



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 12-04943
)	
Applicant for Security Clearance)	

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

06/19/2018

Decision

BORGSTROM, Eric H., Administrative Judge:

Applicant did not mitigate the sexual behavior and personal conduct security concerns arising from repeatedly invading women's privacy by videotaping them without their consent. Eligibility for access to classified information is denied.

Statement of the Case

On October 19, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline D (sexual behavior) and Guideline E (personal conduct).¹ Applicant responded to the SOR on December 8, 2017, and he elected a determination with a hearing. On February 1, 2018, a notice of hearing was issued, scheduling the hearing for February 21, 2018. The hearing proceeded as scheduled. Applicant and three witnesses testified. He submitted 11 documents, which I admitted as Applicant Exhibits (AE) A through K, without objection.

¹ The action was taken 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 implemented by the DOD on June 8, 2017.

Department Counsel submitted five documents, which I admitted as Government Exhibits (GE) 1 through 5, without objection. DOHA received the transcript on March 9, 2018.

Findings of Fact

The SOR alleges sexual behavior and personal conduct security concerns based on Applicant repeatedly videotaping and photographing women, including filming up women's skirts and dresses without their consent. The SOR also alleges that Applicant's conduct led to arrests in 2010 and 2015. In his response to the SOR, Applicant admitted both arrests, but denied the alleged timespan of the conduct. After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact:

Applicant is 50 years old. He earned a bachelor's degree in 1991 and a master's degree in 1998. Since 1991, he has been employed full time as an engineer for a DOD contractor. He has been married since 1994, and he has three children – ages 15, 19, and 21.²

In April 2010, Applicant was arrested for (1) invasion of privacy – record sex act without consent, a felony; (2) tampering with evidence; and (3) harassment. These charges were later dismissed following completion of pre-trial intervention (PTI).³ Under the PTI, the court required Applicant to attend mental-health counseling, which he did from June 2010 to February 2012. Applicant admitted that in the year prior to his arrest, he had surreptitiously videotaped women about once or twice a month. He retained and later viewed these videos and photos. In June 2010, Applicant's employer found inappropriate images of women on Applicant's company-owned laptop. Applicant admitted that these images had been inadvertently transferred with some family photos onto his employer's laptop.⁴

From June 2010 to February 2012, Applicant participated in mental-counseling with a licensed psychologist, who diagnosed Applicant with an anxiety disorder. He concluded that Applicant had experienced significant stress that triggered his criminal conduct and compulsive behavior in 2009 and 2010. The psychologist provided Applicant with stress-reducing techniques and other self-help methods to avoid triggering his compulsive behavior. Applicant and his treating psychologist mutually agreed to terminate the mental health counseling upon the conclusion of the PTI.⁵

Beginning in February 2013, Applicant experienced abdominal pain, insomnia, and depression. For approximately two years, he sought diagnosis and treatment for these ailments, which impacted his ability to work. In July 2014, his treatment began showing

² GE 1; AE G.

³ GE 3.

⁴ GE 1; GE 2; GE 5; Tr. 75.

⁵ GE 1; GE 3; AE A.

favorable results and his symptoms began to improve over the next few months. He received no further treatment after September 2014.⁶

In October 2015, Applicant was arrested for invasion of privacy involving videotaping without consent after a retail-store security officer observed Applicant following a woman in the store. When confronted by police at the store, Applicant denied videotaping the woman and lied about which phone he had used for such a purpose. Later, during a police interview, Applicant again denied videotaping and lied about which phone he used for this purpose. The police investigation determined that Applicant had engaged in similar videotaping behavior on at least six occasions during the month prior to his arrest. Store surveillance video revealed Applicant would return to the store multiple times during the day to engage in the videotaping activity. Applicant later admitted that he would initiate his phone's video camera, place it in a handheld shopping basket, and then surreptitiously videotape women in retail stores.⁷ Applicant pled guilty to disorderly conduct, and he was fined approximately \$600. Following his October 2015 arrest, Applicant returned to counseling with his previous psychologist until summer 2016, when again Applicant and his treating psychologist mutually agreed to terminate his counseling.⁸

During his March 2017 security interview, Applicant admitted that he had concealed his phone in a handheld shopping basket and positioned the basket to capture photos or video under their skirts or dresses. Applicant also admitted that he had denied any wrongdoing when questioned by police at the time of his October 2015 arrest. Applicant further admitted that from the summer of 2015 until his October 2015 arrest, he had repeatedly engaged in similar videotaping behavior about two to four times a month. He would visit stores for the specific purpose of obtaining photos or videos of women under their skirts and dresses. Applicant attributed his criminal behavior to a combination of his insomnia and marital, parenting, and work-related stress.⁹

Following the issuance of the SOR, Applicant participated in a psychological evaluation conducted by a forensic psychologist in November 2017. This psychologist interviewed Applicant, his spouse, and his previous treating psychologist. She reviewed the SOR, Applicant's SOR response, and Applicant's medical records of his treatment for the stomach ailment and insomnia. The forensic psychologist did not review the police reports nor Applicant's admissions of lying to law enforcement. In addition to a clinical interview, the forensic psychologist conducted a diagnostic test. She confirmed Applicant's diagnosis of anxiety disorder, and she recommended that Applicant continue his mental-health counseling and corresponding stress-reducing techniques and coping skills. The forensic psychologist determined that Applicant's criminal conduct is unlikely to recur if he adheres to his techniques, coping skills, and mental health or "maintenance"

⁶ GE 3; AE I; Tr. 34.

⁷ GE 2; GE 3; Tr. 93.

⁸ GE 2-4; Tr. 93, 101.

⁹ GE 3; Tr. 92.

counseling with his treating psychologist. The forensic psychologist testified that Applicant's 2015 relapse likely occurred because he had not adhered to his regimen of diet, exercise, coping skills, and stress-reducing techniques. She further testified that either Applicant, his treating psychologist, or both had misjudged Applicant's propensity for relapse or his inability to recognize his relapse triggers, thus leading to his 2015 relapse while not in counseling. She emphasized the need for "maintenance" counseling to ensure that Applicant is adhering to his self-care regimen. Applicant had discontinued mental health counseling in the summer of 2016. Since the issuance of the SOR, he has attended about six counseling sessions with his treating psychologist; however, no additional appointments are scheduled.¹⁰

Applicant is well regarded by his supervisors, and he has received several performance awards. His supervisor testified that he was aware of the two arrests, but there is no evidence that the full scope of Applicant's conduct has been disclosed to his employer, his co-workers, or family members other than his spouse. There is no evidence of any security violations during his 27-year career; however, Applicant did receive a written reprimand in 2010 for improperly storing proprietary information on a company-owned thumb drive.¹¹

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 to be 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, administrative judges apply the guidelines 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."

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

¹⁰ AE B; Tr. 67-70, 102, 106.

¹¹ AE D-E, H; GE 2.

mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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

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. . . .

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

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) pattern of compulsive, self-destructive, or high-risk behavior that the individual is unable to stop; and
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

Applicant engaged in criminal sexual behavior by surreptitiously videotaping up the skirts and dresses of women. Applicant engaged in this compulsive behavior for about a year prior to his April 2010 arrest and for about three months prior to his October 2015 arrest. While Applicant’s 2015 arrest was publicly disclosed, there is no evidence that the full scope of Applicant’s criminal activity is known by his employers, co-workers, or family

members outside his spouse. Applicant is embarrassed by his criminal conduct. AG ¶¶ 13(a), (b), and (c) apply.

Sexual behavior security concerns may be mitigated under AG ¶ 14. The following is potentially applicable in this case:

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

Applicant's criminal conduct occurred for up to a year prior to his 2010 arrest and for a few months prior to his October 2015 arrest. Surveillance video in one store captured Applicant engaging in his criminal conduct six times in the month prior to his 2015 arrest. Applicant claims that his inappropriate behavior resulted from a combination of his insomnia, marital, parenting, and work-related stress. Applicant's insomnia symptoms were largely resolved by the end of 2014, so I find the nexus between these symptoms and Applicant's behavior to be tenuous. Marital, parenting, and work-related stress are not unusual, and there is no evidence that such stressors will cease. Although Applicant has recently initiated "maintenance" counseling and is adhering to his other regimens, his entirety of his conduct casts doubt on his current reliability, trustworthiness, and judgment. AG ¶ 14(b) does not apply.

There is no evidence that Applicant's employer is aware of the full scope of Applicant's conduct. During his March 2017 security interview, Applicant admitted he is embarrassed and ashamed about his criminal conduct, and that his conduct had greatly impacted his family members. AG ¶ 14(c) does not apply.

After his 2010 arrest, Applicant initiated individual counseling, which later became court-mandated. Applicant and his treating psychologist mutually agreed to terminate counseling in February 2012. After his 2015 arrest, Applicant restarted counseling, which he and the treating psychologist mutually agreed to terminate in summer of 2016. There is no evidence that Applicant and his treating psychologist discussed "maintenance" counseling when their sessions terminated in summer of 2016. Therefore, neither the treating psychologist nor Applicant had the insight that such counseling was necessary, despite Applicant's relapse. After the issuance of the SOR and the evaluation of the forensic psychologist, Applicant restarted counseling and has attended about six counseling sessions. The forensic psychologist concluded that Applicant, his treating psychologist, or both misjudged Applicant's need for "maintenance" counseling to ensure

that he adhered to his self-help regimen. The forensic psychologist's favorable prognosis was conditioned on Applicant's adherence to his self-help regimen and "maintenance" counseling. AG ¶ 14(d) applies. However, I conclude that Applicant's counseling in all three instances was prompted by pending criminal or employment consequences and not by his own insight or judgment. Notwithstanding the application of AG ¶ 14(d), I conclude that Applicant's sexual behavior, compulsion, relapse, and poor judgment are not mitigated by his recent adherence to his self-help regimen and "maintenance" counseling.

Guideline E, Personal Conduct

The concern under this guideline is set out in AG ¶ 15:

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. . .

The guideline notes several conditions that could raise security concerns under AG ¶ 16. The following disqualifying condition is potentially applicable in this case:

(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 . . . (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.

As discussed above, Applicant repeatedly engaged in criminal conduct that reflected questionable judgment and unreliability. While Applicant's 2015 arrest was made public and Applicant's wife is aware of his behavior, there is no evidence that the full scope of Applicant's conduct in 2009, 2010, and 2015 is known by his other family members, his employer, his co-workers, or his community. Applicant and his spouse testified as to the negative impact of Applicant's 2015 arrest. It is reasonable to conclude that similar negative consequences may result from the disclosure of the full scope of Applicant's conduct. AG ¶¶ 16(d) and (e) apply.

The following mitigating conditions under AG ¶ 17 are potentially relevant:

(c) the offense is so minor, or such 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 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's compulsive behavior occurred on several occasions and ceased only upon his October 2015 arrest. Applicant's repeated falsifications to law enforcement in 2015 undercut his credibility and his evidence in mitigation.¹² Given Applicant's relapse after extensive individual counseling following his first arrest, I cannot conclude that so much time has passed that his behavior is unlikely to recur. Furthermore, despite his 2015 relapse, Applicant and his treating psychologist mutually agreed to terminate his individual counseling in summer of 2016 without any further "maintenance" counseling. Applicant's questionable judgment, lying to law enforcement officers, and the ongoing potential for coercion cast doubt on his reliability, trustworthiness, and judgment. AG ¶ 17(a) does not apply.

Applicant has acknowledged his misconduct and is currently attending "maintenance" counseling and adhering to his self-help regimen to alleviate the stressors that contributed to his criminal behavior. The forensic psychologist's favorable prognosis was conditioned upon his adherence to his treatment plan and "maintenance" counseling. Given Applicant's relapse and his recent attendance after the issuance of the SOR, I cannot conclude that his inappropriate behavior is unlikely to recur. AG ¶ 17(b) does not apply.

Applicant's 2015 arrest was revealed publicly; however, there is no evidence that any family members besides his spouse are aware of the full scope of Applicant's inappropriate behavior. Similarly, there is no evidence that Applicant's employer is aware of the full scope of Applicant's behavior, including lying to law enforcement officers. There is no evidence of steps taken by Applicant to reduce his vulnerability to coercion, beyond reporting his arrest to his security officer. AG ¶ 17(e) does not apply.

Applicant's criminal behavior reflected questionable judgment, untrustworthiness, and unreliability. Although he has recently returned to counseling, it is premature to

¹² See ISCR Case No. 08-09232 at (App. Bd. Sep. 9, 2010)("[A] Judge may nevertheless consider unalleged conduct for certain limited purposes. These including assessing an applicant's credibility, evaluating his evidence in mitigation, and considering the extent to which an applicant has demonstrated rehabilitation.").

conclude that Applicant's behavior is unlikely to recur. Applicant did not mitigate the personal conduct security concerns.

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 relevant 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 D and E and the factors in AG ¶ 2(d) in this whole-person analysis.

Applicant repeatedly engaged in criminal, compulsive behavior that reflected poor judgment and unreliability, and he relapsed despite criminal consequences and counseling. When confronted by law enforcement, Applicant repeatedly lied about his conduct. As a result of his past conduct, Applicant's vulnerability to exploitation remains. Despite the favorable, conditional prognosis, I cannot conclude that Applicant's behavior is unlikely to recur, given his only recent return to counseling. Given Applicant's burden to demonstrate trustworthiness, reliability, and good judgment, I conclude Applicant did not mitigate the sexual behavior and personal conduct 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 D:	AGAINST APPLICANT
Subparagraphs 1.a.-1.c.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, I conclude that it is not clearly consistent with national security to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Eric H. Borgstrom
Administrative Judge