



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



In the matter of:)
)
) ISCR Case No. 22-00181
)
Applicant for Security Clearance)

Appearances

For Government: Daniel O’Reilly, Esq., Department Counsel
For Applicant: Charles McCullough III, Esq.

06/06/2024

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to deny his eligibility for a security clearance to work in the defense industry. He failed to mitigate the security concerns related to his history of sexual misconduct. Clearance is denied.

Statement of the Case

On April 22, 2022, DOD issued a Statement of Reasons (SOR) detailing security concerns under the sexual behavior guideline. The Agency acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on June 8, 2017.

Based on the available information, DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant’s security clearance and recommended that the case be submitted to a Defense Office of Hearings and Appeals

(DOHA) administrative judge to determine whether to grant or deny his security clearance.

Department Counsel sent Applicant the disclosure letter and proposed exhibits on July 1, 2022. The disclosure letter is included in the record as Hearing Exhibit (HE) I. The hearing convened on July 31, 2023. I admitted Government's Exhibits (GE) 1 through 3 and Applicant's Exhibit (AE) A without objection from either party. DOHA received the transcript on August 11, 2023.

Procedural Issues

SOR Amendment

The SOR ¶ 1.c alleges, based on statements from Applicant, that he "suffers from sex addiction." Neither "sex addiction" nor compulsive sexual behavior are conditions listed in the Diagnostic and Statistical Manual of Mental Disorder, Fifth Edition, Text Revision (DSM-5-TR). Furthermore, the record does not contain any definition of the term "sex addiction." Department Counsel amended the allegation to read that "Applicant engaged in a pattern of compulsive, self-destructive, or high-risk behavior that he is unable to stop." Applicant did not object to the amendment, but admitted the allegation in part and denied it in part. (Tr. 152-155)

Findings of Fact

Applicant, 37, has worked for his current employer, a federal contracting company since October 2012. He was granted access to classified information in 2012, while employed with a different federal contracting company. He completed his current security clearance application in May 2021, seeking an upgrade in his level of access. During his July 2021 background interview, he disclosed that he had an "issue with pornography," that between 2005 and 2020 he engaged in public masturbation, and that while married, he took nude photos and videos of his then wife without her knowledge or consent. (Tr. 80; GE 1)

In his July 2021 background interview Applicant discussed his history of viewing pornography and masturbating in public. He certified the contents of the background interview in response to DOHA interrogatories, dated March 8, 2022. He noted minor changes but did not make substantive changes to the investigator's summary of the interview. (GE 2)

According to the interview summary, Applicant began viewing pornography when he was approximately 12 years old. He viewed videos two to three times per year. In high school, he viewed pornographic videos on a weekly basis. By the end of high school, he watched pornography daily – a habit that continued until 2018. (Tr. 102; GE 2)

In 2005, while he was in college, Applicant began watching pornographic videos in his car and masturbating. He would park his car in an empty section of a public

parking garage on campus where he believed no one would see him. He claims to have masturbated in public 2 to 3 times per year until November 2020. Between 2016 and 2018, he masturbated in the bathroom at work. He would do so in a stall and watching pornographic videos on his phone. According to the interview, Applicant also admitted to masturbating in other locations, including at friends' homes and outside. He did not make any corrections to these statements in the interview summary. However, at the hearing, he testified that he could not recall making those statements. (Tr. 82, 85-90, 103-105, 107-110, 124; GE 2)

Applicant also told the investigator that he took pictures and recorded video of his then wife while she was showering or changing in their bedroom, without her consent or knowledge. He confessed the conduct to her in 2018 during a period of marital difficulty. He admitted that she felt violated by his actions. The couple divorced in December 2020 after eight years of marriage. These incidents occurred in State 1, where he lived from 2012 to 2020. (Tr. 86, 113-115, 136; GE 1-2)

In 2018, Applicant believed his viewing of pornography and masturbation was creating problems in his personal life. He believed his actions constituted a sex addiction, and he sought counseling from a faith-based counseling service (CS1). It is unclear from the record how long he received treatment from CS1. In October 2018, he began receiving faith-based counseling at counseling service 2 (CS2) from a licensed professional counselor (LPC) who is also a certified clinical sexual addiction specialist. He attended sessions at CS2 until March 2022. Applicant did not submit the curriculum vitae for either practitioner at CS1 or CS2. He did not provide diagnostic information, a prognosis, or treatment records from CS1 or CS2. Applicant claims that neither practitioner at CS1 or CS2 gave him a diagnosis related to hypersexualized or addictive behaviors. (Tr. 31-4, 133; GE 2-3; AE A)

The counselor from CS1 referred Applicant to a faith-based ministry program dedicated to "sexual integrity" and helping people stop unwanted sexual behavior. Applicant referred to the all-male group as a "sexual accountability group." One of the tenets of this program is that sexual contact should only occur between a husband and wife. Masturbation and use of pornography are some of the sexual acts that constitute the unwanted sexual behavior the program seeks to stop. Applicant testified that the group followed a 12-step program model like Alcoholics Anonymous. His accountability group was led by an ordained pastor, who is not a licensed therapist or mental health professional. The pastor became a certified Professional Sex Addiction Pastor through the International Institute of Trauma and Addiction Professionals in 2020. The pastor is also a retired military officer, who held a security clearance during his service. (Tr. 95-69, 110, 123-133; GE 2-3; Answer)

According to the May 2022 letter prepared by the pastor in support of Applicant's security clearance application, Applicant attended the accountability group from August 2018 to November 2020. The pastor described Applicant as being well-respected by the other men in the group. He believed that Applicant was open and honest about his past behaviors and displayed a profound willingness to heal from unspecified past wounds. (Answer, Tab D) The letter states, in part:

During his time in group, [Applicant] reported that he did not engage in any sexually inappropriate or otherwise compromising conduct with any person. . . He also reports having not engaged in any activity that might be construed as public masturbation since November 2020. (Answer, Tab D)

Applicant acknowledged that he engaged in illegal behavior by masturbating in public and taking photographs and videos of his then wife's permission. He explained that he used masturbation to complete his stress cycle and deal with difficult emotions. He testified that in counseling he learned to identify his emotions as they arise and to identify his triggers in an effort to control his impulsive behavior. (Tr. 85, 105, 126-130, 135-138)

Four witnesses testified on Applicant's behalf. Each is aware of Applicant's past behavior. Each still considered Applicant trustworthy and of good character, and considered him a suitable candidate for continued access for classified information. (Tr.14-77)

Applicant believes he is managing his issues. He began attending the accountability group again in April 2023, attending virtually 3 to 4 times per week. He explained that the stress associated with the security clearance process prompted him to return. Even though Applicant participates in the sexual accountability group, he continues to view pornography and masturbate in contravention of the group's philosophy. He also relies on another group member for one-on-one support when needed. (Tr. 96, 130-131, 133, 141)

He does not believe that his conduct is a potential source of vulnerability because he has disclosed the behavior to close family members, friends, and a former girlfriend. (Tr. 98-88, 122)

Policies

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(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.

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

Sexual behavior, which includes conduct occurring in person or via audio, visual, electronic, or written transmission, raises a concern when it 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. Based on Applicant's admissions, the following disqualifying conditions apply:

AG ¶ 13 (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

AG ¶ 13 (b) pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;

AG ¶ 13(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and,

AG ¶ 13(d) sexual behavior of a public nature or that reflects lack of discretion or judgment.

After considering all the mitigating conditions available under the sexual behavior guideline, I find that none apply. Applicant began engaging in criminal conduct of a sexual nature as an adult. Though he was never arrested or charged, Applicant engaged in escalating sexual criminal conduct over the course of 15 years. He performed a sex act in public spaces to include his car, his job, outside, and at friends' homes. (See, HE II, State 1 statute regarding sexual misconduct). He also violated his ex-wife's right to privacy by capturing nude images of her without her consent. (See, HE III, State 1 statute regarding invasion of privacy)

This conduct cannot be considered minor or victimless. The four years that he has not engaged in the conduct is not enough time to mitigate his 15-year history of misconduct. Furthermore, there is not sufficient evidence in the record to support a finding that Applicant has engaged in an appropriate program of treatment to address his behavior. Based on Applicant's testimony, his actions were the result of his inability to cope with stress and difficult emotional issues. Both are elements of the human condition that are likely to recur. His claims that he has learned how to better process his emotions and identify his triggers are not corroborated by the record, which does not contain a diagnosis, treatment notes, or prognosis from a qualified mental health professional. In this case, Applicant has essentially made a promise not to engage in similar conduct in the future. However, given the severity of his underlying conduct, neither his promise nor the favorable character evidence in the record is enough to mitigate the security concern.

Applicant's promise is insufficient in that he is not in compliance with the behavior accountability program of his choosing. Since at least August 2018, he has voluntarily chosen to participate in a sexual accountability group that follows a 12-step program, which typically provides guiding principles that outline how to overcome addiction and avoid triggers. The sexual accountability group that he chose teaches abstinence from masturbation and use of pornography. He admits that he continues to engage in both activities. He also believes that he currently requires the support of the group and his accountability partner to help him manage his behavior.

Applicant sought help with these behaviors specifically because he believed they rose to the level of an addiction – indicating that he could not control or limit how or when he engaged in them. He recognized that both behaviors, which many can engage in without issue, constitute a problem for him. His decision to engage in the behaviors again are akin to a relapse. As such, it is possible that Applicant could find himself in a position where he is unable to self-regulate his behavior in the future, resulting in the recurrence of the conduct alleged in the SOR.

Whole Person Concept

Based on the record, I have significant reservations about Applicant's current security worthiness. In reaching this conclusion, I have also considered the whole-

person factors at AG ¶ 2(d). Although Applicant has been candid with the Government about his conduct, that does not mitigate the alleged security concerns. All applicants are expected to provide full, frank, and candid disclosure to the Government at all times during the adjudicative process. Applicant engaged in serious misconduct. He did not meet his burden of proof or persuasion to mitigate the security concerns raised by his 15-year history of sexual misconduct. The record does not contain sufficient information that Applicant has received appropriate treatment for the issues or that he has engaged in sufficient treatment to address the underlying issues that manifested in the alleged misconduct.

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, Sexual Behavior	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant

Conclusion

In light of all of the circumstances presented in this case, it is not clearly consistent with the national interest to grant Applicant's security clearance. Eligibility for access to classified information is denied.

Nichole L. Noel
Administrative Judge