



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



In the matter of:)	
)	
)	ISCR Case No. 09-02538
)	
)	
Applicant for Security Clearance)	

Appearances

For Government, James Duffy, Esquire, Department Counsel
For Applicant: *Pro se*

July 14, 2010

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guidelines D, Sexual Behavior, Guideline E, Personal Conduct, and Guideline J, Criminal Conduct. Applicant’s eligibility for a security clearance is denied.

On January 8, 2010, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline D, Sexual Behavior, Guideline E, Personal Conduct, and Guideline J, Criminal Conduct. 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.

Applicant answered the SOR in writing on February 3, 2010, and elected to have his case decided on the written record. Department Counsel submitted the Government’s file of relevant material (FORM) on March 25, 2010. The FORM was mailed to Applicant and it was received on April 8, 2010. Applicant was afforded an

opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the FORM and he submitted additional material for consideration. The case was assigned to me on June 7, 2010.

Findings of Fact

Applicant admitted all of the allegations in the SOR. After a thorough and careful review of the pleadings, exhibits, and statements submitted, I make the following findings of fact.

Applicant is a 46-year-old employee of a defense contractor. He is married and has two children, ages 15 and 13. He earned a bachelor's degree and a master's of business administration degree. He served in the Air Force for 21 years and received an honorable discharge. He held a Top Secret security clearance for 18 years until it was revoked by the Air Force due to misconduct that will be addressed below.

On February 8, 2005, Applicant was arrested by Park Police on federal property, and charged with Disorderly Conduct (Obscene Act). On February 22, 2005, he received a letter of reprimand from a Brigadier General for violation of the Uniform Code of Military Justice, Article 133, Conduct Unbecoming an Officer; Article 134, Indecent Exposure; Article 134, Indecent Acts with Another; and Article 125, Sodomy.

The arresting officer's report stated:

I observed [Suspect] in a kneeling position in front of [Applicant]. [Suspect] had his right hand around [Applicant's] erect penis as [Applicant's] right hand was placed on the top of [Suspect's] head as [Suspect] stroked and performed oral sex on [Applicant]. I moved approximately 15 feet from [Suspect] and [Applicant's] (sic) and [Suspect] stopped performing oral sex on [Applicant] and turned toward to (sic) my location still in a kneeling position holding [Applicant's] penis with his right hand. I contacted Sgt. [X] [via] cell phone to let him know I had an arrest situation. [Suspect] began to cough and gag as he stood up and turned away from [Applicant] and started spitting as he left [Applicant's] location. [Suspect] continued walking toward the parking lot as I moved toward [Applicant]. I approached [Applicant] and displayed my police badge and identified myself as a police officer. [Applicant] stated, "[P]lease let me go I am sorry, I know what I was doing was wrong but I am married and I am in the military and I will lose my job." [Applicant] immediately complied and was placed in handcuffs.¹

The police officer's report also indicated Suspect admitted soon after he was arrested, to "giving oral sex to the other guy", that is Applicant.

¹ Item 9.

On June 7, 2005, Applicant was represented by an attorney, and pled not guilty before a U.S. Magistrate in U.S. District Court, to a misdemeanor charge of Disorderly Conduct. The arresting officer testified at the trial. Applicant was found guilty and sentenced to six days in the Bureau of Prisons, two years probation, and a \$750 fine.

In June 2005, an Air Force Board of Inquiry (Board) was conducted to determine if Applicant should be discharged from the Air Force. The Board concluded Applicant committed serious misconduct due to his civilian conviction, and recommended he be retained in the Air Force.

In February 2007, the Department of the Air Force Central Adjudication Facility (AFCAF) issued a Letter of Intent to revoke Applicant's security clearance. The AFCAF set forth allegations under the guidelines for Sexual Behavior, Personal Conduct, and Criminal Conduct. Applicant elected a personal appearance hearing before a DOHA Administrative Judge.

At Applicant's hearing he stated: "First off, let me say, on that day, February 8th . . . I did not commit any kind of misconduct in that wooded area that day. I am not a homosexual. And I have never done any kind of sexual activity outside the sanctity of marriage to my wife."²

In her decision the Administrative Judge noted that at his hearing Applicant repeatedly denied he committed the alleged conduct. The Administrative Judge recommended the Air Force Personnel Security Appeal Board (AFPSAB) sustain the AFCAF decision to revoke Applicant's access to classified information. The AFPSAB concurred with the Administrative Judge's recommendation and denied Applicant's appeal.

Applicant provided a sworn affidavit on July 23, 2009, to an investigator from the Office of Personnel Management (OPM). In his statement he claims when he entered the park he was in need of a restroom to urinate. He indicated he did not see a restroom and was relieving himself in the woods. He acknowledged seeing Suspect. He stated: "At no given time, did the unidentified man ever have any direct physical contact with me. No part of my body touched this man and no part of his body touched me."³ He further stated in his sworn statement:

I was informed that I was arrested for receiving oral sex from an unidentified male. This is an allegation and there was no truth to this. The only thing I did was urinate in the wooded area which I later discovered was a federal park.⁴

² Item 6.

