



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 07-10795
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: John B. Glendon, Esq., Department Counsel
For Applicant: William F. Savarino, Esq.

October 31, 2008

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has not mitigated security concerns pertaining to Criminal Conduct, Sexual Behavior, and Personal Conduct. Clearance is denied.

Statement of the Case

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on March 2, 2006. On February 28, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines J, D, and E. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on March 17, 2008, and requested a hearing before an Administrative Judge. DOHA received his response on March 19, 2008. Department Counsel was prepared to proceed on April 14, 2008, and I received

the case assignment on April 16, 2008. DOHA issued a notice of hearing on May 8, 2008, scheduling the hearing for June 17, 2008. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 8, which were received without objection. Applicant offered Applicant Exhibits (AE) A through C. Department Counsel had no objection to AE A and AE C, but did object to AE B on the grounds of hearsay and lack of timely submission. AE B is a letter dated June 13, 2008 from Applicant's therapist. After argument by counsel, I overruled Department Counsel's objection, and admitted AE A through C. Tr. 20-22. Applicant testified on his own behalf. DOHA received the hearing transcript (Tr.) on June 27, 2008.

Findings of Fact

Applicant admitted all of the SOR allegations as alleged. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence, I make the following additional findings of fact.

Applicant is a 31-year-old Information Release Officer, who has been employed by a defense contractor since August 2005. GE 1. He previously held a security clearance when employed as a compliance specialist by a Government agency from January 2003 to May 2005. In May 2005, he resigned from that position after being charged with sexual abuse and simple assault in lieu of being involuntarily terminated, discussed *infra*. Applicant. GE 1. He seeks a security clearance because there are occasions where "it would be very useful to have one." Tr. 176.

Applicant completed his undergraduate studies in April 2002, and was awarded a Bachelor of Arts degree. He attended graduate school from September 2002 to May 2004, and was awarded a Master's Degree. GE 1, Tr. 172-173. Applicant was married from May 2001 to December 2004. That marriage ended by divorce. He has no dependents. GE 1.

The thrust of this case centers on an incident that occurred in August 2003 in a major metropolitan area. While walking to work, Applicant noticed a young woman who he found "attractive" and stated "I wanted to go up and talk to her, get to know her." Tr. 105. Applicant said "hello and talked to her for a moment and she turned around and that was when I – that was when I groped her (breast)." Tr. 106, 108. After being groped, she reacted, "What the [expletive deleted] are you doing?" Tr. 107. Referring to what happened next, Applicant testified, "Well I said, 'I'm sorry. It's – I'm sorry, it's nothing personal.'" "That's a stupid thing to say in hindsight, but that was what I said." Tr. 108. Applicant initially ran "a few paces" and continued on to work. At that time, no law enforcement involvement occurred because Applicant left the scene before the victim could summon the authorities. Tr. 109.

In May 2004, the victim later saw Applicant near the location where the incident occurred. This time, she was successful in summoning the police. Applicant was confronted by the police, and was interviewed and photographed. Later that month, the police issued an arrest warrant and Applicant was charged with sexual abuse and

simple assault. In November 2004, Applicant appeared in court and the sexual abuse charge was dismissed, and he was convicted of simple assault pursuant to his guilty plea. He was sentenced to 6 months incarceration, which was suspended, 18 months probation, 60 hours of community service, 6 months mandatory behavioral counselling and ordered to pay approximately \$250 in fines and court costs. (SOR ¶¶ 1.a., 2.a., 3.a.). GE 6 – 8.

In May 2005, as a result of his arrest and conviction discussed *supra*, Applicant resigned in lieu of being terminated from his job as a compliance specialist with a Government agency. (SOR ¶ 3.b.). Tr. 71-72.

Applicant's immediate supervisor testified on his behalf. He stated he has been Applicant's supervisor for three years, that he knows him well, and has written three evaluations on Applicant, which were all commendable, i.e. "commendable, exceptional being the top." He found Applicant to have many good qualities to include honesty and dependability. He added that he was familiar with Applicant's past and the underlying facts in the SOR, and in spite of Applicant's past supports him for a security clearance. Tr. 24-37.

Applicant's father testified on his behalf. He stated he and his wife were present to support their son. He described the relationship with his son as "close," and they share many interests. In that regard, he stated that Applicant informed him of all aspects regarding his May 2004 charges. He has counselled his son "to do the right thing," and "deal with the consequences of the actions that he had done." He stated their family has been and remains very involved with their Church, and that their Church has been a significant source of support for Applicant during this process. Based on how well he knows his son, the fact this incident occurred over four years ago, and the progress Applicant has made, Applicant's father believes Applicant has put this incident behind him. He communicates with his son by telephone. Tr. 37-52.

Applicant's former girlfriend testified on his behalf. She met him at Church and dated him for approximately six months in 2005. She began dating him while he was on probation, and stated Applicant informed her of his past assault on their first date. She was initially taken aback, but proceeded with caution. She stated that while she and Applicant were dating, he did not give her any reason to feel uncomfortable nor did she notice anything unusual about his behavior. She has remained friends with Applicant since they stopped dating. Tr. 52-68.

Applicant spoke of the important role his Church has played and continues to play in his life. Applicant was precluded from attending his Church from August 2004 to November 2007 as a result of this incident. As a precondition of being allowed to return to Church, he met with his Church leaders, came to terms with his actions, repented, and took the necessary corrective action to ensure he did not make the same mistakes again. One of the preconditions of being allowed to return to Church was to meet with his therapist, who communicated with Church leaders regarding Applicant's progress. Tr. 68-78.

In March 2004, Applicant was involved in an incident similar to the one that occurred in August 2003. His in-laws took him and his then-wife to a vacation in Mexico around the time they were completing graduate school. While on vacation and out of the presence of his in-laws and wife, Applicant groped an 18-year-old woman on her breast he met at their hotel. He stated he did so “impulsively” and that he “was not acting on [his] best judgment.” The woman reported her being groped by Applicant to the hotel management, who in turn reported the incident to his in-laws and wife. Applicant stated “things fell apart from that point.” After this incident, Applicant and his wife separated and eventually divorced. Tr. 78-84, 130-132.

After Applicant’s wife left, he sought counselling in April 2004 and continued with counselling until February 2008. Applicant’s therapist diagnosed him with “Impulse Control Disorder NOS 312.3 (due to ego-dystonic involvement with pornography); Partner Relationship Problems V61.10; r/o depression.” GE 3. He initially started counselling in a group format, which he participated for “about a year” and then switched to individual counselling. Applicant’s therapist informed him he was moving from the area and the decision to terminate counselling was “mutual.” Applicant stated while employed by the Government agency, he held a top secret clearance, which was later upgraded to sensitive compartmented information. He held a clearance during the 2003 and 2004 groping incidents. Tr. 84-88, 90, 95-96.

Applicant provided the following explanation regarding how he could engage in such behavior given his background:

You know, when I look at it now I don’t know the answer to that question. I know that at the time I was – I was not acting in my best judgment. I felt – felt isolated in the marriage relationship. I was ashamed of the struggles that I was having in my marriage.

I knew that I was not living up to the standards of the Church, and I got caught in, you know, a bit of a downward spiral that culminated with this incident.

And if I could go back and reverse those decisions, I absolutely would, but the best that I could do was to exert my full effort into recovering, taking responsibility for what I did.

I wanted to save the marriage relationship, but I had made decisions that had taken it out of my hands. My wife was not – she didn’t want to continue with that. And, looking back, I don’t blame her. Tr. 88-89.

On cross examination, Department Counsel reviewed Applicant’s counseling records with him. Applicant acknowledged there were several additional “incidents” that occurred in addition to the two incidents already identified. When pressed for a number, Applicant conceded there were “[m]ore than three, less than ten.” Tr. 117. These other incidents occurred on public transportation or on the street. Tr. 118. Applicant testified he has gotten over his fetish with breasts, which was identified in his counseling records

in July 2004. GE 3, Tr. 132. Applicant's counseling records also identified his having sent text messages to women regarding their breasts and having been with a woman, who worked for an escort service. GE 3, Tr. 133-136. The counseling records also reported that that Applicant was being treated for issues pertaining to being "sober as it pertains to pornography" and ongoing issues with nocturnal masturbation. GE 3, Tr. 139-140. The counseling records document four years of therapy, which Department Counsel queried the Applicant about at some length. These records document a number of sexually related issues that Applicant had discussed with his therapist, and how these problems affected his ability to function as a well adjusted responsible member of society. GE 3, Tr. 132-171.

Applicant submitted a Final Summary Report from this therapist dated June 13, 2008, which is summarized in part:

1. Applicant initiated therapy in April 2004 for problems with his personal life, including his marriage, feelings of depression, and compulsive sexual behaviors that involved groping women's breasts.
2. Applicant was diagnosed with Impulse Control Disorder, NOS, DSM IV code 313.30.
3. His treatment involved twice monthly individual and weekly group psychotherapy sessions for about 24 months. The individual counseling was later reduced to monthly sessions.
4. Applicant's therapy continued until February 2008, primarily as a result of his therapist moving out of state, but also due to mutual agreement that the work of psychotherapy had concluded. The therapist determined it was unnecessary to refer Applicant to another local psychotherapeutic recourse. AE B.

Applicant submitted a signed, sworn statement from a religious leader from his Church. This religious leader has known Applicant since June 2005, and dealt with Applicant after he had been "disfellowshipped" through a Church disciplinary council. He met with Applicant from June 2005 to November 2007 in his capacity as a religious leader. He concluded by stating Applicant had atoned for his actions and made the requisite changes in his life to avoid past bad behavior. He found Applicant to dependable, honest and trustworthy and believes Applicant would be a positive responsible and loyal employee to any employer including the U.S. Government. AE C.

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 useful 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 over-arching adjudicative goal is a fair, impartial and common sense 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,"¹ 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).²

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

¹ 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). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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).

² "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

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.

Conclusions

Guideline J, Criminal Conduct

The security concern relating to the Guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

The Government established its case under Guideline J by Applicant's admissions and evidence presented that Applicant was issued an arrest warrant in May 2004 that he was charged with sexual abuse and simple assault in May 2004, and was convicted pursuant to his guilty plea of simple assault in November 2004, and sentenced.

Of the six Criminal Conduct Disqualifying Conditions listed under AG ¶ 31, two are applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct regardless of whether the person was formally charged, formally prosecuted or convicted.

Of the five Criminal Conduct Mitigating Conditions listed under AG ¶ 32, two are potentially applicable:

- (a) so much time has elapsed since the criminal 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; and
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Guideline D, Sexual Behavior

The security concern relating to the Guideline for Sexual Behavior is set out in AG ¶ 12:

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.

The Government established its case under Guideline D by Applicant's admissions and evidence presented that Applicant sexually abused a woman in a public area in August 2003.

Of the four Sexual Behavior Disqualifying Conditions listed under AG ¶ 13, four are applicable:

- (a) sexual behavior of a criminal nature, whether or not 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.

Of the four Sexual Behavior Mitigating Conditions listed under AG ¶ 14, two are potentially applicable:

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

Guideline E, Personal Conduct

The security concern relating to the Guideline for Personal Conduct is set out in AG ¶ 15:

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.

The Government established its case under Guideline E by Applicant's admissions and evidence presented that he sexually abused a woman in a public area while holding a security clearance, and that he resigned in lieu of being terminated from his Government position as a result of conduct, described *supra*, in May 2005.

Of the seven Personal Conduct Disqualifying Conditions listed under ¶ AG 15, one is applicable:

(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,

Of the seven Personal Conduct Mitigating Conditions listed under AG ¶ 17, two 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 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.

Applicant's arrest warrant issued in May 2004 following his sexual abuse of a woman in a public area in August 2003 brought to the forefront his criminal conduct, sexual behavior, and personal conduct concerns. However, the evidence developed a much broader account than a single incident of groping on a public street. Not long after Applicant's groping incident in August 2003, he groped a woman's breast while on vacation with his wife and in-laws.

During cross examination, Department Counsel uncovered more incidents than the two already identified. He gleaned from Applicant that he had been involved with more than three, but less than ten similar incidents that occurred on public transportation or on the street. Applicant's therapy records document a four-year struggle to overcome not only Applicant's infatuation with breasts and socially unacceptable behavior, but also other sexually dysfunctional issues. His therapy recently ended in February 2008, and although ended in part by "mutual agreement," the primary reason was prompted as a result of Applicant's therapist moving out of state.

Applicant's counseling records note in great detail the groping incidents and other sexually dysfunctional problems that have plagued him. To Applicant's credit, he has made great strides in coming to terms with his past, and has the good fortune of having very supportive parents and a Church community that he has reconnected with. However, the repetitive nature of Applicant's reprehensible conduct and the extremely poor judgment he exercised while holding a security clearance causes me to have serious doubts whether it is in the best interest of national security to grant Applicant a security clearance. It is noteworthy from Applicant's testimony that his strong levels of religious and family influence failed to prevent his inappropriate conduct.

I find the facts warrant application of all the Disqualifying Conditions listed, *supra*. The only Mitigating Conditions listed *supra* that I find partially applicable are those under AGs ¶¶ 32(d), 17(d) and 17(e). Applicant has acknowledged his behavior and did obtain counseling; however, I am reluctant to accept the notion such behavior is unlikely to recur given the fact Applicant recently terminated therapy. Further time is required to evaluate Applicant's behavior. Applicant's family, employer, and some of friends are aware of his past.

I am required to consider Applicant's overall questionable behavior when evaluating the seriousness of the conduct alleged in the SOR to determine factors such as the extent to which his behavior is recent; the likelihood of recurrence; Applicant's explanations concerning the circumstances of the incidents alleged; and his rehabilitation.³

Under the totality of the circumstances, I find Applicant's behavior is relatively recent and not isolated. Considering his past behavior, the nature and seriousness of his misconduct, and his unwillingness to avoid unlawful and/or unacceptable conduct over a period of time, I find his favorable information is not sufficient to mitigate Guidelines J, D, and E security concerns. His behavior raises questions about his ability and willingness to follow the law, and ultimately, to protect classified information. His conduct in which he exercised extremely poor judgment on a number of occasions, spanning a several year period, weighs against a finding of rehabilitation and positive behavioral changes.

To conclude, Applicant presented insufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole person concept was given due consideration and that analysis does not support a favorable decision.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"⁴ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has

³ ISCR Case No. 04-09959 at 3 (App. Bd. May 19, 2006).

⁴ See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

not mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

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 J: Subparagraph 1.a.:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline D: Subparagraph 2.a.:	AGAINST APPLICANT Against Applicant
Paragraph 3, Guideline E: Subparagraph 3.a.: Subparagraph 3.b.:	AGAINST APPLICANT Against Applicant For Applicant

Conclusion

In light of all of the circumstances presented by the record 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.

ROBERT J. TUIDER
Administrative Judge