



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 17-04312
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Troy L. Nussbaum, Esq.

03/13/2019

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines D (Sexual Behavior) and E (Personal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on November 17, 2015. On January 10, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines D and E. The DOD CAF acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on March 19, 2018, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on May 11, 2018, and the case was assigned to an administrative judge on May 16, 2018. It was reassigned to me on November 15, 2018. On December 21, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for February 5, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. GX 4 and 5 were not admitted. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. I kept the record open until February 19, 2019, to enable Applicant to submit additional documentary evidence. He timely submitted AX F, which was admitted without objection. DOHA received the transcript (Tr.) on February 21, 2019.

Findings of Fact¹

In Applicant's answer to the SOR, he admitted all the allegations. His admissions in his answer and at the hearing are incorporated in my findings of fact. His answer to the SOR included eight exhibits (SOR Exhibits A through H).

Applicant is a 55-year-old self-employed owner and president of a federal contractor that provides recovery, screening, and sanitizing of discarded information-technology (IT) materials. He has owned and operated the company since September 2009. He was a self-employed truck driver from March 2007 to September 2009 and a driver for a landscaping company from April 2005 to March 2007.

Applicant married in February 1986, divorced in February 1999, and married his current spouse in February 2000. He graduated from high school and completed one semester of college. He has four adult children and two adult stepchildren. His son, a Navy veteran, is a co-owner of his business and its facility security officer. (SOR Exhibit H at 1.)

Applicant received a security clearance in October 2013. He submitted his most recent SCA to obtain eligibility for access to sensitive compartmented information (SCI). His application was denied in October 2015. (GX 2.)

At the hearing, Applicant testified that, for several years before 2006, he and his wife were focused on parenting and "really weren't much of a couple." In 2006, he seriously injured his neck and back while in heavy surf at the beach. His wife had urged him not to go into the water, but he did not comply with her urging. He spent about three months wearing a "halo," which immobilized his head and neck, followed by a cervical collar for about four weeks. (SOR Exhibit C.) During his recovery period after he was injured, his wife informed him that there would be no more sexual intimacy between them. Neither spouse wanted a divorce, because it would tear apart the family. At the

¹ Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

time, Applicant's children were 21, 20, 17, and 13 years old. (Tr. 50-55.) He told a clinical psychologist that his choices were "leave the marriage and break up the family, or go without sex, or find sex elsewhere." (AX C at 7.)

Near the end of 2006, Applicant was driving a truck far from home and experiencing persistent neck and back pain. He stopped at a massage parlor, and at the end of the massage he unexpectedly received a "happy ending," by having his genitals massaged to the point of orgasm. He repeated his experience about every two months. His genitals were usually massaged manually and sometimes orally. He had sexual intercourse on two occasions. He did not feel that oral or manual stimulation was wrong, but he was uncomfortable with intercourse, and he did not return to the places where intercourse occurred. In each case, when he received sexual services, he had not specifically requested them but did not stop them. (Tr. 63.) He recognized that the experience was illegal in some of the places he visited. (Tr. 56-57.)

In the late 1990s Applicant began shoplifting food items at highway rest stops. He believed that food items were "ludicrously overpriced," and he felt that he was "being ripped off." To compensate for the overpricing, he would take two food items but pay for only one. During the years he was shoplifting, he estimated that the total value of items taken was less than \$100. (Tr. 59-61.)

Applicant testified that in October 2014, during the interviews involved in the adjudication of his SCI application, he suddenly realized the seriousness and gravity of his conduct. (Tr. 66.) When he went home after the interviews in which he disclosed his behavior, he disclosed everything to his wife. He testified, "I recognized that as painful of a conversation as that would be, there'd be no way that I could hold a position of trust if I didn't do that." (Tr. 67.) His wife has forgiven him and they have become very close, to the extent that they communicate several times a day, even when they are geographically separated. He disclosed his conduct to a close business associate and his former director of security. (Tr. 70.)

Applicant has not disclosed his conduct to his children, because he and his wife have agreed to keep the matter as private as possible. He testified that if someone threatened to disclose his conduct to his children, he would immediately notify the appropriate authorities, and then gather the family and fully disclose what he had done. He recognizes that the children would be hurt and might not speak to him. He testified, "My children love me, and I love them. We would get through that without any real tearing the family apart, so to speak." (Tr. 85-86.)

After the unfavorable adjudication of his application for SCI eligibility, Applicant changed his lifestyle. He had been grossly overweight, and he lost 100 pounds. He, stopped smoking after 37 years, and became involved in community activities. Most importantly, he and his wife resumed the close and affectionate relationship that they enjoyed when they first married. (Tr. 71-72.) Applicant's wife submitted a statement affirming that she and Applicant are still in love and moving forward with their lives. She stated that Applicant is "doing everything in his power to atone for his prior sins." She

and Applicant agreed that her personal testimony would be emotionally “far too hard.” She explained, “We have gone through the darkest of our times together and made it out to the light, but it still hurts to have to speak publicly about our dark times, and writing this letter is by far easier.” (AX B.)

Applicant obtained outpatient psychotherapy from a licensed clinical psychologist (LCSW) three or four times a month from August 2015 to June 2017. He was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), and his treatment focused on managing his hyperactivity. (SOR Exhibit E at 1.) He has been treated two or three times a month by another LCSW from July 2017 to the present. The focus is still on managing his impulsivity. The second LCSW states that Applicant “has made considerable progress in his ability to regulate his impulses, and as long as he continues to maintain this progress, his prognosis is good.” (SOR Exhibit E at 2.) A psychological evaluation conducted in April 2018 by a third LCSW found Applicant free from major psychological difficulties and histrionic personality traits. This LCSW’s observations and comments included the following:

The testing suggests that [Applicant] has periods of anxiety and that he may be somewhat intolerant of other’s shortcomings or failings. He reports feeling strong aggressive and sexual drives and he is highly sensitive to rejection. . . . He may feel slighted if he is not receiving what he wants from a relationship. . . .

He has periods where he feels self-remorse and low self-esteem characterized by not feeling that he is “as good” as others. He may try to protect himself in relationships by detaching himself, which fits with his reported history of difficulty with emotional and physical intimacy. This also helps explain how he sought gratification through anonymous relationships that do not require emotions or commitment. These tendencies are not likely to impact on employment matters but affect his interpersonal relationships and his private life. These issues are also not inflexible and can be moderated, particularly since he is involved in counseling and aware of them. . . .

Individuals with these personality tendencies may have some struggle with their closest relationships and intimacy but are inclined to excel professionally in their occupational setting where they are able to fulfil their affiliative needs and find positive reinforcement for their behavior. They are often found to be hard working, reliable, dedicated and highly productive individuals due to these factors. . . .

[Applicant’s] focal behavioral lapses of the past appear to be anomalies based on unusual circumstances that are not likely to happen again and that do not represent his normal behavior. These issues are now well understood and have ceased. There is no indication that this illicit

behavior will ever reoccur, and he appears to be capable of holding a position of trust as he has successfully done for years prior.

(AX C; AX D.)

Applicant began neurofeedback treatment in June 2017 to help him control his impulsivity. (Tr. 73.) His neurofeedback counselor submitted the following comments:

In my experience with [Applicant], he has consistently presented himself as a forthright, honest individual with an excellent work ethic and high personal integrity. He has a high level of self-awareness and personal insight and has been able to provide honest, comprehensive self-reports of functioning and reactions to training. . . . Neurofeedback has helped [Applicant] with increased self-awareness and control and maintenance of an appropriate level of psychophysiological arousal that maximizes attention, focus, working memory and executive functioning capabilities.

(AX E.)

Applicant testified that he did not make his lifestyle changes to enable him to receive a clearance; he made the changes because going through the adjudication process put him in touch with “how awful [he] was.” He testified: “Inside was awful, and I need to fix that. It was a catalyst, if you will, but no, I didn’t become a better person to get a clearance. I want to be a person who’s worthy of a clearance, with or without the clearance.” (Tr. 78.) He submitted a “Statement of Intent” agreeing to revocation of any security clearance if he engages in shoplifting or receives the services of prostitutes in the future. (AX A.)

A defense contractor who relied on Applicant as a subcontractor for many years testified that he regarded Applicant as a “valued partner,” who was very competent, meticulous, and dedicated. Applicant disclosed his sexual conduct and shoplifting to this defense contractor, who was surprised but would not hesitate to work with him again. (Tr. 22-28.) The defense contractor’s facility security officer was especially impressed with Applicant’s meticulous attention and aggressive responses to potential spillages from IT hardware. (SOR Exhibit H at 8; AX F.) A former co-worker regards Applicant as extremely security conscious, dedicated, and knowledgeable. (SOR Exhibit H at 3.)

Applicant’s 33-year-old stepson admires him for teaching him the value of hard work and the importance of family and friends. (SOR Exhibit H at 2.) His 25-year-old stepson remembers him as a loving and caring father-figure, extremely generous, talented, and a great leader. (SOR Exhibit H at 5.)

Applicant’s 29-year-old daughter describes him as extremely patriotic, honest, and hard-working. She admires him for teaching her the value of hard work, teamwork, honesty, and time management. (SOR Exhibit H at 4.) His 25-year-old daughter remembers how Applicant taught her about honesty and hard work. She describes him

as “an amazing father, friendly neighbor, caring friend, loving husband, and most importantly, a patriot.” (SOR Exhibit H at 6.

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr.20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline D, Sexual Behavior

SOR ¶ 1.a alleges that, from approximately 2006 to approximately 2014, Applicant paid money for sexual gratification. The concern under this guideline 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.

Applicant's admissions establish the following disqualifying conditions under this guideline:

AG ¶ 13(a): sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

AG ¶ 13(b): a pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop; and

AG ¶ 13(c): sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

The following mitigating conditions are potentially applicable:

AG ¶ 14(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;

AG ¶ 14(c): the behavior no longer serves as a basis for coercion, exploitation, or duress;

AG ¶ 14(d): the sexual behavior is strictly private, consensual, and discreet; and

AG ¶ 14(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(b) and 14(e) are established. Applicant's sexual misbehavior and petty theft stopped more than four years ago. His debilitating and painful injury, followed by his wife's termination of marital intimacy, were unusual circumstances that left him feeling angry and rejected. He now understands what contributed to his conduct and has obtained counseling to deal with it. The medical professionals who have assisted him believe that recurrence is unlikely.

AG ¶ 14(c) is not fully established. Applicant has disclosed his conduct to his wife, but not to his children and stepchildren. Thus, he remains vulnerable to coercion, exploitation, or duress. However, he found the courage to disclose his misconduct to his wife and a close business associate, and I am confident that he will muster the strength to disclose his misconduct to his children and stepchildren if necessary.

AG ¶ 14(d) is not established. Applicant visited the massage parlors alone, and his sexual activity was private and consensual, but it was not discreet.

Guideline E, Personal Conduct

SOR ¶ 2.a alleges that Applicant engaged in shoplifting for about 35-40 years until 2014. SOR ¶ 2.b cross-alleges SOR ¶ 1.a.

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. . . ."

Applicant's admissions establish the following disqualifying conditions under this guideline:

AG ¶ 16(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;

AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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. This includes, but is not limited to, consideration of: . . . (2) any disruptive, violent, or other inappropriate behavior; [and] (3) a pattern of dishonesty or rule violations; . . .

AG ¶ 16(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 . . . ; and

AG ¶ 16(g); association with persons involved in criminal activity.

The following mitigating conditions are potentially applicable:

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;

AG ¶ 17(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;

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

AG ¶ 17(g): association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶¶ 17(c) and 17(d) are established for the reasons set out in the above discussion of AG ¶¶ 14(b) and 14(e). AG ¶ 17(e) is not fully established for the reasons

set out in the above discussion of AG ¶ 14(c). AG ¶ 17(g) is established, because Applicant no longer visits massage parlors engaged in illegal prostitution.

Whole-Person Concept

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. In applying the whole-person concept, an 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 and applying the adjudicative factors in AG ¶ 2(d).²

I have incorporated my comments under Guidelines D and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment. Applicant was candid, sincere, remorseful, and credible at the hearing. Before his injury and the disintegration of his marriage in 2006, he held a security clearance without incident. His reconciliation with his wife, her strong support, and his continuing treatment by medical professionals are major factors making recurrence unlikely.

After weighing the disqualifying and mitigating conditions under Guidelines D and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his sexual behavior and personal conduct.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline D (Sexual Behavior):	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 2.a and 2.b:	For Applicant

² The factors are: (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.

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge