



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 08-11852

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: Joseph Testan, Esquire,

May 10, 2011

Decision

MOGUL, Martin H., Administrative Judge:

On June 23, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines D and E for 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) effective within the Department of Defense for SORs issued after September 1, 2006.

On August 18, 2010, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. The case was initially assigned to another Administrative Judge. DOHA issued a notice of hearing on October 28, 2010, and the hearing was scheduled for November 16, 2010. Because of scheduling conflict, a second notice of hearing was issued on November 8, 2010, and the hearing was held, as scheduled for December 16, 2010. The case was assigned to this Administrative Judge on December 7, 2010.

The Government offered Exhibits 1 through 4, which were received and entered into evidence without objection without objection. Applicant testified on his own behalf and submitted Exhibits A through D at the time of hearing, which were also entered into evidence without objection. I granted Applicant's request to keep the record open until January 3, 2011, to submit additional evidence. I received a one page character letter, identified as Exhibit E, and entered into evidence without objection. DOHA received the transcript of the hearing (Tr) on December 29, 2010. Based upon a review of the case file, exhibits, and the testimony of Applicant, eligibility for access to classified information is denied.

Findings of Fact

In his RSOR, Applicant admitted SOR allegations 1.a., 1.b., 1.c., 1.d., and 2.a. He denied 1.e., 1.f., and parts of 2.b. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 61 years old. He is married, and he has two children. He received a Bachelors Degree in Electrical Engineering. Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector. He indicated that he plans to retire in March 2011, but he is considering working on a casual basis after his retirement. (Tr at 21-22.)

Paragraph 1 (Guideline D - Sexual Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in sexual behavior that is either criminal, indicates a personality or emotional disorder, reflects lack of judgement or discretion, or which may subject an individual to undue influence or coercion.

1.a. It is alleged in the SOR that Applicant solicited sex from prostitutes from about the 1970s to at least 1990. As reviewed above, Applicant admitted this allegation in his RSOR. At the hearing, Applicant estimated that his last solicitation of a prostitute was between three and five years ago. (Tr at 22.) He estimated that he has solicited a prostitute between 100 and 200 times, and continued to do this even during his period of attending a 12 step sexual recovery program. He testified that his solicitation has gradually decreased over the years, and, "It has really gotten quite rare these days." (Tr at 41-42, 58.)

1.b. It is alleged in the SOR that Applicant engaged in illegal activity of a sexual nature, to include exhibitionism, voyeurism, unauthorized touching, and masturbation from about the 1970s to at least 1990. Applicant admitted this allegation in his RSOR. During Applicant's testimony, it was clarified by his attorney that the allegation of

masturbation referred to Applicant masturbating in public. He estimated that he last engaged in the conduct listed in this subparagraph between five and 10 years ago. (Tr at 22-23.) He also estimated that he engaged in public masturbation “a couple of hundred times.” (Tr at 55.)

1.c. It is alleged in the SOR that Applicant was arrested in about 1990 and charged with Solicitation of a Prostitute. He was found guilty and placed on probation. Applicant admitted this allegation in his RSOR.

1.d. It is alleged in the SOR that Applicant was arrested in about 1991 and charged with (1) Indecent Exposure, and (2) Making False Statement to the Police. He pled guilty to Disturbing the Peace and was fined and placed on three years probation. Applicant admitted this allegation in his RSOR and confirmed it during his testimony. (Tr at 23-24.) This arrest occurred as a result of Applicant masturbating in his vehicle, and a woman claiming that he was engaged in indecent exposure. (Tr at 43.)

1.e. It is alleged in the SOR that Applicant possessed child pornography prior to 1999. Applicant denied this allegation in his RSOR. Applicant testified that he denied this allegation because he had “old nudist magazines” that included people of all ages, including children who were nude, but no sexual activity was depicted. He also testified that he had never had an interest in child pornography, and he had not obtained these magazines with the purpose of viewing underage people in sexual positions. (Tr at 24-25, 45.)

1.f. It is alleged in the SOR that Applicant utilizes the services of a massage parlor that offers the additional services of a sexual nature three to four times a year. Applicant denied this allegation in his RSOR. Applicant testified that he denied this allegation, which was based upon a statement he made, Exhibit 3, because his “slips,” as he described them, involved different forms of breaking the definitions of abstinence from his sexual recovery program called Sex Addicts Anonymous. (Tr at 58.) These included more than massage parlor visits alone; they also included going to sexual video arcades, getting lap dances at a strip club, or going to a hostess dance club. All of these activities were included in his “slips.” (Tr at 27-30.)

Applicant made the distinction between acts that may not be illegal, such as going to sexual video arcades, getting lap dances at a strip club, or going to a hostess dance club, but they were not allowed on his 12 step program, so by engaging in these activities he violated the tenets of his sexual recovery program. This would be similar to a member of alcoholics anonymous who consumes alcohol.

Applicant testified that he had not frequented massage parlors within the last year before the hearing, but upon reflection, he did concede that he did go to a massage parlor in March 2010. (Tr at 26-30.) This massage included sexual gratification. Applicant first testified he was not seeking this service, but when it was offered, he could not refuse because he could not control his compulsion.(Tr at 47, 49.) Upon further examination, Applicant conceded that he had anticipated this massage may include sexual activity, and even though he was aware that he was being

investigated as part of his security clearance application, he could not overcome his addiction. (Tr at 60-63.) He also received a lap dance at around the same time frame.

Applicant testified that he considers himself a sexual addict. He began a 12 step program for sexual addicts in 1990, which he continues to attend weekly. He believes the program has helped him with his addiction. He stated that his sexual behavior has diminished over the years because of this program and also as he has aged he is less inclined to engage in this conduct. He and his wife also have been attending a 12 step sexual addict program for couples during the past 16 years. He plans to continue attending both programs and does not plan to engage in the sexual conduct that is the subject of this case in the future. (Tr at 31-35, 67.)

Applicant testified that his wife is aware of his sexual activity, and I note that she was present at the hearing and heard all of the testimony. He estimated that three people at his place of employment are also aware of his sexual conduct. (Tr at 35-36.) Applicant does supervise three employees, and he testified that none of them was aware of his sexual conduct. (Tr at 51.) He also testified that his two children, who are 22 and 17, his three brothers, and his one sister are not aware of the full extent of sexual conduct, although they are aware that he attends a 12 step program. (Tr at 53.) He indicated that if someone threatened to inform his children of his sexual activities, he would inform the authorities. (Tr at 56.)

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he engaged in conduct that exhibited questionable judgement, unreliability, unwillingness to comply with rules and regulations, and untrustworthiness.

2.a. It is alleged in the SOR that Applicant was denied program access by another Government agency in about April 1999 due to criminal conduct, sexual behavior, and personal conduct. Applicant admitted this allegation in his RSOR.

2.b. It is alleged in the SOR Applicant's conduct, reviewed above in Paragraph 1, above, constitutes the kind of behavior that is of concern to the Government, as it exhibits questionable judgement, unwillingness to comply with rules and regulations, and untrustworthiness. Applicant admitted SOR allegations 1.a., 1.b., 1.c., 1.d., above.

Mitigation

Applicant introduced a document titled "Intent to Retire On" which indicated that he notified his employer that he planned to retire on March 1, 2011. (Exhibit A.)

He also introduced a letter from a Licensed Marriage and Family Therapist, dated December 13, 2010, who met with Applicant on three occasions. (Exhibit B.) She reviewed the information that he provided to her and wrote, "It is also my professional assessment, based on three interviews with [Applicant] that he is unlikely to commit any illegal sexual behavior. He has shown an ongoing commitment to his sexual recovery

and he and his wife are both active in working with other couples as part of their own recovery.” In reviewing this report, including Applicant’s history, I note there is no mention of Applicant receiving the sexual massage or the lap dance in 2010, nor is there any discussion about Applicant’s amount of solicitation of prostitution (100 to 200 times) or his public masturbation (200 times), so I do not know if this therapist was aware of Applicant’s full sexual history. Therefore, I do not give this report a great deal of weight.

Applicant submitted two letters of reference. The first one is from Applicant’s line manager for the past three years, who has known Applicant for almost 20 years. He wrote he “always regarded [Applicant] as being reliable and trustworthy, and have never encountered any reason to doubt his loyalty or suitability to work on national security programs.” No mention was made of Applicant’s sexual issues. (Exhibit D.) The second letter was from Applicant’s sponsor in Sexual Addicts Anonymous, who has known him for 20 years. He confirmed that Applicant is conscientious in attending the meetings and working the 12 step program. (Exhibit E.)

Applicant also submitted his performance evaluations signed in 2008 and 2009. (Exhibit C.) He received Satisfactory rather than Unsatisfactory for both years regarding “Safeguarding of Classified Information” and “Maintaining Safe Work Environment.”

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 over-arching 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.” 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.

Section 7 of Executive Order 10865 provides that decisions shall be “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

Guideline D, Sexual Conduct

It has been established by substantial evidence that Applicant engaged in the kind of sexual behavior that is of concern to the Government, as it is criminal conduct, and it exhibits a lack of discretion and good judgement. Applicant engaged in the solicitation of prostitution between 100 and 200 times and public masturbation on 200 occasions. Even when he was aware that he was being investigated because of his security clearance, he engaged in sexual massage and a lap dance in 2010. While it appears that he would like to abstain from this conduct, and the conduct has diminished in frequency, when I consider the frequency and longevity of his sexual history and the fact that he continues to have “slips” from his sexual 12 step program, I cannot conclude that he has established a pattern of significant sexual abstinence.

Under AG ¶ 13 (a) “sexual behavior that is of criminal nature, whether or not the individual has been prosecuted” applies to the facts of this case. AG ¶ 13 (d) also applies because Applicant “engaged in sexual behavior that reflects lack of discretion or judgement.” No mitigating condition under AG ¶ 14 can be found to apply here. Paragraph 1, Guideline D is found against Applicant.

Guideline E, Personal Conduct

With respect to Guideline E, the evidence establishes that Applicant engaged in conduct, which considered as a whole, exhibits questionable judgement, unreliability, unwillingness to comply with rules and regulations and a lack of candor. I resolve Paragraph 2, Guideline E, against 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 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) 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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, including all of the reasons cited above as to why the Disqualifying Conditions apply and no Mitigating Condition is applicable regarding Applicant's sexual conduct over many years. I find that the record evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole person concept. For all these reasons, I conclude Applicant has not mitigated 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 D:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d.:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	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.

Martin H. Mogul
Administrative Judge