



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



In the matter of:)
)
) ISCR Case No. 10-01892
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esquire, Department Counsel
For Applicant: William S. Aramony, Esquire

04/16/2012

Decision

RIVERA, Juan J., Administrative Judge:

Applicant has a long history of high risk sexual behavior that culminated in his pleading guilty to a solicitation charge. Considering his personal circumstances, his sexual behavior and criminal conduct continue to cast doubt on his judgment and on his ability to comply with the law and regulations. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 17, 2009. On September 26, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) listing security concerns under Guideline J (Criminal Conduct), Guideline D (Sexual Behavior), and Guideline F (Financial Considerations).¹ Applicant answered the SOR on November 8, 2012, and

¹ DOHA acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

requested a hearing before an administrative judge. The case was assigned to me on January 12, 2012.

DOHA issued a notice of hearing on January 24, 2012, convening a hearing for February 13, 2012. Applicant requested a postponement, and a second hearing notice was issued on February 9, 2012, convening a hearing on February 22, 2012. At the hearing, the Government offered exhibits (GE) 1 through 8, which were admitted without objection. Applicant testified, presented two witnesses, and submitted exhibits (AE) A through S, which were admitted without objection. AE S was submitted post-hearing. DOHA received the hearing transcript (Tr.) on March 1, 2012.

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.a and 2.b at his hearing. (Tr. 17) He had failed to address both allegations in his answer to the SOR. In his answer, he admitted the factual allegations in SOR ¶¶ 3.a through 3.f. He denied SOR ¶¶ 3.h and 3.i. His admissions are incorporated to the findings of fact. After a thorough review of all the evidence, and having observed Applicant's demeanor and considered his testimony, I make the following additional findings of fact.

Applicant is a 55-year-old principal systems engineer working for a government contractor. He was awarded a bachelor's degree in computer science in 1985, a master's degree in telecommunications management in 1998, a master's degree in project management in 2003, and a master's degree in strategic studies in 2005. He is currently working on a doctorate degree in computer information security, which he anticipates completing in 2014. Applicant married his wife in August 1997, and they have a 31 year-old son and two grandchildren.

Between January 1980 and June 1985, Applicant served as soldier in the U.S. Army Reserve. In June 1985, he received a Reserve Officers Training Corps (ROTC) commission in the Marine Corps (MC), where he served on active duty until June 1994. He joined the Navy Reserve in 1994, and he continues to serve in the Reserve. From 2002 until 2008, he was recalled into active duty. He was deployed to the Middle East between 2005 and 2008. He is currently serving in the rank of colonel (O-6), and he is assigned to the Inactive Reserve. As an officer, he held a secret security clearance during most of his service. He was granted a top secret clearance in 2002. There is no evidence to show that Applicant has compromised or caused others to compromise classified information.

Applicant's military records show that he is considered to be a highly qualified professional who has made significant contributions to the Marine Corps both on active duty and as a Reserve officer. He received 10 decorations for exceptional performance, and completed military education requirements commensurate with his rank. In 2011, he was selected by a military board to hold an important Reserve billet. He was unable to accept the position because he does not have a security clearance due to the concerns raised in the SOR. His mandatory retirement date is in September 2015.

In 2005, Applicant and his wife were earning approximately \$230,000 combined yearly income working for the same company. Between his network engineer salary, a teaching job, and his drilling Reserve pay he was earning approximately \$150,000 a year. His wife was earning approximately \$80,000. In early 2005, Applicant and his wife accepted their company buy outs and received \$40,000 each. They moved to another state and with their savings, Applicant and his wife established a real estate business for his wife to manage. Their business plan was to purchase real estate properties and place them for rent.

Applicant and his wife acquired most of the alleged SOR debts because of their real estate business. The debt alleged in SOR ¶ 3.a originated from a home equity loan that Applicant made against the equity of one of their properties. In 2008, the loan became delinquent for lack of payment, and Applicant accumulated \$117,000 in debt. Applicant's real estate attorney is in negotiations with the creditor to establish a payment plan. As of the hearing date, he did not have a payment plan in place. He had a scheduled deposition with the creditor to discuss his earnings and to establish a viable payment plan.

Applicant purchased the property alleged in SOR ¶ 3.b (for \$344,000) in August 2006. They had some tenants, but they were not paying rent consistently. The mortgage became delinquent for lack of payment, and he accumulated a deficiency of around \$100,000. In 2009, Applicant retained an attorney and started to negotiate a mortgage modification for an interest and payment reduction. In November 2011, they evicted the tenants for lack of payment and secured a judgment against them. Applicant obtained a mortgage modification in February 2012. (AE B) As of the hearing date, the property was on the market to be rented or sold in a short sale. Although Applicant has been trying to sell the property, he had difficulty selling it because the current value of the property is lower than its mortgage.

