. According to the budget he established in conjunction with that service, it appears he has about \$2,700 remaining each month after paying expenses. From that, he is currently paying \$735 to four other credit card accounts (all current) and the aforementioned line of credit. (Ax. B)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁴ for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁵ and consideration of the pertinent criteria and adjudication policies in the revised Adjudicative Guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole person” concept, those factors 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) 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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under AG ¶ 12 (Guideline D - Sexual Behavior), AG ¶ 15 (Guideline E - Personal Conduct), AG ¶ 18 (Guideline F - Financial Considerations), and AG ¶ 30 (Guideline J - Criminal Conduct).

The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the government based

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ Directive. 6.3.

⁶ See *Egan*, 484 U.S. at 528, 531.

on trust and confidence. Thus, the government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the government.⁷

Analysis

Financial Considerations.

The government presented sufficient information to support the allegations in SOR ¶¶ 4.a - 4.d. The facts thus established show that Applicant owed approximately \$19,319 in unpaid debts dating back to at least 2001. The resulting security concern about Applicant’s finances, as stated in AG ¶ 18, is that

[f]ailure 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 record as it pertains to Applicant’s finances requires application of the disqualifying conditions listed at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*) and AG ¶ 19(c) (*a history of not meeting financial obligations*). By contrast, as to SOR ¶¶ 4.a, 4.c, and 4.d, Applicant showed he has paid or otherwise resolved those debts. He also showed he is making payments to his largest creditor (SOR ¶ 4.b) and appears to have sufficient financial resources to continue resolving his financial problems with the help of a financial counselor.

Further, the debts he incurred stemmed from unforeseen circumstances surrounding the disposition of his late mother’s house. Had he been able to sell the house as he intended, he likely would have been able to pay off or stay current on the debts he incurred as he tried to salvage the value of the house. In response to those circumstances, Applicant has paid or resolved all but one of his delinquencies, and his current finances appear to be sound as he has a significant positive monthly cash flow. Available information supports application of the mitigating conditions at AG ¶ 20(b) (*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*), AG ¶ 20(c) (*the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control*), and AG ¶ 20(d) (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*). On balance, Applicant’s information is sufficient to mitigate the Guideline F security concerns established by this record.

⁷ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

Criminal Conduct.

The government presented sufficient reliable information to support the allegation of criminal conduct in SOR ¶ 1.a. It is uncontroverted that Applicant engaged in illegal sexual conduct in front of an undercover police officer and that he pleaded no contest to a lesser charge. He was sentenced to probation and ordered to undergo a psycho-sexual evaluation. He is also permanently barred from entering any public park in the county where the offense occurred. The resulting security concern about Applicant's criminal conduct, as stated in AG ¶ 30, is that "[c]riminal 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." The established facts pertaining to Applicant's criminal conduct require application of the disqualifying conditions at AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*).

I have also considered the potential applicability to these facts of the mitigating conditions listed under AG ¶ 32. Applicant successfully completed all of the terms of his probation, has been gainfully employed before and after his arrest, appears sincerely remorseful of his conduct, and the psycho-sexual evaluation he was given showed no risk that this behavior would repeat. Aside from an arrest in 1987 for driving under the influence of alcohol (not alleged in the SOR), Applicant does not have a history of criminal conduct. The mitigating conditions at 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 or 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*) apply. On balance, available information is sufficient to mitigate the security concerns about Applicant's criminal conduct.

Sexual Behavior.

The same information that supported the allegation in SOR ¶ 1.a also supported the allegation in SOR ¶ 2.a; that is, that Applicant engaged in improper sexual behavior that has raised a security concern addressed in AG 12 as follows:

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 in the Guideline may be raised solely on the basis of the sexual orientation of the individual.

Applicant's conduct in this regard was public, and it exhibited a significant lack of judgment. His conduct continues to influence him in that he is, by his own admission, very embarrassed and was reluctant to discuss the details of his arrest with a government investigator during his subject interview. The facts established by the government's information and by Applicant's admissions and testimony require application of the disqualifying conditions at AG ¶ 13 (a) (*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*), AG ¶ 13(c) (*sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*), and AG ¶ 13(d) (*sexual behavior of a public nature and/or that which reflects lack of discretion or judgment*).

Of the mitigating conditions listed under Guideline D, only AG ¶ 14(b) (*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*) (emphasis added) is potentially applicable. This was an infrequent act that, arguably, occurred under unusual circumstances. Further, the psycho-sexual evaluation indicates that it is unlikely Applicant will engage in this sort of behavior in the future. However, Applicant remains embarrassed by the details of his conduct, if not by the fact that he was arrested. He acknowledged that he remains concerned that he will lose his job if his employer learns the details of his conduct, and it appears he has not divulged the facts of what happened even to his associates who submitted references in his behalf.

In short, Applicant's behavior, candor and judgment have been adversely affected by his embarrassment over his sexual behavior. These circumstances also raise the distinct possibility that he could be manipulated or coerced into acting so as to harm the national interest. For these reasons, I conclude that AG ¶ 14(b) does not apply and that the totality of the information bearing on this issue shows that Applicant has not mitigated the security concerns about his sexual behavior.

Personal Conduct.

The government's information is also sufficient to support the allegation in SOR ¶ 2.a. Certainly, the conduct that led to his arrest reflects poorly on Applicant's judgment. Additionally, he was embarrassed by and reluctant to discuss with the investigating agent the details of his behavior. While he denies that he hired an attorney to keep his employer from learning of his conduct and arrest, he acknowledges that he waited until after the judicial disposition of the original charges before he advised his employer of the adverse information or completed his e-QIP. It is clear from all of the information bearing on this issue that he has still not divulged this information when required. Further, Applicant was less than candid on his e-QIP when he listed his arrest as a disorderly conduct charge rather than the original two misdemeanor sex offenses for which he was initially charged. It is also clear that Applicant remains concerned about the possible adverse effects on his employment that might arise if his employer learns the whole story behind his arrest.

The facts established by the government's information and by Applicant's testimony raise security concerns about his personal conduct, as expressed at AG ¶ 15, as follows:

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.

More specifically, available information requires application of the disqualifying conditions at AG ¶ 16(a) (*deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*), and AG ¶ 16(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,...*).

Of the mitigating conditions listed at AG ¶ 17, only AG ¶ 17(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*) and AG ¶ 17(e) (*the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*) are potentially applicable. However, I decline to apply either. As to AG ¶ 17(c), the underlying conduct that led to his arrest was isolated and not likely to recur. But his embarrassment continues to cast doubt on Applicant's judgment and adversely affect his candor and trustworthiness when dealing with his employer. Concurrently, in considering AG ¶ 17(e), I conclude that Applicant has not done anything to reduce the potential for use of these circumstances for exploitation or coercion against him. On balance, Applicant has failed to mitigate the security concerns about his personal conduct and judgment.

Whole Person Concept.

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines D, E, F, and J. I have also reviewed the record before me in the context of the whole person factors listed in AG ¶ 2(a). Applicant is 47 years old and presumed to be a mature adult. He served his country honorably for most of his adult life, and he has exhibited a laudable measure of generosity (often to his own detriment) in dealing with his friends and family. He acted responsibly in trying to resolve his financial problems, and he enjoys a good reputation among his co-workers. However, that reputation is rendered suspect by the conduct that led to his arrest and by his continued reluctance to disclose relevant information in his background when required. At the very least, his apparent failure to tell two associates who submitted positive recommendations for the record indicates an ongoing risk of coercion and

exploitation. A fair and commonsense assessment⁸ of all available information bearing on Applicant's finances and truthfulness shows he has failed to address satisfactorily the government's doubts about his ability or willingness to protect the government's interests as his own. Because protection of the national interest is paramount in these determinations, such doubts must be resolved in favor of the government.⁹

Formal Findings

Formal findings 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:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline D:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Paragraph 4, Guideline F:	FOR APPLICANT
Subparagraphs 4.a - 4.d:	For Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is denied.

MATTHEW E. MALONE
Administrative Judge

⁸ See footnote 5, *supra*.

⁹ See footnote 8, *supra*.