



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



In the matter of:)
)
) ISCR Case No. 20-01452
)
Applicant for Security Clearance)

Appearances

For Government: Patricia Lynch-Epps, Esq. Department Counsel
For Applicant: *Pro Se*

02/09/2022

Decision

MURPHY, Braden M., Administrative Judge:

In July 2018, Applicant was charged with multiple counts of indecent exposure and public sexual indecency. He pleaded guilty to one count of each offense, received a suspended sentence and probation term, and was ordered to complete a psychological evaluation and treatment. Although he has completed the probation term and the court-ordered requirements, Applicant’s conduct, which occurred after he submitted his security clearance application, continues to cast doubt on his reliability, trustworthiness, and judgment. Applicant did not provide sufficient information to mitigate sexual conduct and criminal conduct security concerns. Applicant’s eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) in February 2018, in connection with his employment in the defense industry. On October 14, 2020, following a background investigation, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline D, sexual conduct; Guideline J, criminal conduct, and Guideline E, personal conduct. DOD issued

the SOR 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 Security Executive Agent Directive 4 (SEAD 4) *National Security Adjudicative Guidelines* (AG), which became effective on June 8, 2017.

Applicant submitted an undated answer to the SOR in which he requested a decision by an administrative judge from the Defense Office of Hearings and Appeals (DOHA) based on the administrative (written) record, in lieu of a hearing. On August 20, 2021, Department Counsel submitted the Government's File of Relevant Material (FORM), including documents identified as Items 1 through 9. The FORM was mailed to Applicant on August 26, 2021. He was afforded an opportunity to note objections and to submit material in refutation, extenuation, or mitigation, and was given 30 days from receipt of the FORM to do so. Applicant received the FORM on September 1, 2021. DOHA received his response on September 29, 2021. Applicant did not note any objections to the Government's evidence. Department Counsel did not object to admission of Applicant's FORM response.

The case was assigned to me on November 3, 2021. Government Items 1 and 2, the SOR, and the Answer are the pleadings in the case. Items 3 through 9 are admitted without objection, as is Applicant's FORM Response.

In the Government's FORM, Department Counsel withdrew the Guideline E allegation, which concerned Applicant's alleged failure to disclose his arrest to his employer, as required. (FORM at 3) Accordingly, SOR ¶ 3.a is withdrawn without objection.

Findings of Fact

In his Answer to the SOR, Applicant admitted SOR ¶ 1.a. He did not answer SOR ¶ 2.a, but since it is a cross-allegation of SOR ¶ 1.a, I consider it admitted. He "admitted" SOR ¶ 3.a, but with an explanation that I construe as a denial, and, in any event, SOR ¶ 3.a has been withdrawn. Applicant's admission and statements are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 31 years old. He has never married. He has a three-year-old son with his former fiancée. (Item 5 at 9) Applicant enlisted in the U.S Marine Corps after graduating from high school in 2008. He spent three years on active duty and was honorably discharged in September 2011 as a lance corporal (E-3). After a year of unemployment, he worked for five years in the health care industry (2012-2017). He has worked for his current employer, a large defense contractor, since January 2018. He works in a warehouse. He has never held a security clearance before. (Item 3)

On or about July 26, 2018, police were called to Applicant's home after a neighbor had reported seeing a fully naked male standing in the front yard of the home

actively masturbating while holding a cell phone. (Item 8 at 29) By the time police arrived, Applicant had moved to the backyard. He went inside when he noticed a police officer in his front yard. He did not answer the door right away, but instead took a shower. He eventually came to the door and was then taken into custody. (Item 4 at 7-8, Item 8)

Police reports reflect multiple calls to the home in June and July 2018 following reports of similar activity. (Item 8 at 29) According to police records, under questioning from police, Applicant admitted exposing himself and masturbating in his front yard about three times a week for the previous three months. (He denied that statement in his FORM Response). According to the police report, he admitted to engaging in similar conduct in the parking lot of a fitness club to which he belonged (leading to an earlier police report), the parking lot of a convenience store, and in a park. (Item 8 at 6)

As Applicant explained during his background interview, he was living with his fiancée at the time. She was pregnant, and they were not sexually active. These circumstances left Applicant sexually frustrated. She would not allow him to watch pornography in their home, so he would do so outside instead, on his cell phone; even, on occasion, such as on the day of his arrest, when she was not home. (Item 4 at 7)

Applicant was charged with four counts of indecent exposure to a person greater than 15 and four counts of public indecency. In October 2018, he pleaded guilty to one count of each offense and the remaining six counts were dismissed. He was given a 180-day jail term, with all but one day suspended (that day was time served), and sentenced to 12 months of supervised probation and six months of unsupervised probation. He was fined \$2,500 (suspended) and ordered to participate in a psychological evaluation. (Item 5 at 5-8; Item 6) (SOR ¶¶ 1.a, 2.a)

Applicant had a one-hour psychiatric evaluation with a DNP (doctor of nursing practice) in February 2019. He was diagnosed with “adjustment disorders with depressed mood.” (Item 5 at 9-13) He did not meet the criteria for sex addiction, but was found to be “at risk.” (Item 5 at 12) Documentation from the evaluation reflects that Applicant reported that he sought counseling from the VA after his arrest, and that the VA therapist told him he no longer needed sessions, but no details were provided and the VA counseling is undocumented. (Item 5 at 9) He successfully completed the requirements of his probation and it was terminated early, in October 2019. (Item 5 at 14)

Applicant’s conduct led to the end of his relationship with his fiancée. He moved in with his parents. His parents, his sister, and some close friends are aware of his actions. (Item 4 at 10)

In his FORM response, Applicant wrote that “this entire situation has been embarrassing and emotionally painful.” This is his only arrest. As noted above, he did not recall stating to police he had “exposed himself three times a week for the last three months prior to the arrest.” He said it was never brought to his attention that he was at

risk for sex addiction or needed more treatment. He did not challenge other details about his conduct as noted in the FORM materials. Applicant indicated that he had set up an October 2021 appointment with a VA counselor. He said he needs his job to care for his young son. (FORM response).

Applicant provided no documentation with either his Answer or his FORM response of any reference letters, work evaluations, or other materials for consideration under the whole-person concept or in mitigation.

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court has noted, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” *Department of the Navy v. Egan*, 484 U.S. 518, 531 (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 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, these guidelines are applied 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(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 not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must 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 applicant or proven by Department Counsel and 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.

Analysis

Guideline D: Sexual Behavior

AG ¶ 12 expresses the security concern for sexual conduct:

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;
- (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 was arrested in July 2018 on multiple counts of indecent exposure and public indecency after he was observed fully naked outside his home, masturbating while watching pornography on his cell phone. The police report reflects that Applicant admitted engaging in this activity in other public locations around that time. AG ¶¶ 13(a), 13(c) and 13(d) apply.

AG ¶ 14 sets forth the potentially applicable mitigating conditions for sexual conduct:

- (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.

In June and July 2018, Applicant was observed on multiple occasions fully naked and masturbating in public, on some occasions while watching pornography on his cell phone. He did so during a period of sexual frustration while his fiancée was pregnant. His fiancée did not approve of his actions. He chose to do so outside, in public, both in the front yard of his own property, and in other public areas. AG ¶ 14(d) does not apply. AG ¶ 14(a) is not applicable, since Applicant's actions occurred during adulthood.

Applicant's actions put him in position where he might have been subject to coercion, exploitation, or duress. His actions ended his relationship with his fiancée, and his family and close friends are aware of his conduct. His subsequent arrest is also a matter of public record. Thus, AG ¶ 14(c) has some application.

AG ¶ 14(e) has some application. Applicant participated in a court-ordered psychological evaluation, and, while he was found to be "at risk," he was not found to meet the criteria for sex addiction, so no treatment was deemed necessary. He also pursued counseling with the VA, and was told he did not need further counseling.

Applicant engaged in this activity during a period of sexual frustration in his relationship with his pregnant fiancée. Perhaps not surprisingly, that relationship ended because of his actions. His actions were limited to the summer of 2018, more than three years ago. Nevertheless, Applicant's conduct is too recent to be considered fully mitigated. He engaged in this conduct while his current security clearance application was pending adjudication, a time when an individual might be expected to be particularly mindful of the importance of exercising good judgment, particularly in public. He showed extremely poor judgment in engaging in this activity in public, on numerous

occasions, not only on his own property (in the front yard, while fully naked) but in other public areas as well. He did not provide any evidence beyond his own statements to bolster his case in mitigation. He did not provide sufficient evidence that his actions no longer cast doubt on his current reliability, trustworthiness, and judgment. AG ¶ 14(b) does not apply.

Guideline J: Criminal Conduct:

AG ¶ 30 expresses the security concern for 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 conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions 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 July 2018 arrest, for multiple counts of indecent exposure and public indecency, satisfies AG ¶¶ 31(a) and 31(b).

AG ¶ 32 sets forth the potentially applicable mitigating conditions:

(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.

AG ¶ 32(d) has some application, as Applicant successfully completed probation and did so a year early. Yet there is little record evidence of his job training, good employment record, or constructive employment which might have been considered here, or under the whole-person concept, below. Yet Applicant's criminal conduct is not

mitigated under Guideline J for largely the same reasons that his intertwined sexual conduct is not mitigated under Guideline D, above. Given the pattern of extremely poor judgment shown, his actions are simply too recent. AG ¶ 32(a) therefore does not 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines D and J in my whole-person analysis. As noted, Applicant provided no evidence beyond his own statements. Since he elected a decision on the written record, in lieu of a hearing, I did not have the opportunity to ask him questions about his conduct and his efforts towards rehabilitation. I also had no opportunity to observe Applicant's demeanor, and thus, to assess his credibility beyond the documentary record. The simple fact in this case is that Applicant engaged in a pattern of extremely poor judgment only months after submitting an application for a security clearance. His actions are too recent to warrant a determination that they are fully mitigated. Applicant's acts of extremely poor judgment, in public, cannot be mitigated on this record. He has not shown that it is clearly consistent with the national interest to grant him eligibility for access to classified information. Overall, the record evidence leaves me with questions and doubts as to Applicant's 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3: Guideline E:	WITHDRAWN
Subparagraph 3.a:	Withdrawn

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the interests of national security to grant Applicant access to classified information. Eligibility for access to classified information is denied.

Braden M. Murphy
Administrative Judge