



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



In the matter of:)	
)	
)	ISCR Case No. 15-03101
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

09/26/2016

Decision

RIVERA, Juan J., Administrative Judge:

Applicant's evidence is insufficient to mitigate the personal conduct and sexual behavior security concerns raised by him masturbating in public in 2011 and 2012, and having inappropriate photographs in his work computer in 2012. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 13, 2011. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) was unable to make an affirmative decision to grant Applicant a clearance. On December 14, 2015, the DOD Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline D (sexual behavior) and Guideline E (personal conduct).¹

¹ DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

Applicant answered the SOR on January 15, 2016, and elected to have his case decided on the written record, in lieu of a hearing.

A copy of the Government's file of relevant material (FORM), dated February 24, 2016, was provided to Applicant by transmittal letter dated February 25, 2016. Applicant received the FORM on March 3, 2016. He was allowed 30 days to submit any objections to the FORM and to provide material in extenuation, refutation, and mitigation. Applicant submitted a two-paragraph letter, dated March 25, 2016, as his response to the FORM. The case was assigned to me on September 20, 2016.

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.a, 1.c, and 1.d. He failed to admit or deny SOR ¶ 1.b, and I consider the allegation denied. He also did not admit or deny SOR ¶ 2.a, which alleges the same underlying facts Applicant admitted to under SOR ¶¶ 1.a, 1.c, and 1.d. I considered SOR ¶ 2.a admitted. His admissions are incorporated herein as findings of fact. After a review of the record evidence, I make the following additional findings of fact:

Applicant is a 64-year-old employee of a defense contractor. He graduated from high school in 1970, and shortly thereafter enlisted in the U.S. Air Force. He honorably served in the Air Force from 1970 until 1976. He attended a community college between May 1979 and October 1980, but did not earn a degree. Applicant married his first wife in 1976 and divorced in 1989. He married his current wife in 1994, and they have been married since. He has an 18-year-old son.

Applicant has been working with his current employer, a defense contractor, since May 1978. He has held a secret level DOD security clearance since 1978. There is no evidence of any security violations or issues of security concern, except for those alleged in the SOR.

Applicant submitted his most recent SCA in 2011. Section 28 (Involvement in Non-Criminal Court Actions) of the 2011 SCA asked Applicant to disclose whether in the last seven years he had been a party to any public record civil court action. Applicant answered "yes," and disclosed that in May 2005, he was charged with disorderly conduct. The charge was later dropped and the case dismissed. Additionally, he disclosed that in 2003 he was placed on probation before judgment as a result of a traffic violation.

Applicant was interviewed by government investigators in March and April 2013. During the interviews, Applicant confirmed his 2003 traffic violation and his disorderly conduct charge (dismissed). Applicant disclosed that in March 2012, he was arrested for masturbating inside of the company van while parked on a public town road. A witness called the police and he was arrested and charged with indecent exposure, lewd conduct, and disorderly conduct. Applicant pleaded guilty to indecent exposure, and the other charges were dropped. He was sentenced to pay a fine and court costs, placed on

two-year supervised probation (ended in August 2014), and required to receive psychological counseling (ended in December 2013).

Applicant explained he masturbated in the company van because he was on a work trip. He claimed he was under a lot of stress related to working too hard and traveling. He felt overwhelmed because of the many things that were going on in his life. He averred he needed to relieve the stress of feeling nervous and agitated, and masturbation took care of the problem. Applicant told the investigator he only masturbated in public twice. Applicant further disclosed that in the fall of 2011, he masturbated at a rest stop on the highway while in his private car. At the time, he was driving to a work location. Applicant indicated that he was an active participant and deacon of his church and would be embarrassed if other church members became aware of these incidents.

Applicant was interviewed by another government investigator in May 2014, who was seeking additional information concerning Applicant's prior arrests and employment disciplinary action. The investigator's notes (summary of the interview) indicate that Applicant denied he was masturbating in March 2012, and that he claimed he was changing clothes. In his answer to the SOR, Applicant stated that he did not recall the May 2014 interview, but noted that he had already admitted to masturbating in public during two prior government interviews. He does not know why he would not have been truthful when he had admitted to masturbating in prior interviews.

Applicant considered his criminal conduct wrong and morally improper. He now understands that masturbating in public is against the law and promised to have better self-control in the future. Applicant's probation officer indicated that he has made satisfactory adjustments while on probation. (Item 7)

Applicant also disclosed during his March and April 2013 interviews that in the fall of 2012, he received a written reprimand for having an inappropriate photograph on his work computer. He explained he took a picture of himself naked at a beach using his camera. At a later time, he downloaded the pictures in his camera into the office computer. He claimed he forgot his naked picture was in the camera, and averred its transfer to the government computer was an innocent mistake.

In his answer to the SOR, Applicant stated that during his two-year probation he attended court-ordered weekly counseling sessions with a psychologist. He claimed the therapy was very effective in helping him control his impulses. He believes that the two masturbation incidents were isolated incidents that occurred during a very stressful period of his life.

Applicant believes that he is not a security risk. He noted that he has over 40 years of trustworthy service to his country without any security violations or issues of concern. Applicant stated that he takes "this privilege very seriously" and he would never under any circumstances allow himself to betray this trust. In his answer to the FORM, Applicant emphasized that he had no recurring episodes of public misconduct

since his arrest in 2012. He noted that the therapy he received during his probation period had a substantial impact on his awareness of the severity of the behavior that led to his arrest.

Applicant indicated that he plans to retire from his current job at the end of 2016. He requested that if his clearance will be revoked, that the revocation be delayed until the end of 2016. He believes he has been a dedicated DOD servant for his entire adult life and would like to finish his service on a positive note.

Policies

Eligibility for access to classified information may be granted “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. 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).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline E, Personal Conduct

AG ¶ 15 articulates 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.

Applicant masturbated in public in 2011 and 2012. He pleaded guilty to indecent exposure for the 2012 criminal behavior and was placed on two years' probation. He also received a written reprimand from his employer for having an inappropriate photograph in his work computer in the fall of 2012.

Applicant's behavior triggers the applicability the following disqualifying condition under AG ¶ 16:

- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and
- (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

AG ¶ 17 lists six conditions that could potentially mitigate the personal conduct security concerns:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

Considering the evidence as a whole, including Applicant's age, education, experience working for a government contractor while possessing a clearance, the circumstances surrounding the offenses, and his repeated criminal behavior, I find that Applicant's evidence is insufficient to mitigate the Guideline E security concerns.

Applicant's behavior is recent, frequent, and not an isolated incident. He claimed that he was stressed out because he was working too hard. He averred that his court mandated psychological counseling has been effective to control his impulses. However, he presented no documentary evidence from a duly qualified medical professional concerning his diagnosis and whether he received a favorable prognosis. Absent such evidence, the passage of time so far is insufficient to show Applicant has changed his behavior, learned to control the stressors that caused him to commit the offenses, and that his questionable behavior is unlikely to recur. Applicant's criminal behavior continues to cast doubt on his reliability, trustworthiness, and good judgment. Personal conduct concerns are not mitigated.

SOR ¶ 1.b alleged that Applicant made a false statement to a government investigator during a May 2014 interview when he stated that he was not masturbating in public, but just changing his pants when he was arrested in 2012. In his answer to the SOR, Applicant indicated that he did not recall the interview, but noted that it would not make sense for him to be untruthful when he had admitted to masturbating during two prior government interviews in March and April 2013. I note that he also pleaded guilty to indecent exposure (for masturbating in public), served two years' probation, and participated in court-ordered psychological counseling. Considering the evidence as a whole, I find the SOR ¶ 1.b allegation is not substantiated.

Guideline D, Sexual Behavior

AG ¶ 12 describes the concern about 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 provides four disqualifying conditions relating to sexual behavior that apply to this case, raise a security concern, and may be disqualifying:

- (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.

The sexual behavior security concerns are based substantially on the same sexually-related facts and circumstances alleged under the personal conduct guideline. The discussion under the personal conduct guideline is incorporated herein. Appellant's sexual behavior exposed him to criminal charges; made him vulnerable to possible coercion, exploitation, and duress; and reflected lack of judgment and discretion. AG ¶¶ 13(a), (c), and (d) apply.

AG ¶ 14 lists conditions that could mitigate the sexual behavior security concerns.

- (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.

For the same reasons discussed under the personal conduct guideline, incorporated herein, I find that none of the above mitigating conditions apply. The sexual behavior security concerns are not mitigated.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guidelines D and E in my whole-person analysis.

Applicant receives credit for his years of military service and his years working for a defense contractor. Applicant's personal conduct demonstrates lack of judgment, and an unwillingness to abide by the rules and regulations. He failed to mitigate the Guidelines D and E security concerns.

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:	AGAINST APPLICANT
Subparagraphs 1.a, 1.c-1.d:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant eligibility for a security clearance to Applicant. Clearance is denied.

JUAN J. RIVERA
Administrative Judge