



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



In the matter of:

ISCR Case No. 10-00374

Applicant for Security Clearance

Appearances

For Government: Tovah A. Minster, Esquire, Department Counsel

For Applicant: *Pro se*

January 12, 2011

Decision

RICCIARDELLO, Carol G., Administrative Judge:

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

On August 17, 2010, the Defense Office of Hearings and Appeals (DOHA) issued 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 on August 20, 2010, and provided a second statement on September 15, 2010. He elected to have his case decided on the written record. Department Counsel submitted the Government's File of Relevant Material

(FORM) on November 4, 2010. He received the FORM on November 15, 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 submitted an additional statement. Department Counsel did not object, and I have considered the additional statement. The case was assigned to me on December 10, 2010.

Findings of Fact

Applicant admitted all of the SOR allegations, but denied he deliberately falsified his security clearance application (SCA). After a thorough and careful review of the pleadings, exhibits, and statements submitted, I make the following findings of fact.

Applicant is 33 years old. He has worked for a federal contractor since June 2008. He served in the Navy from August 1999 until his Honorable Discharge in June 2008. He has held a Secret security clearance since 1999. He married in 2001.

Applicant was arrested in 2001 and charged with soliciting a prostitute. He pled guilty to a lesser charge of indecent exposure and was placed on unsupervised probation for three years. In his response to the SOR, Applicant denied his intention was to solicit a prostitute. He stated that he is a religious man who was attempting to “witness” to the prostitute and show her the error of her ways. The person he solicited was an undercover police officer.

Applicant provided a supplemental statement regarding his 2001 conviction. He stated:

After proven that I was part of a[n] Outreach Ministry known as [Ministry] sponsored by [International Ministry], that I was supporting this ministry in trying to reach lost souls, the Judge decided to reduce the charge from Soliciting an Undercover Police Officer to a lesser charge of Indecent Exposure. This was my first ever offense.¹

I find Applicant’s statement of explanation is not credible. No corroborating evidence was provided to support Applicant’s assertions as to why the Judge reduced the charge. The question remains if Applicant was truly involved in ministry, why the Judge did not dismiss the charge and why he pled guilty to it.

In May 2008, Applicant noticed a female walking on the sidewalk. He stopped his vehicle and asked her to get into his vehicle, which she did. He offered her a ride to where she was going. She asked him if he was “looking for a good time.” He told her “yes.” He agreed to pay her \$30 to perform oral sex on him. He went to an automatic teller machine to retrieve the money and then drove to a store’s rear parking lot. Shortly after he parked the vehicle the police arrived and arrested Applicant and the woman. He was charged with soliciting a prostitute. In June 2008, he appeared in District Court and

¹ Response to FORM dated December 1, 2010.

entered a plea of Nolle Prosequi. In August 2008, he served seven days in detention and the charge was dismissed.

Applicant completed his SCA on December 11, 2008. In response to question 23f, which asked if Applicant had been arrested for, charged with, or convicted of any offense(s) in the past seven years that were not previously listed, he answered "no." During his interview with an Office of Personnel Management (OPM) investigator he stated he was advised by his attorney that his records regarding his arrest and conviction would be expunged.

In Applicant's answer to the SOR he stated:

My reason for omitting these two inquiries was my lack of intelligence of reporting expungements given to me from legal counsel after I was released from containment (sic) in August of 2008. It was unclear to me at the moment that if you have been arrested or convicted of a criminal offense where the crime was reduced to a lower sentence and/or dismissed, that you could undergo a (sic) the process of expungement and your record will be cleared which I thought meant that I did not have to report it since the record was destroyed. It was told to me that any police record I had would be destroyed. The previous statement was why I agreed to be detained for one (1) week because the record would be destroyed both physically and from all databases. I asked that specific question and I was assured by the attorney that the record would be destroyed.²

* * *

[I]t is NOT [my] intention to hide information about my personality, character, or integrity. I made a possibly devastating mistake because I was unlearned of the expunging process. Furthermore, I understand that terms Sealing or Expunge are used interchangeable and that the only exception to none (sic) reporting is covered under the Federal Controlled Substance Act ordered by the court.³

Applicant explained in his answer that he was advised by his legal counsel that after he served his seven days of jail there would be no record of the offense. He stated: "I was under the impression from legal counsel at the time of filling out the SF 86 form that I did not have to report anything because my record was expunged."⁴ Applicant

² Item 3.

³ *Id.*

⁴ Item 4.

denied intentionally falsifying his SCA. He stated that he was “misinformed in how to submit information on the SF 86 Form.”⁵

Applicant claims he did not deliberately fail to disclose his prior arrest on his SCA. I find there is insufficient evidence to conclude Applicant deliberately falsified his SCA.

In Applicant’s response to the FORM he stated that his wife is aware of “all of his transgressions.” His said his neighbor witnessed his last arrest. He told a friend about his arrest and “everything that happened with both arrest[s].” He indicated his entire Navy chain of command was aware of his arrests. He stated he confessed his actions to the entire church where he attended and where he is currently the pastor. He did not provide specific information as to what details he disclosed to his family and friends. I did not have an opportunity to question him about these matters.

Applicant further stated in his response to the FORM that he is an upright citizen in his community. He helps teenagers make the right decisions. He uses his arrest as a teaching tool. He conducts Bible studies and holds Sunday worship services.

Applicant stated he voluntarily arranged “addictive sexual behavior” counseling with a “Psychiatric Counsel.” He stated that the doctor decided that there are “no concerns of any addictive behavior or continued advances in [Applicant’s] behavior.” There is no corroborating evidence to support these assertions. I did not have the opportunity to question Applicant about his counseling. I did not have an opportunity to determine a time-frame of when and how long Applicant may have attended counseling and if there was a diagnosis. I did not receive any mental health reports, medical reports, or counseling reports regarding Applicant’s counseling. I do not have any information that details the credentials of his counselor, and the reason for and type of treatment Applicant may have received.

Applicant stated the following: “Remorse is definitely in play because I admitted the arrest and the reason for the arrest publically and will openly talk about the arrest upon request.”⁶ I have not had an opportunity to question Applicant about what specific actions he is remorseful for and I have not questioned him about his repeated criminal sexual behavior. Despite his 2001 plea and conviction, he continues to deny his involvement in the offense.

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

⁵ *Id.*

⁶ Response to FORM.

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 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 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 was arrested in 2001 for soliciting a prostitute. The charge was reduced to indecent exposure and he pled guilty. He received three years of unsupervised probation. In 2008, he solicited a prostitute for oral sex. He entered a plea of Nolle Prosequi to the offense, received seven days detention, and the charge was dismissed. Both offenses occurred in public areas. I find 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; and
- (d) the sexual behavior is strictly private, consensual, and discreet.

Applicant was charged on two occasions with soliciting a prostitute. The first time was in 2001, and the charge was reduced to indecent exposure. The second time was in 2008, and he served seven days detention. Because his conduct was repetitive and recent, I cannot find that it is unlikely to recur. Applicant was on notice after his first offense as to the serious nature of his actions. He again engaged in risky criminal

behavior in 2008. His conduct was in a public place. His statements regarding his first arrest are not credible. His actions cast doubt on his current reliability, trustworthiness, and good judgment. Applicant did not provide sufficient evidence to convince me that his behavior is no longer a basis for coercion, exploitation, or duress. Applicant continues to deny his involvement in the first offense. He has not provided sufficient evidence to corroborate the statements he made that all of his friends and family are aware of his conduct. I do not know if his employer and coworkers are aware of his sexual behavior and criminal offenses. I find none of the 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.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 31 and especially considered:

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

Applicant was convicted in 2001 of indecent exposure and received three years unsupervised probation. In 2008, he pled Nolle Prosequi to the charge soliciting a prostitute and served seven days in detention. I find both of the above disqualifying conditions apply to these offenses. Applicant denied he deliberately falsified his SCA. I find there is insufficient evidence to conclude he intentionally and deliberately failed to disclose information on his SCA. Therefore, I find no disqualifying conditions apply to SOR ¶ 3.b and it will not be discussed further.

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

- (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;
- (c) evidence that the person did not commit the offense; 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 was arrested on two occasions for sexual offenses, the first in 2001 and the latest in 2008. He pled guilty to indecent exposure and pled Nolle Prosequi to soliciting a prostitute. Not enough time has elapsed since his last incident to convince me the conduct will not recur. His conduct casts doubt on his reliability, trustworthiness, and good judgment. I find AG ¶¶ 32(a) and (c) do not apply. Applicant offered his own statements that he is rehabilitated and is remorseful for his conduct. However, he continues to dispute that he did anything wrong with regard to his 2001 conviction, for which he pled guilty. I do not know why he would agree to plead to a lesser charge of indecent exposure if he did not commit some offense, especially considering the impact this charge would have on his credibility in the Christian community. I do not know why if he was “witnessing” to the woman regarding the error of her ways, and she was a police officer and he was not soliciting her for other purposes, the police and prosecution did not dismiss the case outright. I do not know why he received three years of probation if he was merely trying to convince the woman that her ways were wrong.

Applicant did not provide any independent evidence that he attended counseling. He did not provide evidence as to what he admitted to his counselor and if his counselor made a diagnosis. He did not indicate how long he attended counseling. I did not have the opportunity to make a credibility determination. I was not provided any independent evidence other than Applicant’s statements, which were not subject to cross-examination. Applicant has not met his burden of persuasion. I find AG ¶ 32(d) does not 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

(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

(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 denied he deliberately failed to disclose facts on his SCA. He stated he was advised by his attorney that his record was expunged and he did not have to disclose the information. There is insufficient evidence to conclude Applicant deliberately falsified his SCA. Therefore, no disqualifying conditions apply to this allegation.

On two occasions, years apart, Applicant was involved with prostitutes. He pled guilty to a lesser offense of indecent exposure and entered a plea of Nolle Prosequi regarding the 2008 soliciting a prostitute charge. I find disqualifying condition AG ¶ 16(e) applies.

I have also considered all of the mitigating conditions for personal conduct under AG ¶ 17 and the following potentially apply:

(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;

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

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with the rules and regulations.

The same analysis provided under the Guidelines for Sexual Behavior and Criminal Conduct applies under the Personal Conduct Guideline as it pertains to the repetitive nature of his conduct and its recency. I find AG ¶ 17(c) does not apply. Applicant continues to deny his criminal behavior that occurred in 2001. He did not provide sufficient evidence for me to conclude he has acknowledged his behavior and has taken positive steps to change it. I am not convinced the conduct will not recur. He has not provided sufficient evidence for me to conclude he has reduced or eliminated his vulnerability to exploitation, manipulation, or duress. He has not provided sufficient evidence for me to conclude that he no longer is involved in criminal activity. Applicant

did not provide any mitigating information regarding the circumstances surrounding his actions of soliciting a prostitute in 2008. His repeated conduct casts doubt upon his reliability, trustworthiness, judgment, and willingness to comply with rules and regulations. I find none of the remaining 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. Applicant is 33 years old, served in the Navy, and received an Honorable Discharge. He was convicted of two sexual offenses, the latest in 2008. He denies criminal involvement in the first offense, despite his plea of guilty. He did not provide any explanation regarding his 2008 conviction for soliciting a prostitute. 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 meet his burden of persuasion and mitigate the security concerns arising under the guidelines for Sexual Behavior, Personal Conduct, and Criminal Conduct.

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
Subparagraphs 1.a-1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT

Subparagraph 2.a:
Subparagraph 2.b:

For Applicant
Against Applicant

Paragraph 3, Guideline J:

AGAINST APPLICANT

Subparagraph 3.a
Subparagraph 3.b:

Against Applicant
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