



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



In the matter of:)	
)	
)	ISCR Case No. 14-05078
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: Jonathan Bell, Esq.

10/14/2015

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the sexual behavior and personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On May 16, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D (sexual behavior) and E (personal conduct). The action was taken under Executive Order (EO) 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) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on June 3, 2015, and requested a hearing before an administrative judge. The case was assigned to me on July 13, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 16, 2015, scheduling the hearing for August 18, 2015. The hearing was convened as scheduled. DOHA received the hearing transcript (Tr.) on August 26, 2015.

Procedural and Evidentiary Rulings

Request for Continuance

Applicant requested a continuance contingent on certain actions by Department Counsel. The continuance request was denied. The request and correspondence are included in the record as Hearing Exhibit (HE) I.

Evidence

Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. Applicant testified, called a witness, and submitted Applicant's Exhibits (AE) A through D, which were admitted without objection.

Findings of Fact

Applicant is a 34-year-old employee of a defense contractor. He has worked for his current employer since 2013. He served in the U.S. military from 2002 until he was honorably discharged in 2008. He has a bachelor's degree. He has never married, but he cohabitates with his girlfriend. He has a one-year-old child.¹

In August 2013, Applicant set the timer on his cell phone's camera and placed the cell phone on the floor in an attempt to take a picture of a female co-worker's underwear without her knowledge. A male co-worker observed Applicant and interceded. The co-worker told Applicant that he could report himself to his supervisor or the co-worker would report him. Applicant reported the incident to his supervisor. His employment was terminated the next day.²

Applicant expressed remorse for his action. He stated that he had never done anything like it before or after the incident. He agreed with his current supervisor's characterization of the incident as "[j]ust stupid young people doing stupid things." His girlfriend is aware of the incident, as is his current supervisor.³

Applicant received a psychological evaluation from a licensed clinical psychologist. The psychologist determined that

"[Applicant] does not have emotional or behavioral disorder problems associated with sexual problems or have rationalizations, attributes, or sexual attitudes similar to known sexual offenders. He produced a non-pathological self-report."⁴

¹ Tr. at 25-29, 35, 43, 45; GE 1, 2.

² Tr. at 32-34, 38; Applicant's response to SOR; GE 2; AE A.

³ Tr. at 32-37, 47-48; Applicant's response to SOR; AE A.

⁴ AE A.

The psychologist also opined that Applicant's "inappropriate sexual behavior act was isolatory, and not representative of a sexual disorder nor any significant issues of concern."⁵

Applicant listed his termination on his Questionnaire for National Security Positions (SF 86), which he submitted in October 2013. He wrote that a "[v]iolation of corporate policy resulted in termination." During his background interview in January 2014, Applicant stated that the male co-worker interceded before the female co-worker was present, resulting in no picture being taken. The psychologist who performed his psychological evaluation wrote that Applicant described the incident as he "set his phone with a two second timer, placed the phone on the floor underneath a lady's legs, a photo was taken that ended up blurred."⁶ Applicant testified:

I took my phone and with a stupid idea in my head, I set a timer on its camera, placed the camera on the floor near my female coworker's feet basically to get an upward shot, camera shot and when I went to pick it up after a moment a third coworker saw me and that's when he confronted me or he would confess, you know tell on me. And so, of course, I decided I would take the high road and confess myself and so got terminated.⁷

Applicant testified that the photograph was "a blurry mess," and he deleted it.⁸

A witness testified, and Applicant submitted several letters attesting to his excellent job performance, work ethic, trustworthiness, reliability, and dependability.⁹

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 to be 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, administrative judges apply the guidelines 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

⁵ AE A.

⁶ GE 1, 2; AE A.

⁷ Tr. at 33.

⁸ Tr. at 33.

⁹ Tr. at 16-24; AE C, D.

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.”

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 the applicant or proven by Department Counsel.” The applicant 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 EO 10865 provides that adverse 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

The security concern for sexual behavior is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which can 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 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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's conduct resulted in his termination. It reflected a severe lack of judgment. The above disqualifying conditions have been established.

Conditions that could mitigate sexual behavior security concerns are provided under AG ¶ 14. The following 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; and

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

There is no evidence of any similar conduct, either before or after the incident. The psychological evaluation reported that Applicant does not have a sexual disorder. Applicant expressed remorse for the incident. His girlfriend and his supervisor are aware of the incident. However, the conduct reflected extremely poor judgment. I am also concerned about the inconsistencies in this case. I am unable to determine that similar incidents are unlikely to recur. The conduct continues to cast doubt on Applicant's current reliability, trustworthiness, and good judgment. AG ¶ 14(b) is not applicable. Applicant has lessened, but not eliminated, his vulnerability to coercion, exploitation, and duress. AG ¶ 14(c) is partially applicable. I find that sexual behavior concerns remain despite the presence of some mitigation.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

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. The following disqualifying condition is 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's conduct created a vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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; and

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

Under the same rationale discussed above for sexual behavior, I find that Applicant's conduct continues to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 17(c) and 17(d) are not applicable. AG ¶ 17(e) is partially applicable. I find that personal conduct concerns remain despite the presence of some mitigation.

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 D and E in my whole-person analysis.

I considered Applicant's honorable military service. However, this was not a high school or college prank. Applicant was in his early 30s when he attempted to take a picture of a female co-worker's underwear without her knowledge. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. I do not have trust or confidence in Applicant's judgment.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the sexual behavior and 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 D:	Against Applicant
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge