



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



In the matter of:)
)
) ISCR Case No. 07-18672
)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esq., Department Counsel
Tovah Minster, Esq., Department Counsel
For Applicant: *Pro Se*

June 22, 2009

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated the concerns raised under the Sexual Behavior and Personal Conduct guidelines. Eligibility for access to classified information is denied.

On January 20, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline D, Sexual Behavior and Guideline E, Personal Conduct. 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 on February 19, 2009, and requested a hearing before an administrative judge. The case was assigned to me on May 11, 2009. DOHA issued a notice of hearing on May 12, 2009, and the hearing was convened as

scheduled on June 1, 2009. The Government offered Exhibits (GE) 1 through 10, which were received without objection. Department Counsel's discovery letter was marked Hearing Exhibit (HE) I. Applicant testified on his own behalf, called two witnesses, and submitted Exhibits (AE) A through C, which were received without objection. DOHA received the transcript of the hearing (Tr.) on June 9, 2009.

Procedural Rulings

I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to 15 days notice.

Findings of Fact

Applicant is a 54-year-old employee of a defense contractor. He has worked for his current employer or a predecessor company since 1990. He has held a security clearance at the Secret or Top Secret level since 1985. He has a master's degree. He has been married since 1980. He has two adult children.¹

Applicant has a long history of incidents of indecent exposure and public masturbation. He was charged as a juvenile in 1968, when he was 14 years old, with indecent exposure. He was masturbating in his front yard and was observed by his adult neighbor. He was placed on probation for two years for the offense. He admitted that his incidents of indecent exposure and public masturbation occurred about once or twice every two weeks from about 1968 through 1978. He received psychological treatment from about 1968 to 1970 for his issues.²

Applicant was arrested in 1978, and charged with exposing himself in a public place. He was 24 years old at the time. He exposed his genitals and was masturbating in front of two girls who were about 14 years old. He was convicted of the reduced charge of disturbing the peace and was placed on probation for at least one year. He again received psychological treatment from about 1978 to 1980.³

Applicant continued his behavior of public masturbation approximately once a month from 1978 through September 2005. He often observed a female that he found attractive while he was driving or walking. If he was driving, he would find a parking lot or side street and masturbate. If he was not in the car, he would attempt to find a place such as public bathroom with a locked stall or a bathroom shower in the gym and masturbate. He stated that the last time someone observed him masturbating was in the mid-1990s. He was in a car and saw a woman. He was masturbating while he drove

¹ Tr. at 33-35, 44; GE 5.

² Applicant's response to SOR; GE 1-4, 6, 9, 10.

³ *Id.*

past her and she saw him. He stated that he stopped exposing himself out of fear of being arrested.⁴

Applicant submitted a Personnel Security Questionnaire on November 13, 1985. He listed his two arrests and his psychological counseling. He also wrote, "I have had no further problems and do not anticipate any more problems."⁵ He provided a signed written statement for his background investigation on January 30, 1986. He discussed his arrests, psychological counseling and sexual behavior up through 1978, but he wrote:

Partly because of my counseling and mostly because I became a Christian I gave up this behavior in 1978. It is no longer even something that I have to guard against and I don't feel it is a security problem as my wife, my family and close friends are aware of my past behavior.⁶

Applicant testified that he had given up exhibitionism by that time, but was still masturbating in public places. He later admitted that when he provided the statement, he was still having problems with exhibitionism, and that it was a false statement.⁷

Applicant submitted another Personnel Security Questionnaire on January 7, 1991. He again listed his two arrests and his psychological counseling. He provided another signed written statement for his background investigation on March 27, 1991. He discussed the omission of some old drug use from the questionnaire. He did not admit that his incidents of public masturbation had continued. He wrote:

When asked by the interviewer how I view myself in relation to honesty and ethical behavior, I described myself as an experienced man. I have lived through the mistakes of my youth and still have to explain them to others. This has resulted in a great deal of self evaluation which has helped me to make better decisions and live a more honest life. I believe I am very honest and as I mentioned above I am not comfortable with dishonesty. . . . Again I ask you to forgive me for omitting the above drug use and believe me when I say that I am being completely honest with you. Thank you.⁸

⁴ Tr. at 30-32, 37-40; Applicant's response to SOR; GE 6, 9.

⁵ Tr. at 30; GE 1. It was not alleged in the SOR that Applicant submitted false information and any false statements will not be used for disqualification purposes. His statements will be considered in assessing his credibility, in the application of mitigating conditions, and in analyzing the "whole person."

⁶ GE 2.

⁷ Tr. at 31-32.

⁸ GE 4.

Applicant had a polygraph and interview in October 2005, pursuant to a request that he be granted access to Sensitive Compartmented Information (SCI). He admitted during the interview that he had continued to masturbate in public places, with the last incident in September 2005. He stated that he did it because he was unable to control his urges. He was denied access to SCI in February 2006.⁹

After he was denied access to SCI, Applicant sought counseling through his Employee Assistance Program (EAP). He received counseling from a Licensed Professional Counselor (LPC) from about March 2006 to August 2006 for his sexual compulsion issues. He enrolled in a program at his church in which he was provided a trained accountability partner. He met with or conversed weekly with his accountability partner for about six months. He began attending a 12-step program through his church in March 2006, and still regularly attends and leads the program. Applicant's LPC wrote that "in [his] professional judgment, [Applicant] did not have a condition or treatment that would impair his judgment or reliability, particularly in the context of safeguarding classified national security information."¹⁰ The director of the 12-step program wrote:

In my experience [Applicant] is well into recovery and plans to continue with the program. Based on his actions and honesty, I do not judge him to be an imminent threat to the national interest, nor a security risk due to his open and honest behavior. Given the number of people that are aware of his issue and the steps he has taken to change his behavior I do not believe that [he] would be subject to influence or coercion, exploitation, or duress. I find [Applicant] to be reliable, trustworthy and a leader within our program.¹¹

Applicant admitted that he last masturbated in an inappropriate place a few weeks ago, when he masturbated in the locked bathroom on an airplane. He was at his son's college graduation and "there were a number of very attractive young women in very slinky dresses, and one in particular caught [his] eye and stayed in [his] mind."¹² He stated that he attempts to avoid things and places that could act as a sexual stimulus such as:

Looking at pornography, watching things on TV that would be stimulating, going places where you would know that there would be females that might be undressed, like at a beach or swimming pool, where you could see more flesh. So I avoid those situations. I don't go actively seek those out. So I don't take in as much stimulus, and I mean, you get a certain amount just on a normal summer day, but I look away, I talk to people in

⁹ Tr. at 32-33; GE 6, 8, 9. The results of the polygraph are not considered for this decision except insofar as the impact the polygraph had on Applicant providing details about his sexual incidents.

¹⁰ Tr. at 26-27, 35-37, 41-44, 47; Applicant's response to SOR; AE C.

¹¹ AE B.

¹² Tr. at 37-41.

my accountability group about struggles. And that helps to debilitate it and take it out of my mind.¹³

Applicant's wife is completely aware of his sexual issues and the steps he has taken to address them. He has also told his children about his problem. A leader of Applicant's 12-step program testified on his behalf. He stated that Applicant is committed to the program. Applicant told him about the incident on the airplane. He believes that Applicant is trustworthy and that he would not be subject to coercion or duress because of his condition.¹⁴

Applicant noted that he takes national security very seriously and has no personal security violations in his record. He stated that his issues could not be used as a basis for duress or exploitation and that he would contact security officials if anyone ever attempted to do so.¹⁵

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 to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is

¹³ Tr. at 41.

¹⁴ Tr. at 27-28, 45-54; Applicant's response to SOR; AE A.

¹⁵ Tr. at 28.

responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion as to obtaining 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 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 adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

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 can 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 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;
- (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.

Applicant's incidents of indecent exposure, exhibitionism, and masturbating in public and/or inappropriate places establish all the above disqualifying conditions. SOR ¶¶ 1.c, 1.e, 1.h, and 1.i allege Applicant's counseling and participation in the 12-step program. Those are matters in mitigation and do not raise a disqualifying condition. SOR ¶¶ 1.c, 1.e, 1.h, and 1.i are concluded for Applicant.

Conditions that could mitigate Sexual Behavior security concerns are provided under AG ¶ 14. The following are potentially applicable:

(a) the behavior happened 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.

Some of the incidents alleged occurred during Applicant's adolescence. However, they continued well into his adult years. AG ¶ 14(a) is not applicable. It has been more than ten years since he exposed himself to a woman, but his incidents of masturbating in inappropriate places has continued. Applicant may not have been observed when he masturbated in a parked car, bathroom stall, gym shower, and the bathroom on an airplane, but they are not completely private places, and the behavior cannot be considered discreet. AG ¶¶ 14(b) and 14(d) are not applicable. Applicant has informed his wife, children and others about his sexual issues. That has lessened his vulnerability to coercion, exploitation, and duress. Because he continues to engage in inappropriate sexual actions, his vulnerability to coercion, exploitation, and duress also continues. AG ¶ 14(c) is partially applicable.

In sum, I conclude that Sexual Behavior security concerns are still present despite the presence of some mitigation.

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.

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

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

Applicant's personal conduct was also alleged under the Sexual Behavior guideline, as addressed above. That behavior also constitutes personal conduct and concealment of information about his conduct that could create a vulnerability to exploitation, manipulation, or duress. AG ¶ 16(e) is applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following 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;

(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.

AG ¶¶ 17(c) and 17(e) correspond to similar mitigating conditions under the Sexual Behavior guideline. AG ¶ 17(c) is not applicable and ¶ 17(e) is partially applicable under the same rationale discussed above. Applicant has obtained counseling and taken other positive steps to address his sexual problems. However, he repeated his inappropriate behavior several weeks ago. He is clearly sincere in his attempts to control his behavior, but at this time the behavior is likely to recur. AG ¶ 17(d) is partially applicable. Like the Sexual Behavior concerns, the Personal Conduct concerns are still present despite the presence of some mitigation.

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 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines D and E in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. Applicant has suffered from sexual compulsion problems since his early teens. He curtailed his incidents of exposing himself to women more than ten years ago because he was afraid of being arrested. He continued to masturbate in semi-private places such as a parked car, bathroom stall, gym shower, and the bathroom on an airplane. When he applied for a security clearance in 1985, Applicant revealed his sexual issues as a youth, but indicated they were in the past and he kept his problems hidden from the Government for many years. He finally revealed his problems during a polygraph and interview pursuant to a request for access to SCI. He initiated counseling, obtained an accountability partner, and started attending a 12-step program after he was denied SCI access. Applicant should be commended for his actions to address his problems. He is clearly sincere in his desire to control his compulsions. It is equally clear that he is not yet in complete control of himself. He has lessened his vulnerability to pressure, coercion, exploitation, and duress by his openness to his family and others about his problems. I considered all of Applicant's favorable information. However, the sexual conduct is likely to recur and his vulnerability remains a very real concern.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the concerns raised under the Sexual Behavior and Personal Conduct guidelines.

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
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against 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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge