



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



In the matter of:)	
)	
)	ISCR Case No. 22-00655
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

05/23/2023

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the personal conduct and psychological conditions security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On June 10, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct) and I (psychological conditions). Applicant responded to the SOR on June 30, 2022, and requested a decision based on the written record in lieu of a hearing. On November 16, 2022, he changed his request to a hearing before an administrative judge. The case was assigned to me on January 8, 2023.

The hearing was convened as scheduled on March 22, 2023. Government Exhibits (GE) 1 through 8 were admitted in evidence without objection. Applicant testified and submitted Applicant’s Exhibits (AE) A and B, which were admitted without objection. Without objection, I have taken administrative notice of certain provisions of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). I have not attached copies to the record as the source material is readily available.

Findings of Fact

Applicant is a 49-year-old employee of a defense contractor. He has worked for his current employer since about July 2019. He earned a bachelor's degree in 2016. He married in 1995 and divorced in 2016. He and his ex-wife reconciled about a year later and have lived together since, but they have not remarried. They have four children, including one that was born after they reconciled. (Transcript (Tr.) at 17-19, 33-35; Applicant's response to SOR: GE 1, 2)

Applicant indicated that he was battling untreated depression for about ten years before 2016. He started receiving counseling in about August 2016. His marriage was extremely troubled at the time. He and his then wife lived in the same house but were essentially separated and were dating other people. On September 3, 2016, he came home and had sexual intercourse with his then wife without her consent. (Tr. at 16, 20-23, 27-28; GE 2-5) Applicant testified about the incident at his hearing:

DEPARTMENT COUNSEL: Do you recall it happening?

APPLICANT: I did. I do. All right. At the time, my recollection of it is that, like she said, I got home late. I was sleeping on the couch at the time, and she came out to the living room where I was. She had -- all she had on was her underwear and a V-Neck T-shirt, a V-Neck shirt. And she had just gotten out of the shower, and she sat down right next to me. And I realize that, yes if she was saying no -- that I should have stopped but I didn't. But, at that time, I believe I felt like she was giving me an invitation because of the way she was dressed.

DEPARTMENT COUNSEL: All right. I don't think I'm in a position where I need to Mirandize you. But is it possible that she may have said no?

APPLICANT: Yes. I believe she did, yes. Yes. (Tr. at 28-29)

On September 4, 2016, Applicant's wife at the time went to a hotel. On September 5, 2016, she went to their house to pack items to take to her mother's house, Applicant helped her by carrying some items out to her car. She reported that he suddenly got angry and broke a dresser. He stated that he accidentally dropped the dresser. (Tr. at 27-28; GE 2-5)

On September 6, 2016, Applicant was "in the middle of a mental break," and he was brought to a mental health clinic by a woman that he was dating and his then wife. His conduct and words were bizarre. He told the APN (advanced practice nurse) that he hated his then wife and thought about killing her. He thought about shooting her in the face or stabbing her. The assessments were psychosis, rule out fixed delusions; major depression, recurrent; and other sexual dysfunction not due to a substance or known psychological condition. Applicant was transported to a hospital, and his then wife was informed of his threats against her and issued a strong recommendation that she seek a protection order for herself and her children. She received a temporary order of

protection from the court on September 6, 2016. (Tr. at 23-26; Applicant's response to SOR; GE 3-5)

Applicant admitted during his hearing testimony that when he was at the mental health clinic, he threatened suicide, and he threatened to kill his then wife. He also admitted that he was "hearing voices" for a short period. He stated that it sounded like somebody was talking in the next room, but he could not hear specific words or what was being said. He has not heard voices since that period. (Tr. at 27, 32-33)

Applicant was hospitalized as an inpatient at a psychiatric facility from September 7, 2016, through September 14, 2016. During his intake evaluation, he admitted that before he was hospitalized, he wanted to kill himself and his then wife, but that was no longer true. He was diagnosed with major depressive disorder, severe without psychotic features. (Tr. at 26; GE 6, 7)

Applicant submitted a Questionnaire for National Security Positions (SF 86) in July 2019. He reported his mental health treatment and hospitalization. He added, "My wife and I were going through a divorce. I was at my counselor and indicated that I wanted to kill myself. I was subsequently diagnosed with major depressive disorder." (GE 1)

Applicant was interviewed for his background investigation in November 2019. They discussed his mental health treatment. He stated that he had been battling depression for ten years. He admitted that he told a counselor in September 2016 that he had thoughts of harming himself and his then spouse. He told the investigator that he did not believe he forced his then wife to have sexual relations with him. He stated that she told him that she did not want to have sex, but she did not stop him. He stated that he made no threats and committed no acts of violence. He stated that he did not throw a dresser; he accidentally dropped it. (GE 2)

A psychological evaluation was conducted at the DOD's request on February 16, 2022, by a licensed clinical psychologist (hereinafter referred to as psychologist). A report of the evaluation was prepared on February 24, 2022. They discussed his hospitalization in 2016. He stated that he told the provider in 2016 that he was **not** having thoughts of hurting himself or someone else. He stated that the provider then asked him, if he **could** kill his spouse, how would he commit the act, to which he said, "I guess I'll stab her." He told the psychologist that he did not have any intent to do so. Regarding the incident with his then wife, he told the psychologist that they began "touching each other" and eventually had intercourse. He stated that he thought it was consensual, and that he did not think it was rape because she never said "no." (GE 8)

The psychologist diagnosed Applicant with major depressive disorder, severe, in partial remission. She concluded:

Regardless of the diagnosis, it is clear that [Applicant] lacks insight into his condition and his need for treatment. He expressed multiple risk factors for relapse of depressive symptoms, including limited hobbies of interest,

poor sleep quality, relocation from his “home town” of approximately 40 years at the request of his spouse, significant physical ailments, and lack of personal friendships in the area that he has lived for over two years. He has not undergone appropriate mental health treatment, to date, for the condition that [led] to legal issues and psychiatric hospitalization. Therefore, he does possess a mental health condition that could impede his reliability, judgment, stability, and trustworthiness. His prognosis is guarded. (GE 8)

Applicant continued in counseling and therapy after his 2016 hospitalization until about 2017. He has remained on anti-depressant medication. He stated that he has not had any issues since the events leading up to his hospitalization. He stated that he would seek help if he “ever felt like [he] was heading down that road again.” (Tr. at 17, 23, 29-31, 35-36)

Applicant’s employee evaluations for the last three years reflect outstanding job performance. His supervisor for the last three and a half years wrote that Applicant is “simply amazing.” He further stated that Applicant “handles himself with an exceedingly high level of decorum and professionalism. I have absolute faith and trust in his integrity and personal accountability.” (AE A, B)

Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)

Major Depressive Disorder

The criterion symptoms for major depressive disorder must be present nearly every day to be considered present, with the exception of weight change and suicidal ideation. . . . Fatigue and sleep disturbance are present in a high proportion of cases; psychomotor disturbances are much less common but are indicative of greater overall severity, as is the presence of delusional or near-delusional guilt.

The essential feature of a major depressive episode is a period of at least 2 weeks during which there is either depressed mood or the loss of interest or pleasure in nearly all activities Many individuals report or exhibit increased irritability (e.g., persistent anger, a tendency to respond to events with angry outbursts or blaming others, an exaggerated sense of frustration over minor events).

Policies

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief

introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline I: Psychological Conditions

The security concern for psychological conditions is set out in AG ¶ 27:

Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified

mental health professional (e.g., clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this guideline and an opinion, including prognosis, should be sought. No negative inference concerning the standards in this guideline may be raised solely on the basis of mental health counseling.

AG ¶ 28 provides conditions that could raise psychological conditions security concerns. The following are potentially applicable:

(a) behavior that casts doubt on an individual's judgment, stability, reliability, or trustworthiness, not covered under any other guideline and that may indicate an emotional, mental, or personality condition, including, but not limited to, irresponsible, violent, self-harm, suicidal, paranoid, manipulative, impulsive, chronic lying, deceitful, exploitative, or bizarre behaviors;

(b) an opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness; and

(c) voluntary or involuntary inpatient hospitalization.

SOR ¶ 1.a

SOR ¶ 1.a alleges that Applicant was hospitalized after expressing suicidal and homicidal thoughts, and that he was diagnosed with major depressive disorder, severe without psychotic features. Thoughts are not behavior. AG ¶ 28(a) is not applicable.

Major depressive disorder is a condition that may impair judgment, stability, reliability, or trustworthiness. AG ¶ 28(b) is established by that diagnosis. AG ¶ 28(c) is established by the hospitalization.

SOR ¶ 1.b

SOR ¶ 1.b alleges that Applicant sought treatment from the mental health clinic, where he was diagnosed with major depression, recurrent. Seeking treatment is a positive response to mental health issues and potentially mitigating. It does not raise a disqualifying condition. The document from the mental health clinic states that Applicant was assessed with major depression, recurrent. I am unsure who provided that opinion. In any event, this assessment is redundant with the diagnosis when he was an inpatient at a psychiatric facility. SOR ¶ 1.b is concluded for Applicant.

SOR ¶ 1.c

SOR ¶ 1.c alleges the opinion of the psychologist during the DOD-requested evaluation that Applicant met the criteria for major depressive disorder, severe, in partial remission, and that he had a mental health condition that could impede his reliability, judgment, stability, and trustworthiness. That is an accurate synopsis of the evaluation. AG ¶ 28(b) is applicable.

AG ¶ 29 provides conditions that could mitigate psychological conditions security concerns. The following are potentially applicable:

- (a) the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;
- (b) the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional;
- (c) recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by, the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation;
- (d) the past psychological/psychiatric condition was temporary, the situation has been resolved, and the individual no longer shows indications of emotional instability; and
- (e) there is no indication of a current problem.

There is no evidence of any significant mental health issues after 2016. Applicant's ex-wife has forgiven him, and they have reconciled and had another child together. His job performance has been excellent, and his supervisor raved about him.

Nonetheless, I have remaining concerns. Applicant's conduct and mental state in 2016 are alarming. He heard voices; he had suicidal and homicidal thoughts; he threatened to kill his then wife; he provided inconsistent statements through the years; and his sexual assault of his then wife amounts to rape. None of the mitigating conditions are sufficient to alleviate those concerns. Psychological conditions security concerns are not mitigated.

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:

(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; 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 ¶ 2.a alleges that Applicant "forcefully had sexual relations with [his] then spouse." That constituted a criminal sexual assault. The conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. The conduct also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(c) is not perfectly applicable because Applicant's conduct is sufficient for an adverse determination under the sexual behavior and criminal conduct guidelines. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

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's conduct was a serious crime. It occurred almost seven years ago, and his former wife has forgiven him and moved past it. He was never charged or prosecuted, which cuts both ways, because it is not clear from the record whether he could still be criminally charged. I also note the fact that he threatened to kill his then wife and provided inconsistent statements over the years. Applicant's conduct continues to make him vulnerable to exploitation, manipulation, and duress; and it casts doubt on his current reliability, trustworthiness, and good judgment. Personal conduct security concerns are not mitigated.

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 I 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 did not mitigate the personal conduct and psychological conditions 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 I:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge