



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



In the matter of:)
)
) ISCR Case No. 14-03638
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

02/25/2015

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline E, personal conduct, and Guideline D, Sexual Behavior. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On August 29, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, personal conduct, and Guideline D, sexual behavior. 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 DOD on September 1, 2006.

Applicant answered the SOR on October 6, 2014. The Government requested a hearing before an administrative judge on November 21, 2014. The case was assigned to me on January 3, 2015. The Defense Office of Hearings and Appeals (DOHA) issued

a notice of hearing on January 21, 2015. I convened the hearing as scheduled on February 9, 2015. The Government offered exhibits (GE) 1 and 2, which were admitted into evidence without objection. Applicant testified and did not offer any exhibits. DOHA received the hearing transcript (Tr.) on February 19, 2015.

Findings of Fact

Applicant admitted the allegations in the SOR. His admissions were incorporated into the findings of fact. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 40 years old. He completed one semester of college and has taken some online college courses. His marriage from 2002 to 2004 ended in divorce. He remarried in 2004 and was divorced in 2014. He has three children ages 21, 7, and 5.¹

Applicant was employed as a police officer from 2003 until 2013, when he was terminated. Between 2009 and 2010, over a six-month period, Applicant engaged in sexual intercourse on four separate occasions with three prostitutes. He had sexual intercourse with one of the women twice. Three of the sexual encounters took place while he was on-duty, in his police uniform, and working the graveyard shift. One encounter took place while he was off-duty. He initiated the contact with known prostitutes who lived in his patrol area. The on-duty sexual contact occurred in a park. The off-duty sexual contact occurred in a hotel. Applicant paid the prostitutes. He knew his actions were wrong.²

Applicant explained he was going through marital problems when he engaged in sexual activities with prostitutes. He explained he participated in these acts to release tension, and he was looking for companionship. He was not thinking about the possible consequences of his actions at the time. An internal investigation was conducted by the police department. Applicant was confronted with the allegations and admitted his conduct.³

Applicant stated he told his federal employer of his termination from the police department before he was hired. He worked in Afghanistan from April 2013 until July 2013, and returned when a background investigation resulted in the withdrawal of his interim security clearance. He is remorseful for his behavior.⁴

¹ Tr. 24-25; GE 2.

² Tr. 20-24; GE 2.

³ Tr. 21-22, 26; GE 2.

⁴ Tr. 24-27; GE 2.

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 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 conditions 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; and

(g) association with persons involved in criminal activity.

As a police officer, Applicant knowingly initiated contact and engaged in sexual intercourse with prostitutes on four separate occasions in 2009 and 2010. Three of the occasions occurred while he was on-duty and in uniform. The above disqualifying conditions apply.

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

(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, or judgment, or willingness to comply with rules and regulations.

Applicant engaged in criminal conduct while he was a police officer both on-duty in uniform and off-duty. He was aware that his conduct was illegal. He abandoned his position of trust as a law enforcement officer. His conduct is serious and casts doubt on his reliability, trustworthiness, and good judgment. AG ¶ 17(c) does not apply. His explanation that he was going through a difficult time in his marriage suggests that he does not understand the gravity of his misconduct. AG ¶ 17(b) does not apply. There is no evidence that he continued to engage prostitutes after the six-month period from 2009 to 2010. There is no evidence he sought counseling to change his behavior or took other positive steps to relieve the stressors or reduce the vulnerability to exploitation, manipulation or duress. AG ¶¶ 17(f) and 17(e) do not apply. Although it is unlikely that he still associates with prostitutes, his willful participation in wrongful conduct raises questions about his willingness to comply with rules and regulations.

Guideline D, Sexual Behavior

AG ¶ 12 expresses the security concern for 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.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying. I find the following 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 sexual intercourse with prostitutes while serving as a police officer, both in uniform on-duty, and while off-duty. He was in a park for three of the sexual encounters. His conduct was criminal. His conduct, as a trusted law enforcement officer, reflects lack of judgment and makes him vulnerable to exploitation and coercion. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from sexual behavior. I have considered the following mitigating conditions under AG ¶ 14:

- (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.

Applicant's inappropriate conduct with prostitutes while serving as a police officer casts doubt on his current reliability, trustworthiness, and good judgment. Applicant's position of trust as a law enforcement officer and his inappropriate actions raise questions about his judgment that are not mitigated by the passage of time. He was a mature man when the behavior occurred, who swore to uphold the law, not break it. His explanation that he was having marital problems as a justification for his conduct raises lack of judgment concerns. His misconduct occurred in a park and in uniform. This was not a private discreet place. I am unable to conclude 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 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines E and D in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is 40 years old. He began serving as a police officer in 2003. Between 2009 and 2010, while going through marital problems, he engaged in sexual intercourse on four separate occasions with three prostitutes. Police officers are held to a high standard regarding their personal conduct because they hold a special trust in society. Holding a security clearance requires a person to be held to an equally high standard to protect our nation's secrets. Applicant abandoned his position of trust as a police officer and engaged in conduct he was specifically entrusted to prevent. Although he is remorseful for his actions and characterizes them as mistakes, there is insufficient evidence to mitigate the security concerns raised by his behavior. The record evidence leaves me with serious questions and doubts about 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 personal conduct and sexual behavior guidelines.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge