



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



In the matter of:)
)
) ISCR Case No. 18-02018
)
Applicant for Security Clearance)

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

08/10/2021

Decision

LOUGHRAN, Edward W., Administrative Judge:

Personal conduct security concerns are mitigated, but Applicant did not mitigate the sexual behavior security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On January 11, 2019, 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). Applicant responded to the SOR on May 14, 2019, and requested a hearing before an administrative judge. The case was first assigned to an administrative judge on October 1, 2019. A hearing set for November 29, 2019, was cancelled. Rescheduling of the hearing was delayed because of the COVID-19 pandemic, and Applicant was working overseas.

The case was reassigned to me on July 13, 2021. The hearing was convened as rescheduled on July 15, 2021. Government Exhibits (GE) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through N, which were admitted without objection.

Findings of Fact

Applicant is a 48-year-old (his birth certificate from Iraq is incorrect) employee of a defense contractor. He has worked for his current employer since 2016. He served on active duty in the U.S. Army from 2009 until he was honorably retired because of a medical disability in 2015. He is applying for a security clearance for the first time. He has the equivalent of a bachelor's degree from an Iraqi university. He married in 2008 and divorced in 2012. He married his current wife in 2019. He does not have children. (Transcript (Tr.) at 13-14, 20, 28-30, 35; GE 1, 2; AE D, E, G, K)

Applicant was born in Kuwait. He moved with his family to Iraq in about 1991 after Iraq invaded Kuwait. He worked under dangerous conditions in Iraq as a linguist in support of the U.S. mission from 2004 to 2008. He married his first wife, a U.S. citizen, in Syria in 2008. She sponsored his immigration to the United States in 2009. He enlisted in the U.S. Army the same year, and he became a U.S. citizen in 2010. (Tr. at 13, 24-30, 35-39; Applicant's response to SOR; GE 1, 2; AE A, B)

Applicant met his first wife through an online dating service. After his divorce, from about 2015 through 2018, he met a number of foreign women through online dating services. He met three women from Morocco, two women from Tunisia, a woman from Thailand, and a woman from Peru. He provided financial assistance to all of the women, including a woman in Morocco that he was engaged to, but never married (\$15,590); another Moroccan woman (\$10,950); a woman in Morocco that became his current wife (\$5,250); two sisters in Tunisia (\$5,250 and \$1,450); a woman in Thailand (\$900); and a woman in Peru (\$1,700). (Tr. at 15-23, 31-34, 45, 48-64; Applicant's response to SOR; GE 3)

Applicant stated that he gave money to his Moroccan fiancée, whom he never married, and to his current wife to help them and as a dowry. Several of the women were living in difficult circumstances and struggling financially. Applicant sent them money to ease their burden. He gave money to the Tunisian sisters to help their mother who had cancer. (Tr. at 15-23, 58, 61-64; Applicant's response to SOR; AE G)

Applicant lived with his American girlfriend from 2015 to 2016. She had a daughter (Daughter), an eight-year-old granddaughter (Granddaughter), and a five-year-old grandson (Grandson). In August 2016, Daughter reported to the police that her eight-year-old daughter (Granddaughter) had been molested by Applicant. Daughter told the police that she was driving her two children to school when Grandson said to Granddaughter: "do you remember when [Applicant] put medicine on your [child's slang term for vagina]?" Daughter did not ask her about it before school because she did not want to upset her. After school, she asked Granddaughter what happened when she was at her grandmother's house and Applicant put medicine on her [child's slang term for vagina]. (Tr. at 23-24, 64-66; Applicant's response to SOR; GE 2, 5) The following is from the police report:

At that time [Granddaughter] told her mother, while at their house on [two days before the report to the police] she had scraped her knee on a

bicycle and had went to lay down on the couch. While on the couch, [Applicant] walked over to her and picked her up and carried her in to her grandmother[']s bedroom then laid her on the bed. Once on the bed [Applicant] began to rub lotion on her leg and slowly began to move upward. When [Applicant] reached the top of the leg, he then placed his hand inside of her panties and began to rub her vagina in an up and down motion ten times. At some point [Applicant] asked [Granddaughter] if she was feeling uncomfortable which she replied yes. [Applicant] then climbed off the bed and walked in to the bathroom, which [Granddaughter] was able to run out of the room and to the outside where her five year old brother was playing. (GE 5)

Daughter told the police that her mother had left the children in Applicant's care while she went to Walmart. She also told the police that Granddaughter told her that it hurt and burned when Applicant touched her vagina. The police recommended that Daughter take Granddaughter to a children's hospital for an examination, and a child protective services (CPS) referral was submitted. A detective was contacted, who responded to the hospital to speak with Daughter and Granddaughter. The detective later reported:

I have spoken with ADA (presumably Assistant District Attorney) [P] about the case. ADA [P] attempted to gain cooperation from the mother of the victim. The mother refused to allow the victim to testify. After further talks with ADA [P] we both agreed that there is not enough evidence to get a conviction without the victim[']s testimony. I am closing the case due to lack of cooperation. (GE 5)

Applicant adamantly denied any inappropriate contact, sexual or otherwise, with Granddaughter. He stated that Daughter did not like him because he was Muslim. He stated that she used to call him a terrorist. He stated that she made the incident up in order to break up his relationship with her mother. Applicant stated that Daughter accomplished her goal because her mother broke up with him after the allegation. (Tr. at 23, 64-68; Applicant's response to SOR; GE 2; AE H)

Applicant was evaluated in May 2019 by a licensed clinical social worker (LCSW). She tested Applicant and interviewed him. She also had access to the SOR. They discussed his background and the allegations. She concluded that there was no diagnosis, and that Applicant had "a low probability of a Sexual Addiction Disorder or Sexual or Paraphilic Disorders." (AE L)

Applicant deployed while in the U.S. military. He is currently working overseas in support of the U.S. mission. He submitted documents and letters attesting to his excellent job performance, before he immigrated to the United States, in the U.S. military, and during his current work overseas. He is praised for his strong moral character, professionalism, work ethic, reliability, leadership, and trustworthiness. A Marine lieutenant colonel wrote that Applicant "exhibited character traits with that of a Marine officer." (GE 2; AE A-F, M, N)

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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 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."

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; 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.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (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.

The SOR alleges that "From August 2016 through approximately August 2017, you were the subject of a police investigation into an allegation of sexual assault of a child." Applicant admitted that he was investigated, but denied the sexual assault. An investigation is not enough to raise a disqualifying condition; I have to make a determination as to whether Applicant committed the underlying conduct. After considering all the evidence, including Applicant's testimony, strong character evidence, and that he was never arrested, charged, or convicted of the charge, I find by substantial evidence¹ that he committed the sexual assault on Granddaughter, essentially as described in the police report. I considered that Applicant provided a motive for Daughter to fabricate the story. While that is possible, that would mean that Daughter was willing, at least initially, to lie to the police, put her daughter through an

¹ Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." See, e.g., ISCR Case No. 17-04166 at 3 (App. Bd. Mar. 21, 2019) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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); ISCR Case No. 04-07187 at 5 (App. Bd. Nov. 17, 2006).

investigation and medical examination, and involve CPS. Additionally, the details of the case lend an aspect of believability. I certainly agree with the detective and ADA that the case could not be proven beyond a reasonable doubt without Granddaughter's testimony. However, it is enough to satisfy the substantial evidence standard. 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;

(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.

Applicant adamantly denied any inappropriate contact, sexual or otherwise, with Granddaughter. However, having found that he committed a serious sexual offense against a young girl, his denials only serve to indicate that he is not rehabilitated. Applicant is vulnerable to coercion, exploitation, and duress. His behavior continues to cast doubt on his reliability, trustworthiness, and good judgment.² The above mitigating conditions are not applicable.

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during the national security investigative or adjudicative processes.

² See ISCR Case No. 09-03233 (App. Bd. Aug. 12, 2010). The Appeal Board determined that an applicant's child molestation offense "even though it occurred long ago, impugn[ed] his trustworthiness and good judgment."

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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;

(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:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations; 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;

(2) while in another country, engaging in any activity that is illegal in that country;

(3) while in another country, engaging in any activity that, while legal there, is illegal in the United States.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. The following mitigating conditions 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 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 met foreign women online and provided them money. He was engaged to one woman from Morocco and married another Moroccan woman. He indicated that he gave some of the women money to help them through difficult times, including two sisters in Tunisia whose mother had cancer. There is no evidence that Applicant broke any laws or did anything inherently wrong. Department Counsel argued that the conduct showed poor judgment. Applicant is now married. The conduct has not been repeated. I am not convinced that the conduct raises any specific disqualifying condition under AG ¶ 16. I am convinced that any security concerns raised by the conduct are mitigated under AG ¶ 17.

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. I have incorporated my comments under Guidelines D and E in my whole-person analysis.

This is a difficult case because Applicant has an impressive record of service to the United States. However, the protection of the national security is the paramount consideration, and I am required to resolve any doubt in favor of the national security.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude that personal conduct security concerns are mitigated, but Applicant did not mitigate the sexual behavior 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 E:	For Applicant
Subparagraphs 1.a-1.g:	For Applicant
Paragraph 2, Guideline D:	Against Applicant
Subparagraph 2.a:	Against Applicant

Conclusion

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