



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



In the matter of:)	
)	
)	ISCR Case No. 19-01004
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

10/25/2021

Decision

Curry, Marc E., Administrative Judge:

Applicant’s failed to mitigate the security concerns generated by his molestation of his ex-wife’s teenage sister. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application on November 12, 2008. On November 5, 2009, the Department of Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, detailing the security concerns under Guidelines J, D, and E, explaining why it was unable to find it clearly consistent with the national interest to grant security clearance eligibility. DOHA acted Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; and DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive) and the National Security Adjudicative Guidelines (AG), effective September 1, 2006. On June 29, 2010, a hearing was conducted, and on September 21, 2010, the court, per Administrative Judge Leroy Foreman, denied Applicant’s security clearance application.

On February 7, 2017, Applicant re-applied for a security clearance. On February 13, 2020, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued an SOR denying the reapplication, and detailing the security concerns under Guidelines D and J. In executing the SOR, DOD CAF referenced the same authorities as DOHA had referenced, with the exception of the 2006 AGs, which had since been amended on June 8, 2017.

On March 19, 2020, Applicant answered the SOR, admitting the allegations and requesting a hearing, whereupon the case was assigned to me on May 21, 2021. On July 7, 2021, DOHA issued a notice of hearing, scheduling Applicant's case for July 23, 2021. The hearing was held as scheduled. I received four Government exhibits (GE 1 - GE 4), nine exhibits of Applicant (AE A – AE I), and Applicant's testimony. At the conclusion of the hearing, I left the record for Applicant to submit additional exhibits. (Tr. 31) Within the time allotted, he submitted an additional exhibit that I incorporated into the record as AE J. The transcript (Tr.) was received on August 3, 2021.

Findings of Fact

Applicant is a 40-year-old single man with two children, ages 15 and 10. He was married previously from 2003 to 2008. The marriage ended in divorce. Applicant served in the U.S. Navy from 1999 to 2005. He was released from active duty under honorable conditions. (Answer, Enclosure (Enc.) 1 at 2) He served in the U.S. Navy Reserve from 2005 to 2007. Applicant has been working for his employer in the engineering and design division since 2005. (Answer, Enc.1 at 2)

Applicant's then wife was hospitalized on July 3, 2008 after she became depressed and suicidal. Applicant's 13-year-old sister-in-law agreed to stay in his home and take care of his daughter while he was at work. On the evening of July 5, 2008, Applicant visited his then wife in the hospital, then went out with friends until about 11:30 pm, before returning home. After arriving home, he and his sister-in-law began talking. (Tr. 25) During their conversation, his sister-in-law mentioned that her parents let her drink alcohol. Applicant then went to the freezer, retrieved some alcohol, and began preparing drinks. He gave her two drinks. The first was a mixture of vodka and Mountain Dew. The next drink he prepared her was nicknamed "liquid cocaine," and consisted of a combination of Jagermeister, gold schlagger, rumple minze (a brand of peppermint schnapps), and 151-proof Bacardi. (Tr. 26) He testified that he did not intend to get her intoxicated. (Tr. 27)

At or about the time Applicant and his 13-year-old sister-in-law began consuming alcohol, the conversation turned to sexual matters. He asked her to remove her clothing and she complied. (Answer, Enc. 1 at 2) Applicant then removed his clothing and began touching her body with his hands and mouth. Applicant stopped short of sexual intercourse when he realized that what he was doing was wrong. His sister-in-law slept on the living room sofa and left his home on the following day. (Answer, Enc. 1 at 2-3)

On July 22, 2008, Applicant was arrested and charged with indecent liberties with a child by a custodian and aggravated sexual battery. (GE 2 at 26) In November 2008, the

charge of aggravated sexual battery was disposed of by *nolle prosequi*. In January 2009, Applicant was indicted for indecent liberties with a child by a custodian, a felony. He pleaded guilty in March 2009. In May 2009, he was sentenced to confinement for 12 months (suspended for 12 months), and placed on supervised probation for ten years. The sentencing order required him to register as a sex offender and to have no contact with anyone under the age of 18 without supervision. (Answer, Enc. 1 at 3) Moreover, Applicant was placed on the state's sex offender list. (Answer, Enc. 1 at 3)

In August 2008, while awaiting trial, Applicant voluntarily contacted a certified sex offender treatment provider. (Answer, Enc. 1 at 3) Applicant started individual therapy in September 2008 and group therapy in May 2009. He completed his therapy in late November 2009 and participated in an aftercare program from December 2009 to May 2010. His diagnosis upon discharge from the program was depressive disorder, not otherwise specified; impulse control disorder, not otherwise specified; and sexual abuse of a child. His risk of recurrence was assessed as "low provided he uses what he has learned in treatment." (Answer, Enc. 4 at 2) In September 2010, the court released Applicant from probation early for good behavior. (AE A)

In his answer to the first SOR, Applicant stated that his misconduct with his sister-in-law occurred while he was under great emotional pressure, dealing with his then wife's bipolar disorder and attempts to kill herself. (Answer, Enc. 4 at 4) At the first hearing, he testified that he acquired skills during his therapy that help him cope with stress, and that he has a network of friends, including his rabbi whom he can depend upon for support when needed.

After Applicant's first ISCR hearing, the judge credited him for being remorseful about his conduct, voluntarily seeking treatment, and informing his employer and the members of his faith community about his crime. However, the judge concluded that it was too soon to conclude that he had mitigated the security concerns, given the impulse control diagnosis and the recency of the conduct. (Answer, Enc. 1 at 9)

Since the 2010 denial, Applicant has earned an associate of science degree, and an associate degree of applied science in photography, specializing in visual communications. (AE B at 2) He graduated *summa cum laude*. (AE B at 3; AE E) He maintained his outstanding grades while being a leader in student organizations, contributing to the good of the larger community, and maintaining a full-time job. (AE B at 3)

Applicant consistently receives good annual performance ratings. (AE I) In 2012, his supervised probation was suspended for good behavior. (AE A)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 overall 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. 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 mitigate facts admitted by 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 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. Section 7 of Executive Order 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).

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d).¹

¹ The factors under AG ¶ 2(d) are as follows:

- (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.

Analysis

Guideline J, Criminal Conduct

Under this guideline, “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 ¶ 30)

Applicant’s conviction of indecent liberties with a child by a custodian, a felony, raises the disqualifying conditions in AG ¶ 31(a), “a single serious crime,” and AG ¶ 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.”

The following mitigating conditions are potentially applicable under 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

(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 behavior was an isolated incident that occurred more than ten years ago. He successfully completed counseling and complied with the terms of probation, leading to its early suspension for good behavior in September 2012. Since the incident, he has earned two associate degrees, has performed well on the job, and has received an award while in college that, among other things, credited him for his exceptional community involvement. Under these circumstances, AG ¶ 32(d) applies.

Conversely, I am troubled by Applicant’s testimony that he did not intend to get his sister-in-law, then 13 years old, intoxicated before molesting her, despite giving her two alcoholic drinks, one of which he characterized as “liquid cocaine.” Such an outlandish statement calls into question both the sincerity of his contrition and his credibility. Consequently, I cannot conclude that his conduct no longer casts a doubt on his reliability, trustworthiness, or good judgment. AG ¶ 32(a) is inapplicable.

Guideline D: Sexual Behavior

Under this guideline, sexual behavior is a security concern if it “involves a criminal offense, reflects a lack of judgment or discretion, or may subject an individual to undue influence of coercion, exploitation, or duress.” Applicant’s committed a felony when he

molested his former sister-in-law. His conduct was compulsive, made him vulnerable to criminal prosecution, and was symptomatic of an impulse control disorder. Moreover, it made him vulnerable to coercion, exploitation, or duress. Under these circumstances, the following disqualifying conditions under AG ¶ 13 apply:

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

Security concerns raised by sexual behavior may be mitigated if “the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances that it is unlikely to recur and does no cast doubt on the individual’s current reliability, trustworthiness, or good judgment,” or “the behavior no longer serves as a basis for coercion, exploitation, or duress.” (AG ¶¶ 14(b) and (c)). Applicant has disclosed his conduct to his supervisors, friends, and faith community. His registration as a sex offender is a matter of public record. Under these circumstances AG ¶ 14(c) applies. Conversely, the mitigating condition set forth in AG ¶ 14(b) is inapplicable for the same reasons that the mitigating condition set forth in AG ¶ 32(a) does not apply under the criminal conduct guideline, as discussed above.

Whole-Person Concept

The steps that Applicant have taken to demonstrate that he has rehabilitated himself have been commendable. More than ten years have elapsed since his conduct, and he had never engaged in such conduct before the incident.

Conversely, child molestation is an extraordinarily serious crime, compounded by the fact that Applicant’s sister-in-law was in his care when he abused her. Applicant’s contention that he did not intend to get his sister-in-law intoxicated when he gave her two alcoholic drinks was not credible, and created the impression that he is still unable to come to terms with the magnitude of his transgression. Under these circumstances, doubts remain about Applicant’s trustworthiness. Having considered this case in the context of the whole-person concept, I conclude that it is not clearly consistent with the national security to grant Applicant access to classified information.

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
Subparagraph 1.a:	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, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge