



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 19-02658

Appearances

For Government:

Aubrey De Angelis, Esquire, Department Counsel

For Applicant:

Pro se

April 8, 2021

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on June 1, 2016. (Government Exhibit 1.) On November 21, 2019, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines D (Sexual Behavior), J (Criminal Conduct), and E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on June 8, 2017.

Applicant answered the SOR in writing (Answer) on December 14, 2019, and requested a decision without a hearing. On January 27, 2020, pursuant to ¶¶ E3.1.7 and E3.1.8 of Enclosure 3 of the Directive, Department Counsel requested a hearing before an administrative judge. Department Counsel was prepared to proceed on January 27, 2020. The case was reassigned from another judge to me on January 20, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on December 22, 2020. I convened the hearing as scheduled on February 1, 2021.

The Government offered Government Exhibits 1 through 7, which were admitted without objection. Applicant offered Applicant Exhibits A through D, which were admitted without objection. Applicant testified on his own behalf. He requested that the record be left open for additional documentation. He submitted Applicant Exhibit E in a timely fashion and it was received without objection. DOHA received the transcript of the hearing (Tr.) on February 17, 2021.

Findings of Fact

Applicant is 59 years old, and married with three adult children. He has a high school education with additional college classes. Applicant is employed by a defense contractor as an Analyzer and is seeking to obtain national security eligibility for a security clearance. (Government Exhibit 1 at Sections 12, 13A, 17, and 18; Tr. 17.)

Paragraph 1 (Guideline D, Sexual Behavior)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he engaged in sexual behavior that reflects a lack of judgment, or may subject Applicant to undue influence or coercion. In his Answer, Applicant admitted the two allegations in the SOR under this guideline with exceptions and explanations, stating in his Answer, "I admit to a sexual relationship for 6 months, [approx.] 1989 to 1990." He also submitted additional evidence to support his request for a finding of national security eligibility.

Applicant testified that he was sexually involved with his sister-in-law (Ms. One) approximately 20 to 50 times between 1993 and 1994. At that time she was 14 and 15 years old, being born in 1978. Applicant was in his late 20s at the time of their involvement and in the Navy. With regard to the relationship, Applicant stated, "It was wrong. It was totally wrong. I have no excuses." I have compared Applicant's testimony of the relationship with the statements of Ms. One to local and Naval authorities. Many of the claims made by Ms. One appear to be exaggerations, particularly about the number of times they had sexual intercourse. (Government Exhibits 3 and 4; Tr. 19-21, 40-46.)

In May 1995 Ms. One's parents found out about her sexual relationship with Applicant and reported it to the local police. The local police coordinated with the Naval authorities and Applicant was arrested and charged with Unlawful Sexual Intercourse,

Oral Copulation of a Person Under 16, and Lewd Act Upon A Child. From the available evidence, including Applicant's testimony, it appears he pled guilty to Lewd or Lascivious Acts With a Child 14 or 15 Years of Age, and Sexual Intercourse With a Child 14 or 15 Years of Age. He was sentenced to one year in the county jail. He ended up serving eight months on work release. Applicant also served probation successfully. He has had to register yearly as a sex offender since that time as required by state law. Applicant has been consistent in fulfilling his legal responsibilities. (Government Exhibits 5, 6, and 7; Tr. 21-27, 29-31, 40.)

During the time he was incarcerated Applicant was separated from the Navy for misconduct with a General Discharge (Under Honorable Conditions), as supported by his DD Form 214. (Applicant Exhibit E; Tr. 27-28.)

Paragraph 2 (Guideline J, Criminal Conduct)

The Government alleges in this paragraph that Applicant's conduct alleged under Paragraph 1 was also criminal activity that creates doubt about his judgment, reliability, and trustworthiness. By its very nature, such conduct calls into question Applicant's ability or willingness to comply with laws, rules, and regulations. Applicant denied this allegation.

Paragraph 3 (Guideline E, Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. In his Answer, Applicant denied all three subparagraphs under this guideline.

3.a. The Government alleged in this subparagraph that Applicant's sexual relationship with Miss One, as set forth above, was also cognizable under this guideline.

3.b and 3.c. Applicant was interviewed by an investigator from the Office of Personnel Management on June 20, 2017. A Report of Investigation (ROI) was prepared by the investigator, which Applicant certified to be accurate on September 28, 2019. The investigator prefaces the discussion about the above events as follows, "He [Applicant] offered the following detailed information to the best of his memory: in approximately 1985 (exact date not recalled) he was in the navy [sic] and was stationed in Redding, CA." The ROI goes on to state that Applicant became involved with Ms. One in 1985 (when she would have been eight years old). The ROI reports that Applicant further stated that the relationship lasted six months or less. These statements are factually incorrect. (Government Exhibit 2; Tr. 33-39.)

Applicant was extensively questioned about the differences between the statements in the ROI and the facts as presented by other exhibits, and agreed to by Applicant in his testimony. Applicant adamantly stated he simply could not remember the exact years things happened when he was questioned in 2017, or when he prepared his

Answer. He particularly stated that he did not have access to the exhibits presented by the Government, which contained accurate dates. Applicant testified, "I've never denied any wrongdoing." When asked by Department Counsel if he was downplaying what happened between himself and Ms. One he testified, "No. I would never downplay this. It's not something that's taken lightly at all. I would never take this lightly. So, I would never downplay anything. Like I said, I would rather get it right the first time instead of having to reopen this over and over again. But, I will if I have to." (Tr. 36-39.)

Mitigation

Applicant's mother-in-law, wife and oldest son wrote letters on Applicant's behalf. They all acknowledge the "unfortunate situation that involved both of my daughters." They all say he has paid a severe price over many years and has learned from his mistakes. (Applicant Exhibits A, B, and C.)

Policies

When evaluating an applicant's suitability for national security eligibility and a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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, "Any 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (Guideline D, Sexual Behavior)

The security concerns relating to the guideline for sexual behavior are set out in AG ¶ 12, which reads in pertinent part:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence or 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 . . .

The following disqualifying conditions apply to the facts of this case under ¶ 13:

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

Applicant was sexually involved with his minor sister-in-law in 1993 and 1994. Applicant was arrested in connection with that involvement, pled guilty, and served his jail

sentence, including probation. He registers every year with his state as a sex offender. All of the above disqualifying conditions apply to the facts of this case.

The following mitigating conditions have been considered in this case under 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; and

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

Applicant has successfully mitigated the security significance of his misconduct. The evidence of record, including letters from his wife, son and mother-in-law, show that this behavior no longer serves as a basis for any coercion. While Applicant is not proud of his conduct, he does not hide the fact that it happened. The misconduct happened over 25 years ago and he has not been involved in any other type of misconduct, sexual or otherwise, since that time. While he has to register as a sex offender, that fact is not determinative, as further discussed below. Paragraph 1 is found for Applicant.

Paragraph 2 (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.

The guideline at AG ¶ 31 contains five disqualifying conditions that could raise a security concern and may be disqualifying. One condition applies:

(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.

As stated, Applicant was arrested, charged and convicted of sexually-related offenses in 1995. He pled guilty and successfully fulfilled his sentence, including probation.

The guideline in AG ¶ 32 contains four conditions that could mitigate criminal conduct security concerns. Two are applicable to the facts of this case:

(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.

As stated, it has been over 25 years since Applicant's criminal conduct. He fulfilled all of his sentencing requirements, and has not had any recurrence of criminal conduct since that time. His family, with intimate knowledge of his misconduct, state that he has grown since this incident and that there is no chance of recurrence. Paragraph 2 is found for Applicant.

Paragraph 3 (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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The following disqualifying conditions are applicable under AG ¶ 16:

(b) deliberately providing false or misleading information, or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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; and

(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 had a sexual relationship with his sister-in-law when she was a minor. This resulted in criminal penalties as discussed above. The Government also alleged that Applicant falsified material facts when he was questioned by a Government investigator. All of the cited disqualifying conditions arguably apply.

The following conditions are mitigating under AG ¶ 17:

(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; and

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

Turning first to his sexual misconduct with his sister-in-law. As discussed above, it has been over 25 years since this occurred, there were obviously unique circumstances, it has not recurred and it does not cast doubt on Applicant's current reliability, trustworthiness, or good judgment.

With regard to his interview with an investigator from OPM, it must first be remembered that a statement being wrong does not necessarily mean it was made with the intent to deceive. There is the possibility it could just be an error. That is so in this case. It is important to note that in the ROI the investigator indicates that Applicant was giving information “to the best of his memory.” The investigator also states that Applicant was giving information about times when “exact date not recalled.” The Government was put on notice that Applicant was speaking from memory, which is fallible. There is insufficient evidence to find that he “deliberately” provided false information during the interview.

Department Counsel noted the possible applicability of the DOHA Appeal Board decision in ISCR Case No. 09-03233 (App. Bd. Aug. 12, 2010), which held that the administrative judge erred in a Guideline J case in her evaluation of contrary evidence concerning that Applicant’s activities. That case is distinguishable. As noted in footnote 2 on page 3 of the Appeal Board decision, that case was an administrative decision, where the judge did not have an opportunity to question the Applicant or observe his testimony. In this case Applicant was extensively questioned by Department Counsel and myself about the discrepancies noted in the SOR. I was able to determine his demeanor and the overall positive credibility of his testimony and other positive evidence of record. He was obviously mistaken, but not actively trying to deceive the Government.

I have also considered the fact that Applicant is required to continue to register as a sex offender more than 25 years after the incidents in question. In this case that fact is mitigated by his decades-long history of non-involvement with law enforcement, along with the positive recommendations of his mother-in-law and wife, who are intimately related to Applicant and his victim and knowledgeable of the facts.

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 national security eligibility 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 pertinent facts and circumstances surrounding this case. Applicant has mitigated the concerns regarding his sexual and criminal misbehavior with regard to his then-minor sister-in-law, Miss One, and his personal conduct with regard to his mistakes about dates in his interview. He established a solid record of lawful behavior, trustworthiness, and good judgment over the past 25 years, and minimized any potential for coercion or duress. Overall, the record evidence does not create substantial doubt as to Applicant's present suitability for national security eligibility, and a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline D:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraphs 3.a through 3.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's national security eligibility. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge