

Applicant answered the SOR allegations on November 22, 2010, and requested a hearing. On January 13, 2011, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On January 14, 2011, I scheduled the hearing for February 16, 2011.

I convened the hearing as scheduled. Seven Government exhibits (Ex. 1-7) were admitted. Applicant objected to Government exhibits 5 and 6, which were both from the same police department. Both records referenced a number of 911 calls to the police station that were due to a problem with the phone service, as well as other incidents that were not alleged in the SOR, which the Government argued were relevant to a whole-person assessment of Applicant. Since police records are admissible under the Directive, and they also covered the charges alleged in the SOR, I admitted both documents with the weight to be afforded specific information dependent on its relevance to the issues alleged in the SOR. Applicant submitted no documents on his behalf, but he testified, as reflected in a transcript (Tr.) received on February 28, 2011.

Findings of Fact

The SOR alleged that under guidelines J, D, and E that Applicant was charged in April 2009 with felony assault to rape, indecent assault and battery on a person 14 or over, and assault and battery, and that he pleaded guilty to the assault and battery charge. (SOR 1.a, 2.a, 3.a). When he answered the SOR, Applicant admitted the charges and court disposition for assault and battery. However, he indicated that he pleaded guilty to the “trumped up charge” to avoid the costs and negative publicity of a public trial. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 54-year-old port engineer who has been employed by the same defense contractor since June 1987. (Ex. 1.) He currently serves as the director of engineering and holds a secret-level security clearance. (Answer; Ex. 1.) A graduate of a maritime academy, Applicant had prior military reserve service as an officer and achieved the rank of lieutenant commander. (Ex. 1.)

In late April 2009, Applicant went on a date with a woman whom he had met online through a members only website for those seeking alternative sexual behaviors.¹ After they ate dinner at a local inn, he accompanied her to her vehicle where he then assaulted her. A police officer on detail in the area noticed that the woman was “hysterical” outside of the inn. (Ex. 3.) She complained that Applicant had kissed her very forcibly, grabbed her in the breast and vaginal areas, and grabbed her around the neck, making it difficult for her to breathe. She indicated also that while Applicant was assaulting her, he repeatedly asked whether he could go to her home, and he appeared to her to be very intoxicated. He left only after she began honking her car’s horn. On her complaint, Applicant was arrested and brought to the station, where he admitted to the police that he had kissed the woman aggressively and had grabbed her breast. However, he denied that he had put his hands

¹The police who checked the website described it as a “fetish” website that one had to be a member to access. (Ex. 3.)

around her neck. Bail was set at \$100,000 cash, and he was jailed overnight awaiting arraignment. The next day, he was released on personal recognizance. (Ex. 3.) Applicant was charged in court with assault with intent to rape (felony), indecent assault and battery on a person age 14 or over,² and assault and battery. In August 2009 he pleaded guilty to misdemeanor assault and battery and was placed on probation for two years, until August 23, 2011. Applicant was also ordered to undergo an alcohol evaluation and any recommended counseling, to stay away from the victim, to complete an anger management program, and to pay a \$1,560 probation supervision fee and a \$50 victim witness assessment. The felony assault with intent to rape and indecent assault charges were dismissed at the request of the complainant. (Ex. 4.)

On December 17, 2009, Applicant was interviewed about his arrest by an authorized investigator for the Office of Personnel Management (OPM). Applicant told the investigator that after he and his date had dinner, she invited him to her car where they kissed; that the woman then asked Applicant if “he liked it rough,” at which point he told her that he was going home. Applicant added that a statement was presented in court in which the victim complained that he had grabbed her breast. Applicant denied that he had done so, but he agreed to plead guilty to misdemeanor assault to avoid a trial in order to keep his family and company “out of it.” Applicant averred that his arrest was known to his family and to the company’s president and facility security officer. To date, he had completed five of 15 court-mandated anger management counseling sessions and was scheduled to remain on probation until August 2011. In September 2010 DOHA gave Applicant an opportunity to review a report of this interview containing these representations. Applicant attested to its accuracy and made no changes. (Ex. 2.)

On April 12, 2010, Applicant completed a domestic abuse and generalized violence intervention program as required by the court. To meet the discharge criteria, he was required, in part, “to report an acceptance of responsibility for the abusive and violent behaviors [he had] used towards others,” and to cease blaming the victim for his own actions. The counselor reported that Applicant admitted during counseling that he had “grabbed” the woman and “kissed [her] roughly.” (Ex. 7.) Applicant contends that the counselor was only reporting the conduct of which he had been accused, and Applicant denies that he admitted to the counselor that he had engaged in the assaultive behavior. (Tr. 60-61.)

On November 4, 2010, DOHA issued an SOR to Applicant because of the April 2009 sexual assault. In his November 20, 2010 answer to the SOR, Applicant described his conduct on the day in question as follows:

² Applicant testified that the felony charges were dismissed. (Tr. 30.) Presumably, Applicant is referring not only to the felony assault with intent to rape charge, but also the indecent assault and battery on a person 14 or over. (Ex. 3.) The arrest report indicates that the crime is a misdemeanor. The criminal complaint indicates that the offense is punishable in state prison not more than five years, or jail or house of correction not more than 2.5 years. (Ex. 4.) Under Section 274:1 of the state’s criminal code, a crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors. Apparently, indecent assault could be charged as a felony or a misdemeanor depending on the circumstances.

The 48 year old woman who accused me of these charges I had only met once for dinner. After dinner she invited me to her car where she proceeded to 'insist' that I play rough with her at which point I sensed something was not right and left her car and drove home. Both the Assistant District Attorney and the Judge sensed that there was something 'missing/wrong' with the plaintiff's claim as no bail was set and both felony charges were dismissed. I pleaded guilty to the misdemeanor A & B in order to forego a public trial and the associated costs and negative publicity. (Answer.)

Applicant gave a similar account at his February 2011 hearing on his security clearance eligibility ("She got aggressive with me, to be honest with you. At one point, again, said do I—do you like it rough, or this and that. I sensed something was not right, I got out of my [sic] car and I drove home."). (Tr. 29-30.) He continued to maintain that he pleaded guilty to the misdemeanor assault and battery ("simply it's a misdemeanor assault as if somebody threw a glass of water on somebody") to avoid a trial and media exposure. (Tr. 30.) Applicant persisted in his denial that he did anything wrong.³ (Tr. 50.) He accepts responsibility only for putting himself in a situation where he should not have been. (Tr. 60.)

As of February 2011, Applicant had yet to complete his probation for the offense. He had two more meetings scheduled with his probation officer, which were to be held in March and then June 2011. (Tr. 63.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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 overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious

³Applicant testified he did not know as of April 2009 that the website at issue had anything to do with alternative sexual preferences (Tr. 33-34.) He claims that it was his idea to meet her at the inn rather than have dinner at her house; that she invited him into her car after dinner; that in the car she kissed him first and bit down on his lip; that she asked him if he liked it rough; and that she was aggressive with him in view of two officers on detail not far from the car. He admitted that he may have caressed her breasts but claimed that the woman was "willing." (Tr. 39-41.) Applicant denied that he ever groped her vaginal area or that he grabbed her by the neck, or that he was intoxicated on the night in question. (Tr. 39-42.) He also contested her account that she honked the horn to get him to leave her vehicle. (Tr. 43.) Applicant had no explanation for why the victim would have been crying hysterically if she was the aggressor other than that she might have been upset with him for leaving. (Tr. 44.)

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. 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 responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Upon consideration of all the facts in evidence, and after application of pertinent laws and the adjudicative conditions, I conclude that Applicant’s April 2009 assault and battery raises security concerns under Guidelines J (Criminal Conduct), Guideline D (Sexual Behavior), and Guideline E (Personal Conduct), as follows.

Criminal Conduct

AG ¶ 30 expresses the security concern about criminal conduct, “Criminal activity creates doubt about a person’s judgment, reliability, and untrustworthiness. By its nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.” AG ¶ 31(a), “a single serious crime or multiple lesser offenses,” and AG ¶ 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” apply because of Applicant’s assault and battery conviction. AG ¶ 31(d), “individual is currently on parole or probation,” is also implicated in that Applicant is scheduled to remain on probation until August 23, 2011. Applicant testified at his February 2011 hearing on his security clearance eligibility that he had only two more meetings with his probation officer, to be held in March and then in June

2011. However, court records show that his probation is not scheduled to end at that time, and there is no evidence that Applicant will be discharged early from his probation.

AG ¶ 32(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,” does not apply to such relatively recent criminal conduct. The state does not consider Applicant fully rehabilitated until such time as he has completed his full sentence, which includes his probation term.

Applicant’s case in mitigation is predicated on AG ¶ 32(c), “evidence that the person did not commit the offense.” During his subject interview, in his Answer to the SOR, and at his hearing, Applicant contended that he did nothing wrong. He testified on cross-examination that while he may have fondled the woman’s breast, she was willing. He maintains that she was the aggressor, and that he pleaded guilty to misdemeanor assault to avoid a trial and potentially negative publicity. His present denials of any culpability cannot be reconciled with his previous admissions or with independent observations of the police, however. The police noticed the woman crying hysterically outside the inn. Her reaction is not what one would expect if she was the aggressor or accepted his advances willingly. Furthermore, Applicant admitted to the police at the time of his arrest, and to his counselor in the anger management program, that he had grabbed the woman’s breast and that he had kissed her roughly. His lawyer advised him to accept the plea bargain, apparently after hearing Applicant’s version of what happened. This would suggest that the attorney felt there was a risk of him being convicted at a trial. Applicant’s assaultive behavior was sufficient for a misdemeanor assault and battery conviction.

Applicant’s present probationary status is not a per se bar against renewal of his security clearance, but when coupled with his failure to acknowledge his own wrongdoing, I cannot apply AG ¶ 32(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.” Applicant’s completion of the court-ordered domestic abuse and generalized violence intervention program is not particularly indicative of reform when he does not accept responsibility for his own misconduct. The Criminal Conduct concerns are not fully mitigated.

Sexual Behavior

The security concerns arising from sexual behavior are set forth 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.

Two Sexual Behavior disqualifying conditions clearly apply because of his sexual assault of the woman in April 2009: AG ¶ 13(a), “sexual behavior of a criminal nature, whether or not the individual has been prosecuted,” and AG ¶ 13(d), “sexual behavior of a public nature and/or that reflects lack of discretion or judgment.” While private consensual conduct between adults does not raise a security concern, Applicant’s sexual advances were unwanted and sufficiently public to reflect poor judgment on his part. Even if it involved only rough kissing and forcible fondling, it took place in the victim’s vehicle, which was parked about 30 feet away from the police detail according to Applicant. (Tr. 40.) AG ¶ 13(c), “sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress,” also must be considered in light of Applicant’s testimony that he accepted the plea bargain in part to avoid the negative publicity (“it was just the exposure you would have and that your company would have to a trial”). (Tr. 53.) Applicant was obviously concerned about the damage to his and his employer’s reputations if his case should go to trial.

Only one mitigating condition has any applicability: AG ¶ 14(c), “the behavior no longer serves as a basis for coercion, exploitation, or duress.” AG ¶ 14(c) applies only if I accept his uncorroborated testimony that his family and employer are aware of the arrest. Given his efforts to blame the victim and an “overzealous” police officer for overcharging him (Tr. 50), he is not likely to have given an accurate account of his behavior to his family and employer, if he informed them of the charges. His relatively recent sexual assault continues to cast doubt on his reliability, trustworthiness, and good judgment.

Personal Conduct

The security concern about personal conduct is set out in Guideline E, 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.

Applicant exercised questionable judgment within AG ¶ 15 when he forcibly grabbed and roughly kissed his date without her consent in April 2009. The most relevant Personal Conduct disqualifying condition is 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. . . .”

Despite the isolated nature of the incident, neither AG ¶ 17(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,” nor AG ¶ 17(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,” are fully established. Not only does Applicant refuse to acknowledge his misconduct or to express remorse, but his failure to provide a credible account of his actions on April 29, 2009, raises independent security concerns of the type contemplated within AG 16(d), “deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.”

The contemporaneous report of the victim cannot easily be reconciled with his account that she was a willing participant. This is particularly so where he also testified that it was something about her demeanor that led him to stop (“I could just sense by her demeanor that this was not right and I put an end to it. I stopped it.”). (Tr. 41.) Serious Guideline E issues are implicated by a lack of candor during the investigation or adjudication of his security clearance eligibility. See AG ¶ 16(b) (stating, “deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative”). The Personal Conduct concerns are also not sufficiently mitigated.

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 his conduct and all relevant circumstances in light of 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.

Applicant questions whether this single incident is serious enough to revoke his security clearance in light of his contributions to his employer. Applicant’s unwanted sexual aggression raises concerns about his judgment. The isolated nature of the assault weighs in Applicant’s favor. He also completed the violence intervention program as required, and there is no evidence that he has violated the terms of his probation. But considerable doubts persist about his reform in light of his refusal to accept responsibility for anything other than putting himself in a potentially compromising situation. He blames the woman and even an “overzealous” police officer for the “trumped up charge” against him. Applicant’s present probationary status and his lack of credibility about his role in the April 2009 sexual assault are significant reasons to deny approval of his security clearance at this time.

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: AGAINST APPLICANT

 Subparagraph 1.a: Against Applicant

Paragraph 2, Guideline D: AGAINST APPLICANT

 Subparagraph 2.a: Against Applicant

Paragraph 3, Guideline E: AGAINST APPLICANT

 Subparagraph 3.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.

Elizabeth M. Matchinski
Administrative Judge