



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



In the matter of:)
)
) ISCR Case No. 20-03235
)
Applicant for Security Clearance)

Appearances

For Government: Eric C. Price, Esq., Department Counsel
For Applicant: *Pro se*

02/22/2022

Decision

Curry, Marc E., Administrative Judge:

Applicant mitigated the sexual behavior security concern, but failed to mitigate the personal conduct security concern.

Statement of the Case

On March 8, 2021, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline D, sexual behavior, and Guideline E, personal conduct, and 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 March 12, 2021, Applicant answered the SOR, admitting the allegations. He requested a hearing, and the case was assigned to me on October 5, 2021. On October 8, 2021, the Defense Office of Hearings and Appeals issued a notice of hearing,

scheduling Applicant's case for October 18, 2021. The hearing was held as scheduled. I received five Government exhibits (GE 1 – GE 5), 12 Applicant exhibits (AE 1 – AE 12), 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 October 26, 2021.

Findings of Fact

Applicant is a 41-year-old married man with two teenage children and one teenage stepchild. Two previous marriages ended in divorce. (GE 1 at 22-23) He has been married to his current wife for nearly two years. (AE C) Applicant is a high school graduate and has taken some college courses. (GE 1 at 12) He is a veteran of the U.S. Marine Corps, serving from 2003 to 2017. (GE F at 1) He served in two overseas combat theaters. (AE E at 1) He received a discharge under other than honorable conditions. (GE F at 1)

Currently, Applicant works for a defense contractor as a technician who builds simulators. (AE A at 2; Tr. 17) His job duties include complex panel assembly, panel wiring, building complex cables, and assembling flight training device equipment. (AE L) These duties are similar to the duties that Applicant performed when he was in the Marines. (GE L at 2) Applicant is highly respected on the job. According to his most recent performance evaluation in March 2021, his quality of work and initiative are excellent. (AE K at 3)

From 2008 to 2017, Applicant engaged in compulsive sexual behavior. This behavior began shortly after he returned from his second overseas combat deployment. He would seek out women and couples to have sexual intercourse on a weekly basis. (GE 3 at 15) He also engaged in multiple extramarital affairs. (Answer at 1) Per his counselor, some of this behavior was of a public nature. (AE A at 6)

In 2011, Applicant sought help from a psychiatrist who diagnosed him as a sex addict. (Answer at 1; GE 3 at 15; AE 3 at 4) He consulted with the psychiatrist for three to four months. (AE A at 3) Applicant began attending therapy, consistent with his psychiatrist's recommendation. (GE 3 at 15; Tr. 32) He attended therapy for eight months on a weekly basis. (EX A at 3) The psychiatrist also recommended that Applicant tell his then wife about his sex addiction. (GE 3 at 15) Applicant followed his psychiatrist's advice, leading to her decision to seek a divorce, (GE 3 at 15)

Applicant began dating his second wife after his divorce. He subsequently stopped engaging in sex with random partners. (GE 3 at 15) Sometime after dating his second wife, Applicant stopped seeing his therapist. Consequently, he began indulging in sex with random partners again.

In August 2017, Applicant was tried at a summary court martial for violation of Uniform Code of Military Justice, Article 92, violation of a lawful general order and dereliction of duty, and Article 93, maltreatment of a subordinate, after being involved in a sexual encounter with two subordinates approximately nine months earlier. (Answer at

1; GE 3 at 16) He was convicted, demoted, given half pay for three months, confined to the barracks for four to six weeks, placed on restricted duty, and discharged. (Answer at 1; GE 4; Tr. 45)

Applicant has not engaged in any sexually addictive behavior since December 2017. In early 2018, he met his current wife. They married in 2019. She is aware of his past behavior, and characterizes him as “a good, kind, caring man who works hard day in and day out to support [their] family . . .” (GE D at 1) She is aware of his past conduct. (AE D at 1)

In October 2021, Applicant consulted with a certified addictions counselor who is professionally familiar with the adjudicative guidelines in the Directive, having evaluated hundreds of security clearance holders and applicants over the years. (AE A, AE B) During the consultation, Applicant elaborated on the roots of his sexual addiction, attributing it to what he considered, in retrospect, to have been caused by undiagnosed post-traumatic stress disorder, which worsened at the conclusion of his deployment when he was transferred to recruitment duty. (AE A at 2) The stress of striving to meet recruitment quotas led him to act out in a sexual manner by going to strip clubs, picking up women at bars, and engaging in sexual encounters of a public nature. (AE A at 7) The more stressed he became, the more he engaged in high-risk sexual behavior.

According to the therapist, Applicant’s behavior “was a direct result of trying to replicate the adrenaline responses during deployment, or offset the anxiety he experienced as a recruiter.” (AE A at 3) She characterized him as forthright, remorseful, and fully cooperative. (AE A at 2, 7) The standardized testing the therapist conducted revealed that Applicant was in prolonged recovery from sexually acting out after his combat deployment and his stint as a recruiter. (AE A at 7) The therapist ultimately concluded that Applicant had no disorder and that he “is not at risk of relapse or return to his previous behavior.” (AE A at 7)

On cross-examination, Department Counsel asked Applicant to provide an approximate number of extramarital sexual encounters that he had between 2008 and 2017, (Tr. 34) He said that he did not recall. (Tr. 35) After he continued to be evasive in this manner, I advised him of the importance of transparency to the security clearance process, and asked him to provide a “ball park estimate.” (Tr. 35) Department counsel then said the following:

I think the Judge is asking for a ball park estimate. Do you have a ball park estimate of the number of extramarital sexual encounters you have had?
(Tr. 35)

In response, Applicant replied, “I’m not going to presume a number that’s not factual; that’s not going to happen.” (Tr. 35)

Department Counsel then asked Applicant whether he had ever engaged in sexual behavior of a public nature. He replied, “I don’t recall.” (Tr. 38) When asked if his

counselor's report, which referenced public sexual behavior, was inaccurate, Applicant responded, "I didn't write it." (Tr. 38) I then asked, "would [the counselor] be inaccurate if she was to have said that you engaged in sexual encounters of a public nature?" (Tr. 39) Applicant responded, "I don't know." (Tr. 39)

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 D: Sexual Behavior

The security concerns about sexual behavior are set forth in AG ¶ 18:

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 . . . may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information.

From 2008 to 2017, Applicant engaged in a pattern of compulsive, high risk sexual behavior. In 2011, he was diagnosed with a sexual addiction. Applicant's problem reached its nadir when he was discharged under other than honorable conditions after engaging in a sexual encounter with two subordinates. Under these circumstances, AG ¶ 13(a), "sexual behavior of a criminal nature . . .," AG ¶ 13(c), "sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;" and AG ¶ 13(d), "sexual behavior . . . that reflects a lack of discretion or judgment."

In October 2021, Applicant consulted with a counselor. After speaking with him and analyzing the results of a standardized test, she concluded that he was in prolonged recovery, and that his sexual misconduct was unlikely to recur. Under these circumstances, AG ¶ 14(b), "the sexual behavior happened so long ago . . ., that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment," and AG ¶ 14(d), "the individual . . . has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable . . ." apply.

Applicant's current wife is aware of his sexual addiction. Therefore, AG ¶ 14(c), "the behavior no longer serves as a basis for coercion, exploitation, or duress," also applies. Under these circumstances, Applicant has mitigated the sexual behavior security concern.

¹ The factors under AG ¶ 2(a) 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.

Guideline E, Personal Conduct

Under this guideline, candor and cooperation are critical components of the investigative process. Therefore, any failure to cooperate or provide truthful and candid answers during national security investigative security eligibility determinations, security clearance actions, or cancellation of further processing for national security eligibility is “of special interest.” (AG ¶ 15)

Applicant provided evasive testimony, which I interpreted as an unwillingness to cooperate with the adjudicative process. Despite repeated admonitions from the bench, he continued to be uncooperative and evasive. Applicant’s failure to testify candidly, and his failure to cooperate with the Court’s instructions during cross-examination raise questions about his judgment and trustworthiness that go to the heart of the investigative process, as set forth in AG ¶ 15, above. These unresolved issues render Applicant an unacceptable security risk, notwithstanding his mitigation of the sexual behavior concerns. I conclude Guideline E applies without mitigation and it is not clearly consistent with the national security to grant or continue Applicant’s access to classified information.

Whole-Person Concept

I considered the whole-person factors in my analysis of the guidelines, particularly Guideline E, 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 D:	FOR APPLICANT
Subparagraphs 1.a – 1.d:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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