



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



In the matter of:)
)
) ISCR Case No. 18-01638
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

04/11/2019

Decision

Curry, Marc E., Administrative Judge:

Applicant’s use of his work computer to solicit sex, and his subsequent failure to disclose this episode on his security clearance application as the reason for his subsequent employment termination, generate personal conduct security concerns that he failed to mitigate. Clearance is denied.

Statement of the Case

On August 22, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline E, personal conduct, explaining why it was unable to find it clearly consistent with the national interest to grant security clearance eligibility. The DOD CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; and DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive) and the National Security Adjudicative Guidelines (AG), effective June 8, 2017.

On September 17, 2018, Applicant answered the SOR, admitting the allegations and requesting a hearing, whereupon the case was assigned to me on January 16, 2019. On February 11, 2019, the Defense Office of Hearings and Appeals issued a notice of hearing, scheduling Applicant's case for March 14, 2019. The hearing was held as scheduled. I received two Government exhibits (GE 1 and GE 2) and considered Applicant's testimony. I also incorporated a copy of the discovery letter that Department Counsel mailed to Applicant (Hearing Exhibit I). The transcript (Tr.) was received on March 26, 2019.

Findings of Fact

Applicant is a 58-year-old man who has been married for 23 years. He was married previously from 1983 to 1986. The marriage ended in divorce. For the past three years, he has been working for a telecommunications company, as a network systems manager. (Tr. 13)

Between January and February of 2015, Applicant used his personal e-mail account, which he accessed through his work computer, to solicit sexual acts via Craigslist. On one occasion, Applicant attached to his solicitation an electronically-transmitted photo of himself that he described as sexually explicit. In May 2015, Applicant's employer discovered these illicit online communications. Shortly thereafter, he was terminated.

Applicant completed a security clearance application in October 2015, when he applied for his current job. He admitted that he was terminated, but stated that he was terminated for buying and selling things on eBay and Craigslist while at work, rather than for soliciting sex online while at work.

Applicant characterized himself as "a stupid person at the time" he misused the work computer, and testified that such behavior will never recur. (Tr. 27) He characterized his relationship with his wife as an open one, in which they have both had affairs over the years. He testified that his wife is aware that he occasionally uses the internet to arrange sexual encounters with others. (Tr. 21) She neither testified, nor provided an affidavit.

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). 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 required to be considered 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall 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 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. 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 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 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. Section 7 of Executive Order 10865 provides that 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).

Under the whole-person concept, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d).¹

Analysis

Guideline E: Personal Conduct

Under this guideline, “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

¹ The factors under AG ¶ 2(d) are as follows:

- (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.

information.” (AG ¶ 15) Applicant’s misuse of his work computer triggers the application of AG ¶ 16(e), “personal conduct . . . that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group.” His subsequent falsification of his e-QIP triggers the application of 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’s misuse of his work computer occurred four years ago. However, he provided no evidence of anything that he has done to prevent a recurrence. Moreover, his testimony that his wife knows about his online sexual solicitations has little probative value absent her testimony. Lastly, Applicant’s failure to disclose this episode as the cause of his job termination, when he completed his 2015 e-QIP, clearly demonstrates that he remains vulnerable to coercion. Under these circumstances, none of the mitigating conditions apply. Applicant has failed to mitigate the personal conduct security concerns.

Whole-Person Concept

I considered the whole-person factors in my analysis of the relevant disqualifying and mitigating conditions and they do not warrant a favorable conclusion.

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 E:	AGAINST APPLICANT
Subparagraphs 1.a – 1.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 interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge