



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



In the matter of:

Applicant for Security Clearance

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) ISCR Case No. 15-07356
)
)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel

For Applicant: *Pro se*

11/30/2017

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline D, sexual behavior, Guideline M, use of information technology, and Guideline E, personal conduct. Applicant's eligibility for a security clearance is denied.

Statement of the Case

On October 5, 2016, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline D, Guideline M, and Guideline E. The DOD acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.¹

¹ I decided this case using the AG implemented by DOD on June 8, 2017. However, I also considered this case under the previous AG implemented on September 1, 2006, and my conclusions are the same using either set of AG.

Applicant answered the SOR on November 23, 2016, and requested a hearing. The case was assigned to me on February 15, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 27, 2017, and the hearing was held as scheduled on June 20, 2017. The Government offered exhibits (GE) 1 through 3, which were admitted into evidence without objection. The Government's Exhibit list was marked as hearing exhibit (HE) I. Applicant testified and offered exhibits (AE) A and B, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on June 28, 2017.

Findings of Fact

In Applicant's Answer, he admitted all the allegations in the SOR, with explanations, except for SOR ¶ 1.d, which he denied. The admissions are adopted as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 29 years old. He is single and has no children. He has worked for a defense contractor since October 2013. He has a bachelor's degree.²

The SOR alleges Applicant: (1) took and saved semi-nude photos of two girlfriends while they were sleeping, without their consent, sometime in 2007 or 2008 and 2009 (SOR ¶¶ 1.a and 1.b); (2) had nonconsensual sexual relations with a girlfriend in 2009 (SOR ¶ 1.c); (3) in 2009 and 2010, set up and used his laptop computer to video record two women in the bathroom when they were showering without their knowledge or consent (SOR ¶¶ 1.d and 1.e); (4) in 2014, had sexual relations with a girlfriend in public, in a foreign country (SOR ¶ 1.f); and (5) in July 2008 and February 2009, used a key logger on his computer to gain access to two girlfriends' email and social media accounts without their consent (SOR ¶¶ 2.a and 2.b). All this conduct was cross alleged as personal conduct under Guideline E in the SOR. (SOR ¶ 3.b). The SOR also alleged that in 2009 Applicant withheld information during an initial polygraph examination (SOR ¶ 3.a).

During his background interview by a defense investigator in July 2014, Applicant admitted that in 2007 or 2008, he took photos of his then girlfriend while she was sleeping topless. He took these photos without her knowledge or consent. He kept these digital photos until sometime in 2012. He admitted to the investigator that he engaged in the same conduct in 2009 with a different girlfriend. He also stated that at the time he took the pictures, he did not think any harm had been done. He now realizes that taking these pictures without their consent violated their privacy rights. Applicant admitted to the investigator that in both December 2009 and 2010, he was staying with a mixed-gender group of friends in a hotel room and he set up his computer in the bathroom to video record two women while they showered. He was sexually attracted to

² Tr. 5; GE 1.

these women. Neither woman had knowledge of the video recording or consented to it when he made them. He claims he did not show the recording to anyone else. He has never told the women about the secret recordings he made or apologized to them for secretly recording them. He claims he destroyed the recordings in 2012. During his testimony, he acknowledged violating these women's privacy rights.³

During Applicant's background investigation, he admitted using an information technology system (key logger software) in 2008 and 2009 to gain access to two girlfriends' email and social media accounts without their knowledge or consent. He was insecure about his relationship with these girlfriends, so he allowed them to use his computer to access their email and social media accounts. When they used his keyboard, his key logger program was able to capture the secure data to access their accounts, which allowed him to secretly gain entry to these accounts. He then viewed the girlfriends' accounts without their knowledge or consent. He blamed his action on insecurity and immaturity. During his testimony, he stated that he was confronted by one girlfriend about his actions of gaining access to her accounts without consent and he initially denied that he did so, but later admitted it to her. He has never let the second former girlfriend know that he gained access to her accounts without her permission.⁴

In 2009, Applicant sought a security clearance from another government agency (OGA). He was interviewed and required to take a polygraph examination. During this exam, Applicant was asked if he had ever cheated on an academic test. He answered "no," which was a false answer that he knew to be false at the time he gave it. Applicant also admitted that he would lie to friends on a regular basis about his life experiences. According to him, he has become more aware of this and starting in 2013, he is less comfortable with lying so frequently. To hold himself accountable, he began writing down all the lies he told people. He has never received counseling for this issue.⁵

Applicant denied having nonconsensual sexual relations with his girlfriend in 2009. His denial is corroborated by a statement from that girlfriend where she asserts that the sexual activity that occurred was consensual. Applicant described the sexual activity in 2014 in a foreign country as occurring on a private beach, at night, with no other people around.⁶

Applicant presented a reference letter from a supervisor who recommends Applicant for a security clearance because of the value having a clearance will bring to the company's customers. He also believes Applicant has grown in technical ability as well as in leadership.⁷

³ Tr. 32, 40-43, 52; GE 3.

⁴ Tr. 44-46, 50-51; GE 3.

⁵ Tr. 28-29, 48-49; GE 2; Answer.

⁶ Tr. 26-27, 30; AE A.

⁷ AE B.

Applicant testified that he has learned from his past immature action and changed his behavior. He is engaged and has a healthy relationship with his fiancée. He also volunteers in a community program to help victims of sexual assault.⁸

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(a), the entire process is a careful weighing 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 national security eligibility will be resolved in favor of the 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 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 about potential, rather than actual, risk of compromise of classified information. Section 7 of EO 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

⁸ Tr. 34, 37

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

12: The security concern under the guideline for sexual behavior is set out in AG ¶

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying in this case. The following are potentially applicable:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (d) sexual behavior of a public nature or that reflects lack of discretion or judgment.

Applicant took explicit photos and videos of women without their knowledge or consent and kept the digital photos and recordings. Such violations of privacy constitute criminal behavior in many jurisdictions. Applicant's actions in this regard show a lack of discretion and judgment. AG ¶¶ 13(a) and 13(d) both apply.

I have also considered all of the mitigating conditions for sexual behavior under AG ¶ 14 and considered the following potentially relevant:

- (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 judgment;
- (d) the sexual behavior is private, consensual, and discreet; and
- (e) the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and consistent compliance with the treatment plan, and/or has received a

favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

Applicant's inappropriate sexual actions occurred a number of years ago. However, he has not accepted full responsibility for his conduct by informing the victims of his actions and apologizing to them. He also presented insufficient evidence that future similar behavior would not occur because he has not dealt with his problem through counseling or therapy. His lack of rehabilitative action casts doubt on his current reliability, trustworthiness, and judgment. AG ¶¶ 14(b) and 14(e) do not apply. Applicant presented sufficient evidence to mitigate the conduct described in SOR ¶¶ 1.c and 1.f, but the record evidence supports that his remaining conduct, concerning taking pictures and videos, was non-consensual. AG ¶ 14(d) applies, in part, as described above.

Guideline M, Use of Information Technology Systems

AG ¶ 39 expresses the security concern pertaining to use of information technology systems:

Failure to comply with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology includes any computer-based, mobile, or wireless device used to create, store, access, process, manipulate, protect, or move information. This includes any component, whether integrated into a larger system or not, such as hardware, software, or firmware, used to enable or facilitate these operations.

AG ¶ 40 describes conditions that could raise a security concern and may be disqualifying. I have considered the following as potentially relevant:

- (a) unauthorized entry into any information technology system;
- (c) use of any information technology system to gain access to another system or to a compartmented area within the same system; and
- (e) unauthorized use of any information technology system.

Applicant used a key stroke software system on his computer to gain access to two women's personal email and social media accounts without their knowledge or consent. All the above conditions are applicable.

I reviewed all of the mitigating conditions under AG ¶ 41, and I considered the following relevant:

(a) so much time has elapsed since the 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.

Although some time has passed since Applicant violated these two women's privacy, he has not shown the rehabilitative qualities necessary to establish changed behavior. He has not told one of the women what he did and only told the other woman when she confronted him and he initially denied his actions. He has not sought professional counseling for his behavior. Future recurrence cannot be ruled out. Without any rehabilitative progress, his actions cast doubt on his current reliability, trustworthiness, and judgment. AG ¶ 41(a) does not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct security concern:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

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

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative; 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.

Applicant deliberately failed to provide truthful information during a polygraph interview in 2009. His actions in taking explicit pictures and videos of women without their knowledge or consent constitutes dishonest, untrustworthy, and unreliable behavior. He has an acknowledged pattern of lying to others. Both of the above conditions apply.

I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

(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.

Applicant's false statement during a polygraph interview and his acknowledged pattern of lying to others is not minor. Since he has presented no evidence of counseling to deal with his aberrant behavior, the possibility of recurrence is present and his reliability, trustworthiness, and good judgment are questionable. AG ¶ 17(c) does not apply.

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(d):

(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 considered Applicant's youth at the time of his actions, the passage of time since then, his current engagement, his community volunteerism, and his other personal circumstances. However, I also considered that he violated the privacy rights of four women without their knowledge or consent by using his technical skills to gain access to their personal information or record their activities for his own gratification. He lied to an OGA and is a confessed liar. Applicant failed to provide sufficient evidence to mitigate the sexual conduct, use of information technology, and personal conduct 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 under Guidelines D, M, and E.

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.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraphs 1.d – 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Paragraph 2, Guideline M:	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a – 3.b:	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