



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-02724
)
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: Tod D. Stephens, Esq.

December 10, 2020

Decision

GLENDON, John Bayard, Administrative Judge:

Applicant failed to mitigate security concerns regarding his sexual behavior and criminal conduct. Based upon a review of the pleadings, the documentary evidence, and the testimony presented at the hearing, national security eligibility for access to classified information is denied.

Statement of the Case

On June 25, 2018, Applicant filed a security clearance application (SCA). The Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant on October 28, 2019, detailing allegations under Guideline D (Sexual Behavior), which were cross-alleged under Guideline J (Criminal Conduct). The DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (Dec. 10, 2016),

effective for all adjudicative decisions within the Department of Defense on or after June 8, 2017.

On January 20, 2020, Applicant responded to the SOR (Answer). He requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On April 28, 2020, the case was assigned to me. The scheduling of the hearing was delayed due to Covid-19 pandemic safety concerns. DOHA issued a notice of hearing on October 1, 2020, scheduling the hearing for October 28, 2020. An amended hearing notice, issued on October 23, 2020, changed the starting time for the hearing to accommodate a scheduling conflict.

I convened the hearing as scheduled. Department Counsel presented seven exhibits, marked as Government Exhibits (GE) 1 through 7 and an exhibit list, which I marked as Hearing Exhibit I. Applicant offered eight exhibits, which were marked as Applicant Exhibits A through H. Absent any objections, I admitted all exhibits into the record. DOHA received the hearing transcript (Tr.) on November 10, 2020.

SOR Amendment

At the conclusion of Applicant's testimony, Department Counsel moved to amend the SOR by adding new allegations under Guidelines D and J to conform the allegations to the evidence. The amendment reads as follows:

- 1.c. While travelling in Mexico, in approximately 2004, you engaged in sexual activity with a prostitute; and
- 2.a. That information as set forth in subparagraphs 1.a through 1.c, above.

Applicant and his attorney were invited to seek additional time to respond to the amendment. After consultation with his attorney, Applicant decided not to oppose the motion to amend and not to seek additional time to respond to the amendment. Accordingly, I granted the motion to amend to conform the SOR allegations to the evidence presented. (Tr. at 45-49, 76-77, 84-89.)

Findings of Fact

Applicant's personal information is extracted from his SCA unless otherwise indicated by a parenthetical citation to the record. After a thorough and careful review of the pleadings, including Applicant's SOR admissions, his testimony and that of his two character witnesses, and the documentary evidence in the record, I make the following findings of fact:

Applicant, 53, is employed by a U.S. Government contractor as a manufacturing engineer and as a quality assurance engineer. He began this job in April 2018. He is required to have a security clearance to maintain his position. His June 25, 2018 SCA is his first application for a security clearance. (Tr. at 16-17, 22, 56.)

Applicant was born in a Southeast Asian country in 1967. He was separated from his family in 1979 due to an assault by Communist forces on the people in his home area. Applicant, his uncle, and his cousins escaped to a neighboring country. Five-to-six months later, Applicant was reunited with his parents and siblings. In 1980, his family immigrated to the United States with the help of the American Red Cross. He learned English in school and attended college courses in his new home country. He did not earn a degree. (Tr. at 19-21, 23, 58, 60; GE 2 at 8.)

After immigrating to the United States, Applicant met his future wife. In January 1992, they married pursuant to their culture in their native country. They have not been married pursuant to U.S. civil law. He has no reason for not marrying his wife legally in this country. They have five children, who are now 8, 18, 25, 26, and 28 years old. Applicant became a naturalized U.S. citizen in 2010. He became a U.S. citizen 30 years after his arrival in the United States because citizenship was a requirement for his employment at that time. His wife has never become a U.S. citizen. Applicant worked hard, sometimes working at two full-time jobs. He purchased a home for his family in 2017. (Tr. at 21-24, 58-61; GE 1 at 10.)

Applicant has strong connections to his “community,” immigrants from his native country who are part of a minority population there. The community is made up of immigrants that entered the United States in 1979-1980. On January 1, 2014, Applicant was appointed a “Clan Leader” of his community’s U.S. non-profit organization. One of the main purposes of the organization is to preserve the culture of this immigrant population. (Tr. at 40, 62; AE G.)

Sexual Behavior and Criminal Conduct

In 2006 to early 2007, Applicant began to communicate with others online in a chat room. He did this because he was bored. His online activity became frequent, and he spent significant periods of time making friendships online. He “chatted” with many women and some developed into discussions involving sexual flirtations. He was on the internet “all the time, even during working hours because I was the only one there.” He was living a “double life.” He developed an online friendship with a person who represented that she was a 13-year-old girl named “Jamie.” Jamie was in fact an undercover vice police officer. The two chatted at length over a period of six or seven months. They frequently chatted about meeting and their online conversations became explicitly sexual. Applicant twice agreed to meet Jamie in her home town, but he failed to show up. A third time in January 2007, they agreed to meet at a train station and planned on spending time together, which they discussed would include having sex and drinking alcohol. Applicant decided to meet Jamie at the train station. When he arrived he was arrested. (Tr. at 25, 30, 50-52, 63-64; GE 2 at 2-3; AE B at 20.)

Applicant initially told the police that he had made a mistake. At one point in his interrogation, Applicant was nervous and tried to lie about his reason for being at the train station. He then decided to tell the truth and admit his true intentions. He was charged

with one felony account of Luring and Meeting a Child for Sexual Interest and three misdemeanor counts of Luring a Child for Sexual Interest. On the advice of his attorney, Applicant pleaded guilty to all four charges in 2008. He was fined \$4,000 and sentenced to ten days in jail and three years of probation. He successfully completed his probation in July 2011. One of the terms of his probation was that he receive a psychiatric evaluation. He complied, but he did not provide a copy of the evaluation as evidence. He was also unable to recall any of the details of the evaluation, except that he was not diagnosed with an abnormality. There is no record evidence of the evaluator's diagnosis or prognosis. His probation terms also required that he annually register as a sex offender for the rest of his life. He complies with this annual registration requirement. (Tr. at 27-28, 65-66, 71-72.)

In 2008, Applicant entered a counseling program for individuals who had experienced problems with having a sexual interest in children. He claimed that his participation in the program was voluntary and was not a part of his sentence or probation. The minutes of the July 18, 2008 court proceeding of his sentencing states that Applicant is required to "cooperate with Probation Officer in any plan for psychiatric, psychological, alcohol and/or drug treatment, or counseling." He provided no documentation from the court, probation officer, or the counselor confirming that his counseling was indeed voluntary. He testified that his wife was supportive of his decision to seek counseling. (Tr. at 34, 37-41, 51, 68, 70-73; GE 5 at 14.)

The counseling program involved weekly one-hour group sessions and was supposed to last 18 months. The focus of the group was persons who had sexual addiction involving minors. In this program, Applicant learned to identify situations that created a "high-risk" for him to repeat his past behavior. He was "brutally honest" with himself because he wanted to change. Since his 2007 arrest, he has made "a conscious effort to better [himself]." Through his counseling, he has come to understand the "urges" within himself that seeks gratification that are hard for him to resist. He learned "tools" that will help him for the rest of his life avoid pursuing his urges. (Tr. 34, 37-41, 51-55, 77-78.)

Applicant was active in the counseling program from 2008 to 2011, much longer than 18 months. He ceased attending about the same time his probation terminated. He did not receive a certificate of completion, however. He testified that he stopped attending the counseling sessions because he was working two full-time jobs to support his family and his work schedule did not give him the necessary time to attend. He testified that the completion of the program was not a "priority" for him. To obtain a certificate of completion, he had to complete 21 "tasks." He only completed about 90 percent of the tasks. He offered no documentation from the program that provided a diagnosis or a prognosis. He has received no treatment, counseling, or an evaluation of any kind since 2011. (Tr. at 51-53, 70-76, 82-83; AE B.)

Applicant provided as evidence some random notes he prepared in his counseling sessions. The notes reveal that he intensively examined his sexual interest in and interactions with Jamie. He sought understanding of the causes of his sexual interest in underage girls, and the situations that he believed triggered that interest, which he labeled

“high-risk factors.” He acknowledged at the hearing that having his sons’ attractive young girlfriends’ visits to his home was a high-risk factor. He also acknowledged that his sexual interest in young girls was a significant problem for him and that he needed to take steps to control his impulses and avoid acting on those impulses. He testified that in his native country, it is typical that girls marry at the age of 15. His sexual interest in young girls is consistent with his cultural upbringing. He testified that he enjoyed the flirtation of online chatting with Jamie and other woman and that he “can’t resist,” a phrase that he repeated a second time for emphasis: “I can’t resist.” In an essay he wrote as part of his counseling, he commented that he would “groom” underage girls in online chats in the hopes of having sex with them. He acknowledged that his sexual urges were “really big and uncontrollable.”(Tr. at 64-65, 69, 78; AE B at 20.)

Applicant has not committed any crimes since his 2007 arrest. He no longer chats online. His immediate family and a close circle of friends know about his criminal history. His employer does not know that he is a registered sex offender, except that his facility security officer has seen his SCA. Applicant does not know if his employer would have hired him had the employer known about his sex offender status. He has no formal support system in place to help him should he ever feel a strong temptation to act out his sexual impulses with respect to young girls. Moreover, he has not provided a recent evaluation of his psychological condition. (Tr. at 33, 35-36, 40, 44, 67-68; AE D, E.)

In addition to the above sexual conduct, Applicant also acknowledges other extra-marital sexual behavior. In 2004 or 2005, Applicant travelled with several male relatives to a nearby foreign country. He paid for sex with a prostitute while he was there. He also engaged in a close, personal relationship with a 35-year-old female co-worker for about a year. On one occasion, the woman performed oral sex on Applicant. Applicant recorded both of these incidents in his counseling notes, and his wife learned about them by reading the notes. (Tr. at 45-49, 76-77; GE 2.)

At the hearing and in his Answer, Applicant expressed his sincere remorse for his actions with Jamie. He has refocused his energy on working hard, at times working two full-time jobs, and on supporting his family, clan, and community. He was a clan representative to his immigrant community association. He wrote in his Answer that he would never meet a young girl or a woman alone. He values the United States as the country that offered him protection from the dangers in his native country and considers the United States to be his “home.” (Tr. at 19, 29, 44.)

Character Evidence

Two of Applicant’s cousins testified as character witnesses. They both believe that Applicant has stepped up and accepted responsibility for his past actions and is a better person for having done so. They testified that Applicant is remorseful for what he did in the past. They do not believe that Applicant presents a future risk to minors. He is a family man who works hard to provide for his family. One cousin testified that Applicant is “a productive member of the community,” referring to their immigrant community. The other

cousin commented that Applicant is “active” in their community. Both live near Applicant. (Tr. 89-97, 99-106.)

Applicant also offered two employment performance evaluations (2018 and 2019). They reflect that Applicant meets expectations and has some room for improvement. His performance is rated at 3 in 2018 and at 2.96 in 2019. The documents do not explain the scale or meaning of these numbers. He received bonuses in both years. (AE F.)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines

presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

Analysis

Guideline D, Sexual Behavior

The security concern under this guideline is set out in AG ¶ 12 as follows:

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.

Applicant's admissions in his Answer and his testimony and the documentary evidence in the record establish the following disqualifying conditions under this guideline:

AG ¶ 13(a): sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

AG ¶ 13(b): a pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop; and

AG ¶ 13(c): sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

The guideline in AG ¶ 14 contains five conditions that could mitigate security concerns arising from sexual behavior. Four of them have possible applicability to the facts of this case:

AG ¶ 14(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;

AG ¶ 14(c): the behavior no longer serves as a basis for coercion, exploitation, or duress;

AG ¶ 14(d): the sexual behavior is strictly private, consensual, and discreet; and

AG ¶ 14(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.

AG ¶ 14(b) is partially established. Applicant's admitted criminal and other sexual behavior occurred 13 or more years ago. His online contact with a person he believed to be a 13-year-old girl was frequent and sexually flirtatious. Applicant's admitted sexual contact with a co-worker and a prostitute was also long ago and infrequent. For the reasons discussed in the analysis of mitigating condition AG ¶ 14(e) below, Applicant has not, however, met his burden to establish that his criminal sexual behavior is unlikely to recur and does not cast doubt on his current reliability, trustworthiness, or judgment.

AG ¶ 14(c) is not established, except with respect to the co-worker and the prostitute. No one outside of Applicant's immediate family, including his cousins who testified, knows about his conviction for sexual crimes, with the exception of his security officer who had access to his SCA. Applicant does not know if he could keep his job if his criminal history was known by his employer outside of his security officer. Given the highly sensitive and derogatory nature of Applicant's sexual misconduct, he is vulnerable to coercion, exploitation, or duress.

AG ¶ 14(d) is established with respect to Applicant's sexual activity with a prostitute. His actions were strictly private and consensual.

AG ¶ 14(e) is not established. Applicant did not successfully complete his program for persons who are addicted to sexual activity with children and he is not currently enrolled in one. He testified that he has demonstrated ongoing and consistent compliance with the goal of his treatment program of avoiding any repeated criminal sexual behavior with young girls. He also testified that he no longer chats online. He did not, however, provide evidence of his specific treatment plan and whether he has complied with such a plan. Also, he has not provided evidence of a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment. As a result of this evidentiary omission, the issue of whether Applicant might repeat his past

behavior is left solely to this adjudication process. I conclude that he has not carried his burden of persuasion to mitigate the security concerns raised by his past conduct. His current need to resist his urges in high-risk situations creates a risk of recidivism with the attendant risks to children and to the national security should Applicant's conduct be used to coerce or exploit him to act contrary to the interests of national security.

Applicant's criminal sexual behavior, his failure to complete his counseling program, and the lack of a strong support system to help him successfully manage sexual impulses place him in a high-risk of recidivism. Applicant's evidence is insufficient to show his criminal sexual behavior is unlikely to recur. He failed to provide sufficient evidence to mitigate security concerns raised in SOR ¶¶ 1.a and 1.b. The security concerns raised in SOR ¶ 1.c are mitigated because the incident occurred long ago, has not been repeated, and was private and consensual. Overall, Paragraph 1 is found against Applicant.

Guideline J, Criminal Conduct

The security concern under this guideline is set out in AG ¶ 30 as follows:

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.

Applicant's SOR admissions, his testimony, and the documentary evidence in the record establish the following disqualifying condition under this guideline:

AG ¶ 31(b): evidence (including but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

The guideline in AG ¶ 32 contains four conditions that could mitigate security concerns arising from financial difficulties. Two of them have possible applicability to the facts of this case:

AG ¶ 32(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

AG ¶ 32(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.

AG ¶ 32(a) is partially established for the reasons set forth in the analysis under AG ¶ 14(b), above. Applicant's criminal behavior with a prostitute occurred long ago, was

infrequent and is unlikely to recur. He has not, however, established the critical elements of this mitigating condition -- that his criminal behavior with minors is unlikely to recur and does not cast doubt upon his reliability, trustworthiness, or good judgment. Applicant's requirement to give public notice by means of the sex offender registry has been recognized by the Appeal Board as implying "a real possibility of recidivism in the state's view." ISCR Case No. 09-03233 at 3-4 (App. Bd. Aug. 12, 2010). In addition, Applicant's offenses impugn his trustworthiness and good judgment. *Id.*

AG ¶ 32(d) is partially established. Applicant presented evidence of rehabilitation consisting of the passage of time without recurrence of criminal activity, compliance with the terms of his probation, a good employment record, and constructive community involvement. This evidence of rehabilitation is not conclusive, however, because the evidentiary record is insufficient to permit a conclusion that future criminal behavior with minors is unlikely to recur.

Overall, the nature of Applicant's criminal behavior and his failure to complete his counseling program; to provide a favorable prognosis; and to put in place a strong support system to help him successfully manage his actions in the future, creates a risk of recidivism with respect to criminal conduct involving minors. Applicant failed to provide sufficient evidence to mitigate security concerns raised in SOR ¶¶ 1.a and 1.b, which are cross alleged in SOR ¶ 2.a. Applicant has provided sufficient evidence to mitigate security concerns raised in SOR 1.c. Paragraph 2 is found against Applicant.

Whole-Person Analysis

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. In applying the whole-person concept, an 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 and applying the adjudicative factors in AG ¶ 2(d), specifically:

- (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.

I have incorporated my comments under Guidelines D and J in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under these Guidelines and evaluating all of the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his sexual behavior and criminal conduct.

Formal Findings

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| Paragraph 1, Guideline D: | AGAINST APPLICANT |
| Subparagraphs 1.a through 1.b: | Against Applicant |
| Subparagraph 1.c: | For Applicant |
| Paragraph 2, Guideline J: | AGAINST APPLICANT |
| Subparagraph 2.a (¶¶ 1.a and 1.b): | Against Applicant |
| Subparagraph 2.a (¶ 1.c): | For Applicant |

Conclusion

I conclude that it is not clearly consistent with the national interests of the United States to grant Applicant national security eligibility for access to classified information. Clearance is denied.

John Bayard Glendon
Administrative Judge