



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



In the matter of:)
)
) ISCR Case No. 12-07071
)
Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esquire., Department Counsel
For Applicant: Robert S. Peters, Esquire

08/23/2016

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the security concerns under Guideline E, personal conduct. Applicant's eligibility for a security clearance is granted.

Statement of the Case

On January 6, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, personal conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

Applicant answered the SOR on January 15, 2015, and requested a hearing before an administrative judge. The case was assigned to me on June 6, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 22, 2016. I convened the hearing as scheduled on July 19, 2016. The Government offered

exhibits (GE) 1 through 4, which were admitted into evidence without objection. Applicant testified and offered Applicant Exhibit (AE) A, which was admitted into evidence without objection.¹ DOHA received the hearing transcript (Tr.) on July 27, 2016.

Findings of Fact

Applicant admitted the sole allegation in the SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 60 years old. He earned an associate's degree in business. He has been employed at the same job with a federal contractor since 1985s. Before then he was a police officer for two years. He was married from 1993 to 2012 and has two daughters ages 16 and 18.²

Applicant became separated from his wife in 2009 and was going through a child custody dispute. Their marriage and separation was contentious. He had concerns over his wife's treatment of their children and was seeking full custody of the children. His ex-wife has a bipolar disorder. Applicant testified she was abusive to him and the children.

Applicant was approached by woman X whom he was familiar with from his law enforcement employment and was aware of her past criminal record. She told Applicant she had derogatory information about Applicant's ex-wife and her boyfriend that would be helpful to his divorce case. Woman X contacted Applicant on several occasions and provided him with information about his ex-wife. Soon, she began asking for money for the information. He admitted he should never have continued interacting with woman X and did not adequately consider the potential repercussions.³

On October 19, 2011, Applicant had gastric bypass surgery. He was recovering at home and in a great deal of pain. On October 25, 2011, woman X contacted him and told him she had some good information about his ex-wife, and it would cost him money to get it, but it was worth it. Applicant was not feeling well and declined her offer. She continued to call him and pressure him for money in exchange for the information. He continued to decline. During this time, he was seeing a counselor through his church for emotional support while he was going through his divorce. The counselor called him on October 25, 2011, to see if he was going to keep his scheduled appointment that night. Because he was unable to sleep, he decided to go see his counselor. He was in pain from the surgery and was taking a prescribed painkiller. He admitted he should not have driven after taking the painkiller. When he left his counseling appointment, he noticed he had three text messages from woman X, again asking him to meet her. She told him

¹ Hearing Exhibit I is a copy of Department Counsel's discovery letter to Applicant.

² Tr. 15.

³ Tr. 24-35; GE 2, 3

she had photos of his wife taking drugs with her boyfriend. Applicant does not know why he agreed to meet her, but he did.⁴

Woman X told Applicant to meet her at a house. He arrived and was invited in. Applicant does not remember everything that happened, but recalled that there was a second woman at the house when he arrived. Both women asked Applicant what he wanted, and he responded that he wanted whatever woman X had obtained, referring to information about his ex-wife. After this verbal exchange, police officers who were in the closet, came out and arrested Applicant for soliciting a prostitute. Applicant told the police he was not at the house for sex. He said: "I just had gastric bypass. That would kill me. I've got intestines sewn to my new stomach."⁵ He told the police he was there to obtain photos of his wife using drugs. Woman X denied telling Applicant she had photos. When Applicant was searched, his prescription painkillers were found, and he was also charged with possession of a controlled substance. This charge was later dismissed when he provided proof that he had a valid prescription.⁶

Applicant credibly testified that he never had sex with woman X either before the arrest or after the arrest. He has had no contact with woman X since his arrest in 2011.⁷

Applicant became aware that woman X had been charged with two driving under the influence offenses in a month and her probation had been revoked. After Applicant's arrest, she was released. He believes she lied so she could set him up in exchange for her release. Applicant's arrest was publicized in the newspaper and his friends and family are aware of it. After his arrest, he self-reported the incident to his security manager on the same day.⁸

Applicant hired an attorney, who advised him that he could plead not guilty to the misdemeanor charge and he would win, but that the litigation would cost him ten thousand dollars because they would have to obtain cell phone records and text message records. In the alternative, he could plead no contest through a diversion program, and, if he stayed out of trouble for six months the charge would be dismissed and then expunged. He was advised if he did the later it would accomplish the same thing. Applicant pled no contest through the diversion program and the charge was dismissed. In July 2012 the charge was expunged.⁹

⁴ Tr. 23-35.

⁵ Tr. 32.

⁶ Tr. 23-35; GE 2, 3.

⁷ Tr. 34-36.

⁸ Tr. 24-35; GE 3, 4.

⁹ Tr. 35; GE 2, 3.

Applicant credibly testified that he did not meet woman X for sex or to break the law. He wanted information from her about his wife for his custody dispute. He does not believe he was thinking clearly. Applicant was born without an eye socket and had a tumor growing where his eye socket should be. Doctors removed the tumor, but it grows back every three to four years and must be surgically removed. He testified that he consulted his doctor and asked if the tumor could affect his brain and was told that it could cause confusion and memory problems. Applicant believed that the brain tumor may have had an effect on his interactions with woman X. He admitted he did not think through the interactions with her as clearly as he should have. He had surgery to remove the tumor on December 1, 2011, which was 36 days after he was arrested.¹⁰

Applicant was told by his doctor that after he had gastric bypass surgery having sex too soon after the surgery would likely kill him. Applicant testified that he was in too much pain to think of sex.¹¹

Applicant was awarded full custody of his children in 2013. He provided numerous character letters describing him as honest, hardworking and trustworthy. He has served on the county school board and the county commission.¹²

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

¹⁰ GE 2, 3.

¹¹ GE 2, 3.

¹² Tr. 36-37; AE A.

on the evidence contained in the record. Likewise, I have not drawn 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 to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 E, Personal Conduct

AG ¶ 15 expresses the security concern for 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 a condition that could raise a security concern and may be disqualifying. I find the following potentially applicable:

(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 pled no contest to the charge of patronizing a prostitute. The above disqualifying condition applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating condition under AG ¶ 17:

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant provided compelling testimony that although he was charged and pled no contest to patronizing a prostitute, the evidence was unsubstantiated and from a source of questionable reliability. He followed his attorney's advice in accepting the diversion program, rather than spending thousands of dollars to litigate the charge. Particularly compelling and credible is the unlikelihood that five days after having major gastric bypass surgery, while on painkillers and having been advised by his doctor of the life threatening dangers of engaging in sex soon after surgery that he would patronize a prostitute. Also persuasive was woman X's repeated badgering of Applicant to meet her, given her pending criminal charges, and Applicant's interest in obtaining information for the child custody dispute. AG ¶ 17(f) applies.

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 relevant 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 pertinent facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is 60 years old. He was arrested and charged with possession of a controlled substance and patronizing a prostitute. The drug charge was dismissed because he had a valid prescription due to his recent surgery. He provided compelling evidence that he did not commit any offense. He pled no contest to save the cost of a trial and the charge has been expunged. Overall, the record evidence does not leave me with any questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the personal conduct 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 E:	FOR APPLICANT
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Subparagraph 1.a:	For Applicant
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Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

Carol G. Ricciardello
Administrative Judge