



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-02859

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: *Pro se*

04/06/2017

Decision

Harvey, Mark, Administrative Judge:

In August 2011, Applicant used a cell phone camera to videotape under the skirt of a girl who appeared to be less than 16 years old in a mall while they were on an escalator. He did not have the girl's consent to make the videotape. Criminal conduct and sexual behavior security concerns are not mitigated; however, personal conduct security concerns are mitigated as a duplication. Eligibility for access to classified information is denied.

Statement of the Case

On January 13, 2012, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (GE 1) On November 20, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. (Hearing Exhibit (HE) 2) The SOR alleged security concerns under Guidelines E (personal conduct), D (sexual behavior), and J (criminal conduct). (HE 2)

On December 22, 2015, Applicant responded to the SOR. On July 20, 2016, Department Counsel was ready to proceed. On August 30, 2016, the case was assigned to me. On December 21, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for January 18, 2017. (HE 1) Applicant's hearing was conducted as scheduled.

During the hearing, Department Counsel offered four exhibits; Applicant offered five exhibits; and all proffered exhibits were admitted without objection. (Transcript (Tr.) 19-24, 75-77; Government Exhibits (GE) 1-4; Applicant Exhibits (AE) A-E) On January 24, 2017, DOHA received a copy of the transcript of the hearing. On March 17, 2017, Applicant submitted one post-hearing document, which was admitted without objection. (AE F)

Findings of Fact¹

Applicant's SOR response admitted with explanations some of the underlying factual predicate for the SOR allegations. (HE 3) He also provided extenuating and mitigating information. (HE 3) His admissions are accepted as findings of fact. Additional factual findings follow.

Applicant is a 53-year-old supervisory security officer employed by a defense contractor. (Tr. 7-8, 26; GE 1) He occupies a sensitive security position where he is entrusted with significant responsibilities. (AE E) A defense contractor has employed him for eight years. (Tr. 9, 25) In 1981, he graduated from high school, and in 1994, he received a bachelor's degree. (Tr. 7-8) He has not served in the U.S. armed forces. (Tr. 8) He has held a security clearance since 2008. (Tr. 39) He has been married over 30 years, and he has two step children who are in their 30s. (Tr. 27)

Criminal Conduct, Sexual Behavior, and Personal Conduct

In August 2011, a store security officer (SSO) observed Applicant on an up escalator in a mall. (GE 3 at 3) Applicant stood in close proximity to a female; he lifted his left leg onto a step;² he placed his cell phone on his knee; and his cell phone was

¹ Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

² Applicant disagreed with the witness description because he is right handed and would not have lifted his left leg and used his left hand to make the video. (Tr. 40)

underneath the skirt of a girl. (GE 3 at 3)³ The SSO estimated the age of the girl to be 13-15 years old. (GE 3 at 3) The SSO called security and subsequently identified Applicant to the police. (GE 3 at 3) The police did not question or identify the girl who was a victim.

Shortly after the SSO called security, Applicant was stopped by a police officer in the same mall where Applicant was observed with his cell phone beneath the skirt of a girl. (GE 3 at 2) The police officer asked Applicant if he knew why the police officer stopped him, and Applicant replied, "I made a mistake and videotaped a girl with my cell phone." (GE 3 at 2) Applicant provided his cell phone and the password to the police, and the most recent video on the cell phone was of Applicant placing his cell phone underneath the skirt of a female in the mall. (GE 3 at 2) Applicant told the police officer that the video was recorded inside the mall. (GE 3 at 3)

The police seized Applicant's phone and found other videos of Applicant "recording unsuspecting females 'upskirt' from behind." (GE 3 at 4)⁴ See note 9, *infra*. (defining "upskirting") During a subsequent interview, Applicant told the police:

[He] was riding up the escalator . . . behind an unknown female. . . . [He] used his cell phone to video record underneath the unknown female's skirt. . . . [He] has a problem and that he has been recording numerous women's butts and undergarments for approximate 2-3 weeks. . . .^[5] [He] has an uncontrollable "urge" to record unsuspecting women's butts and undergarments, without their knowledge. . . . [He] had other recordings,

³ Applicant remembered using escalators in the mall; however, he claimed that he did not remember using his cell phone to videotape underneath a female's skirt in the mall. (Tr. 41) He did not remember making any videos in the mall. (Tr. 42)

⁴ Applicant said he could not recall any other videos recording views underneath female's skirts being on his cell phone. (Tr. 42)

⁵ Applicant's SOR does not include the allegation that he repeatedly upskirted females. The SOR does not allege that he falsely claimed he did not remember upskirting the females, what he told the police, or the upskirting videos he had on his cell phone. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See also ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). Consideration of these allegations will not be considered except for the five purposes listed above.

