



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



In the matter of:

ISCR Case No. 07-05532

Applicant for Security Clearance

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel

For Applicant: Joel M. Abramson, Esquire

July 23, 2009

Decision

RIVERA, Juan J., Administrative Judge:

From approximately 1995 to February 2005, Applicant engaged in exhibitionistic fantasies that cause security concerns under the guidelines for sexual behavior and personal conduct. He stopped his questionable behavior in February 2005, attended counseling, and disclosed his behavior to his wife. He has lost interest in his exhibitionistic fantasies because of physiological and cognitive reasons. He has learned his lesson, and the likelihood of recurrence is remote. Eligibility for access to classified information is granted.

Statement of the Case

On November 28, 2005, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On November 28, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive),

dated January 2, 1992, as modified and revised.¹ The SOR alleged security concerns under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, denied, or revoked.

On December 29, 2008, Applicant responded to the SOR allegations, and requested a hearing before an administrative judge. The case was assigned to me on March 3, 2009. DOHA issued a notice of hearing on March 19, 2009. The hearing was convened as scheduled on May 4, 2009. The government offered Government Exhibits (GE) 1 through 7, which were admitted without objection. Applicant testified on his own behalf, presented the testimony of an expert witness, and submitted Applicant Exhibits (AE) 1 through 12, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on May 11, 2009.

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.a, 1.b, and 2.a, in part. SOR ¶ 2.a alleges the same behavior alleged under SOR ¶¶ 1.a - 1.d. Applicant admitted under SOR ¶ 2.a only the corresponding allegations to SOR ¶¶ 1.a and 1.b. He denied ¶¶ 1.c and 1.d, and the corresponding allegations under SOR ¶ 2.a. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 64-year-old systems engineer working for a defense contractor as a proposal manager for government contracts (Tr. 32, e-QIP). He assists government contractors preparing and responding to the government's requests for proposals. Applicant's education is extensive. He completed a bachelor's degree in mathematics in 1972, received his master's degree in business administration (accounting) in 1974, and earned his doctorate in business administration in the management of science technology and innovation in 1992 (Tr. 34, e-QIP). Applicant has been married to his second wife since 1999. He has two adult children of his first marriage. His current wife has three adult children of her prior marriage.

Applicant has had access to classified information since his first job out of college at age 21 (Tr. 36). During the last 40 years, he has had access to classified information at different levels (including top secret with access to sensitive compartmented information (SCI)) on and off depending on the needs of his job. He worked for

¹ On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006.

government agencies and government contractors in specialized positions requiring sophisticated knowledge of systems and science. Throughout his career, Applicant has made significant contributions to the government identifying and solving problems involving a variety of sensitive systems.

In 2004, Applicant committed a security violation because he took home classified information that was mixed in with unclassified documents. The next day, Applicant reported the incident to his supervisor and his security officer (AE 4). Other than this incident, there is no evidence that Applicant has compromised or caused others to compromise classified information (Tr. 57). According to Applicant's past reports of investigation and background interviews, there was nothing suggesting in his background, conduct, or character that could have resulted in his exploitation or blackmail (AE 2-4).

In November 2004, Applicant was sponsored by a government agency for reinstatement of his access to SCI. During a February 2005 polygraph-assisted interview, Applicant disclosed behaviors that raise security concerns both under Guidelines D and E, specifically:

- From around 1995 to February 2005 (the day of his interview), he dressed and undressed in front of his walk-in closet window with the drapes/blinds open, approximately two to three times a week (GE 3). The windows faced his neighbor's driveway and home.

Applicant admitted he dressed and undressed in front of his walk-in closet window with the drapes/blinds open regularly (Tr. 68-69). He explained he was engaging in acts of fantasy of exhibitionism, and that he never engaged in actual exhibitionism because he never actually exposed himself to anyone. He became sexually aroused fantasizing that someone was observing him dressing or undressing (Tr. 110). He explained that he was always careful to ensure that no one was close to his home or in the woods, because he did not want to actually be seen. He claimed he is a shy person and would not have done it if he knew someone was capable of seeing him. His home was protected by a fence and surrounded by tall woods. The nearest home and street were far enough from his home that it would have been difficult for anyone to see him with the naked eye.

- From around 1995 to November 2004, while staying in hotels, Applicant would exit the shower naked and walked toward his hotel's room window while the curtains/blinds were open. He would do this for his sexual arousal two to three times a week while travelling.

Applicant denied walking naked in front of a hotel window with the curtains/blinds open (Tr. 113). He stated: "I may have opened the curtains slightly so that no one could actually see me; but that I could imagine that someone could see me" (Tr. 113). He claimed he was engaging in acts of fantasy of exhibitionism, that he never intended to

expose himself to anyone, and that he never exposed himself to anyone. At his hearing, he explained that he was extremely careful and never opened the drapes/blinds completely, because he did not want to actually be seen. At the hotels, his fantasy was not as satisfying as when he did it at home because he was afraid of getting caught. His fear of actual detection detracted from his fantasy.²

- Between about 1999 and June 2002, and between December 2004 and January 2005, Applicant drove to and from work with his penis exposed outside of his pants to play with himself and become sexually aroused (Tr. 70, 107-109). On one occasion, in February 2005, he masturbated to the point of ejaculation while driving to work.

Applicant admitted the above facts at his hearing. He claimed his actions were not an act of exhibitionism, because he never intended to expose himself to anyone. He explained he was traveling on single lane roads at low speeds, and when a car approached he covered himself. He further explained that this was a very stressful period for him. Because of his wife's health problems, he had been unable to have sexual relations for an extended time, and he was pending a prostate needle biopsy to detect possible cancer, which later tested positive for prostate cancer.

Applicant did not consider his stressful situation an excuse for his actions. He expressed regret for his indiscretion and promised it would never happen again. He testified that as a result of his interview and subsequent embarrassment he has never engaged in similar conduct again.

- Between about 1996 and February 2005, Applicant periodically urinated off the balcony of his home. He also defecated in his yard approximately once a year. Applicant engaged in this behavior for his personal gratification.

Applicant explained he engaged in these acts for his private gratification, and that these were not acts of exhibitionism. He was always careful to ensure that no one could observe him in these acts. His home was protected by a fence and surrounded by woods, and far enough from the nearest home and street that it would have been difficult for anyone to see him. He urinated and defecated in his property because of the good feeling of freedom he received. He equated his actions to that of "marking" his property. He denied engaging in these acts for sexual arousal.³

Applicant expressed embarrassment and regret for his actions numerous times throughout his hearing. After his 2005 interview, he was so embarrassed that he has never again engaged in any of the conduct alleged in the SOR. Before the interview, he

² The August 2000 report of interview indicates Applicant stated he was aroused by hoping someone would see him undressed (GE 3).

³ The August 2000 report of interview indicates Applicant stated he urinated and defecated on his property for sexual gratification (GE 3).

considered all his behavior “private,” because his actions were on his own property, or he always made sure no one actually observed him. According to Applicant, no one ever saw him engaging in this private behavior and he had not told anyone about it. He disclosed his “private” behavior during his polygraph-assisted interview because he was asked to disclose any behavior that a police officer would consider illegal if the police officer was present.

After his February 2005, interview, he realized the potential negative consequences of his past behavior and completely stopped (Tr. 119-123). He now understands his behavior was inappropriate for someone of his age, status, and education (Tr. 135). Applicant disclosed his questionable behavior to his wife after the 2005 interview (Tr. 125). In January 2009, he sought counseling/therapy to help him deal with his behavior and to learn to communicate better with his wife (Tr. 89). Applicant has not disclosed any of his questionable behavior with his employer, other relatives, or friends.

At his hearing, Applicant presented the testimony of a psychologist as an expert witness (Tr. 147-227). The Doctor assessed Applicant on March 18 and 24, 2009. After numerous tests and two personal interviews, the Doctor concluded Applicant does not suffer from any clinically diagnosable emotional disorder. He believes Applicant has not engaged in similar questionable behavior since February 2005. In his opinion, Applicant’s recurrence is unlikely for the following reasons: (1) Applicant’s sincere remorse and embarrassment; (2) he is extremely intelligent with a superior range of intellectual functioning, verbal reasoning, and social convention; and (3) the drive for Applicant’s fantasies has decreased both from a physiological and cognitive level.

In 2005, Applicant received surgery to address his prostate cancer, and he is in remission. As a result of his operation, he now suffers from erectile dysfunction, and reduced libido (Tr. 91). He also moved from his house to a condominium. In reference to the cognitive level, the Doctor believes the fantasies do not work for Applicant now because they do not make sense for him anymore.

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). 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 controlling 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 access to classified information will be resolved in favor of 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.

In the decision-making process, the government has the initial burden of establishing controverted facts alleged in the SOR by “substantial evidence,”⁴ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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 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* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Guideline D, Sexual Behavior

Under AG ¶ 12 the government concern is that:

⁴ See Directive ¶ E3.1.14. “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

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.

Between approximately 1995 and February 2005, Applicant drove to and from work with his penis outside of his pants. He also urinated and defecated in his yard, dressed/undressed in front of an open window, and walked naked in front of his hotel's room windows. Applicant engaged in this questionable behavior for his own sexual arousal and gratification.

Applicant's behavior raised security concerns under AG ¶ 13:

(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.⁵

AG ¶ 14 provides three mitigating conditions that, considering the totality of the circumstances are present in this case and mitigate Applicant's sexual behavior security concerns:

(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.

Applicant's questionable sexual behavior was, to a certain extent, private and discreet. There is no evidence he was ever seen by anyone performing one of his exhibitionistic fantasies. He last engaged in questionable sexual behavior in February 2005. Since then, he disclosed his behavior to his wife and participated in counseling.

⁵ I find AG ¶ 13 (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," does not apply. The evidence is not sufficient to show Applicant has a personality disorder, and he stopped his questionable behavior in 2005.

As a result of his prostate cancer operation, Applicant has decreased libido and suffers from erectile dysfunction. He has lost interest in his exhibitionistic fantasies.

Applicant expressed sincere remorse for his past behavior and promised never to engage in similar conduct again. Moreover, as a result of the security clearance process, Applicant has learned his lesson and is fully aware of the potential negative consequences of his past questionable sexual behavior to his ability to hold a security clearance.

Guideline E, Personal Conduct

Under Guideline E, the security concern is that 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. AG ¶ 15.

Applicant's questionable past sexual behavior (as discussed above under the sexual behavior guideline) triggers the applicability of AG ¶ 16:

(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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

AG ¶ 17 provides three conditions that mitigate the personal conduct security concerns:

(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; and

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

As stated above in the discussion concerning the applicability of mitigating conditions under AG ¶ 14, Applicant's questionable sexual behavior was, to a certain

extent, private and discreet. There is no evidence he was ever seen by anyone performing one of his exhibitionistic fantasies. He last engaged in questionable behavior in February 2005. Since then, he disclosed his past behavior to his wife, security officials, and participated in counseling. As a result of his 2005 prostate cancer operation, Applicant has decreased libido and suffers from erectile dysfunction. He has lost interest in his exhibitionistic fantasies. He mitigated the personal conduct security concerns.

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 the relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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.

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. During a 10-year period, Applicant drove to and from work with his penis outside of his pants. He also urinated and defecated in his yard, dressed/undressed in front of an open window at his residence, and walked naked in front of his hotel room's windows. He engaged in this questionable behavior for his own sexual arousal and gratification. Applicant placed himself at risk, demonstrated questionable judgment, and an unwillingness to follow/comply with social rules of conduct. He also risked criminal prosecution for exposing himself to others.

On the other hand, Applicant is a mature, well-educated man, and a good husband and father. He has successfully worked for government agencies and defense contractors since age 21. He has had access to classified information on-and-off during the last 40 years. The only security violation on record occurred in 2004 when Applicant self-reported taking classified information home by mistake. There is no evidence this mistake resulted in the compromise of classified information. Through his many years of government service, Applicant has made significant contributions to the government and government contractors.

Applicant expressed sincere remorse for his past behavior. He stopped his questionable behavior in February 2005, and promised never to engage in similar conduct again. Applicant has learned his lesson and is fully aware of the potential negative consequences of engaging in questionable sexual behavior to his ability to hold a security clearance. I find that Applicant's questionable behavior is unlikely to recur, does not cast doubt on Applicant's current reliability, trustworthiness, or good judgment, and that he has taken positive steps to reduce his vulnerability to exploitation, manipulation, or duress.

Applicant disclosed his questionable behavior to his wife and participated in counseling. His 2005 prostate cancer operation has reduced his libido and he now suffers from erectile dysfunction. He has lost interest in his exhibitionistic fantasies. The drive for Applicant's fantasies has decreased both from a physiological and cognitive level. For all the foregoing reasons, I conclude Applicant has mitigated the sexual behavior and personal conduct 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:	FOR APPLICANT
Subparagraphs 1.a - 1.d:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge