



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



In the matter of:)
)
) ISCR Case No. 12-05847
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

05/14/2013

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s sexual behavior and psychological conditions continue to cast doubt on his judgment, stability, reliability, and on his ability to comply with the law and regulations. Moreover, he made false statements to government investigators when he omitted relevant information during his 2012 interviews. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 30, 2011. On September 20, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR), listing security concerns under Guideline D (Sexual Behavior) and Guideline I (Psychological Conditions).¹ Applicant answered the SOR on October 15, 2012, and requested a hearing before an administrative judge.

¹ DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

The Government amended the SOR on December 13, 2012, and Applicant answered the amended SOR on December 26, 2012. The amendment deleted SOR ¶¶ 2.a through 2.e, and 2.g. The only remaining allegation under Guideline I is ¶ 2.f. The amendment also added five allegations under Guideline E (Personal Conduct), SOR 3.a through 3.e. (Tr. 12-13) The case was assigned to me on January 11, 2013.

The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 16, 2013, convening a hearing for February 7, 2013. At the hearing, the Government offered two exhibits (GE) 1 and 2, which were admitted without objection. Applicant testified and submitted no exhibits. DOHA received the hearing transcript (Tr.) on February 14, 2012.

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.a, 1.b, 1.d, 1.e, 1.f, 2.f, 3.a, 3.b, and 3.c, with explanations. He denied the allegations in SOR ¶¶ 1.c, 3.d, and 3.e. After a thorough review of all the evidence, and having observed Applicant's demeanor and considered his testimony, I make the following findings of fact.

Applicant is a 40-year-old test software engineer working for a government contractor. He married his wife in 1999, and they have four children, ages 11, 9, 7, and 5. Applicant was awarded a bachelor's degree in electrical and computer engineering in 1997. While in college (1995-1997), Applicant worked as a cooperative education student for a government agency, and he was granted access to classified information at the secret level. In 1998, he was hired by his current employer, a government contractor. He has worked for the same employer, although under different company names, since 1998. Applicant possessed access to classified information, sometimes at the top secret level, from 1996 until 2010. There is no evidence to show that he has compromised or caused others to compromise classified information.

In 2008, Applicant submitted a request for an upgrade of his security clearance required for an anticipated job position. From 2008 until March 2010, Applicant participated in six background interviews, two of which were polygraph-assisted interviews, and a third interview involved a mental evaluation by a licensed psychologist. During the interview process, Applicant disclosed that between 1996 and 2008 he used binoculars to look into his neighbor's home; drove his car naked from his garage onto his driveway one time; twice rode his bike naked at a public park; walked naked once at another public park (denied at hearing, Tr. 47); pulled down his pants in the workplace while alone in a closed office; and pulled down his swim trunks in a hotel hot tub.

Applicant also disclosed that from 1999 to 2007, he ran in his backyard, stood on his porch, or bounced on his backyard trampoline while naked about once a month. He stated that he enjoyed daring himself to engage in public nudity, and that engaging in such activity was dangerous and sexually arousing. He knew that he would be arrested for public indecency if he was caught. In 2002, he put on a sweater gifted to his sister-

in-law, because it excited him to know that she would be wearing the sweater he put on. Applicant reported having sexual fantasies regarding his teenage babysitter and teenage students (ages 17-19) from his Sunday school class. He also disclosed that after four years fantasizing about killing his neighbor, he assaulted her after a verbal altercation in 2005.

During a September 2009 interview, Applicant told the interviewer that about four to five months after his April 2008 testing, he had thoughts of revenge against those involved in his security process that included "shooting up the place." He explained that his fantasies included kicking down the door of the adjudicators and confronting those involved in the decision-making process. At his hearing, Applicant explained that these were just his thoughts and that he would never do it. He was expressing his frustration with the security process. He also told the interviewer that he was so frustrated that he had been forced to think about breaking his secrecy agreement by shedding light on the security clearance process.

After these disclosures, Applicant underwent a mental evaluation conducted by a qualified mental health professional who advised the agency that the evaluation conclusions raised significant concerns about Applicant's stability, reliability, and judgment. In the mental health professional's opinion, Applicant's character logic pattern of schizoid adaptation (lack of social awareness and interpersonal isolation) was stable and of long duration.

By letter dated March 19, 2010, the agency revoked Applicant's security clearance. The agency's revocation letter specifically outlined the factual information that was the basis for the revocation (as stated in the four preceding paragraphs). (GE 2) Applicant did not appeal the agency's revocation of his clearance.

In March 2011, Applicant submitted an SCA to DOD in which he disclosed that in 2005, he was arrested and charged with simple assault (Section 22); that he consulted with a health care professional regarding an emotional or mental health condition (Section 21); and that his clearance was revoked in 2010 (Section 25). Subsequently, Applicant participated in three DOD interviews. In his May 12, 2011 interview, Applicant discussed the circumstances surrounding his assault arrest, charge, and subsequent anger management counseling. Applicant also discussed that he had his security clearance revoked after several lifestyle-polygraph interviews.

Applicant failed to disclose during his May 2011 interview most of the factual bases for the revocation of his clearance, including: Applicant's detailed fantasies over a four year period of killing his neighbor; his revenge fantasies about "blowing-up" or "shooting up" the place and confronting agency personnel involved in his clearance processing; the sexual behavior alleged in SOR ¶ 1, his sexual thoughts about teenage women; and a mental evaluation that raised significant security concerns about his stability, reliability, and judgment.

On his second DOD interview (March 12, 2012), Applicant expanded on the circumstances surrounding his assault charge and the subsequent anger management counseling. He also discussed that his security clearance was revoked after several lifestyle-polygraph interviews and a mental evaluation. Applicant failed to disclose during the March 12, 2012 interview his revenge fantasies about blowing up offices and confronting personnel involved in his clearance processing, the sexual behavior alleged in SOR ¶ 1, and his sexual fantasies about teenage women.

Applicant's third interview was on March 27, 2012. During this interview, he revealed that he was called into a meeting by the agency during which the reasons for the revocation of his clearance were explained. A couple of weeks later, he received a formal letter stating the reasons for his clearance revocation. Applicant told the investigator that there may have been more reasons for the revocation of his clearance, but that he did not remember all of them.

Applicant testified that he has always been a good employee. He follows rules and procedures. He believes that he has always done what he is supposed to do. He repeatedly stated that he has never compromised classified information, and that he always honored the vows of secrecy he took when he was hired.

Applicant admitted that his nudist behavior was risky and demonstrated bad judgment. He claimed that the last public nudity incident happened 11 years ago, and he has not been involved in any recent questionable behavior. He believes he has matured, and claimed that he no longer has the desire to get involved in the same behavior. He promised never to repeat it again. Losing his security clearance has forced him to reinforce his vows to never get involved in questionable behavior again.

Applicant denied making false statements and deliberately omitting relevant information during his interviews with DOD investigators. He testified that during the DOD interviews, he disclosed only that which he believed was pertinent to a secret-level security clearance investigation. (Tr. 30) During the first interview, he "just went into details he thought were appropriate." (Tr. 31) He also claimed he did not know he was supposed to disclose all the information discussed during the polygraph-assisted interviews. He averred that it was not until the second DOD interview that he was asked to disclose everything that happened during his lifestyle polygraph.

Applicant also claimed that he read the clearance revocation letter only once (when it was handed to him), because it was too painful. He claimed that during the interviews, he did not remember all the issues outlined in the revocation letter. (Tr. 30)

Concerning his thoughts about "shooting up the place," Applicant explained to the DOD investigator that he was frustrated with the agency's clearance process. He admitted that he told an agency investigator during an interview that he wanted to blow up or shoot the place (the agency's facility). At his hearing, Applicant claimed that his frustration was with the building and not with the people in it. He repeatedly stated that he no longer has the desire, and does not want to shoot up or kill anybody. (Tr. 33-34)

Applicant testified: “that was the worst thing I possibly could have said at the time . . . that was a terrible . . . that was a mistake for me to say.” (Tr. 33)

Applicant claimed he has been able to control his anger using the tools he learned at his anger management training. During his treatment he was given a book with exercises and he has learned of ways to control his frustrations. He repeatedly apologized for his past behavior, and expressed regret and remorse.

Policies

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch 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).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline D, Sexual Behavior,

AG ¶ 12 describes the concern about sexual behavior:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. 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 provides four disqualifying conditions relating to sexual behavior that apply to this case, raise a security concern, and may be disqualifying:

- (a) sexual behavior of a criminal nature, whether the individual has been prosecuted;
- (b) a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and
- (d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

Between 1996 and 2007, Applicant engaged in numerous incidents of public nudity because it was thrilling, dangerous, and sexually arousing. Applicant's public nudity incidents exposed him to possible criminal charges; made him vulnerable to coercion, exploitation, and duress; and reflect lack of judgment and discretion. All of the sexual behavior disqualifying conditions apply.

AG ¶ 14 lists conditions that could mitigate the sexual behavior security concerns.

- (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 good judgment;

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

(d) the sexual behavior is strictly private, consensual, and discreet.

None of the mitigating conditions is fully applicable. Applicant was a mature, married adult when he engaged in his questionable behavior. He claimed he stopped his behavior 11 years ago, but such claims are contrary to the information he provided during his polygraph-assisted interviews. It is not clear to what extent Applicant's wife is aware of his behavior. Considering the adverse social stigma associated with his behavior, the lack of treatment or counseling, and Applicant's last mental evaluation conclusions, I find Applicant's sexual behavior continues to raise questions about his reliability, trustworthiness, and judgment. Applicant failed to establish that his high-risk behavior is unlikely to recur. Considering Applicant's circumstances (his age, education, work experience, and period possessing a security clearance), his actions continue to cast doubt on his judgment.

Guideline I, Psychological Conditions

AG ¶ 27 articulates the security concern relating to psychological conditions:

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. No negative inference concerning the standards in this Guideline may be raised solely on the basis of seeking mental health counseling.

AG ¶ 28 provides one disqualifying condition that could raise a security concern and may be disqualifying in this case:

(b) an opinion by a duly qualified mental health professional that the individual has a condition not covered under any other guideline that may impair judgment, reliability, or trustworthiness

Applicant's nudist behavior from 1996 to 2007; his long-term fantasies about killing his neighbor (highlighted by his assault on the neighbor); his statements to investigators about "blowing up" or "shooting up" an agency's facilities because he was frustrated with the security process; and his September 2009 mental evaluation results (indicating significant concerns about his stability, reliability, and judgment) support applicability of the disqualifying condition.

AG ¶ 29 provides three conditions that could mitigate the security concerns in this case:

(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; and

(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 emotional instability was a temporary condition (e.g., one caused by death, illness, or marital breakup), the situation has been resolved, and the individual no longer shows indications of emotional instability;(e) there is no indication of a current problem.

In 2005, Applicant participated in anger management treatment after he assaulted his neighbor. He claims to be doing better controlling his anger. There is no evidence of any further anger management issues, except for Applicant's September 2009 comments expressing his ideations of "blowing up or shooting up" an agency's office because he was frustrated with the clearance process. Applicant expressed remorse for both incidents. He understands that his behavior and comments demonstrate a lack of judgment.

Considering the seriousness of Applicant's behavior and his 2009 mental evaluation results, he failed to present sufficient favorable evidence to mitigate the psychological conditions security concern. The 2009 mental evaluation raised "significant concerns about Applicant's stability, reliability, and judgment." Absent a favorable, current diagnosis and prognosis by a duly qualified mental health professional, the passage of time alone is not sufficient to mitigate the stability, reliability, and judgment concerns.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

Between 1996 and 2007, Applicant engaged in numerous incidents of public nudity because it was thrilling, dangerous, and sexually arousing. His behavior exposed him to possible criminal charges; made him vulnerable to coercion, exploitation, or duress; and reflects his lack of judgment and discretion. After four years fantasizing about killing his neighbor, in 2005, Applicant assaulted her after a verbal altercation. On May 12, 2011 and March 13, 2012, Applicant made false statements to government investigators when he deliberately omitted relevant and material information concerning the reasons behind the 2010 revocation of his security clearance.

Applicant's behavior triggers the applicability of the following disqualifying conditions under AG ¶ 16:

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

AG ¶ 17 provides seven conditions that could mitigate the personal conduct security concerns.

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Considering the record as a whole, I find that some of the Guideline E mitigating conditions partially apply, but do not fully mitigate the personal conduct security concern. AG ¶¶ 17(a), (b), (f), and (g) are not pertinent to the facts of this case. AG ¶ 17(c) does not apply because Applicant's false statements are recent, and constitute felony offenses in violation of 18 U.S.C. Section 1001. His actions continue to cast doubt on his trustworthiness, reliability, and judgment.

AG ¶¶ 17(d) and (e) partially apply. Applicant acknowledged his mistakes and sought anger management counseling. He has taken some steps to reduce his vulnerability to exploitation and duress. Notwithstanding, Applicant's false statements still raise serious questions about his judgment, reliability, trustworthiness, and his ability to protect classified information.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c).

Applicant, 40, is considered to be a productive and valuable employee. He held a security clearance from 1995 until 2010. There is no evidence that he has compromised or caused others to compromise classified information. He spends his free time working for his church and taking care of his family. He expressed remorse for his past questionable behavior and promises never to engage in it again.

Notwithstanding, in light of Applicant's age, education, work experience, his years holding a security clearance, the lack of a current mental evaluation, and his recent false statements, his sexual behavior, psychological conditions, and personal conduct continue to raise doubts about his judgment and his ability to comply with the law and regulations.

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.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Paragraph 2, Guideline I:	AGAINST APPLICANT
Subparagraph 2.f:	Against Applicant
Subparagraphs 2.a-2.e, 2.g:	Withdrawn by Government
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a, 3.c, 3.d, and 3.e:	Against Applicant
Subparagraph 3.b:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Eligibility for a security clearance is denied.

JUAN J. RIVERA
Administrative Judge