but that they were made [at other stores or malls]. . . . [He] was very sorry and he wanted to get help for his “compulsion.” (GE 3 at 5)⁶

On December 5, 2012, Applicant pleaded *nolo contendere* or no contest⁷ to a violation of Section 647(J)(2) of the California Penal Code (CPC). (GE 4)⁸ His sentence included 10 days in jail (suspended) and two years of probation (half supervised and half unsupervised). (Tr. 59; GE 4) He paid all fines and complied with all probation requirements. (Tr. 60-62, 66-69; AE A; AE C; AE D) He believed that if he contested the charge he would be found not guilty; however, he decided not to contest the charge because it would be too expensive. (Tr. 55-57) His attorney and the prosecutor threatened Applicant with going to jail if he contested the charge. (Tr. 72)

At his hearing, Applicant said he did not remember making any admissions to the police officer when the police officer stopped him at the mall. (Tr. 36) He remembered giving his cell phone to the police officer and providing the password to the cell phone. (Tr. 36) He did not know whether anything incriminating was found on his cell phone. (Tr. 30) He did not have an opportunity to review the content of his cell phone after the police took custody of it. (Tr. 33)

In a post-hearing submission, Applicant contended he was not guilty of violating CPC Section 647(J)(2) because: (1) his camera was not concealed as the SSO could see the camera on Applicant’s knee; (2) the videotaping was not secret as it took place in a public mall; (3) the victim is not identified; (4) there is no proof the victim was a minor; (5) there is no proof that the victim did not consent; and (6) there are some inconsistencies in the documentation about whether Applicant fled the scene or was stopped and interviewed by the police. (AE F at 1-2)⁹

⁶ Applicant said he did not remember what he told the police officer during his interview. (Tr. 43-47)

⁷ Applicant said he did not remember what he said during the guilty plea colloquy to the judge. (Tr. 70-71)

⁸ California Penal Code (CPC) Section 647(J)(2) states:

A person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another, identifiable person under or through the clothing being worn by that other person, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy. See also AE F at 1 (quoting CPC § 647(J)(2)).

⁹ See *Gary v. State*, 338 Ga. App. 403, 410 n. 6; 790 S.E.2d 150, 155 n. 6 (Ct. App. Ga. 2016) citing CPC § 647(J)(2) and stating:

The type of conduct in which Gary engaged [using a cell phone to videotape under the skirt of a female in a store] is so prevalent that it has earned a name: “upskirting.” See Zeronda, *Street Shootings: Covert Photography and Public Privacy*, 63 Vand. L. Rev.

In January 2015, the court changed Applicant's no contest plea to not guilty and dismissed the charge. (Tr. 57-59; AE A) He is eligible to apply for a certificate of rehabilitation and pardon. (AE A) He received some therapy or counseling from August 2011 through 2013. (Tr. 62-63; AE C) He was compliant with treatment. (AE C) He did not seek help with any compulsion. (Tr. 73) He did not believe he was diagnosed with any psychiatric problems. (Tr. 66)

Character Evidence

In 2015, Applicant received a certificate of appreciation for his detection of a person who was a security threat, and he may have possibly prevented a serious threat to the public. (Tr. 79-81) Applicant's spouse described him as trustworthy, ethical, and a good husband. (Tr. 90) He is dedicated to his work, and he takes pride in doing a good job. (Tr. 91)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch 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). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

1131, 1132-1133 (2010) ("upskirt photography involves taking pictures of women up their skirts"); Horstmann, *Protecting Traditional Privacy Rights in a Brave New Digital World: The Threat Posed by Cellular Phone-Cameras and What States Should Do to Stop It*, 111 Penn. St. L. Rev. 739, 739 n. 1 ("['u]pskirting' generally refers to the practice of taking unwanted pictures up a woman's skirt or dress"). Recognizing that existing criminal statutes do not generally reach this conduct, several jurisdictions have enacted voyeurism statutes, which criminalize the photographing or filming of private areas of an individual's body without that individual's consent and "under circumstances in which the individual has a reasonable expectation of privacy[.]" 18 USC § 1801 (West) (the "Video Voyeurism Act"). See also N.Y. Penal Law § 250.45 (McKinney) (punishing such conduct as unlawful surveillance in the second degree); Cal. Penal Code § 647(j)(2) (West) (defining the crime of disorderly conduct to include acts such as those committed by Gary).

See also 18 USC § 1801(a), video voyeurism (stating "(a) Whoever, in the special maritime and territorial jurisdiction of the United States, has the intent to capture an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy, shall be fined under this title or imprisoned not more than one year, or both."). Applicant did not violate 18 USC § 1801(a) as his upskirting did not occur in a special maritime or territorial jurisdiction of the United States. Enactment of 18 USC § 1801(a) shows Congressional intent to prohibit upskirting on federal property.

Eligibility for a security clearance is predicated upon meeting the criteria contained in the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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. Adverse clearance decisions are made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision on any express or implied determination as to applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). 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). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "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.”

AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying in this case: “(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.”

In August 2011, Applicant engaged in disorderly conduct involving his use of his cell phone to videotape under the skirt of a girl that appeared to be under 16 years old. In a criminal trial, the prosecution is required to establish the defendant's guilt with sufficient admissible evidence to prove guilt beyond a reasonable doubt. In a security clearance hearing, the Government is required to prove the Applicant committed the conduct alleged in the SOR by the lower burden of substantial evidence. In this instance, Applicant's no contest plea and the police report establish SOR allegation in § 3.a and AG ¶¶ 31(a) and 31(c) by substantial evidence.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

(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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; 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.

Although none of the mitigating conditions fully apply, there are important mitigating factors. Applicant completed all sentencing requirements. He successfully completed probation. He received some mental health counseling. In 2015, the court set aside his no contest plea, entered a plea of not guilty, and dismissed his conviction. He has an excellent employment record, including a certificate for detection of a threat to safety.

Significant factors weighing against mitigating criminal conduct concerns remain. He committed a serious criminal offense. His crime is relatively recent. There was some evidence on his cell phone that he engaged in the same conduct on multiple occasions for two or three weeks before he was caught and made admissions about upskirting females in August 2011. During a subsequent interview, he admitted to the police that he engaged in upskirting females on more than one occasion.

At his hearing, Applicant said he was unable to remember much about what he did, what was on his cell phone, what he told the police, and what he told the court when he entered his no contest plea. It is unclear whether he was fully frank with his therapist about his conduct and whether he has an ongoing compulsion to seek sexual gratification from looking under skirts without consent. He did not express his remorse at his hearing about committing the misconduct. More time must elapse before there is enough assurance that criminal conduct security concerns are unlikely to recur. Applicant is not ready to be entrusted with access to classified information at this time. Criminal conduct security concerns are not mitigated.

Sexual Behavior

AG ¶ 12 describes the security concern pertaining to sexual behavior:

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.

AG ¶ 13 lists three conditions that could raise a security concern and may be disqualifying in this case: "(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;" "(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;" and "(d) sexual behavior . . . reflects lack of discretion or judgment." AG ¶¶ 13(a), 13(c), and 13(d) apply for the reasons stated in the previous section.

AG ¶ 14 provides four conditions that could mitigate security concerns including:

(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.

None of the mitigating conditions fully apply for the reasons stated in the previous section. Sexual behavior security concerns are not mitigated.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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 two conditions that could raise a security concern and may be disqualifying in this case:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

The SOR cross-alleges under the personal conduct guideline the same conduct alleged under the criminal conduct guideline. His upskirting of a girl who appeared to be under 16 years old under Guideline J is sufficient to warrant revocation of his security clearance without incorporating or applying Guideline E. The concerns under Guidelines J and E address identical issues involving judgment, trustworthiness, and reliability. All

personal conduct security concerns described in the SOR are directly related to his criminal conduct with the adolescent girl he upskirted. Personal conduct security concerns as alleged in the SOR constitute an unwarranted duplication of the concerns under Guideline J, and accordingly Guideline E is found for Applicant.

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 have incorporated my comments under Guidelines J, D, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) warrant additional comment.

Applicant is a 53-year-old supervisory security officer employed by a defense contractor. He occupies a sensitive security position where he is entrusted with significant responsibilities. A defense contractor has employed him for eight years. In 1994, he received a bachelor's degree. In 2015, Applicant received a certificate of appreciation for his detection of a person who was a security threat, and he may have possibly prevented a serious threat to the public. Applicant's spouse described him as trustworthy, ethical, and a good husband. He is dedicated to his work, and he takes pride in doing a good job. There is no evidence of security violations, abuse of alcohol, or use of illegal drugs.

Applicant completed all sentencing requirements. He successfully completed probation. He received some mental health counseling. In 2015, the court set aside his no contest plea, entered a plea of not guilty, and dismissed his conviction.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant committed a serious offense, upskirting a girl who appeared to be under 16 years old in August 2011. He engaged in upskirting females on other occasions. His criminal conduct is relatively recent, and he claimed that he was unable to remember much about what he did, why he did it, what he told police, and the proceedings in court. He did not express his remorse about upskirting females. There

are unresolved questions about Applicant's reliability, trustworthiness, and ability to protect classified information. More time without criminal conduct and improper sexual behavior is necessary to fully mitigate security concerns.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude personal conduct security concerns are mitigated; however, criminal conduct and sexual behavior security concerns are not mitigated. 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 E:	FOR APPLICANT (DUPLICATION)
Subparagraph 1.a:	For Applicant (Duplication)
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline J:	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 national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge