



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



In the matter of:)	
)	
)	ISCR Case No. 19-02739
)	
Applicant for Security Clearance)	

Appearances

For Government: John Lynch, Esq., Department Counsel
 Alison O’Connell, Esq., Department Counsel
 For Applicant: James R. Klimaski, Esq.

02/17/2021

Decision

CERVI, Gregg A., Administrative Judge

This case involves security concerns raised under Guideline D (Sexual Behaviors) and Guideline J (Criminal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 15, 2017. On November 19, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines D and J. 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 revised adjudicative guidelines (AG) effective on June 8, 2017.

Applicant responded to the SOR on January 24, 2020, and requested a hearing before an administrative judge. The case was assigned to me on September 10, 2020. I

contacted Applicant on September 11, 2020, to determine his availability for a hearing. On September 11, 2020, Applicant's counsel entered his appearance. The Defense Office of Hearings and Appeals issued a notice of hearing on October 2, 2020, and the hearing was convened on October 20, 2020.

Government Exhibits (GE) 1 through 18 with an amended exhibit list were admitted into evidence without objection. Applicant Exhibits (AE) A and B were admitted into evidence without objection. Department Counsel's discovery letter was marked as HE 1 and appended to the record. Applicant and two witnesses testified at the hearing. The witnesses testified by telephone and each provided statements.

Findings of Fact

Applicant is a 53-year-old test engineer for a defense contractor, employed since 2010. Applicant received a bachelor's degree in 1989 from a U.S. military academy, a master's degree in 1996 from a military post-graduate school, and a professional degree in aerospace engineering in 1997 from a military test pilot school. He honorably served on active duty in the military from 1989 to 2020, when he retired. Applicant was a pilot in the military until he retired, and began civilian employment as a test pilot and engineer for a defense contractor. He was promoted to director, lead tester, and manager in 2016. Applicant also owns and manages a consulting business. He married in 1993 and has three children, ages 18 to 25. He currently has a secret security clearance. His security eligibility was previously suspended in 2006 and reinstated in 2009.

The SOR alleges under Guideline D (Sexual Behavior) that (SOR ¶ 1.a) on at least three occasion between August 2006 and September 2006, Applicant videotaped up the skirts of unsuspecting women without their consent; (SOR ¶ 1.b) in September 2006, Applicant was charged and found guilty of five counts of Unlawful Filming or Photography of Another; and (SOR ¶ 1.c) in June 2017, Applicant attempted to take video up the skirts of various women in a department store without consent. As a result, he was charged in February 2018 with filming a nude person without consent. Finally, the SOR cross-alleges allegations in SOR ¶¶ 1.b and 1.c, under Guideline J (Criminal Conduct).

In his Answer to the SOR, Applicant admitted SOR ¶ 1.a and 1.b. He denied SOR ¶ 1.c, filming women in 2017 at a department store, but admitted to being charged. He noted the charge was dismissed and that he is applying for an expungement of the record. He generally admitted SOR ¶ 2.a consistent with his admissions in SOR ¶ 1. He submitted background information about himself, a "life synopsis," and performance evaluations with his Answer.

2006 Episodes of Criminal Sexual Conduct

In September 2006, while on active duty, Applicant was arrested at an airport after a passenger notified police that Applicant was using a camcorder placed underneath women's dresses to record them (known as "up skirting") while they picked up bags at a baggage carousel. Applicant was traveling on official Government business. Applicant

was confronted by police at the scene, and he denied that he had taken pictures or filmed anyone or anything. Applicant also denied possessing any tapes or media memory cards for the camcorder.

During questioning by police, Applicant moved from his seat and a videotape fell out from his pocket underneath him. When confronted by a police supervisor, Applicant changed his story and confessed to filming women by sliding his bag underneath their skirt without their consent or knowledge. Applicant consented to a search of his bag, and a video camera and several tapes were found. The police viewed the recordings and confirmed that Applicant positioned the camera inside of his bag with the camera lens facing up, and recorded five women. Applicant admitted that one tape was from another airport where he conducted the same activity. His confiscated videos also showed evidence of taping inside of a mall and possibly a military department store.

Applicant was charged and found guilty at trial of five misdemeanor counts of unlawful videotaping. Applicant sought counseling and treatment during the pre-sentencing process, and his attorney requested sentencing be deferred pending completion of "mental evaluations and treatments." (GE 4; Incident Data Sheet Report pg. 10.) Applicant was sentenced on March 20, 2007, to confinement for two-years, suspended, with the charges dismissed pending successful completion of probation for two years and no further incidents. (GE 9.)

Applicant testified to filming six to seven women during about 40 minutes at the airport in which he was flying for Government business. Applicant admitted to filming women at another airport after returning from his father-in-law's funeral. He then admitted to "possibly" traveling to an electronics store where he filmed additional women. Applicant denied filming women at any other location, despite the evidence on the video recordings. Applicant hid the tapes from his spouse, and "struggled" to keep them from her. Applicant learned about up skirting from the internet, and investigators found 1,700 searches for "up skirting" on his personal computer. Applicant testified that he last watched up-skirting videos while on probation in 2007, and has not recorded additional videos since 2006.

In September 2006, Applicant's security clearance was suspended. In June 2007, Applicant attended an administrative Board of Inquiry to show cause as to why he should be retained in the military. After a hearing, he was retained on active duty and his security clearance was reinstated in 2009. In Applicant's eligibility determination letter, he was "cautioned that receipt of any derogatory information in the future, especially of a similar nature, will be cause for reconsideration of your eligibility for a security clearance and/or special access." (GE 8.)

In 2008, Applicant was directed to undergo a medical evaluation at a military behavioral healthcare center. He was evaluated by a staff psychiatrist. (GE 6.) Applicant attributed his behavior of filming up women's skirts in September 2006 as a response to stress related to difficult work, not being promoted, and difficulties with a child with physical disabilities. On the day he was caught, Applicant worried about being late for a flight so he rescheduled for a later flight. As he sat at the airport "waiting and working," he

was overcome with worry and had an impulse to film under women's skirts for an adrenaline rush. He filmed six to seven women for 40 minutes, but felt worse afterwards.

Applicant reported to the psychiatrist three incidents where he videotaped women without their consent. He described the "most recent incident" as occurring in September 2006. He noted that prior to the September incident, he had "videotaped the private areas of unknowing women in public." He described that in August 2006, he was feeling guilty, sad, and frustrated about having to return early from the funeral of his father-in-law due to work requirements, so he videotaped unsuspecting women at the airport for an "immediate rush." That day, he also went to an electronics store and proceeded to videotape underneath women's skirts at the store.

Applicant relayed to the psychiatrist that when he was approached by police at the airport in September 2006, he was evasive in answering questions, but "was certain that he did not deny having videotaped these women." (GE 6.) After the "last" incident, Applicant reported seeing a psychologist once a week or on alternating weeks for one year, from 2006 to 2007. (GE 6.) Applicant participated in couples counseling, and was involved with his church. (GE 6.)

The psychiatrist concluded that Applicant had been "experiencing overwhelming stressors that contributed to his having videotaped unsuspecting women underneath their skirts." She credited him with "voluntarily" seeking help and "underwent treatment for one year under the care of a psychologist [which] suggests good insight into how inappropriate his actions had been and that to seek mental health counseling to address this behavior in order to prevent it showed good judgment." She noted that "three episodes occurred within the context of multiple stressors," and "this makes the episodes appear to be more circumscribed and as a response to stressors." Finally, she recommended "regular monitoring by a mental health specialist to ensure that he is addressing the stress in his life productively and is aware of controlling his impulses, especially under stress." The psychiatrist made no DSM diagnosis or prognosis.

2017 Episode of Criminal Sexual Conduct

In June 2017, Applicant's daughter was playing in a lacrosse tournament in another city. Applicant and his family drove to the tournament to watch. At about 5pm the same day of the tournament, a customer at a nearby department store reported that a man used his cell phone facing up in a red shopping basket to film up the skirt of women, without their knowledge or consent. The store security officer interviewed the witness and personally observed the man place a basket on the floor behind several women with the camera facing up. The man then moved away to look at merchandise and returned to the basket after the women left the spot. At one point, the man attempted to pull a women's skirt open to enhance the view.

The man was recorded by store security cameras and identified as he exited the store. A close up, color photo of the man was submitted to local police, and distributed via an online crime solvers network. The photo shows a man that clearly resembles

Applicant, wearing a shirt bearing the name of a small college located in another state from which Applicant's son attended. As a result of the photo being displayed on social media by the police, at least 100 friends, associates, and coworkers contacted Applicant and his spouse and identified him as the person in the picture.

Applicant "does not recall" being at the store, but agreed that the picture "looks like me." The police also interviewed Applicant's coworkers who clearly identified him as the man in the photo. Applicant testified that he owns a similar shirt as that in the photo, but his shirt adds the word "lacrosse" near the name of the school. He testified that he was at his daughter's lacrosse tournament that day, and although he owns a car similar to the one described in the police report, he "would have" driven a minivan with his family. He "does not believe" he ever left the tournament that day or visited the department store. Applicant's spouse, who was apparently with Applicant, did not testify or otherwise corroborate Applicant's account, however Applicant stated that his spouse believes the picture was of him, and that he owns a shirt as shown in the picture. Applicant was arrested and charged in February 2018 with misdemeanor filming a nonconsented nude person. The case was dismissed as *nolle prosequi* in April 2018. Applicant denied going to the store or committing the offense.

Applicant was interviewed by Government security investigators in 2014 and 2018. He admitted that the 2006 up-skirting videos were taken for an "adrenaline rush" and were not harmful to anyone. In his 2018 interview, Applicant denied the 2017 incident photo was of him, although it looked like him. He described the incident as a "coincidence." He stated that he was not attempting to victimize anyone in his 2006 up-skirting behavior. He claimed that it impacted his marriage, but had no impact on his home, school, work, friendships, physical or emotional health, reputation, judgment, reliability, finances, or ability to hold a security clearance. He said it was "an isolated incident," but he knowingly participated in the conduct. In testimony, he admitted his 2006 filming was harmful to his victims, but denied telling the investigator that it was an isolated incident. He denied that his 2006 behavior was a pattern, and said his involvement was "risk taking behavior" that he no longer engaged in.

Applicant testified that he attended personal talk-therapy and marriage counseling from 2006 to 2009. This is contrary to the one-year counseling he told the military psychiatrist in 2008. He claimed he left counseling in 2009 feeling "on top of his life." No counseling records from 2006 to 2009 were offered into evidence.

In August 2017, after being identified in the latest up-skirting incident, Applicant stated that he began talk therapy counseling and mediation to "get at the root cause" of behavior, and to better communicate with his wife and children. He also sought help with viewing pornography, and attends Sex Addicts Anonymous meetings from two to three times per week, or up to five times per week on occasions, to address all levels of inappropriate conduct. He is working on the 12-step program, and talks with his priest.

In his Answer to the SOR, Applicant described his current counselor as a "certified sex addiction therapist." He stated that he has been attending counseling since August

2017; initially for marriage counseling but it evolved into individual counseling. Applicant claims his counselor diagnosed him with “general anxiety disorder.” No medical or counseling record were offered into evidence by Applicant to support any diagnosis. Applicant stated he was referred to Sex Addicts Anonymous with the primary purpose to stop addictive sexual behavior through the 12-step program, and to help others recover from sexual addiction. He has attended two weekend retreats and has a sponsor. (Ans.)

Applicant’s counselor testified at the hearing. The counselor stated that he is a licensed clinical professional counselor (LCPC), with a master’s degree in pastoral counseling awarded in in 2013, and an undergraduate degree in biology. No Curriculum Vitae was provided showing the counselor’s education, expertise, or qualifications. He has worked as a counselor since 2013, and Applicant began seeing him in August 2017. He sees Applicant for “general counseling,” once per week. Applicant’s spouse was included in one session, despite efforts to invite her for marriage counseling. He testified that at times Applicant attends group counseling, and “may be” involved in group sex-addiction counseling. The counselor refused to disclose details of Applicant’s admissions or treatment, other than to say he is counseling him for “trauma anxiety for life issues and incidents.” The counselor believes that there is no need for continued therapy as Applicant has a deepening understanding of others, and more compassion and understanding with his spouse. He believes Applicant is truthful, has grown in maturity and ability to connect with others, and he has no concerns regarding Applicant’s future behavior and ability to protect sensitive information.

Applicant’s supervisor testified about Applicant’s work and exceptional performance ratings over the past two years. The witness was not aware of the security concerns alleged in the SOR, or the 2006 and 2017 up-skirting incidents. Applicant testified that the 2006 incidents resulted from depression, and that his up-skirting behavior was not about sex, rather it was about participating in “risky behavior.” He expressed remorse and shame for the behavior to which he admitted. He continues to attend counseling and is involved in church activities. However, he also continues to deny his presence at or participation in the 2017 up-skirting incident.

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.

National security eligibility 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 a person's stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

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. *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, e.g., ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015).

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, e.g., 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; see, AG ¶ 1(d).

Analysis

Guideline D: Sexual Behavior

The security 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.

The relevant disqualifying conditions under AG ¶ 13 include:

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

The evidence in the record supporting the SOR allegations, Applicant's admissions, and testimony are sufficient to establish the disqualifying conditions listed above.

The following mitigating conditions under AG ¶ 14 are potentially relevant:

- (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; and
- (e) the individual has successfully completed an appropriate program or 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.

I find the allegations in the SOR credible and consistent with the evidence. Applicant acknowledged the 2006 incidents of surreptitiously filming up the skirt of unsuspecting women in public, but he denies the 2017 incident despite the overwhelmingly persuasive evidence that is sufficient to trigger security eligibility concerns.

Despite being “caught on tape” in 2017, Applicant maintains that he was not at the store near the lacrosse tournament, in contravention to the photos and video of him at the store, wearing a shirt that he owns with the display of a college in another state from which his son attended, and positive identification of his photo from at least 100 friends, acquaintances, and coworkers. Applicant’s appears to be more concerned with the potential for criminal liability should he admit to activity for which he previously denied. He has shown a pattern of denial, including when confronted by police in 2006, before the evidence literally fell out of his pocket. He continued this pattern of sexual and criminal behavior, resulting in detection again in 2017, and true to form, continues to deny his culpability.

Applicant has shown a history and pattern of reprehensible sexual behavior, despite a criminal conviction and claimed counseling. His blatant, unabashed denials and intentional equivocation show a current and continuing failure to take responsibility for his actions, and a clever effort to deceive this tribunal and others as to his involvement. I am unpersuaded by Applicant’s testimony and his counselors’ evaluations. Applicant attempted to avoid responsibility for the 2006 incidents when questioned by police, and he has been less than forthcoming about his involvement in the 2017 incident. The evidence is persuasive and Applicant’s denials and claim of “coincidence” are absurd.

Despite self-proclaimed counseling, a criminal conviction, probation, a military board of inquiry, and suspension of his security clearance, Applicant continued his criminal behavior and sexual activities against unsuspecting victims. He claimed to have learned from his current counseling sessions, but he failed to offer sufficient evidence of his counselor’s qualifications, specific content of his counseling and treatment, counseling records, consistency of sessions, and any diagnoses or prognoses.

Despite calling his counselor to testify on his behalf at this hearing, Applicant did not ask for or grant the witness permission to fully and candidly disclose details of his counseling. Therefore, I am unable to draw reasonable conclusions whether Applicant has successfully completed an appropriate program or treatment in mitigation.

Additionally, although Applicant is apparently enrolled in counseling, I am not convinced he has been honest and forthcoming about his past behavior with his counselor. Finally, I am unable to conclude that Applicant demonstrated ongoing and consistent compliance with an appropriate treatment plan, or that he has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment. Clearly, given Applicant’s past sexual behavior, he has not shown that he followed any legitimate treatment plan and his behavior has not been controlled with treatment.

Applicant's behavior is recent and recurring. There is insufficient evidence to show that it can be controlled through counseling, or that it has been so controlled. His intentional and willful criminal conduct of a sexual nature continues to expose him to the possibility of coercion, exploitation, and duress. His actions cast doubt on his current reliability, trustworthiness, and judgment, and call into question his security eligibility worthiness. No mitigating condition applies.

Guideline J, Criminal Conduct

The Security concern under this guideline is set out in AG ¶ 30:

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 conditions that could raise a security concern and may be disqualifying in this case. The following are potentially applicable:

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

Applicant's admissions, testimony, and the documentary evidence in the record concerning his criminal conduct in 2006 and 2017, are sufficient to establish the disqualifying conditions above.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

- (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;
- (c) no reliable evidence to support that the individual committed the offense; 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.

Applicant has not provided sufficient evidence in mitigation of the criminal conduct concerns. Applicant was caught by the public in 2006, and he falsified his responses to police until evidence that he denied existed, fell from his pocket. The 2017 criminal conduct for which persuasive evidence exists of Applicant's culpability, is recent and remains a concern given Applicant's refusal to acknowledge even being present at the scene. I am incorporating the reasoning discussed above under Guideline D to the extent it applies to Guideline J.

There is insufficient evidence of successful rehabilitation despite completing probation from the 2006 incident. The evidence from the 2017 up skirting incident is persuasive and points to Applicant's culpability. Applicant's character evidence fails to mitigate his ongoing criminal conduct. No successful rehabilitation can occur while Applicant continues to deny his culpability in the face of convincing evidence. I am unpersuaded that similar criminal conduct will not recur. Despite Applicant's good employment record and involvement with his church, his continued criminal behavior and denials show a concerning pattern and clearly reflect poorly on his judgment, trustworthiness, and reliability. No mitigating condition fully applies.

Whole-Person Concept

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the 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).

I considered all of the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guidelines D and J, in my whole-person analysis. I also considered Applicant's military and civilian service, work evaluations, support from his supervisor and counselor, and his years of counseling. I have significant doubts about Applicant's continued access to classified information given his pattern and practice of reprehensible criminal behavior and efforts to avoid responsibility.

Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national security interest of the United States to grant or continue his eligibility for access to classified information.

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: Subparagraphs 1.a to 1.c:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline J: Subparagraph 2.a:	AGAINST APPLICANT Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest of the United States to grant or continue Applicant's eligibility for access to classified information. Applicant's security clearance is denied.

Gregg A. Cervi
Administrative Judge