



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



In the matter of:)	
)	
)	ISCR Case No. 21-01485
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: Ryan C. Nerney, Esq., Applicant’s Counsel

August 25, 2023

Decision

CEFOLA, Richard A., Administrative Judge:

Statement of the Case

On April 19, 2022, in accordance with DoD Directive 5220.6, as amended (Directive), the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guidelines J, D and E. The SOR further informed Applicant that, based on information available to the government, DoD adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant’s security clearance.

Applicant answered the SOR on June 20, 2022, and requested a hearing before an administrative judge. (Answer.) The case was assigned to me on April 7, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 21, 2023, scheduling the hearing for May 31, 2023. The hearing was convened as scheduled. The Government offered Exhibits (GXs) 1 through 6, which were admitted without objection. Applicant testified on his own behalf. Applicant offered five exhibits, marked Applicant Exhibits (AppXs) A through E, which were admitted without objection. The record was left open until June 30, 2023, for receipt of additional documentation.

Nothing further was offered by Applicant into evidence. DOHA received the transcript of the hearing (TR) on June 8, 2023.

Findings of Fact

Applicant denied the allegations in SOR ¶¶ 1.a, 2.a. and 3. a. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 26-year-old employee of a defense contractor. He has been employed with the defense contractor since April of 2020. Applicant is married, and has no children. (TR at page 14 line 14 to page 17 line 13, and GX 1 at pages 7, 15 and 22~23.)

Guideline J - Criminal Conduct, Guideline D - Sexual Behavior, & Guideline E - Personal Conduct

1.a., 2.a. and 3.a. In about October of 2017, more than five years ago while on active duty with the Marine Corps, Applicant attempted to record and take photos of a female sailor, while she was changing her clothes in a changing room. This attempt was done without her knowledge or consent. (TR at page 18 line 2 to page 29 line 17, at page 35 lines 19~23, and at page 37 lines 14~22.) As a result, Applicant was convicted at a Summary Court-Martial (SCM) for Attempt to record and take pictures of a Naval member of the Armed Forces without consent. As a result of this conviction, Applicant was reduced in rank from a Lance Corporal (E-3) to a Private First Class (E-2), and discharged in about December of 2019 with an Other Than Honorable Discharge. (TR at page 45 line 8 to page 49 line 3, and GXs 5 and 6.) Applicant's wife, who was his girlfriend in 2017, is aware of Applicant's criminal conduct.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 AG ¶ 2 describing 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 avoided drawing inferences grounded on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 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 J - Criminal Conduct

AG ¶ 30 sets forth the security concerns pertaining to 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 one condition that could raise a security concern and may be disqualifying in this case:

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

In 2019, Applicant was convicted by a SCM of an offense of a sexual nature. The evidence establishes the above this disqualifying condition.

AG ¶ 32 provides two conditions that could mitigate the above security concerns raised in this case:

(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.

Sufficient time has passed, more than five years since Applicant's 2017 misconduct. The evidence establishes mitigation under the above conditions. Criminal Conduct is found for Applicant.

Guideline D - Sexual Behavior

The security concern relating to the guideline for Sexual Behavior 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. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

The guideline notes several conditions that could raise security concerns under AG ¶ 13. Three are potentially applicable in this case:

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

((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 attempted to take a video and pictures of a sexual nature at a semi-public dressing room. His behavior was criminal, reflected bad judgment, and creates a vulnerability to coercion. The evidence is sufficient to raise these disqualifying conditions.

AG ¶ 14 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 20 including:

- (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; and
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress.

Applicant's sexual behavior occurred more than five years ago. His wife is aware of his indiscretion. There is evidence that future instances of this nature are unlikely to occur. Sexual Behavior is found for Applicant.

Guideline E - Personal Conduct

The security concern relating to the guideline 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 national security investigative or adjudicative processes.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. One is potentially applicable in this case:

- (d) credible adverse information that is not explicitly covered under any other guideline . . . :
 - (1) untrustworthy or unreliable behavior.

Applicant attempted to take a video and photos of a sexual nature in 2017. The evidence is sufficient to raise this disqualifying condition.

AG ¶ 17 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 17 including:

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant's personal conduct indiscretion occurred more than five years ago. His wife is aware of his misconduct. Personal Conduct is found 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 common-sense 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 facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J, D and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment. Applicant has taken a significant amount of training to avoid any future indiscretions. (AppX E.) Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the personal conduct, sexual behavior, and criminal conduct security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline D:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3 Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Richard A. Cefola
Administrative Judge