



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-09378
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: John Bayard Glendon, Esquire, Department Counsel
For Applicant: *Pro se*

July 13, 2009

Decision

CURRY, Marc E., Administrative Judge:

Applicant failed to mitigate the security concerns generated by his sexual behavior and personal conduct. Clearance is denied.

On February 19, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under the sexual behavior, criminal conduct, and personal conduct guidelines. 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 March 5, 2009, admitting that the conduct raised a sexual behavior security concern, as set forth in Paragraph 1, but denying that the conduct constituted criminal conduct, as set forth in Paragraph 2. The case was

assigned to me on April 2, 2009. On April 7, 2009 a Notice of Hearing was issued scheduling the case for April 30, 2009.

At the hearing, I received two government exhibits, eight Applicant exhibits, and Applicant's testimony. Also, at department counsel's request, I took administrative notice of relevant state law defining prostitution, sexual acts, and solicitation of sexual acts (Exhibit I). The transcript was received on May 8, 2009.

Procedural Ruling

Department counsel moved to amend the SOR by cross-alleging the sexual behavior allegation, set forth in SOR Paragraph 1, under an additional paragraph for personal conduct. Applicant did not object, and admitted that his sexual behavior also raised a personal conduct security concern. I granted the motion.

Findings of Fact

Applicant is a 51-year-old, married man with two teenage children. He has been married for 22 years. He earned a bachelor of science degree in computational science in 1979, and has been working in the software engineering field since graduating (Tr. 20). He has spent the majority of his career working for defense contractors (*Id.*).

Currently, Applicant develops signal intelligence technology for a defense contractor (Exhibit A at 2). According to his supervisor, he is a strong, innovative leader who communicates well with customers (Exhibit D). Applicant is active in the community donating blood to medical charities (Tr. 42).

Between 1998 and 2008, Applicant paid for, and received sexual massages from several females whom he solicited through the Internet (Tr. 32). The sexual activity did not involve vaginal, oral, or anal intercourse, and was limited to use of the hands (Exhibit 2 at 5; Tr. 32). Applicant engaged in this activity twice per year, and the last episode occurred in early 2008. He always paid cash for the services, and never left any identifying information with the women (Tr. 37).

Soliciting sexual massages constitutes a misdemeanor in the state where Applicant engaged in this activity (Exhibit I). He understands that soliciting prostitution is illegal, but did not know that soliciting sexual massages was illegal (Tr. 34).

Applicant voluntarily disclosed this behavior during a June 2008 interview with an agent from the United States Office of Personnel Management (OPM; Tr. 38). He recognizes that the activity was wrong and immoral, and he has no intentions of engaging in this activity in the future (Tr. 10). He has never informed his wife of this activity, and she is unaware of it (Tr. 32). He does not want to disclose it because of "the pain that it would cause her" (Tr. 34).

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 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 solicitation of women for sexual massages constituted criminal behavior under state law. His wife is unaware he indulged in this conduct. Consequently, 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," apply.

Applicant has not engaged in this activity for approximately 18 months. His testimony reflected sincere remorse. However, he remains vulnerable to coercion because he never told his wife of the behavior, and acknowledges that he is afraid of

the pain it would cause her if she were aware of it. The fairly recent nature of the conduct, and the vulnerability to coercion it poses renders all of the mitigating conditions inapplicable.

Applicant has not mitigated the sexual behavior security concern.

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.*). Applicant’s conduct triggers the application of AG ¶¶ 31(a) “. . . multiple lesser offenses,” and 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, prosecuted or convicted.”

Applicant has a good employment record, and is active in his community. His stated remorse and his intention not to engage in any future such activity were credible. AG ¶ 31(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,” applies.

The minor nature of Applicant’s crime is outweighed by the presence of rehabilitation. He has mitigated the criminal conduct security concern.

Guideline E, Personal Conduct

Under this guideline, “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” (AG ¶ 15). Applicant’s conduct 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 . . .”

None of the personal conduct mitigating conditions apply for the same reasons that none of the sexual behavior mitigating conditions apply. Applicant has not 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) 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 conduct was fairly recent, and he never informed his wife. Consequently, his vulnerability to coercion is unacceptably high. Upon evaluating this case in light of the whole person concept, it is not clearly consistent with the national interest to grant Applicant a security clearance. Clearance 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, Guideline D:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.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