



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



In the matter of:)	
)	
)	ISCR Case No. 23-01805
)	
Applicant for Security Clearance)	

Appearances

For Government: Troy L. Nussbaum, Esq. Department Counsel
For Applicant: *Pro se*

07/12/2024

Decision

HALE, Charles C., Administrative Judge:

This case involves security concerns raised under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct). Applicant’s eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 27, 2023, in connection with his employment in the defense industry. On November 30, 2023, following a background investigation, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline D, sexual conduct, and Guideline E, personal conduct. DoD issued the SOR under Executive Order (Exec. Or.) 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 Security Executive Agent Directive 4 (SEAD 4) *National Security Adjudicative Guidelines* (AG), which became effective on June 8, 2017.

Applicant submitted an answer to the SOR on January 12, 2024, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on February 8, 2024, and the case was assigned to me on April 2, 2024. On May 1, 2024, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 11, 2024. I convened the hearing as scheduled. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified but did not offer any documentary evidence. DOHA received the transcript (Tr.) on June 25, 2024.

I kept the record open after the hearing to enable Applicant to submit documentary evidence. He timely submitted the court records and information regarding his therapist. I have consolidated these into two exhibits, Applicant Exhibit (AE) A (Complaint) and AE B (therapist email imbedded), which I admitted without objection. After the hearing adjourned (June 11, 2024), I informed Department Counsel and Applicant that I would take Administrative Notice of the misdemeanor portion of the statute that Applicant had been charged with and the applicable portion of the annulment statute. The email with the specific provisions of the state statute is attached as Hearing Exhibit (HE) III. Both sides were given until the record closed to raise any objection to the Administrative Notice. Neither side objected and the record closed on July 1, 2024.

Findings of Fact

In his Answer to the SOR, Applicant denied SOR ¶ 1.a on the basis that the indecent exposure language had been removed from the offense to which he had pled guilty. He denied SOR ¶ 2.a, on the basis he had answered all of the questions honestly. His admissions are incorporated into my findings of fact.

Applicant is 38 years old. He is married. He has two sons, ages eight and six. Until the incident, he had worked as a teacher and a coach in some capacity since he was 20 years old. (Tr. at 22.) After his arrest, he worked various other jobs until he was hired by his current employer. Until he was hired for his current position, he worked for a friend installing hardwood floors and at a golf course. He has worked for his current employer, a large defense contractor, since January 2023 and has never held a security clearance. (Tr. at 17-21.)

SOR 1.a.: In approximately May 2021, Applicant was charged with two counts of Indecent Exposure/Gross Lewdness after he was alleged to have masturbated in a public parking lot. He pled guilty to one count and received a suspended sentence. In April 2021, police were called by a woman (K) who reported seeing a male masturbating in his SUV in a shopping center parking lot while he watched pornography. Applicant had parked next to K, who drove a high clearance vehicle, a Jeep, and could see into his SUV. They both parked front in. She was parked on his left. (Tr. at 21-22; GE 3 at 8-9, 11.) K described Applicant actively masturbating while holding a cell phone with his right hand on his center arm console. K contacted the police. By the time police arrived, Applicant had left the area, but K had provided the license plate of his SUV. The police called him down to the station in May 2021, to discuss the allegation. He initially denied viewing pornography in the parking lot. (Tr. at 40; GE 3.) He finally admitted to viewing pornography in the parking lot and noticing a woman parked next to him. He acknowledged his phone would be visible

from outside the vehicle. (Tr. at 21-22, 40-41.) He acknowledged that he gave her a smile and a wave which in her statement she described as a smirk. (Tr. at 35-36; GE 3 at 9.) He denied masturbating in public stating “absolutely not.” (Tr. at 41.) He denied the witness’s statement that she saw him masturbating and that he thrust his hips up from his chair and exposed himself to her. He and K had never met prior to this incident. (Tr. at 37-38.) Applicant was holding his pen with his left hand during the hearing and acknowledged he writes with left hand but added he is ambidextrous. (Tr. at 62.)

Applicant said he and his wife had been unable to find any quiet time at home. He admitted during this period of his life he was viewing adult pornography on a daily basis and masturbating to it. (Tr. at 28-29; 43-44; GE 3)

Applicant was charged with two counts of Indecent Exposure and Lewdness. In February 2022, he pled guilty to one count of Lewdness. He testified it was agreed to as part of the plea he would not have to plead to Indecent Exposure. (Tr. at 41.) Lewdness under the statute requires the person to have performed any other act of gross lewdness under circumstances which he or she should know will likely cause affront or alarm. The court ordered that he was to have no contact with K for a period of 12 months; have good behavior for one year; a 90-day jail term suspended for one year; and he was fined \$620. (Tr. at 48; GE 4 at 14-15.) He has had no further incidents and no terms of his sentence are still pending. He is eligible for annulment of his criminal record in another year. He acknowledged he was hesitant to get back into community activities until the charge is annulled. (Tr. at 54, 73.)

Applicant attended sexual-addiction therapy prior to his plea agreement. (Tr. at 72.) The therapist specialized in sexual addictions. (Tr. at 50-52; 67.) He took his therapist’s advice and started attending Sexaholics Anonymous (SA) to help reduce the amount of pornography he was viewing. He attended weekly SA meetings for several months. (Tr. at 49-50, 73.)

The police notified Applicant’s school superintendent. Applicant’s conduct led to the end of his coaching positions, and he was removed from contact with children under 18 years old. He did not continue with teaching after the school year ended. As terms of his bail, he was ordered not to have contact with persons under the age of 18. (GE 3 at 3.) He does not coach because he does not want to deal with the background checks and has found great pleasure in being a dad watching his boys play their sports. He has reoriented his life to focus on his family and has appreciated his current work because it allows him to be home with his wife and children. (Tr. at 74-77.)

Applicant testified that besides his wife, he told his parents and sister and noted he had given his father more detail than his mother and sister. (Tr. at 46.) He did not believe he could be coerced if someone threatened to bring this matter out. He noted he cannot change the facts of the conviction noting “it’s part of my history” and that he does not volunteer the information. (Tr. at 72.) He did not challenge other details about his conduct, as noted in the police report, but was adamant that he did not expose himself. (Tr. at 41; GE 3 at 5.)

Guideline E

SOR ¶ 2.a cross-alleges the information set forth in SOR ¶ 1.a. Applicant denied the allegation. He focused his denial on the truthfulness portion of Guideline E. See the above findings of fact for the underlying conduct involving his questionable judgment.

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court has noted, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” *Department of the Navy v. Egan*, 484 U.S. 518, 531 (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 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, these guidelines are applied 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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must 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 applicant or proven by Department Counsel and 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.

Analysis

Guideline D: Sexual Behavior

AG ¶ 12 expresses the security concern for sexual conduct:

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.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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 was arrested in May 2021 on two counts of Indecent Exposure and Lewdness and pled guilty to Public Lewdness based on the complaint of a witness who observed him masturbating in a shopping center parking lot in a car parked next to her. AG ¶¶ 13(a), 13(c) and 13(d) apply.

AG ¶ 14 sets forth the potentially applicable mitigating conditions for sexual conduct:

(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;

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

(e) the individual has successfully completed an appropriate program of

treatment, or is currently enrolled in one, has demonstrated ongoing and consistent compliance with the treatment plan, and/or has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

Applicant was observed masturbating to pornography on his cell phone in public by a witness. The witness and Applicant have never met. He did so during a period of sexual frustration at home when he and his wife could not find enough alone time because they had two young children, and both worked.

Applicant's actions put him in a position where he was subject to coercion, exploitation, or duress. His actions ended his teaching and his coaching positions. His family is aware of his conduct. His subsequent arrest is also a matter of public record. AG ¶ 14(c) has some application.

AG ¶ 14(e) has some application. Applicant sought therapy and attended sex addiction meetings.

Applicant engaged in this activity during a period of sexual frustration in his relationship with his wife. His actions were limited to the spring of 2021, more than three years ago. Nevertheless, Applicant's conduct is too recent to be considered fully mitigated. He engaged in lewd conduct while working with children when an individual might be expected to be especially mindful of the importance of exercising good judgment, particularly in public. He showed extremely poor judgment in engaging in this activity in a public parking lot. He did not provide any evidence beyond his own statements to bolster his case in mitigation. He did not provide sufficient evidence that his actions no longer cast doubt on his current reliability, trustworthiness, and judgment. AG ¶ 14(b) does not apply.

Guideline E: Personal Conduct:

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

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

(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;

(2) while in another country, engaging in any activity that is illegal in that country;

(3) while in another country, engaging in any activity that, while legal there, is illegal in the United States.

SOR ¶ 2.a cross-alleges SOR ¶ 1.a. AG ¶ 16(e) applies to SOR ¶ 2.a.

The following mitigating conditions under AG ¶ 17 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; and

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

AG ¶ 17(c) is not established for SOR ¶ 2.a. Applicant's offense is not minor. None of the circumstances are unique and his explanation for his 2021 incident is not credible. He and the witness had no prior history until the day in question that would cause her to make a criminal complaint.

Applicant has taken positive steps to reduce or eliminate his vulnerability to exploitation. He has sought treatment and abstained from viewing pornography. He is still very cautious about his arrest and conviction. Personal conduct security concerns for SOR ¶ 2.a are not mitigated under AG ¶ 17(e).

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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.

After weighing the disqualifying and mitigating conditions under Guidelines D and E and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his sexual behavior and personal conduct.

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
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the interests of national security to grant Applicant access to classified information. Eligibility for access to classified information is denied.

CHARLES C. HALE
Administrative Judge