



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



In the matter of:)
)
) ISCR Case No. 11-05586
)
)
Applicant for Security Clearance)

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: Brian Musell, Esq.

02/11/2013

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline D, Sexual Behavior, Guideline J, Criminal Conduct, and Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On August 3, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines D, J, and E. DOD acted 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 adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

Applicant answered (Answer) the SOR on August 31, 2012, and requested a hearing before an administrative judge. The case was assigned to me on October 15, 2012. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 13, 2012, and the hearing was convened as scheduled on December 4, 2012. The Government offered exhibits (GE) 1 through 8, which were admitted into the record without objection. Department Counsel's exhibit index is marked as Hearing Exhibit (HE) I. Applicant testified, called six witnesses, and offered exhibits (AE) A through F that were admitted into the record without objection. DOHA received the hearing transcript (Tr.) on December 17, 2012.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the underlying factual allegations. The admissions are incorporated as findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following additional findings of fact.

Applicant is 66 years old. He has worked for a defense contractor since October 2005. He was married in 1969. He has one adult son and two young grandchildren. He has a bachelor's degree. He has no military experience and currently holds a security clearance.¹

Applicant's conduct raised in the SOR includes: (1) exposing himself in public, specifically when he was 15 years old to a neighbor girl (admitted); (2) exposing himself, with the intent to be viewed by young girls, on at least two occasions between 1997 and 1999 (admitted); and (3) being arrested and charged with indecent exposure on August 20, 2010, to which he pleaded guilty on December 16, 2010, and for which he was sentenced to four years supervised probation, ordered to complete sex offender treatment, and required to register as a sex offender on February 16, 2011 (admitted). This same conduct is alleged under Guideline D, Guideline J, and Guideline E.

When Applicant was about 15 years old, he exposed himself to a neighbor girl. He thought the girl was about 14 years old at the time. The incident was not reported to the police, but the parents of the girl told Applicant's father about the incident. As a result of the incident, Applicant began seeing a counselor. The counseling lasted about one year, and then Applicant stopped attending because his father believed he did not need to go anymore. Applicant attempted to expose himself when he was 16 years old. This exposure occurred after he attended the earlier counseling. He did not report this incident to a defense investigator when he was questioned in January 2011. Although there are no written records supporting it, he claims he brought up this incident with the counselors he was required to see as a result of his December 2010 conviction. He did reveal this incident during cross-examination of his hearing testimony.²

¹ Tr. at 161; GE 1, 2.

² Tr. at 135-136, 164; GE 4.

The next incident occurred during the summer of 1969, when he attempted to expose himself. No further information was given. This admission was not disclosed until brought out on cross-examination. The next period of time that he exposed himself was from 1970 to 1972 when he went to a local mall. He ended up staying in the car and masturbating. He did this on four or five occasions. This admission was not disclosed until brought out on cross-examination. The next incident occurred in about 1974 when he again drove to an area and masturbated in his car. He told his wife about this single incident and they began seeing a counselor. The counseling dealt more with marital issues than it did with his compulsive behavior. There is no information about how long he attended counseling at the time. The next time frame that he attempted to expose himself in public was about 1997. He would go to a public park wearing very tight shorts and attempted to expose himself to some young girls by leaning down to tie his shoe which would expose his genitals. His actions did not gain the attention of the girls he targeted. He was attracted to high school and college-age girls who wore shorts, or what he considered to be revealing clothes.³

On August 20, 2010, Applicant went to a local shopping mall. While eating in the food court area of the mall, he developed an urge to expose himself to two teenage girls who were eating there. He was wearing tight shorts and by moving and positioning his legs, his genitals became visible. He intended to expose himself to the girls. One of the girls saw him, immediately got up, and notified mall security. Applicant got up and left the food court area, went to the parking lot and got into his car, but before he could leave he was stopped by a police officer. He initially denied exposing himself, but later admitted it. He was arrested and charged with indecent exposure, a Class 1 Misdemeanor. He pleaded guilty to the charge and was sentenced to four years supervised probation, mandatory sex offender counseling, and registration as a sex offender. Some of the conditions of his probation included, among other things, no contact with children under 18 years old, submission to psychological testing, and participation in polygraph examinations. He has had no probation violations to date and will remain on probation until about February 2015.⁴

Applicant began his mandatory group therapy with a sex-offense-specific evaluation that was completed in September 2010. He attended eight group or individual therapy sessions through December 2010. He then withdrew from this treatment program to find one that was closer to his home residence. At the time of his withdrawal, his therapist indicated that he had several risk factors that increased his risk of recidivism. These factors included "stranger and/or unrelated victim, sexual preoccupation, and deviant arousal pattern." The therapist also noted that because he scored on the low range on several sexual prediction instruments, he was viewed as having a low risk of re-offending. Finally, the therapist stated that he was still in need of

³ Tr. at 140, 166-168; GE 4.

⁴ Tr. at 150, 182; GE 4.

offense-specific treatment because he was only in the beginning stages when he voluntarily withdrew from treatment.⁵

Applicant introduced a letter from the follow-on sexual treatment program that he entered in December 2010. He has participated in group and individual counseling sessions. He has also taken several polygraph tests, including one that described his past sexual history. He passed four of the polygraph tests and had two with inconclusive results. No detailed records from this treatment program were included in the record.⁶

Applicant also offered the testimony of his treating clinical psychologist (Dr. F). He began treating Applicant in August 2010. Applicant is participating in his treatment voluntarily and at his own expense. As of November 2012, he had completed 95 appointments with Dr. F. Dr. F has worked with sex offenders in the past, but that is not an area of psychology in which he specializes. Dr. F stated that Applicant is through the first stage of disclosure, of which there are three stages. He believes Applicant has made progress with his treatment because there have been no relapses. Applicant also has been diagnosed with cyclical depression. He is taking medication for this condition. Dr. F has not read the Applicant's treatment records from either of the two sex offender programs Applicant has attended, nor has he contacted any of Applicant's therapists or counselors from those programs. Dr. F indicated that since Applicant has exposed himself more than four times, he meets the diagnostic criteria for severe exhibitionism. The targets for his exhibitionist behavior are teenage or young adult females between the ages of 14 to 20. When asked directly why Applicant engaged in this type of behavior, Dr. F stated that he is still exploring that question with him. Dr. F believes that Applicant is treatable and has available to him all the elements of a successful treatment program. He also believes Applicant needs at least one more year of treatment with him. He acknowledged that Applicant will have to continue treatment through the sex offender program for the duration of his probation. Using the Diagnostic and Statistical Manual (DSM) IV-TR, Dr. F diagnosed Applicant under Axis II as having "Exhibitionism."⁷

The terms of Applicant's probation have affected his daily lifestyle in several ways. He is required to complete a safety plan for any trip he makes away from his house. This plan must be approved by his counselor and his probation officer. He also is required to obtain temporary travel permits when he intends to leave town. He is not allowed to see his two grandchildren or to view pictures of them.⁸

In his hearing testimony, Applicant admitted that he did not disclose the full extent of his previous exposure incidents to the defense investigator in January 2011. In

⁵ GE 6.

⁶ Tr. at 148-150; AE A.

⁷ Tr. at 97-129; GE 5.

⁸ Tr. at 146, 151; GE 5; AE E.

his testimony, he admitted to a possible 40 previous exposure incidents, while only admitting to four previous incidents to the investigator. He stated that he knew at the time he was minimizing his previous number of exposure incidents. He kept his behavior a secret and only divulged the full extent of his actions to his wife after his arrest in 2010. When asked about his secretive behavior, he said he kept his actions secret to fulfill his own sexual gratification.⁹

Applicant presented the testimony of friends, colleagues, and his current supervisor who all indicated that he was trustworthy, reliable and an outstanding engineer. He also produced several company awards he received for outstanding achievement.¹⁰

Policies

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 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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

⁹ Tr. at 147, 172, 177-178.

¹⁰ Tr. at 30-89; AE B-C.

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 an 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

Guideline D, Sexual Behavior

AG ¶ 12 expresses the security concern:

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.

I have considered all of the Sexual Behavior disqualifying conditions under AG ¶ 13 and the following 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 exposed himself on numerous occasions to young females over the past 50 years. He was arrested, convicted, and sentenced in 2011 for exposing himself to a teenage girl in a public place in 2010. He has been diagnosed by a psychologist as

an exhibitionist. He kept his behavior secret thus making him vulnerable to coercion, exploitation, or duress. All his actions were criminal, demonstrated a pattern of compulsive sexual behavior, were of a public nature that reflected a lack of judgment, and caused him to be vulnerable to coercion, exploitation, or duress. All the above listed disqualifying conditions apply.

I have considered all of the Sexual Behavior mitigating conditions under AG ¶ 14 and the following are potentially applicable:

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;
- (b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress; and
- (d) the sexual behavior is strictly private, consensual, and discreet.

Although Applicant's first two exposures occurred when he was an adolescent, he continued his exposing behavior beyond adolescence. AG ¶ 14(a) does not apply. Applicant's last exposure occurred in 2010; however, considering that he engaged in similar behavior over the course of about 50 years, it cannot be determined at this point that the behavior is unlikely to recur. His actions cast doubt on his trustworthiness and good judgment. AG ¶ 14(b) does not apply. He finally disclosed his actions to his wife and some of his friends and colleagues. Additionally, as part of his sex offender counseling, he is required to disclose his sexual history, and have that history corroborated by passing a polygraph test. AG ¶ 14(c) applies. His exposure took place in public and his victims did not consent to his actions. AG ¶ 14(a) does not apply.

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 an Applicant'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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following are potentially applicable:

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

Applicant pled guilty to a Class 1 Misdemeanor for which he was sentenced in February 2011 to four years of supervised probation, which he is still serving. He also admitted to exposing himself on multiple occasions over the past 50 years. I find that all the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for Criminal Conduct under AG ¶ 32 and considered the following relevant:

- (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.

Applicant's last known act of exposure occurred in 2010, but it was the most recent act in a pattern of behavior that began when Applicant was a teenager, more than 50 years ago. Under these circumstances, his last act is not sufficiently attenuated after considering his behavior in its totality. AG ¶ 32(a) does not apply. Although Applicant is receiving both group and individualized counseling, he remains on probation and is still considered a risk by the state where he resides. He is required to complete detailed travel plans before he is allowed to leave his immediate area. Even though there is no evidence of a recurrence of his criminal behavior since his arrest, Applicant produced insufficient evidence that his reliability, trustworthiness and judgment are not in question based upon the nature of his previous conduct. Although it appears he is headed down the right track, not enough time has passed to determine whether his rehabilitative efforts have succeeded. So, while some aspects of this mitigating condition are present, on the whole Applicant has not presented sufficient evidence for AG ¶ 32(d) to completely apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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 in this case. 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 (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.

Applicant's conduct of exposing himself to teenage girls in public places made him vulnerable to exploitation, manipulation, or duress and affects his professional standing in the community. He described his conduct as secretive, keeping it undisclosed from his wife and others until after he was arrested. AG ¶ 16(e) applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and 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.

Applicant engaged in unlawful and inappropriate sexual behavior for over 50 years that calls into question his good judgment. Although the last reported behavior was in 2010 and Applicant is receiving counseling to modify his behavior, it is too early to determine whether that counseling will have the desired impact. His admission to his wife and friends about his past sexual behavior is a positive step in reducing his vulnerability to exploitation, manipulation, or duress. AG ¶ 17(c) does not apply. AG ¶ 17(d) partially applies. AG ¶ 17(e) applies.

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 commonsense 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 considered Applicant's current position and his supportive character evidence. I considered his psychologist's testimony that he has not re-offended and has the proper elements available for successful rehabilitation. However, I also considered that Applicant's actions involved 50 years' worth of deviant behavior. He remains on probation for the last criminal act he committed and will remain so for another two years. Additionally, his treating psychologist indicated that at least one more year of therapy is required. He also testified that he minimized his behavior in the past. Only during his hearing testimony did he admit to having been involved with about 40 past incidents. Although Applicant has made positive strides toward his rehabilitation, it is too early to determine whether those efforts will ultimately prove successful. Applicant failed to provide sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline D, Sexual Behavior, Guideline J, Criminal Conduct, and Guideline E, Personal Conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline D:	AGAINST APPLICANT
Subparagraphs 1.a -1.c:	Against Applicant
Paragraph 2, Guideline J:	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.

Robert E. Coacher
Administrative Judge