



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



In the matter of:)
)
) ISCR Case No. 19-00408
)
Applicant for Security Clearance)

Appearances

For Government: Andrew Henderson, Esq., Department Counsel
For Applicant: Mark A. Myers, Esq.

09/18/2019

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline D, sexual behavior, Guideline J, criminal conduct, and Guideline E, personal conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On April 4, 2019, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline D, sexual behavior, Guideline J, criminal conduct, and Guideline E, personal conduct. 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 June 8, 2017.

Applicant answered the SOR on April 23, 2019, and requested a hearing. The case was assigned to me on June 7, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 10, 2019, and the hearing was held as scheduled on July 24, 2019. The Government offered exhibits (GE) 1 through 8, 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 through O, which were admitted into evidence without objection. Applicant's exhibit list was marked as HE II. The record was held open until August 9, 2019, to allow Applicant to provide additional evidence. He failed to submit anything. DOHA received the hearing transcript (Tr.) on September 12, 2019.

Findings of Fact

In Applicant's Answer, he admitted SOR ¶¶ 1.a-1.d and denied ¶ 1.e. As to the cross allegations in ¶¶ 2.a and 3.a, he admitted and denied consistent with his earlier admissions and denials. He denied the allegations in ¶¶ 3.a-3.b. The admissions are adopted as findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 60 years old. He has been married for 38 years. He and his wife have two adult children born from their marriage and they adopted three girls from an African nation in approximately 2009 (A1, A2, A3). The adopted daughters no longer reside with Applicant and his wife. He currently works for a defense contractor for whom he has worked for 15 years. He has two master's degrees. In 2001, he retired from the Air Force after 21 years of honorable service as a lieutenant colonel (O-5). He has held a security clearance for over 40 years. (Tr. 17-19; GE 1; AE A-B)

Under Guideline D, the SOR alleged Applicant is currently registered as a sex offender in his state of residence (SOR ¶ 1.a); that he is on intensive supervised probation from 10 years to life after pleading guilty to *criminal attempt to commit aggravated incest* (this is not the language from the SOR, which the facts at hearing revealed to be incorrect, but is the correct charge to which Applicant pleaded guilty) (SOR ¶ 1.b); that he was arrested in September 2015 and charged with three counts of sexual assault of a child under 15 years while being in a position of trust and one count of aggravated incest (SOR ¶¶ 1.c-1.d); that he engaged in incest and aggravated sexual assault of his minor child from about April 2014 to about July 2015 (SOR ¶ 1.e). All these allegations were also cross-alleged under Guidelines J and E (SOR ¶¶ 2.a, 3.a). Additionally, under Guideline E, the SOR alleged Applicant failed to notify his security office of the stated arrest and subsequent conviction and sentencing in May 2016 until December 2016 (SOR ¶¶ 3.b-3.c). (Tr. 32, 34; GE 3-5)

In August 2015, A3, who was 13 years old at the time, disclosed to a caseworker that Applicant, her father, had touched her breasts and made inappropriate comments. A few days later, A3 participated in a forensic interview. A3 disclosed that before the touching, her father was her "best friend" and that she trusted him. She then stated, "but I don't trust him anymore." She described Applicant coming into her room when her

mother was gone and asking her if he could touch her “boobs.” She told him no. The next day he came in and began touching her without asking. She did not tell him to stop because she was scared. She was scared because of his military background and she believed he was strong and could do anything he wanted. She felt like she had no choice other than let him touch her. Applicant touched her breasts under her clothing. A3 told the interviewer that Applicant’s touching began when she was 12 years old and happened more than once. She described another time Applicant touched her when he came into her room with just his underwear on and touched her breasts. Another time Applicant came into her room after her alarm had gone off and laid down in her bed and “cuddled” her, pulled up her shirt, and touched her breasts. A3 also described, through her words and drawing, an occasion when Applicant pulled down her underwear and touched her groin area. She stated that this type of touching happened more than once. A3 told her mother about the touching. Applicant told A3 not to tell anyone about the touching because it would get him in “big trouble.” (GE 3)

In September 2015, after A3’s disclosures, Applicant was charged with four counts of sexual assault of a child and one count of aggravated incest. A plea agreement was reached and in May 2016, Applicant pleaded guilty to one count of attempted aggravated incest and all the original charges were dropped. His sentence included 10 years to life on sex offender intensive supervised probation (SOISP); SOISP weekly counseling; placement on a sex offender’s registry (registration a yearly requirement); no contact with minor children; restrictions on travel; and other related requirements. He was not sentenced to any jail time. He remains on SOISP. (Tr. 22-27; AE 3-5)

During Applicant’s background investigation, he was interviewed by an investigator in September 2018 about the above-described criminal actions. Applicant claimed that his criminal assaults took place on only two occasions two weeks apart in April 2015. He admitted touching A3’s breasts under her clothes. He was aroused by her. There was no one else present at the time. The following weekend the second assault occurred. He once again touched her breasts as he had before, then he placed his hand under her pajamas touching her pubic hair near her vagina. He claims he stopped at that point realizing what he was doing was wrong and criminal. In his hearing testimony, Applicant maintained that he only assaulted A3 two times by touching her breasts. He denied going into her room wearing only his underwear and, contrary to his statement to the investigator, he denied touching her groin area. (Tr. 56-61; GE 2)

Applicant related that A3 was seven years old when she was adopted and that she suffered from post-traumatic stress disorder (PTSD) and reactive detachment disorder (RDD) because of things she experienced as a young child in her home country. He also discovered that she had been raped in her former country. He was aware of all these factors at the time he assaulted her. He acknowledged that he was in a position of trust relative to A3. (Tr. 51-55; GE 2)

Applicant’s supervisor indicated that Applicant kept the appropriate people notified within the company regarding his being charged, arrested, entering into a plea

agreement, pleading guilty, and being sentenced. A Joint Personal Adjudication System (JPAS) document shows a single entry from December 2016 indicating his plea. Applicant testified that he kept his chain of command informed of all events related to his criminal charge. The record was kept open to allow Applicant to provide a statement from his security officer on this issue. No further evidence was received. (Tr. 46-47; AE A)

Applicant provided a letter from his probation officer (PO) who stated that he has complied with all his probation terms to date. Several of his probation requirements have been loosened, such as, allowing Applicant to travel out of state and allowing him supervised visits with his grandchild. The PO indicated that Applicant meets the criteria to “be progressed off intensive supervision.” He also maintained a low risk score for reoffending on all assessments completed by the PO. (Tr. 29-30, 49-50; AE O)

Applicant provided a letter from his therapist (T) who provided treatment to him in accordance with his sexual offense conviction. T stated that he has treated Applicant for the past three years. T further stated that Applicant was fully accountable for his offense and has remained accountable to his probation rules and therapy requirements. He constructed a relapse prevention plan while in therapy. He completed his sex offense specific treatment. In terms of risk measurement regarding reoffending, Applicant is below the average adult male sex offender who has completed treatment. (Tr. 49; AE N)

Applicant presented 13 reference letters from coworkers, friends, his biological daughter, his son-in-law, and other acquaintances. All the letters describe Applicant in the most positive light, emphasizing his integrity, honesty, family orientation, and church and community service. None of the letters indicate whether the authors were familiar with the facts surrounding this conviction. Applicant provided evidence concerning his military awards and decorations, two years of work appraisals for years 2016-2018, his academic achievements, as well as other biographical information. (AE A-M)

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 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 relating to the guideline 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. 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 is potentially applicable:

(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted.

Applicant pleaded guilty to attempted aggravated incest. Credible evidence supports that he sexually assaulted his 12 or 13-year-old daughter on multiple occasions. The above disqualifying condition applies to SOR ¶ 1.e. The remaining SOR allegations under this Guideline are all consequences of his actions in SOR ¶ 1.e and are not independently disqualifying under this Guideline.

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; 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 sexual assaults of his adopted daughter occurred in 2014 to 2015. His criminal acts were recent enough to merit a sentence of 10 years to life on probation to ensure ongoing supervision by the state's criminal authorities. AG ¶ 14(b) does not fully apply. Applicant has made successful strides through his therapy to accept responsibility for his actions. His therapist gave him a positive report and considers him low risk for recidivism. However, based upon the evidence, it appears he is minimizing the full extent of his criminal acts against A3. AG ¶ 14(e) has some applicability.

Guideline J, Criminal Conduct

The security concern relating to the guideline for criminal conduct is set out in AG ¶ 30:

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

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of

whether the person was formally charged, formally prosecuted or convicted; and

(c) individual is currently on parole or probation;

Applicant was convicted of attempted aggravated incest, a felony, and was sentenced, *inter alia*, to 10 years' to life SOISP. I find that both disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

(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; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant's conviction occurred in 2016. Although he is three years removed from that conviction, he remains on probation. He is in compliance with his probationary terms. However, he violated the trust of his daughter who was already the victim of a horrendous childhood. His willingness to take advantage of such a vulnerable child, who trusted him, casts doubt on his reliability, trustworthiness, and good judgment. Additionally, Applicant gave inconsistent statements about the full extent of his criminal acts. This calls into question whether he has minimized his wrongdoing and therefore is not fully rehabilitated. AG ¶¶ 32(a) and 32(d) do not fully 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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following are potentially applicable:

(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's occasions of committing sexual abuse on his 12 to 13-year-old adopted daughter demonstrates questionable behavior and raises questions about his reliability, trustworthiness and ability to protect classified information. Applicant's sexual assaults on his daughter could certainly affect his personal, professional, or community standing. Regarding the two failure to report allegations, I find the evidence insufficient to support them.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. 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;

(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;

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

Applicant pleaded guilty to attempted aggravated incest against his daughter, and credible evidence supports that he committed sexual assaults on multiple other occasions. His daughter was not just vulnerable because of her age, but also because of the trauma she suffered before her adoption to include being raped. Applicant was fully aware of her past when he chose to violate her trust by sexually abusing her. His actions in abusing her trust in such a fundamental relationship calls into question his reliability, trustworthiness, and good judgment. Although he has had made successful strides in his therapy and is compliant with his probationary terms, he remains on intense supervised probation for 10 years to life. AG ¶ 17(c) does not apply, but AG ¶¶ 17(d) and 17(e) have some application.

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 letters of recommendation, his probation officer's letter, his counseling, his military and contractor achievements and evaluations, and his personal circumstances. I weighed these factors against his conviction for sexually abusing his adopted daughter and his continuing probation term.

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, J 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.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraphs 3.b – 3.c:	For 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