



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



In the matter of:)
)
) ISCR Case No. 17-01741
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

01/16/2019

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s evidence is insufficient to mitigate the sexual behavior, handling protected information, and personal conduct security concerns. Clearance is denied.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on March 20, 2012. He was interviewed by government investigators in April, June, July, and September 2010; July 2011; and January 2015. He also answered interrogatories from the Defense Office of Hearings and Appeals (DOHA) in July and August 2017. After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued a Statement of Reasons (SOR) on October 10, 2017, alleging security concerns under Guidelines D (sexual behavior), K (handling protected information), and E (personal conduct). Applicant answered the SOR on August 31, 2017, and requested a hearing before a DOHA administrative judge.

DOHA assigned the case to me on April 13, 2018, and issued a notice of hearing on July 20, 2018, setting the hearing for August 1, 2018. At the hearing, the Government offered three exhibits (GE 1 through 3), which were admitted into the

record without any objections. Applicant testified on his own behalf, and presented no additional evidence. DOHA received the hearing transcript (Tr.) on August 7, 2018.

Procedural Issue

Applicant affirmatively waived his right to 15-days advanced notice of his hearing. (Tr. 11-12)

Findings of Fact

Applicant admitted all of the SOR allegations (§§ 1.a and 1.b; 2.a and 2.b; and 3.a through 3.g) with mitigating and explanatory comments. His SOR and hearing admissions are accepted herein as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 58-year-old employee of a federal contractor. He received his bachelor's degree in 1984, and completed master's degrees in 1996 and 2009. He enlisted in the Navy in 1978, and was discharged in 1979 and placed in the Inactive Reserve while attending college. He was commissioned as a Navy officer in 1984, and served honorably until retired as a lieutenant commander in 2002. Applicant married his wife in 1992. They have a daughter, age 24, and a son, age 22.

Applicant has been working for federal contractors since he left the service in 2002. He held a top-secret clearance while in the service. His clearance eligibility has been continued while employed with federal contractors. He seeks the continuation of his clearance, which is required for his employment with a federal contractor.

In about 2010, Applicant applied for a job with another Government agency (Agency) that required him to participate in polygraph-assisted interviews. After a series of interviews, Applicant disclosed, in substance, all of the facts alleged in the SOR allegations:

1. When he was about 13 years old, while babysitting for a friend of the family, he touched, and on a second occasion, he penetrated, a three-year-old girl's vagina with his finger while getting aroused. He was never caught, but stopped his behavior because he knew that what he was doing was wrong. (SOR ¶ 1.b)

2. Applicant started having uncomfortable feelings about his daughter - a strange sexual attraction - when she started puberty. He was afraid that he would do something stupid. When his daughter and her friends were about 13 years old (in about 2009), Applicant began sexually fantasizing about his daughter and her friends and masturbated two to three times per month to those fantasies. Applicant denied he ever touched his daughter or her friends inappropriately or that he acted on his fantasies (other than masturbating). (SOR ¶ 1.a)

Applicant told the Agency investigator that he stopped his sexual fantasies in about May 2011. (GE 3) At his hearing, Applicant testified that he stopped having the sexual fantasies after his interview with the last investigator in January 2015. (Tr. 39)

After his 2010-2011 interviews, the Agency reported Applicant's statements to the state's social services agency who investigated the concern. Applicant's family was interviewed, and apparently he was cleared of sexual misconduct.

3. In about 1988, Applicant removed documents from a sensitive compartmented information facility (SCIF) and took them to his home to study for an exam. Sometime later, he returned the documents to the SCIF. He also took submarine qualifications cards (marked confidential) as souvenirs. Applicant averred that at the time he took the cards, he did not know they were marked confidential. During a move in 1999, he discovered they were marked confidential. Applicant did not return or properly dispose of the cards after he discovered they were classified confidential. He maintained possession of the cards until 2010 when an Agency investigator asked him to surrender them to him. (SOR ¶¶ 2.a and 2.b)

4. In about 2009-2010, Applicant took computer equipment home without authorization from his federal contractor employer. The equipment included, in part, a server with five drives, eight to ten keyboards, mice, a wireless router, network cables, three laptops, three docking stations, and cables for hard drives. Applicant explained that he was asked to recycle old computer equipment under his control before the company moved to another location. Part of his job was to create mock computer labs for testing and studies. He did not recycle the equipment and took it home because he believed he would need it to establish mock computer labs. Applicant did not ask for authorization to take the equipment home. After he participated in four Agency interviews, Applicant returned the equipment to his then employer to recycle it. Applicant donated some of the computer equipment he wrongfully appropriated to his daughter's school robotics lab.

5. SOR ¶ 3.f alleges that Applicant deliberately omitted and failed to disclose material information to an Office of Personnel Management (OPM) background investigator. Applicant participated in an interview with an OPM investigator in January 2015. During the interview, he was asked whether he had sexual fantasies or masturbation habits related to minors. Applicant admitted to having fantasies and that he masturbated to pornography of young women, but specifically denied any sexual fantasies or masturbating habits related to minors. Applicant deliberately failed to disclose to the OPM investigator all the information he disclosed during his four interviews with the Agency investigators about his sexual fantasies and masturbation habits concerning his minor daughter and her friends as set forth in SOR ¶ 1.a.

6. SOR ¶ 3 g alleged that Applicant deliberately omitted and failed to disclose material information to an OPM background investigator when he failed to disclose the true extent of his unauthorized taking of computer equipment from his employer as set

forth in SOR ¶ 3.e. During his 2015 interview, Applicant admitted to, on one occasion, taking home a computer shell (stripped of parts) except for its power supply. Applicant deliberately omitted and failed to disclose that he had taken home, at least, a server with five drives, eight to ten keyboards, mice, a wireless router, network cables, three laptops, three docking stations, and cables for hard drives.

When questioned about his omissions and failure to disclose the same information he disclosed to Agency investigators in 2010-2011, Applicant stated he did not see the need to disclose the information because he assumed the investigator had read his statements to Agency investigators in 2010-2011.

Policies

The SOR was issued 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

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 SEAD 4, App. A ¶¶ 2(d) and 2(f). 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; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 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 sets forth the security concern as follows:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

At age 13, Applicant sexually molested a three-year-old girl by twice fondling her vagina while getting aroused. When Applicant’s daughter and friends were about 13 years old (in about 2009), Applicant began sexually fantasizing about his daughter and her friends and masturbated frequently to those fantasies. He admitted to having a “strange sexual attraction” to his then minor daughter.

Applicant’s sexual fantasies (thoughts) are not “behavior” that could raise a concern under the AGs, and there is no evidence he acted on his fantasies, except for his masturbating habit. His masturbation occurred in the privacy of his home, and it remained private until he disclosed his masturbating habit to Agency investigators during his 2010-2011 interviews. His sexual behavior then became a concern because he is now susceptible to coercion, exploitation, or duress. Applicant would like to prevent others from knowing about his masturbating habits and sexual fantasies involving his minor daughter and her friends because it would adversely affect his reputation, esteem in the community, judgment, and his ability to find or keep a job.

AG ¶ 13 provides conditions that could raise a security concern and may be disqualifying:

- (a) sexual behavior of a criminal nature . . . ;
- (b) pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and
- (d) sexual behavior of a public nature or that reflects lack of discretion or judgment.

Applicant's frequent masturbating habit to sexual fantasies about his underage daughter and her friends raises concerns under AG ¶¶ 13(b) and (c).

AG ¶ 14 provides the following possible mitigating conditions:

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of 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 judgment;
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress;
- (d) the sexual behavior is strictly private, consensual, and discreet; and
- (e) the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and consistent compliance with the treatment plan, and/or has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

AG ¶¶ 14(a) and (b) apply to SOR ¶ 1.b. Applicant was 13 years old at the time he sexually molested the three year old girl, and there is no evidence of similar behavior during the following 45 years.

Concerning Applicant's sexual fantasizing and masturbating to thoughts of his daughter and her friends, there is no evidence to show Applicant ever acted on his fantasies (other than masturbating) or that he inappropriately touched a minor. His sexual behavior (masturbating) was strictly private. Applicant claimed that as a result of

the state's social services investigation in 2011, his wife became aware of his sexual behavior towards his minor daughter and her friends. If true, the basis for possible coercion, exploitation, or duress would be diminished. However, Applicant failed to present independent evidence to corroborate his testimony about his wife's knowledge and her forgiveness. AG ¶¶ 14(c) and (d) apply, in part, to SOR ¶ 1.a, but they do not completely mitigate the security concerns. Applicant has not participated in any counseling or treatment. AG ¶ 14(e) does not apply.

Applicant testified that he stopped sexually fantasizing and masturbating about his daughter and her friends in 2015. Thus, I consider his questionable behavior recent. I note that Applicant told the Agency investigator that he stopped his sexual fantasies in about May 2011. (GE 3) However, at his hearing, Applicant testified that he stopped having the sexual fantasies after his last interview with a Government investigator in January 2015. (Tr. 39)

Guideline K: Handling Protected Information

Deliberate or negligent failure to comply with rules and regulations for handling protected information – which includes classified and other sensitive government information, and proprietary information - raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.¹

Security clearance cases require administrative judges to assess whether an applicant has the requisite good judgment, reliability, and trustworthiness to be entrusted with classified information. When evidence is presented that an applicant previously mishandled classified information or violated a rule or regulation for the protection of protected information such an applicant bears a very heavy burden in demonstrating that they should once again be found eligible for a security clearance.²

Applicant's removal of documents classified confidential from a SCIF in 1988, and his taking and keeping the submarine qualification cards after he realized they were classified confidential in 1999, raise the following Guideline K security concerns.

AG ¶ 34(b): collecting and storing protected information in any unauthorized location; and

¹ AG ¶ 33.

² ISCR Case No. 11-12202 at 5 (App. Bd. June 23, 2014) (very heavy burden standard); ISCR Case No. 01-25941 at 5 (App. Bd. May 7, 2004) (security clearance determinations are "not an exact science, but rather predicative judgments.").

AG ¶ 34(g): any failure to comply with rules for the protection of classified or other sensitive information.

After considering the conditions that could mitigate the security concerns one is partially applicable to the facts in this case:

AG ¶ 35(a): so much time has elapsed since the behavior, or it happened so infrequently or under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.

Applicant returned to the SCIF the document he removed from it to study in 1988. He found out that the submarine qualification cards he took as souvenirs were classified confidential during one of his moves in 1999. However, he kept the submarine qualifications cards even after realizing they were classified confidential. Applicant was commissioned in 1988, served in the Navy as an officer, and held a clearance until he retired in 2002. He was aware of the security rules that required him to protect classified information, to return the classified documents or destroy them, and to then notify his security officer of his violation of the security rules. He failed to do so and retained the submarine qualifications cards until he was asked to hand them over to an Agency investigator in 2011. There is no evidence of additional security violations after 2011.

Applicant's security infractions were deliberate, or the result of a reckless or even negligent disregard for security rules and regulations. There is no evidence to show that after his security violations ended (2011), Applicant established a strong reputation for following and complying with security rules and regulations. Nor is there evidence of additional training to prevent such security violations in the future.

Guideline E: Personal Conduct

AG ¶ 15 sets forth the security concern as follows:

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 or sensitive information

Under Guideline E, the SOR cross-alleges in ¶¶ 3.a through 3.d, the same factual concerns alleged in ¶¶ 1.a and 1.b, and 2.a and 2.b. Because those concerns were fully addressed under Guidelines D and K, for the sake of brevity my findings, analysis, and conclusions under those guidelines will be incorporated herein without repeating them.

Additionally, the SOR alleged that Applicant was less than candid and forthcoming during an official interview with an OPM investigator in 2015, when he failed

to disclose the full extent of his sexual fantasies and masturbation habits involving his minor daughter and her friends as disclosed to Agency investigators during interviews in 2010-2011. (SOR ¶ 3.f) During his 2015 interview, Applicant stated that he masturbated to pornography involving young women, but denied sexually fantasizing and masturbating about minors. When cross-examined at hearing about the substantial discrepancy in his statements in 2010-2011 to those made in 2015, Applicant explained that he believed the OPM investigator had access to and had read his statements to the Agency, and as such, he did not have to repeat the information.

Applicant admitted that in 2009-2010, he wrongfully appropriated computer equipment from his federal employer and did not return the equipment until confronted about it during at least four interviews with Agency investigators in 2010-2011. The computer equipment taken included, at least: a server with five drives, eight to ten keyboards, mice, a wireless router, network cables, three laptops, three docking stations, and cables for hard drives. (SOR ¶ 3.e)

Applicant was less than candid and forthcoming during an official interview with an OPM investigator in 2015, when he failed to disclose the full extent of the numerous computer parts that he wrongfully appropriated from his employer. During his 2015 interview, he admitted to taking home only one computer shell with a power supply and some cables. He claimed that he had stripped out the hard drive and other components from the computer shell. He stated that he donated the computer shell to his daughter's high school. When cross-examined at hearing about the substantial discrepancy in his statements, Applicant explained that he believed the OPM investigator had read his prior statements to the Agency, and as such, he did not have to repeat the information. (SOR ¶ 3.g)

Applicant's behavior raises the following disqualifying conditions under AG ¶ 16:

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing

The record established the above disqualifying conditions, requiring additional inquiry about the possible applicability of the mitigating conditions. I considered the following mitigating conditions set forth by AG ¶ 17 as partially raised by the evidence:

(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 contributed to 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.

Applicant was 13 years old when he sexually molested the 3-year-old girl. (SOR ¶ 3.a) There is no evidence to show Applicant has been involved in any similar behavior during the last 45 years. AG ¶ 17(c) applies and mitigates this allegation.

Applicant's sexual fantasies (thoughts) are not "behavior" that could raise a concern under the AGs, and there is no evidence he acted on his fantasies, except for his masturbation habit. His masturbation practices occurred in the privacy of his home, and it remained private until he disclose his masturbation habit to Agency investigators during his 2010-2011 interviews. His sexual behavior is a concern because he is susceptible to coercion, exploitation, or duress. Applicant would like to prevent others from knowing about his masturbation habits and sexual fantasies involving his minor daughter and her friends because it would adversely affect his reputation, esteem in the community, put into question his judgment, and his ability to find or keep a job. Thus the reason he deliberately omitted the information during his 2015 interview.

Applicant has not participated in counseling. AG ¶ 17(d) is not applicable. AG ¶ 17(e) is partially applicable because Applicant and his family were interviewed by state social services and apparently he was cleared of the allegations. He testified that his

wife forgave him for his past sexual behavior; however, he failed to present corroborating evidence to support his claim. Notwithstanding, its partial applicability, AG ¶ 17(e) does not fully mitigate the concerns. Considering the evidence as a whole, I find that the Guideline E allegations continue to raise concerns under AG ¶¶ 16(b), (c), and (e), which are not mitigated.

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(a) and 2(d). I have incorporated my comments under Guidelines D, K, and E in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant, 58, served in the Navy and was honorably retired after 20 years of service. He has been employed with federal contractors since he retired in 2002. He held a clearance while in the service that has been continued while working for federal contractors to present.

Nevertheless, it is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. Unmitigated security concerns lead me to conclude that granting a security clearance to Applicant is not warranted at this time.

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
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline K:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Subparagraph 3.b:	For Applicant
Subparagraph 3.c:	For Applicant
Subparagraph 3.d:	Against Applicant
Subparagraph 3.e:	For Applicant
Subparagraph 3.f:	Against Applicant
Subparagraph 3.g:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for a security clearance. Clearance is denied.

JUAN J. RIVERA
Administrative Judge