Applicant purchased the properties alleged in SOR ¶¶ 3.c (for \$155,000) and 3.d (for \$181,000) in June 2005. The mortgages became delinquent in 2008. He accumulated a deficiency of \$27,862 on the property alleged in SOR ¶ 3.c, and a deficiency of \$35,082 on the property alleged in SOR ¶ 3.d. Applicant obtained mortgage modifications for both properties in February 2012. (AE C, AE D) For the property alleged in SOR ¶ 3.c, his modified mortgage payment is \$730. As of the hearing date, the property was rented for \$1,200 a month. For the property alleged in SOR ¶ 3.d, the modified mortgage payment is \$885 and the property was also rented for \$1,100 a month. However, both properties' home owners' associations (HOA) seized some of the monthly rental fees to cover HOA's delinquent dues.

In February 2005, Applicant purchased the property alleged in SOR ¶ 3.e, for around \$308,000. He became delinquent on the mortgage in November 2008, and accumulated a deficiency of \$18,640. He contacted the creditor and negotiated a mortgage modification with reduction of mortgage payments effective February 1, 2012. (AE E) This property is Applicant's current residence.

The debt alleged in SOR ¶ 3.f resulted from a home equity loan made against the equity of another of their business properties. In 2008, the loan became delinquent. Applicant accumulated \$74,000 in debt, and the debt was charged off. Applicant asked his real estate attorney to negotiate a payment plan with the creditor. As of the hearing date, no agreement had been reached. (Tr. 92)

SOR ¶ 3.d and SOR ¶ 3.g allege the same delinquent \$181,000 mortgage. Applicant credibly testified that he does not own any additional properties. He does not have any additional mortgages other than those alleged in the SOR. SOR ¶ 3.g is decided for Applicant.

Applicant and his wife purchased a timeshare property in 1997. SOR ¶ 3.h alleges that property's delinquent annual maintenance fee, which Applicant failed to pay because of his financial problems. Applicant submitted an account statement showing that he paid his 2012 maintenance fee in November 2011. The account reflects no other delinquent fee or balance owed. (AE H) Applicant disputed the debt alleged in SOR ¶ 3.i. The dispute was resolved in his favor and the debt is no longer posted in his most current credit reports. (GE 6, GE 7, and AE I) This allegation is decided for Applicant.

In 2005, Applicant started the real estate business for his wife to manage believing that she had extensive real estate business experience. He established budget plans for years 2006 through 2008, and planned their financial situation to ensure they had the resources to operate their business. While he was deployed overseas, his wife had his power of attorney to conduct all the business related transactions. He testified that when he was deployed, she purchased two real estate properties, one after consulting with him, and the other without his knowledge and authorization for \$450,000. The mortgages for these properties became delinquent in 2008-2009. In 2011, the creditor for the \$450,000 property accepted a deed-in-lieu of foreclosure and released Applicant from financial responsibility. This debt is not alleged in the SOR.

Applicant testified that his business financial budget and plans were solid. He explained that his financial problems were caused by several factors, including his wife's business inexperience and her purchase of an expensive property without his knowledge while he was deployed. In 2008, Applicant was released from active duty and he was unemployed from November 2008 until around March 2009. His wife was also unemployed and could not find a job. At about the same time, the U.S. real estate market collapsed. Applicant had unreliable tenants and he had difficulty renting his properties. For some time, Applicant paid his mortgages using his retirement saving (401k) and by using several home equity loans. When he exhausted his savings in late 2008, the mortgages became delinquent and he could not afford the payments. In 2009, Applicant took control of the real estate business from his wife and started to manage it. He also retained a real estate lawyer to help him negotiate payment plans and to resolve his financial problems.

Applicant's reference and childhood friend is a senior Department of Justice (DOJ) attorney working in the DOJ's bankruptcy department. He advised Applicant to file for bankruptcy protection. However, Applicant refused to do so. Applicant believes that since he is no longer financially responsible for the \$450,000 property, he has the financial means to afford all of his mortgages. He has a working budget that includes the payment of all of his debts, and it also provides for his day-to-day living expenses. Applicant's average monthly income is \$13,350; his expenses total \$10,350; which leaves him with a monthly net remainder of \$2,542. This does not include the possible monthly Reserve drilling pay of \$1,381 that Applicant could earn if he receives his security clearance. It also does not include Applicant's wife's expected salary. She accepted a job offer as an adjunct professor in 2011, and he anticipates that she will start working in March 2012.

When Applicant accepted his current job in early 2009, he moved from his state of residence to where his job is. His wife stayed in their home of residence. He rented an apartment from February 2009 until June 2011. He moved in with his brother in July 2011, to reduce his financial expenses and to save money to resolve his financial problems. He was unemployed for four months during early 2010, when his employer lost the government contract he was working on. In addition to the income he receives from his job with a government contractor, Applicant receives income from a university teaching position he has held since 2002. In September 2011, he started a third job teaching at another university. Applicant and his wife received financial counseling through their church in the summer of 2008.

SOR ¶¶ 1.a and 2.a alleged substantially the same disqualifying facts under the criminal conduct and sexual behavior adjudicative guidelines. Between 1995 and July 2009, Applicant viewed pornographic material online and participated in sexually explicit online chat groups. He answered online advertisements for sexual services, and between 1995 and 2002, he arranged to have sexual intercourse with three women he met online. Applicant claimed that after 2002, he did not engage again in what he called "full sexual services." Between 2003 and 2009, Applicant participated on internet chat room and used online advertisements to schedule "massages with happy endings," or "massages with hand release." He solicited sexual services from online prostitutes between about once a month to once every three months.

In July 2009, Applicant answered an online advertisement selling sexual services by young women in their early twenties. After exchanging emails and phone calls with a woman, he went to meet with her, and he was arrested by police officers conducting a sting operation against pedophiles. Applicant was charged with solicitation of a minor, a felony offense. He pled guilty to a misdemeanor solicitation charge. He was sentenced to two years probation before judgment and required to complete a sex offender treatment program. He complied with all the court ordered conditions and was released from his probation in August 2011.

Applicant testified that since July 2009, he has not searched the internet seeking pornographic material, participated in any online chat groups of an explicit sexual

nature, or solicited services from prostitutes. He promised never to engage in such questionable behavior ever again. Applicant successfully completed his sex offender treatment program in January 2012. He believes that his therapy taught him how to avoid the triggers and conditions that led him to the solicitation conviction. He averred that he has learned to modify his high risk sexual behavior. Applicant informed his wife, his employer, and the company's security officer of the charge filed against him.

Policies

Eligibility for access to classified information may be granted "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their 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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline J, Criminal Conduct

Under Guideline J, the Government's concern is that 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. AG ¶ 30.

Between 1995 and July 2009, Applicant participated in sexually explicit online chat groups. He solicited and received sexual services from women he met online on a frequent basis, and had sexual intercourse with three of them.² In July 2009, Applicant was charged with solicitation of a minor, a felony offense. He pled guilty to a solicitation charge, a misdemeanor offense. He was sentenced to probation before judgment for a period of two years and he was ordered to complete a sex offender treatment program. He was released from his probation in August 2011, and he successfully completed his sex offender treatment program in January 2012.

Applicant's behavior raises security concerns under 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."

AG ¶ 32 lists four conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31:

(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;

² The SOR did not allege that between 1995 and July 2009, Applicant participated in sexually explicit online chat groups, solicited and received sexual services from women he met online on a frequent basis, and had sexual intercourse with three of them. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole-person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). I have considered the non-SOR derogatory information accordingly.

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(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.

Considering the evidence as a whole, none of the Guideline J mitigating conditions fully apply. Applicant's criminal behavior is recent and happened under ordinary circumstances. AG ¶ 32(a) does not apply. AG ¶¶ 32(b) and (c) are not reasonably raised by the evidence, and are not applicable.

AG ¶ 32(d) partially applies, but does not fully mitigate the security concerns. Applicant's criminal conduct and the resulting solicitation charge occurred because of his long-term high risk sexual behavior. He solicited prostitutes for sexual favors from 1995 until he was arrested in 2009. He disregarded that he was married and had a child, that he was a Marine Corps officer, and that he possessed a security clearance. He placed himself in a position vulnerable to exploitation. His overall behavior established doubts about his judgment, and raise questions about his reliability, trustworthiness, and ability to protect classified information. Moreover, it calls into question Applicant's ability and willingness to comply with the law, rules, and regulations.

Except for the July 2009 incident, and possibly his numerous payments to women in exchange for sexual gratification,³ Applicant maintained a good behavior and performance record as an officer and a civilian. He has the support of his employer and his friend, both of whom recommended he retain his security clearance. Applicant's good performance and his successful participation in the sex offender treatment program are some evidence that he is on the path to rehabilitation. Notwithstanding, considering the evidence as a whole, it is too soon for me to conclude that his high risk sexual behavior is unlikely to recur.

Guideline D, Sexual Behavior,

AG ¶ 12 describes the concern about 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

³ See footnote 2, *infra*.

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

The sexual behavior security concern allegation is based on the same course of conduct discussed under the criminal conduct security concern (the solicitation). To avoid unnecessary repetition of the facts, circumstances, and the analysis discussed under the criminal conduct guideline, such facts, circumstances, and analysis are incorporated here.

AG ¶ 13 provides four disqualifying conditions relating to sexual behavior that could raise a security concern and may be disqualifying in this case:

- (a) sexual behavior of a criminal nature, whether the individual has been prosecuted;
- (b) a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;
- (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.

AG ¶¶ 13(a) and (c) apply. Applicant's behavior was of a criminal nature and made him vulnerable to exploitation. AG ¶¶ 13(b) and (d) do not apply because the course of conduct contemplated by the disqualifying conditions was not alleged in the SOR.

AG ¶ 14 lists conditions that could mitigate the sexual behavior security concerns.

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;
- (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.

AG ¶¶ 14(a), (b), and (d) are not applicable to this case. Applicant was a mature adult when he engaged in the questionable behavior (the solicitation). Although he stopped his questionable behavior after his 2009 arrest, considering the period during which he solicited women for sexual favors, it is too soon for me to conclude that his high risk sexual behavior is unlikely to recur. Considering Applicant's circumstances (his age, education, military experience, rank, and period possessing a security clearance), his actions continue to cast doubt on his judgment.

Applicant receives credit under AG ¶ 14(c) because he disclosed to his wife, to his friend, and to his employer his questionable behavior. As a result of the security clearance process, the Government is aware of it. Notwithstanding, for the reasons articulated in my discussion of Guideline J (incorporated here), and in the preceding paragraph, I find that the sexual behavior concerns are not mitigated. I conclude Guideline D against Applicant.

Guideline F, Financial Considerations

Under Guideline F, the security concern is that failure 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. AG ¶ 18.

Between 2005 and 2006, Applicant and his wife financially overextended themselves when they acquired five real estate properties with a total value of over \$1,390,000, and two home equity loans totaling \$191,000. They defaulted on the two home equity loans, the five mortgages, and stopped making homeowners' association payments. AG ¶ 19(a): "inability or unwillingness to satisfy debts" and AG ¶ 19(c): "a history of not meeting financial obligations," apply.

AG ¶ 20 provides five conditions that could mitigate the financial considerations security concerns:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(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;

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant's behavior was frequent as demonstrated by the number of debts, the aggregate total of the debt, and the period they were delinquent. His financial problems are ongoing as he has two unresolved debts (SOR ¶¶ 3.a and 3.f), and he has substantial mortgage debts, albeit in current status. AG ¶ 20(a) is not applicable.

I considered Applicant's difficulty finding a job, the real estate market downturn, and his inability to rent the properties as circumstances beyond his control that contributed to his inability to pay his debts. Notwithstanding, these circumstances do not fully mitigate the financial considerations concerns. Applicant and his wife financially overextended themselves by purchasing too many properties too quickly. She also did not have the experience to manage their real estate business.

Applicant demonstrated financial responsibility and diligence by using his retirement savings to pay, for as long as he could, his delinquent financial obligations. He promptly contacted his creditors, participated in financial counseling, obtained legal counsel, assumed personal management of the business, secured mortgage modifications, and established payment plans for four delinquent mortgages. He was released of financial responsibility for a \$450,000 mortgage (not alleged in the SOR). Additionally, he continues his efforts to establish payment plans for the two unresolved debts (SOR ¶¶ 3.a and 3.f).

Considering the evidence as a whole, Applicant has undertaken reasonable, measurable steps to bring under control his delinquent financial obligations. I also find that there are indications that his financial problems are being resolved. Financial considerations mitigating conditions AG ¶¶ 20 (b), (c), (d), and (e) apply. The remaining mitigating condition is not pertinent to the facts of this case. The financial considerations concern is resolved in Applicant's favor.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. (AG ¶ 2(c)) Applicant's long-term high risk sexual behavior led to his solicitation charge and probation before judgment.

In light of Applicant's age, education, military experience and rank, and his years holding a security clearance, his sexual behavior and criminal conduct continue to raise doubts about Applicant's judgment and on his ability to comply with the law and regulations. Not enough time has passed for me to conclude that Applicant modified his behavior and has established permanent lifestyle changes to ensure that his questionable behavior is unlikely to recur.

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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline F:	FOR APPLICANT
Subparagraphs 3.a – 3.i:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Eligibility for a security clearance is denied.

JUAN J. RIVERA
Administrative Judge