³ *Id.* The police officer also testified at his trial that there were approximately four restrooms in the park, including a port-a-john in plain view on the way to the parking lot and wooded area.

⁴ Item 12.

* * *

In regard to this incident, I did not engage [in] any sexual act with the unidentified man nor have I ever engaged in any same-sex sexual act. My spouse [W], mother, [M], and my siblings are all aware of the previously mentioned incident.⁵

* * *

My spouse is fully aware of all the circumstances surrounding my security clearance being suspended and revoked.⁶

Applicant's response to the FORM states: "I committed serious misconduct punishable by military and civilian authorities. However, the behavior was a departure from my usual and customary behavior. . ." ⁷

Applicant provided the following comments under the heading: "Guideline D, Sexual Behavior-I did commit a criminal act." He further stated:

The behavior occurred in a public place thus indicating a lack of discretion.⁸

* * *

My family, co-workers and friends are aware of my crime that took place that day. Everyone is aware and I do not hide from the fact that the crime occurred. Many supported me during my trial and continue to support me today. I have always performed my job to the best of my abilities. I deny that the crime occurred under circumstances which could occur again and which could serve as a basis for coercion, exploitation or duress.

In his response to the FORM under the Personal Conduct Guideline he stated:

It happened over 5 years ago and I have continuously given a voluntarily (sic) detail of the events of February 8, 2005. I have given full disclosure not only to my employers, but my family and friends as well.

* * *

⁵ *Id.*

⁶ *Id.*

⁷ Response to FORM.

⁸ *Id.*

I made voluntary statements to my superiors and everyone involved [in] the isolated incident that happened over 5 years ago.

* * *

I have acknowledged the behavior and obtained counseling for myself and marriage counseling with my wife. I submitted to evaluations and followed all recommendations of the counselor. I went to the VA hospital and I reported to the counselor what happened. I asked to be evaluated and receive services. I was dismissed without any findings because there was no evidence of deviant sexual behavior.

* * *

Additionally, any statements previously made were at the direction of my attorney. I hired legal counsel and was advised accordingly including my plea of not guilty.⁹

It is unclear what specific behavior Applicant is admitting he committed. For more than four years, Applicant repeatedly denied engaging in the obscene act. He denied the act under penalty of law at his personal appearance hearing. His most recent denial was in a sworn statement in July of 2009. It is unclear if Applicant has acknowledged committing the obscene act or merely acknowledges he was found guilty of the offense in court. It may be, but cannot be confirmed, that Applicant is acknowledging that the criminal act he committed was urinating in a public park.

It is unclear what specifically Applicant has admitted to his family and friends. Applicant provided written character statements as part of his response to the FORM. These statements were originally provided to the Board of Inquiry. The letter from his wife states: "If I thought one tenth of these accusations were true I would be the first person outraged. After all, what he is accused of doing would be a direct assault on our marriage vows."¹⁰ I do not know if Applicant has now admitted to his wife that he committed the obscene act. Her letter is dated March 3, 2005, and was obviously written shortly after the event when Applicant was denying he committed the offense.

Another letter written on March 2, 2005, from an Air Force colonel stated: "I feel that it is unfortunate that the 'bazzar' (sic) circumstances surrounding this issue have cast a doubt on the service and credibility of [Applicant]."¹¹ I do not know whether Applicant admitted to the Colonel that he committed the obscene act.

⁹ *Id.*

¹⁰ Letters included as part of Response to Form, page 22.

¹¹ *Id.* at 19.

A retired colonel provided a letter that stated: "I am aware that [Applicant] has been served with a letter of reprimand for homosexual conduct. However, I do not know any specifics regarding the alleged acts nor the details of the rebuttal that he has prepared."¹²

Applicant repeatedly and continuously denied he participated in the obscene act in the park on February 8, 2005. He swore to the accuracy of his denials to an OPM investigator on July 23, 2009. He testified under penalty of law at his personal appearance hearing that he did not commit the obscene act. His response to the FORM is somewhat vague as to what acts he now is admitting to have participated in. However, he does admit to committing a serious criminal act.

I have not been provided with a report from the Veterans Administration that details what facts Applicant provided to them regarding the incident. I did not have an opportunity to question Applicant to determine what admissions he has made to his family and friends. There is no doubt that they are aware of his court conviction. However, I do not know what specific crime Applicant now admits he committed and what he has told his family and friends.

I have considered the complete contents of the character letters provided and Applicant's military service, including all of his awards and decorations.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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 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.

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

¹² *Id.* at 24.

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, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 that an applicant may deliberately or inadvertently fail to 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 Behavior

AG ¶ 12 expresses the security concern pertaining to sexual behavior.

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

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I have considered the following as potentially applicable:

(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

(d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

Applicant engaged in an obscene act with another man in a public park, where he was observed by a police officer. Applicant was married at the time. He was arrested, charged, and convicted of Disorderly Conduct (obscene act). He was an Air Force officer when he committed the obscene act. I find all of the above disqualifying conditions apply.

The guideline also includes examples of conditions that could mitigate security concerns arising under the sexual behavior guideline. The following mitigating conditions under AG ¶17 are potentially applicable:

(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;

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress;

(d) the sexual behavior is strictly private, consensual, and discreet.

Applicant committed an obscene act in a public place with a person he did not know at the time. His sexual behavior was not private or discreet. He has repeatedly denied, under oath, that he committed the obscene act. Although it has been more than five years since the offense occurred, I cannot mitigate the sexual behavior because Applicant denied he committed the offense for five years, including during sworn testimony at his personal appearance hearing, and in a sworn written statement. In his response to the FORM where he now admits to committing a crime, he wrote he made the declaration "the 20th of May, 2010, under the pain and penalty of perjury and declare that the information contained herein is true." I find Applicant's behavior under the circumstances casts doubt on his reliability, trustworthiness, and good judgment. His statements raise questions about his conduct and credibility and serve as a basis for coercion, exploitation, or duress. I find none of the mitigating conditions apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct.

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I have specifically considered

(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.

Applicant committed an obscene act with a person he did not know in a public park. He was an Air Force officer at the time. He has repeatedly denied under oath and penalty of law that he committed the act, both through testimony and a sworn statement. He was found guilty of Disorderly Conduct (obscene act) in a federal court. In his response to the FORM, he admitted he committed a criminal act. Applicant has gone through great pains for more than four years to deny his past conduct, and he now admits he committed a criminal act. Insufficient information was provided to determine what information he had admitted to his family and friends. His behavior raises the above disqualifying condition.

AG ¶17 includes examples of conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions and find the following are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the secure clearance process. Upon being made aware of the requirement to cooperate or provide information, the individual cooperated fully and truthfully;

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant has repeatedly denied under penalty of law and in sworn statements that he committed the obscene act for which he was convicted. He claims his previous statements were made at the direction of his attorney. He now admits he committed criminal conduct. I have not had an opportunity to judge Applicant's credibility in person. I have not had an opportunity to resolve discrepancies and question him about the statements he has made. I do not know what information or admissions he provided to his counselors, family, and friends. It is clear that Applicant's actions, subsequent statements, and lack of candor, are a concern. Although he has sought counseling, he failed to describe what behavior he admitted to and he failed to provide the counselor's reports. I find none of the above mitigating conditions apply.

Guideline J, Criminal Conduct

AG ¶ 30 sets out the security concern relating to criminal conduct:

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.

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 and the following are potentially applicable:

- (a) a single serious crime or multiple lesser offense; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was arrested, charged and convicted of Disorderly Conduct (obscene act). I find both of the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and the following are potentially applicable:

- (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
- (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.

Applicant denied he committed the obscene act for which he was convicted. He has maintained that denial for more than four years, including when testifying under penalty of law and in a sworn statement. In response to the FORM, he admitted he

committed a crime. I have considered his vague statements and lack of candor. I find these issues cause me to question his reliability, trustworthiness, and good judgment. Applicant denied his behavior for years and only recently admitted he committed a criminal act. I have not had an opportunity to question Applicant and cannot resolve discrepancies question him about his statements. Therefore, I cannot find any of the above mitigating conditions apply.

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. I have incorporated my comments under Guidelines D, E, and J, in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. Applicant served in the Air Force 21 years and was honorably discharged. I have considered all of the character letters, medals, and awards he received and his work performance. Applicant was convicted of Disorderly Conduct (obscene act) in 2005. He unequivocally and repeatedly denied in his testimony and sworn statement that he committed the act. In his response to the FORM, he acknowledged he committed a crime. The record provided includes statements provided by Applicant. I have not had an opportunity to observe his demeanor and judge his credibility. Based on the record, I have not been able to resolve questions related to Applicant's candor and specific admissions made to his family, friends, and employer. Overall, the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the guidelines for Sexual Behavior, Personal Conduct, and Criminal Conduct.¹³

¹³ In reaching my findings, I do not find the consequences of Applicant's conduct to be disqualifying. That is, I do not find the fact that Applicant received a letter of reprimand or that his security clearance was

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
Subparagraphs 1.b-1.d:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	For 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.

Carol G. Ricciardello
Administrative Judge

revoked by the Air Force as a disqualifying factor, but rather the underlying conduct for which the consequences were based is the disqualifying fact.