



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



In the matter of:	)	
	)	
	)	ISCR Case No. 16-02193
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Aubrey M. De Angelis, Esq., Department Counsel  
For Applicant: *Pro se*

03/30/2018

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**Decision**

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BENSON, Pamela C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline E (Personal Conduct) and Guideline D (Sexual Behavior). Eligibility for access to classified information is denied.

**Statement of the Case**

On November 10, 2014, Applicant submitted a security clearance application (SCA). On September 28, 2016, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline E, Personal Conduct, and Guideline D, Sexual Behavior. (Items 1, 4) The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, effective within the DoD after September 1, 2006.<sup>1</sup>

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<sup>1</sup> I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same if the case was considered under the previous AG.

Applicant answered the SOR on October 10, 2016. He admitted both Guideline E allegations (SOR ¶¶ 1.a and 1.b), but he denied that his touching of female co-workers without their consent was done in a sexual manner. He did not submit any documentation with his Answer. He requested that his case be decided by an administrative judge on the written record in lieu of a hearing.<sup>2</sup> Department Counsel submitted the Government's written case. A complete copy of the File of Relevant Material (FORM), containing six Items, was mailed to Applicant on June 27, 2017. The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant did not respond to the FORM and he did not object to Items 1 through 6, which are admitted into evidence. The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on November 13, 2017.

### **Findings of Fact**

Having thoroughly considered the evidence in the record, including Applicant's admissions, I make the following findings of fact: Applicant is 42 years old, and he is employed part-time as a substitute teacher for a college. He had previously worked for another employer from March 2012 until his termination for cause in September 2014, as outlined in the SOR. He has been married since 2003 and has two sons, ages 11 and 9. He served with the U.S. Navy from 1998 through 2001 and from 2003 until his honorable discharge in 2012. He is requesting national security eligibility.<sup>3</sup>

Applicant admitted, as alleged in SOR ¶ 1.a, that he was issued a written warning in June 2014, by his previous employer, for arriving late to work for 18 consecutive days, and for being late a total of 27 days out of the last 30. He had received a previous verbal warning. In addition, he also failed to properly clock-in, as required, upon his arrival to work. Applicant claimed in his Answer that during the summer months, his 31-mile commute was often clogged with tourists, which caused heavier than normal traffic. During this season he would leave his house with additional time to handle the heavy traffic, but he had no way of accurately predicting how much extra time was needed to allow him to report to work on time. On many occasions, after reporting to work late, he claimed that he was rushed to do his job duties and he forgot to clock-in. Other times, he admitted that he deliberately did not clock-in when he saw workers were congested around the two time clocks at the job site, and he was urgently needed to perform a specific job duty elsewhere.<sup>4</sup>

SOR ¶ 1.b, (also cross-referenced under Guideline D), alleges that Applicant was discharged from employment in September 2014, due to his violation of company rules outlined in the written warning issued in June 2014, and after an investigation revealed he had also violated the company's sexual harassment policy by touching, hugging and

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<sup>2</sup> Item 3.

<sup>3</sup> Items 1, 4.

<sup>4</sup> Items 4, 6.

making inappropriate sexual gestures to female co-workers, without their consent. Applicant admitted this conduct, but he denied that the touching was sexual in nature. Applicant claimed that the HR manager had described his behavior as “flirting” with female co-workers. He acknowledged that his home state had informed him, however, that his conduct was considered sexual harassment. He listed in his 2014 SCA that he was “suspended for investigation of flirting allegations.”<sup>5</sup> He also admitted to making an offensive gesture to female co-workers, which gave the appearance that he was masturbating, but Applicant claimed this was only a cultural gesture made between him and the Hispanic male co-workers, the gesture being equivalent of a fist-bump. He did not mean to make the gesture in front of the female co-workers, and listed that he apologized profusely to them when he mistakenly made this gesture out of habit. He also stated that on occasion he inadvertently touched female co-workers when passing them on narrow catwalks in the plant. He would try to get their attention visually, or by tapping them on the shoulder or their shoe in an effort to let them know he needed to pass by them.<sup>6</sup>

In September 2014, a complaint was filed by a female co-worker against Applicant.<sup>7</sup> The victim claimed that Applicant blew kisses to her at work, watched her intently, remarked to her that he thinks she’s pretty, he likes her hair, and that he loves her. One morning while she was clocking into work, he asked her, “Do you want to have sex with me?” The victim immediately told Applicant that this comment was completely inappropriate since she was a married woman and the mother of two children. On another occasion, Applicant had approached her, put his hands on her shoulders in an attempt to rub them, and asked her why she was so tense. He was offering to give her a massage, and the victim turned around and told him “No!” While she was on vacation, Applicant had approached her supervisor to inquire about her. Upon her return, the supervisor told her that Applicant had a crush on her. These problems persisted despite the victim telling Applicant to leave her alone or that she was happily married. She finally reported Applicant’s conduct to the employer because she just wanted the incidents to stop.

Applicant listed that prior to his termination he did not receive a copy of the investigation, and he did not have the opportunity to review the complaint filed against him. He noted that in the two years that he held an interim security clearance, he has not had any repeat complaints relating to any of the issues outlined in the SOR.<sup>8</sup>

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<sup>5</sup> Item 4 page 12.

<sup>6</sup> Item 3.

<sup>7</sup> Item 6.

<sup>8</sup> Item 3.

## Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG 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 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. 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 as to obtaining 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 as to 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 applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## Analysis

### 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 national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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 individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(2) any disruptive, violent, or other inappropriate behavior;  
and

(3) a pattern of dishonesty or rule violations. . . .

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing. . . .

Applicant has demonstrated a pattern of rule violations that resulted in him being terminated from employment. His inability to report to work on time, or clock-in as required, taken together with his inappropriate conduct towards his female co-workers, show questionable judgment and unwillingness to comply with rules and regulations. There is sufficient evidence to support application of the above disqualifying conditions.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. The following mitigating conditions under AG ¶ 17 are potentially applicable:

(c) the offense is so minor or so much time has passed, or the behavior is so infrequent, or 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 contributed to 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 listed in his SOR Answer that he had never seen a complaint or the results of his investigation which resulted in his job termination. Department Counsel submitted a copy of the complaint (Item 6). Applicant did not respond to the Government's case and did not acknowledge his sexual harassment of a particular female co-worker. His inappropriate behavior is recent, and there is no evidence to show that Applicant has obtained counseling, or taken positive steps to prevent this misconduct from recurring. There is insufficient evidence to support the application of the above mitigating conditions.

#### **Guideline D: Sexual Behavior**

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

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. . . .

The guideline notes conditions that could raise security concerns under AG ¶ 13. The disqualifying conditions potentially applicable in this case include:

(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

(d) sexual behavior of a public nature or that reflects lack of discretion or

judgment.

Applicant's sexual harassment of a female co-worker reflects a lack of judgment and discretion. The information about Applicant engaging in sexual harassment is damaging to his reputation and may make it more difficult for him to obtain future employment. Thus, he is vulnerable to coercion, exploitation and duress. His sexual conduct in the workplace is public. There is sufficient evidence to support application of the above disqualifying conditions.

AG ¶ 14 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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;

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress;

(d) the sexual behavior is strictly 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.

None of the mitigating conditions listed in AG ¶ 14 are applicable for the same reasons discussed in the personal conduct section, *supra*.

### **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 have incorporated my comments under Guidelines E and D in my whole-person analysis.

Applicant's failure to correct his repeated tardiness to work, despite being warned, together with his failure to clock-in, as required, shows that he is unreliable and untrustworthy. His explanation of "flirting" with female co-workers, and his denial that his actions were sexual in nature, raise concerns about his credibility and willingness to accept responsibility for his conduct. It is clear from his Answer that the state defined his conduct as sexual harassment. Despite knowing the proper term for his misconduct, he nonetheless listed on his SCA that he was "suspended for investigation of flirting allegations." In his Answer, he denied reviewing any reports of his investigation or viewing the complaint that was filed against him. When he received the Government's FORM, however, he was provided a copy of the complaint. Asking a female co-worker if she wanted to have sex with him is most certainly sexual in nature. Applicant did not submit any additional information or explanation after receiving the Government's case. I find that his continued use of the term "flirting" seriously minimizes his unethical and grossly improper conduct, which indicates a tendency on his part to rationalize unfavorable information. His behavior shows a deficiency in the judgment, reliability, and trustworthiness required of persons handling sensitive and classified information. Applicant's conduct demonstrates that he has a problem with complying with well-established laws and company policies, and as such, he may likewise have a problem following government rules and procedures in the protection of classified information. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for access to classified information. For all these reasons, I conclude Applicant has not mitigated the Guidelines E (Personal Conduct) and D (Sexual Behavior) security concerns in this case.

### **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 and 1.b:	Against Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.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 security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson  
Administrative Judge