



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



In the matter of:)
)
) ISCR Case No. 22-01076
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: Alan Edmunds, Esq.

12/20/2023

Decision

Curry, Marc E., Administrative Judge:

Applicant failed to mitigate the security concerns generated by attending swingers’ parties unbeknownst to his wife, showing an inappropriate picture of himself to a female coworker, and viewing pornography on his work laptop. Clearance is denied.

Statement of the Case

On April 20, 2021, Applicant completed a security clearance application. On September 12, 2022, the Department of Defense Consolidated Adjudication Services (DOD CAS) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline D, sexual behavior, Guideline E, personal conduct, and Guideline M, use of information technology, explaining why it was unable to find it clearly consistent with the national interest to grant security clearance eligibility. The DOD CAS 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 October 4, 2022, Applicant answered the SOR, admitting the allegations and requesting a hearing, whereupon the case was assigned to me on June 2, 2023. On June 29, 2023, the Defense Office of Hearings and Appeals issued a notice of video teleconference hearing, scheduling Applicant's case for July 18, 2023. The hearing was held as scheduled. I received three Government exhibits (GE 1 – GE 3) and nineteen Applicant exhibits (AE A – AE T) and considered Applicant's testimony. The transcript (Tr.) was received on August 3, 2023.

Findings of Fact

Applicant is a 56-year-old married man with four adult children. He and his wife have been married for 26 years. A previous marriage ended in divorce. Applicant has a high school diploma and has taken some college courses. (AE G; Tr. 11) He is a veteran of both the U.S. Navy and the U.S. Army. Applicant served in the Navy from 1987 to 1991. (AE B) He was discharged honorably. In 1998, Applicant enlisted in the Army and served until 2015, when he retired honorably. (AE A) While in the Army, he completed three tours of duty in combat zones. (Tr. 22) He has held a security clearance since 1988. (Tr. 21)

Through Applicant's Army career, he developed subject-matter expertise in the field of ordnance, storage, and security. (AE F at 3) Since February 2021, he has been working for his current employer as a security officer. (GE 1 at 12)

Applicant has a history of misconduct of a sexual nature. In 1999, he was cited for solicitation of a prostitute. (Answer at 1) Applicant testified that he had no intention of soliciting a prostitute that evening. Rather, while he was sitting at a traffic light on the way home one evening in a part of town where prostitutes congregated, he saw a woman get out of a sports car. (AE T at 4) He suspected the woman was an undercover police officer because she was well dressed and looked "much different than the other typical ladies of the night would [look] in that area." He explained further that, because he was taking a course in criminology at the time, he wanted to speak to the supposed undercover officer to see firsthand how undercover sting operations are conducted, in the event he ever needed to write a paper on the subject. (Tr. 26; GE 2 at 14) Subsequently, he asked the woman where she took her johns, and she nodded her head in the direction of a nearby hotel. (GE 2 at 15) Applicant then drove his car towards the hotel and parked at an adjacent parking lot, whereupon multiple police officers pulled beside him in unmarked vehicles and issued him a citation for soliciting prostitution. (Tr. 28) Subsequently, Applicant paid a fine.

Shortly after the episode, Applicant told his wife the same explanation of the circumstances surrounding the issuance of the citation, to which he testified. She did not find this explanation credible. (Tr. 48)

Beginning in 2017, Applicant attended swingers' parties every four to five months. At the hearing, he testified that he stopped attending them in 2020, whereas, during a subject interview, he told the investigator that the last swingers' party he attended was in February 2022, ten months after the initiation of the security clearance investigation. (GE 2 at 11) Often while at these parties, he had sexual intercourse with strangers. (Tr. 31-32) His wife

was unaware that he was attending these parties. When he went, he would tell her that he was going to work. (Tr. 31)

At one of the parties, a woman with whom Applicant had sexual intercourse, photographed him wearing no clothing except for a pair of panties. (AE T at 3) In March 2021, while at work, Applicant checked his personal email and discovered that the woman he met at the swingers' party emailed him the picture. (Tr. 15) Applicant tried to delete it, but accidentally saved it onto his office's work drive. (Tr. 15; GE 2 at 5) Because Applicant is not computer literate, he was unable to delete it. Consequently, he asked a female coworker for help. He did not ask a male coworker for help because he was too embarrassed. (GE 2 at 12) Before his coworker helped him, he warned her that she might find the photograph offensive. (Tr. 15) She then went into the work drive and deleted the picture. (Tr. 16)

Shortly thereafter, the woman who helped Applicant delete the inappropriate picture filed a sexual harassment complaint with their employer. The next day, Applicant's employer fired him for violating company policy. (GE 2 at 6; GE 3) According to the termination letter, Applicant's employer also reviewed the contents of Applicant's computer after the coworker's complaint and discovered several "obscene and offensive" files. (GE 3)

While on the job, Applicant watched pornography on his telework laptop approximately 15 to 20 times. (GE 2 at 6, 13; Tr. 38) He knew that it was against company policy to download pornography onto his work computer, but he did not think that watching pornography on his work computer while connected to his home internet carrier posed a problem. (Tr. 17, 39) At the time Applicant was fired, he was the company's facility security officer. (GE 1 at 13)

Applicant has not watched pornography since May 2020, and he has not attended a swingers' party since February 2022. (Tr. 19, 35; GE 2 at 11) He is ashamed of the pain that he caused his wife and understands that "love is more powerful than any kind of fantasy." (Tr. 24)

In late 2022, Applicant told his wife about his swingers' party attendance. (AE F at 4; Tr. 33) According to Applicant's wife, he feels shame and remorse for his behavior, has grown as a person, "and is working hard to develop the skills needed to avoid making such poor choices again." (AE F at 4) Moreover, he is a man of tremendous character who has supported her through her fight with cancer, given a homeless man the shoes off his feet, and covered shifts for coworkers in crisis without advance notice. (AE F at 4)

One of Applicant's current supervisors provided a character reference. He is aware of Applicant's past misconduct and stated that it "play[s] no difference on his role and position at his workplace" because of the stellar judgment he demonstrates on the job. (AE F at 2)

In July 2023, Applicant voluntarily underwent a psychological evaluation to ascertain whether his behavior, as described above, was indicative of any underlying psychological

disorder. (AE T) After interviewing Applicant and conducting psychological testing, the psychologist concluded that “Applicant’s behaviors of concern . . . were the function of poor choices made over the course of his life rather than because of any malicious intent or sexual deviance.” (AE T at 6) Moreover, he concluded that the risk Applicant will engage in any such behavior in the future is low. (AE T at 6)

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.

Applicant's attempt to solicit a prostitute in 1999, his participation in swingers' club parties without his wife's knowledge, and his perusal of pornography on his work laptop, trigger the application of 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 lack of discretion or judgment."

The potentially applicable mitigating guidelines set forth under AG ¶ 14 are as follows:

(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 attended swingers' club parties unbeknownst to his wife for nearly five years, and he did not stop until several months after the completion of his security clearance application. Under these circumstances this behavior is too recent for AG ¶14(b) to apply.

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.

Applicant's conduct indirectly led to the loss of his job after another swinger emailed him a compromising picture that Applicant inadvertently saved to his work drive and was unable to delete without the assistance of a coworker, who subsequently filed a sexual harassment complaint with their employer. Nevertheless, Applicant continued to attend these parties for nearly a year after he was fired, and ten months after the initiation of the security clearance investigation. Moreover, although Applicant told his wife about this behavior, he did not do so until late 2022, nearly 18 months after he lost his job. Consequently, although Applicant's disclosure of this behavior constitutes a step in the right direction to reduce vulnerability to exploitation, manipulation, or duress, it is insufficient to conclude that this risk has been completely eliminated. I conclude that AG ¶ 14(c) does not apply.

Guideline E, Personal Conduct

Under this guideline, "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." (AG ¶ 15)

In addition to generating disqualifying conditions under the sexual conduct guideline, as discussed above, Applicant's misconduct, which ultimately contributed to him losing his job, triggers the application of AG ¶ 16(e)(1), "engaging in activities which, if known, could affect the person's personal, professional, or community standing." Applicant's use of his telework laptop, in addition to being inappropriate, was a significant misuse of his employer's time and resources. AG ¶ 16(d)(4), "evidence of significant misuse of . . . employer's time or resources," applies

The following mitigating conditions under AG ¶ 17 are potentially applicable:

(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 told his wife about his sexual indiscretions and consulted with a psychologist, who ruled out sexual deviance as the cause of his behavior. Moreover, Applicant's testimony about the damage his behavior caused to his marriage and the pain it caused his wife seemed contrite. In addition, one of Applicant's supervisor's is aware of his past misconduct. Consequently, AG ¶ 17(e) applies.

Conversely, Applicant's testimony about his past sexual misconduct, including his explanation of the circumstances surrounding his citation for soliciting prostitution, and his

conflicting dates of when he stopped going to swingers' parties, was not credible. This lack of credibility undercuts the probative value of his reassurance that this conduct will not recur. Therefore, AG ¶ 17(d) only applies partially.

Guideline M: Use of Information Technology

Under this guideline, "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." (AG ¶ 39) Applicant's use of his telework laptop to view pornography triggers the application of AG ¶ 40(e), "unauthorized use of any information technology system."

Applicant viewed pornography on his telework laptop recently. Consequently, AG ¶ 41(a), "so much time has elapsed since the 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," is inapplicable.

AG ¶ 41(b) "the misuse was minor and done solely in the interest or organizational efficiency and effectiveness," and AG ¶ 41(d), "the misuse was due to improper or inadequate training or unclear instructions," are not relevant.

Applicant's viewing of pornography on his telework laptop was neither unintentional nor inadvertent. Moreover, his employer did not know about this conduct until a coworker informed them about the inappropriate picture that Applicant asked her to help him delete. AG ¶ 41(c), "the conduct was unintentional or inadvertent and followed by a prompt, good-faith effort to correct the situation and by notification to appropriate personnel," is not applicable.

Whole-Person Concept

While Applicant was at a swingers' club party, another club member took a compromising position of him which she emailed to his personal drive. This ultimately led to his dismissal from employment as Applicant attempted to delete the picture and inadvertently saved it to a work drive. As such, it epitomizes the type of unintended consequence that can result from irresponsible, reckless behavior.

As recently as February 2022, ten months after Applicant completed his security clearance application, he was still attending swingers' parties without his wife's knowledge. Consequently, given the nature and seriousness of the conduct and its recency, it is too soon to conclude that Applicant has mitigated the 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 D:	AGAINST APPLICANT
Subparagraphs 1.a – 1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline M:	AGAINST APPLICANT
Subparagraph 3.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