



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



In the matter of:)
)
) ISCR Case No. 14-05391
)
Applicant for Security Clearance)

Appearances

For Government: Benjamin Dorsey, Esquire
For Applicant: Leslie McAdoo Gordon, Esquire

12/24/2015

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s solicitation of prostitution was a one-time, isolated criminal offense. There is no other evidence of sexual behavior or criminal conduct to raise security concerns. His prompt disclosure of his arrest to his facility security officer, guilty plea, remedial security training, good character, and productive service to his employer serve as evidence of his rehabilitation. Clearance is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 27, 2014. The Department of Defense (DOD) issued him a Statement of Reasons (SOR) alleging security concerns under Guideline J (criminal conduct) and Guideline D (sexual behavior) on April 4, 2015.¹ Applicant answered the SOR on May 15, 2015, and requested a hearing before an administrative judge. The case was assigned to me on

¹ The DOD acted 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* (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.

July 1, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 3, 2015, scheduling a hearing for September 22, 2015.

At the hearing, the Government offered four exhibits (GE 1 through 4). Applicant testified, presented the testimony of one witness, and submitted exhibit A, with Tabs 1 through 12. All exhibits were made part of the record without objections. DOHA received the hearing transcript (Tr.) on September 30, 2015.

Findings of Fact

In his response to the SOR, and at his hearing, Applicant admitted all the factual allegations in the SOR. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence, I make the following additional findings of fact:

Applicant is a 46-year-old mechanical project engineer employed by a federal contractor. He attended college and received his bachelor's degree in mechanical engineering in 1992. He then worked for private, commercial companies until he was hired by a federal contractor in June 2000. Applicant has been married for 21 years to his high school sweetheart, and they have three children, ages 17, 15, and 13.

Applicant worked for a federal contractor from 2000 to August 2010, when he was laid off because of a reduction in force. He was hired by his current employer, another federal contractor, in August 2011. Applicant was granted a top secret security clearance in 2000. Aside from the pending SOR allegations, there is no evidence of any other security clearance issues or concerns. (AE 3)

In August 2014, Applicant pleaded guilty to soliciting prostitution, a misdemeanor offense. He was placed on 18-months unsupervised probation before judgment, and fined \$500. His period of unsupervised probation will end on February 22, 2016.

Applicant explained that he has been suffering from neck and back problems since 2004. He frequently visited a massage parlor for therapy purposes. (AE 1) His wife also visited the same massage parlor, and she confirmed his neck and back problems. In June 2014, Applicant called the masseuse he usually visits, and was told that she was not available. He used a web page to look for a close-by massage parlor. He called the advertised phone number, and was given an appointment and an address.

Applicant drove to the address provided and could not find the massage parlor in the mall area. When he called the massage parlor, he was told to come over to the hotel across the street from the mall. When he arrived, two women offered Applicant sexual services for money. Applicant accepted, and he was arrested for soliciting prostitution.

Applicant testified that he was not looking for sexual services. His intent was to get a massage to alleviate his neck and back problems. However, he was tempted by the offer and had the bad judgment to accept the sex for money offer.

After his arrest that Friday, Applicant called his wife and asked her to come and pick him up because his car was impounded. He then disclosed his predicament to his wife and they discussed their situation over the weekend. On Monday, Applicant retained the services of an attorney and recovered his car. On Tuesday, Applicant's first day at work after he was arrested, he disclosed the circumstances of his arrest to his facility security officer (FSO). Applicant's arrest was published in the town newspaper and his wife received several calls from her friends asking about it.

Applicant testified that this was the first time he ever solicited anyone for sexual services or that he had been involved in sex-related misconduct. He attributed his lack of judgment to having marital problems. Notwithstanding his misconduct, Applicant and his wife decided to salvage their marriage and are attending marital counseling. In retrospect, Applicant believes that he engaged in "very stupid behavior." (Tr. 33) He has been with his wife 28 years (7 years dating and 21 married). He acknowledged that he made a huge mistake by risking his family and his job.

Applicant expressed sincere remorse and regret for his criminal misconduct. He believes that he is a responsible and conscientious parent and husband. Applicant's work references believe him to be a dedicated, hard-working, and respected professional. His performance evaluations indicate Applicant meets or exceeds expectations, and makes significant contributions to his employer. Applicant has established a reputation for complying with security rules and regulations. He received two security awards for his zealous adherence to security rules. He also presented performance commendations and certificates of completion of security training. His references consider Applicant's sexual-related misconduct as an aberration. They recommended his eligibility for a security clearance.

Applicant likes his current job and believes that he is a valuable asset to his employer. He understands the responsibilities associated with maintaining eligibility for a security clearance. Applicant promised to never engage in criminal misconduct in the future.

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

AG ¶ 13 provides three disqualifying conditions relating to sexual behavior that apply to this case, raise a security concern, and may be disqualifying:

(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.

In August 2014, Applicant was convicted of prostitution solicitation, a misdemeanor offense. Applicant's sexual behavior exposed him to criminal charges; made him vulnerable to possible coercion, exploitation, and duress; and reflected lack of judgment and discretion. AG ¶¶ 13(a), (c), and (d) apply.

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

(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; and

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

AG ¶ 14(b) and (c) apply and mitigate the sexual behavior security concerns. I considered that Applicant's sexual-related incident occurred in August 2014, and his period of probation will not expire until February 2016. Nevertheless, considering Applicant's one-time sexual-related incident in light of his 15 years of outstanding service and accomplishments, on balance, his past sexual behavior does not raise questions about his current reliability, trustworthiness, judgment, and ability to protect classified information.

There is no evidence to show that Applicant was involved in any other sexual behavior or criminal misconduct before or after his August 2014 conviction. Applicant has a reputation for being a law-abiding citizen, a dedicated father, and a hard-working and respected professional. His performance evaluations indicate Applicant meets or exceeds expectations, and makes significant contributions to his employer. Moreover, he has established a reputation for complying with security rules and regulations. Applicant's criminal misconduct appears to be an aberrational occurrence caused by a one-time lapse of judgment.

Applicant expressed sincere remorse for his misconduct, and credibly promised never to engage in similar misconduct. Additionally, because his wife, employer, his community, and the Government have knowledge of his criminal misconduct, the behavior no longer makes him vulnerable to possible coercion, exploitation, or duress.

Guideline J, Criminal Conduct

Under Guideline J, the 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.

In August 2014, Applicant was convicted of prostitution solicitation, a misdemeanor offense. His criminal 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 two 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; 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.

For the same reasons discussed under the sexual behavior guideline, incorporated herein, I find that AG ¶ 32(a) and (d) apply and mitigate the criminal conduct security concerns.

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)) I have incorporated my comments under Guideline 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, 46, has been working for federal contractors, and has possessed a security clearance since 2000. There is no evidence of any other issues of security concern. Applicant promptly disclosed his 2014 arrest to his FSO, and has been candid and forthcoming during the security clearance process. His good service to his employer, reputation for following security rules and regulations, and credible contrition serve as evidence of his rehabilitation. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I

conclude Applicant mitigated the security concerns pertaining to sexual behavior 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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

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 eligibility for a security clearance. Clearance is granted.

JUAN J. RIVERA
Administrative Judge