



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



In the matter of:)	
)	
)	ISCR Case No. 21-02116
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Kent, Esq., Department Counsel
For Applicant: *Pro se*

03/14/2023

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant refuted security concerns under Guideline M (use of information technology), but he did not mitigate the security concerns under Guideline E (personal conduct).

Statement of the Case

On December 15, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E and M. Applicant responded to the SOR on March 13, 2022, and requested a decision based on the written record in lieu of a hearing. On April 26, 2022, Department Counsel requested a hearing before an administrative judge. The case was assigned to me on December 8, 2022.

The hearing was convened as scheduled on January 19, 2023. Government Exhibits (GE) 1 through 9 and 11 through 19 were admitted in evidence without objection. The objection to GE 10 was partially sustained. I am not considering it for the truth of any controverted issue. See Directive ¶ E3.1.22. Applicant testified and

submitted Applicant Exhibits (AE) A through H and J through X, which were admitted in evidence without objection. There were no AE I or Y, and AE Z is a duplicate of AE Q.

Findings of Fact

Applicant is a 56-year-old employee of a defense contractor. He spent two years at a U.S. military service academy until he was honorably discharged for medical reasons. He has a bachelor's degree earned in 1989. He is married with four children. (Transcript (Tr.) at 44-45; GE 1, 2; AE Q)

Applicant became the chief executive officer (CEO) of a company (hereinafter "Company") in 2016. Terms of his employment included that he could be terminated for cause for a number of reasons, including "commission of any other act that is, in the Board's good faith judgment, reasonably likely to bring you, the Company or its affiliates into disgrace or public disrepute or materially harm its or their goodwill or business reputation or that of it's or their employees, officers, directors or customers," and "failure to obtain or maintain all security clearances required for the performance of your duties." He held security clearances in the past, but it is unclear if he had one at the Company before he was granted a clearance in 2017. (Tr. at 29, 45-46; GE 4)

Applicant is a longtime photographer. He sometimes used a pseudonym for his photography and for social media accounts. He did photo shoots of women who were scantily clad or in their underwear. He stated that he did not do nude photography, the photos were essentially what could be found on the cover of a legitimate magazine, and the women wore more clothes than what would be found on the average beach. He stated that his wife was aware that he did the shoots and even helped arrange some of them. (Tr. at 27-29, 52-54, 65-67; AE A, C, D, R)

In about 2015, Applicant met a woman (Ms. A) online. They interacted online and met in person twice in 2017, once in the United States while he was on a business trip and once in the United Kingdom (UK). He was in the UK with his family. He stayed in the UK for work after his family left, and he met Ms. A. He agreed to a photography session with her that was supposed to include a male model, but the male model cancelled. He took about 30 to 40 shots. He stated that she took off her top at one point, but she was covered by a sheet or blanket. He denied that it was an "erotic photo shoot." He uploaded the photos to a drop box account and shared the link with Ms. A. He stated that a few weeks later, per her request, he deleted all images he had of her. (Tr. at 28, 32, 47-52, 55-58; GE 3, 14; AE A, K)

Applicant admitted that he had an online "affair" with Ms. A that included "sexting," but he denied that there was ever any physical contact. He stated that he broke off the relationship in 2017 after a family member passed away, and he became recommitted to his family. He told his wife about the affair, and he thought that was the end of it. (Tr. at 31-32, 41-42, 50, 54, 67-68; Applicant's response to SOR; GE 3; AE A, O, W)

Applicant received a demand letter from Ms. A's attorney in October 2017. It included a proposed settlement agreement in which Applicant would pay a set amount if any of her images appear online. Applicant's wife described Ms. A's actions as threatening, and that they "felt bullied and it was bordering on blackmail." He retained an attorney who responded to the demand letter. He refused the settlement agreement. The attorney wrote that against his advice, Applicant was "willing to pay a *de minimis* amount to Ms. [A] in exchange for her promise never to contact him again and to likewise delete any of his photos in her possession." Applicant stated that they did not hear back from Ms. A, and he thought the matter was over. (Tr. at 54-60; GE 9; AE O)

Ms. A's attorney contacted Applicant's employer in 2018. The attorney stated that Applicant pursued a relationship with Ms. A for several years before their relationship that culminated in sex during a business trip to the United Kingdom. The attorney indicated that Applicant took a naked picture and other intimate pictures of Ms. A without her consent. The attorney indicated that Applicant used the company's electronic devices to communicate with Ms. A, and that he told her that he was doing so at home, at work, and while traveling for business. The attorney stated that Ms. A was not seeking monetary compensation, but that she wanted "to make sure [Applicant] has none of her images and that none of her images are saved elsewhere (for example on [Company's] computers or phone)."¹ (GE 10)

The attorney also referenced that Applicant posed as a photographer to convince young women to undress for him, and that he distributed the materials without the individuals' consent. The attorney indicated that Applicant told Ms. A that underage women had lied to him about their age. (GE 10)

The Company retained a professional to conduct a forensic examination of Applicant's work phone and laptop. Numerous adult and pornographic websites were apparently accessed through the phone. Nothing of significance was accessed through the laptop. A picture of a clothed man (Applicant) taking a picture through a mirror of himself and a woman in her underwear (not Ms. A and not Applicant's wife) were found through the phone. Applicant testified that the photo was taken in 2014, and his wife was aware that he did the shoot, and his wife may have helped with the styling. (Tr. at 52-54; GE 11, 12, 15)

Applicant asserted that at the Company's request, when he first started at the Company, his personal phone and account were synched to his work phone, which made everything he did on his personal devices available through his work phone. Without getting too much into the technical realm, that statement is accepted. He stated that he never used the work phone to view anything inappropriate, and that all of the searches were conducted on his personal phone and may have been done by his son. (Tr. at 29-31, 63-65; Applicant's response to SOR; GE 3; AE A, F-H, S)

¹ As indicated in the Statement of the Case, I am not considering any matter in the letter for the truth of any controverted issue. See Directive ¶ E3.1.22.

Applicant was advised by the Company in late October 2018 that the Company received a letter from Ms. A's attorney alleging that he had an intimate sexual relationship with Ms. A. Applicant denied the allegation. He stated that photography was a hobby, but not erotic photography or photography of a sexual nature, rather, he took pictures of musical bands and other non-sexual photography. He indicated that he first met Ms. A in a hotel bar during a business trip in May 2017. She approached him because she noticed his camera. They engaged in conversation, kept in virtual contact, and agreed to meet in the United Kingdom when they both separately were going to be there. While there, he took about 30 photos of her, which did not involve nudity, but she did remove her top. They had lunch afterwards. He stated that he had engaged in no other behavior of a similar nature. (Tr. at 33, 60-61; GE 13, 14)

The Company reduced Applicant's verbal statement to writing. The Company indicated that the allegations potentially implicated the Company and Applicant's security clearance and requested a sworn affidavit by early November 2018. Applicant provided an affidavit in which he wrote:

Since 1985, photography is a hobby of mine, but not erotic photography or photography of a sexual nature, rather, I take photos of family, friends, musical bands and other non-sexual photography.

* * *

I misspoke during our conversation in [city]. In the moment, I was shocked, rattled, and embarrassed to find myself being specifically questioned about whether I had sex with a woman in a hotel room by a member of the Board. I had not met [Ms. A] before the meeting at the [hotel]. However, our occasional virtual relationship extended back before I joined [Company]. She knew I was in [city] and knew to identify me at the hotel bar because I had my camera with me.

* * *

I have engaged in no other behavior of a similar nature. (GE 14)

Applicant stated in the affidavit that many of the photos found on the phone were taken by his son. (GE 14)

The Board of Directors convened and determined that there was a basis to terminate Applicant's employment "for cause" due to lack of truthfulness during the investigative process and because his behavior could jeopardize his ability to maintain a security clearance. A termination letter was prepared, which stated that the conduct that formed the basis of the termination included:

- Engaging in the creation of erotic photography and related activities (together, the "Activities");

- making false statements to the Company during the course of a Company investigation concerning the extent and nature of and other details concerning the Activities;
- submission to the Company of a sworn affidavit containing false statements concerning the Activities; and
- use of Company resources, including a Company-issued iPhone, in connection with the Activities, in violation of Company policy. (GE 17)

On November 26, 2018, the Board met with Applicant and showed him the additional information from the forensic search of the phone, at which time he admitted to the behavior and resigned. The termination letter was never issued to Applicant because he resigned. (Tr. at 36-40; Applicant's response to SOR; GE 18, 19; AE A, B, E, G, L, T, V, X)

Applicant stated that he was shocked, dismayed, embarrassed, and angry when he was first confronted by the Company, and "in the moment, [he] told them half-truths." He stated that he "didn't tell them all that they wanted to know, [he] only told them parts of what they, [he] would argue deserved to know." Applicant asserted at his hearing that he did not believe his resignation was because of "misconduct." He felt it was because he was "not forthcoming" to the Board. He stated that he believes that if he was forthcoming, he could have stayed with the Company in spite of the other issues. (Tr. at 33-35, 61, 69-71; Applicant's response to SOR; GE 3; AE A)

Applicant did not intend to stay with the Company even if issues with Ms. A and his truthfulness never came up. His family remained in another state when he relocated to take the CEO position. He also had another business opportunity. (Tr. at 29, 32-33; AE A, E, O, P, Q, T, V)

Applicant submitted a Questionnaire for National Security Positions (SF 86) in January 2021. Under Section 13A – Employment Activities, he reported the job with the Company. He answered "No" to the following question:

For this employment have any of the following happened to you in the last seven (7) years?

- Fired
- Quit after being told you would be fired
- Left by mutual agreement following charges or allegations of misconduct
- Left by mutual agreement following notice of unsatisfactory performance

He wrote as the reason for leaving the job:

My family didn't relocate to [City A in state where job was located] and stayed in [City B in state where his family lived] when I took the job with [Company]. Nearly three years of commuting every week from [City B] was negatively impacting my family life, especially for my wife and two high school-age daughters. I had an extramarital affair during the first year with [Company] which I ended in mid-2017. My wife is aware of this affair, but this created significant marital distress. With my 2nd child enlisting in [U.S. military], my 3rd child heading into her senior year of high school, and my 4th child becoming a sophomore in HS, in mid-2018, I began seeking job opportunities in [City B]. In early November 2018, I had an agreement in place to buy a privately-held company called [REDACTED] and left [Company] in December. (GE 1)

There is nothing in the above paragraph that is clearly false. The problem is what was left out. Applicant was not fired, but clearly he either "Quit after being told you would be fired" or "Left by mutual agreement following charges or allegations of misconduct." The answer to that question should have been "Yes." (Tr. at 73-74; Applicant's response to SOR; GE 1)

Applicant submitted another SF 86 in March 2021. Most of the SF 86 was identical to the January 2021 SF 86, including the information about his employment with the Company, but there were some minor changes, including his weight and information about his relatives.² (GE 2)

Applicant was interviewed for his background investigation in May 2021. He denied that he was terminated from the Company, which is correct since he resigned from the Company. He was then confronted with the inaccurate information that he was terminated. His explanation about Ms. A and his resignation from the Company is consistent with his testimony at his hearing. (GE 3)

Applicant submitted a third SF 86 in October 2021. He answered the Section 13A question appropriately, that he "Left by mutual agreement following charges or allegations of misconduct." He provided details of his resignation from the Company and his involvement with Ms. A, but he did not add that he was "not forthcoming" to the Board of Directors. (Tr. at 39-40; AE Q)

Applicant stated that he has learned from the experience, and that in the future he will overreport his answers on SF 86s. He and his wife have received therapy, and their marriage is strong. (Tr. at 43, 68, 80; Applicant's response to SOR; AE A, O)

² The SOR did not allege that Applicant falsified this SF 86. Any matter that was not alleged in the SOR will not be used for disqualification purposes. It may be used to assess Applicant's credibility, in the application of mitigating conditions, and in the whole-person analysis.

Applicant submitted documents and letters attesting to his excellent job performance and strong moral character. He is praised for his responsibility, leadership, trustworthiness, and integrity. (AE B, E, N, O)

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).

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.

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

(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;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(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
- (4) evidence of significant misuse of Government or other employer's time or resources; 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.

SOR ¶ 1.a

The information alleged in SOR ¶ 1.a comes directly from the termination letter that was never issued. The conduct in the letter can still be addressed even if the letter was never issued. SOR ¶ 1.a alleges:

You were terminated from your employment at [Company] in about November 2018, for the following misconduct: Engaging in the creation of erotic photography and related activities (together, the "Activities") in violation of company policy; making false statements to company during the course of a company investigation concerning extent and nature of and other details concerning Activities; submission of a false sworn affidavit to company concerning the Activities; and misuse of company re[s]ources, including a company-issued iPhone, in connection with the Activities.

Termination from Employment

This part of the allegation does not raise any disqualifying conditions for two reasons. Applicant was not terminated, and it does not allege conduct by Applicant; it alleges a result of his conduct.

Creation of Erotic Photography and Related "Activities"

The Company may have been concerned with more than Applicant's activities with Ms. A. I am limiting the discussion to her. Applicant admitted that he had an online "affair" with Ms. A that included "sexting," but he denied that there was ever any

physical contact. The photos he took resulted in actions against him and her contacting the Company. Applicant's wife described Ms. A's actions as threatening, and that they "felt bullied and it was bordering on blackmail." His conduct with Ms. A reflects questionable judgment, and it created vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(c) and 16(e) are applicable.

False Statements to Company

Applicant lied to his employer about his involvement with Ms. A. He did so verbally and in a sworn affidavit. His conduct with Ms. A opened the Company up to potential litigation, and it was relevant information for his security clearance. AG ¶¶ 16(b) and 16(e) are established.

Misuse of Company Resources

There were indicators that numerous adult and pornographic websites were apparently accessed through Applicant's work phone, which would have been against company policy. However, the actions could have been done on Applicant's personal devices and then without his knowledge synched over to his work phone. That part of the allegation is not established.

SOR ¶ 1.b

SOR ¶ 1.b alleges Applicant intentionally falsified Section 13A of his January 2021 SF 86 when he answered "No" to the question that asked if he had been fired; quit after being told he would be fired; left by mutual agreement following charges or allegations of misconduct; or left by mutual agreement following notice of unsatisfactory performance, and therefore failed to disclose that he was terminated by the Company. Applicant was not terminated by the Company, but he did leave by mutual agreement following charges or allegations of misconduct. I find that he intentionally provided false information in his answer to that question, which he compounded with a misleading explanation. AG ¶ 16(a) is applicable.

SOR ¶ 1.c

SOR ¶ 1.c alleges Applicant intentionally provided false information during his May 2021 background interview when he stated that he voluntarily resigned from the Company, and therefore failed to disclose that he was terminated by the Company. As indicated above, he was not terminated by the Company. AG ¶ 16(b) is not applicable. This allegation is not established, and it is concluded for Applicant.

AG ¶ 17 provides conditions that could mitigate security concerns. The following 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 lied on multiple occasions to his wife, his employer, and during his background investigation. I have no confidence that he was completely honest with me. Applicant's conduct casts doubt on his current reliability, trustworthiness, and good judgment. Personal conduct security concerns are not mitigated.

Guideline M, Use of Information Technology

The security concern for use of information technology is set out in AG ¶ 39:

Failure to comply with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology includes any computer-based, mobile, or wireless device used to create, store, access, process, manipulate, protect, or move information. This includes any component, whether integrated into a larger system or not, such as hardware, software, or firmware, used to enable or facilitate these operations.

AG ¶ 40 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(e) unauthorized use of any information technology system.

As discussed under personal conduct, the numerous adult and pornographic websites visited could have been done on Applicant's personal devices and then without his knowledge synched over to his work phone. There are no applicable disqualifying conditions. SOR ¶ 2.a is concluded for Applicant.

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 E and M in my whole-person analysis. I also considered Applicant's favorable character evidence.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant refuted use of information technology security concerns, but he did not mitigate the personal conduct 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:	Against Applicant
Subparagraphs 1.a-1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline M:	For Applicant
Subparagraph 2.a:	For 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