



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



In the matter of:)
)
) ISCR Case No. 17-03916
)
)
Applicant for Security Clearance)

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: Alan Edmunds, Esq.

01/31/2019

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant has not mitigated the security concerns under the guidelines for personal conduct, sexual behavior and criminal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On March 22, 2018, in accordance with DoD Directive 5220.6, as amended (Directive), the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guidelines D and J.¹ The SOR further informed Applicant that, based on information available to the government, DoD adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant’s security clearance.

¹ I considered the previous Adjudicative Guidelines (AG), effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same if the case was issued under the previous AG. Applicant was provided with a copy of the new AG prior to the hearing, and permitted time after the hearing to submit further argument based on the new guidelines. (Tr. 4-6.)

Applicant answered the SOR on May 14, 2018, and requested a hearing before an administrative judge. (Answer.) The case was assigned to me on October 22, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 11, 2018, scheduling the hearing for October 26, 2018. The hearing was convened as scheduled. The Government offered Exhibits (GE) 1 through 4, which were admitted without objection. Applicant testified on her own behalf. Applicant submitted 12 exhibits, marked Applicant Exhibit (AX) A through L, which were admitted without objection. The record then closed. DOHA received the transcript of the hearing (Tr.) on November 6, 2018.

Findings of Fact

Applicant admitted all allegations in SOR ¶¶ 1 through 3.² After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

The SOR alleges in (1.a) under Guideline D, a June 2017 arrest and an August 2017 guilty plea to contributing to the delinquency of a minor and indecent exposure. She was sentenced to twelve months in jail, with eleven months suspended and ordered to pay fines. It cross alleges under Guideline J, the same information (2.a). Under Guideline E, an amended SOR (3.a) alleges written falsifications that occurred in January 2017 to Applicant's employer regarding allegations about an inappropriate relationship with a minor student; (3.b) falsification of material facts during a May 2017 interview with an investigator in failing to disclose that she participated in a sexual act with a student; and in another investigative interview in July 2017, (3.c) not disclosing that after a minor student exposed himself to Applicant in a car, that nothing further happened when in fact she did touch him and provided oral sex.

Applicant is a 32-year-old employee of a defense contractor. She is single and has one young child. She received her undergraduate degree in 2008 and her graduate degree in 2016. (AX C, F, G, I) Applicant taught high school from 2015 to 2017, when she was fired for alleged workplace misconduct. (GX 1) She has been employed with a defense contractor for about one year. (Tr. 59) She has received a number of training certificates in cyber security and counterintelligence. (AX L)

Applicant tutored a tenth grade male student while teaching in a high school. On one occasion, she and the student were in a public library after school. (Tr. 21) The student's ride did not appear and Applicant stated that she would take him to his home. (Tr. 22) Applicant claimed that the student exposed himself while in the car and he demanded oral sex. She acknowledged that she tried to fend him off but he was bigger than she was. She testified that he tried to force her to give him oral sex. She continued to refuse but eventually she complied. (Tr. 23)

After an investigation by the school, Applicant received a criminal complaint from the police, and Applicant was charged with contributing to the delinquency of a minor

² Before the hearing the Government amended the SOR to include Personal Conduct. It alleged three falsifications as noted above.

and indecent exposure for the incident that occurred in May 2016. (GX 3, 4, AX H) In August 2017, Applicant pled guilty to the misdemeanor charges. She received consecutive sentences for the two charges. The total sentence was 24 months. Applicant was sentenced to twelve months in jail, with eleven months suspended. (AX H) Applicant served her incarceration on the weekends. Applicant “shall be of good behavior” for a total of six years from the release from confinement. She has not had contact with the student since the conviction. (AX H)

Applicant initially denied that the criminal incident occurred when she received a letter of suspension from the school due to sexual misconduct. (Tr. 53) She told her employer that it was a rumor and was spread on social media. On January 13, 2017 Applicant responded in writing concerning the incident. She acknowledged that she had tutored the student and given him a ride home. She did not disclose any information about the incident of oral sex in her car. (GX 3)

During a May 12, 2017 investigative interview, Applicant described the May 2016 incident with the minor student and mentioned a social media post concerning romantic behavior between Applicant and a minor student. She explained that she was not involved with the student. She made no mention of the fact that she gave the student oral sex in her car. (GX 2)

On July 26, 2017, Applicant was again interviewed by a DOD investigator. She stated that the student exposed himself to her in the front passenger seat of her car. She explained that she told the student that was not appropriate behavior and took him home. Applicant further stated that nothing happened, that she did not touch him, and she did not know why the student made up this story. (GX 2) Applicant did not receive any counseling after this incident.

When cross examined at the hearing, Applicant explained that she did not provide the truth or the entire story as it happened because it was humiliating and embarrassing. (Tr. 56) During the interviews she never mentioned the oral sex.

Applicant submitted five letters of recommendation. Each reference from a former employer knew Applicant for at least two years and described her as honest with a positive attitude. Applicant has exceptional organization and communication skills. She is reliable and motivated. One letter of recommendation commended Applicant for her ability to encourage her students and build self-esteem. (AX A) She attends church and is a member of her church community. (AX I, K)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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 national security eligibility will be resolved in favor of the 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 avoided drawing inferences grounded on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 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 *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline D, Sexual Behavior

The security concern relating to the guideline for Sexual Behavior is set out in AG ¶ 12:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 13. All are potentially applicable in this case:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) a 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 provided oral sex to a minor student who she was tutoring. This occurred in her vehicle while she was taking him home. She did not show good judgment and put herself in a position of vulnerability at the high school where she was teaching. The evidence is sufficient to raise these disqualifying conditions.

AG ¶ 14 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 20 including:

- (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 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.

None of the above mitigating conditions apply.

Guideline J: Criminal Conduct

AG ¶ 30 sets forth the security concerns pertaining to criminal conduct:

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 ¶ 31 describes three conditions that could raise a security concern and may be disqualifying in this case:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and

(c) individual is currently on parole or probation.

Applicant was convicted of contributing to the delinquency of a minor and indecent exposure in August 2017. She completed her consecutive sentences and is on a condition of "six years of good behavior." The evidence establishes the disqualifying conditions.

AG ¶ 32 provides two conditions that could mitigate the above security concerns raised in this case:

(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, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Sufficient time has not passed since Applicant's 2017 conviction. She breached a position of trust that a teacher has with a student. Granted this is a one-time occurrence and she has a good employment record, but given the fact that she used incredibly poor judgment with a minor student in 2016 and has not received counseling, she has not met her burden in this case. The evidence does not establish mitigation under either of the above conditions.

Guideline E, Personal Conduct

The concern under this guideline 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Based on Applicant's alleged deliberate falsifications, the following disqualifying condition could apply:

AG ¶ 16 (a): deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant admitted the three separate falsifications under personal conduct. She explained that she was very humiliated and embarrassed. She admitted that she did not disclose the full story either in writing to her employer or during two investigations. She is 32 years old. Granted she is a small woman, but the student, although larger than Applicant, was a minor. She stated that initially she refused the student's request but

then agreed to perform the oral sex. She told officials at school that the student was starting rumors. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission.³ An applicant's level of education and business experience are relevant to determining whether a failure to disclose relevant information was deliberate.⁴

In this instance, it is clear from Applicant's comments that she was embarrassed and humiliated and hoped nothing would occur. She deliberately falsified and omitted relevant information on three separate occasions in 2017. I find substantial evidence of an intent by Applicant to intentionally omit, conceal, or falsify facts from her employer and the government. Therefore, AG ¶ 16(a) is established.

Applicant did not make prompt or good-faith efforts to correct her falsifications or concealment. She spoke to two investigators and did not reveal the May 2013 incident and the oral sex. She also denied any oral sex in a letter written to her employer. Applicant has not persuaded me that similar lapses in judgment are unlikely to recur. She did not seek counseling and she deliberately withheld relevant information on three separate occasions. There is no information in this record to demonstrate that she did not intentionally falsify and mislead the Government on three separate occasions. None of the 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(d):

- (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.

³ See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

⁴ ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J, E, and D in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

Applicant on three different occasions failed to disclose that she gave oral sex to a minor student that she was tutoring in May 2016. She was convicted in 2017. She denied three different times that the incident occurred. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the personal conduct, sexual behavior, and criminal conduct security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline D:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a-c:	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.

Noreen A. Lynch
Administrative Judge