



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [REDACTED]) ISCR Case No. 20-02965
)
 Applicant for Security Clearance)

Appearances

For Government: Eric C. Price, Esq., Department Counsel
For Applicant: *Pro se*
12/06/2021

Decision

MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his security clearance application (SCA) on July 16, 2019. On January 13, 2021, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J and E. The CAF 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 February 3, 2021, and requested a decision based on the written record in lieu of a hearing. On July 9, 2021, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including pleadings and evidentiary documents identified as Items 1 through 8. He was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government’s evidence. He received the

FORM on July 15, 2021, and did not respond to the FORM or object to the Government's evidence. The case was assigned to me on October 1, 2021.

Evidentiary Matters

Items 1 and 2 contain the pleadings in the case. Items 3 through 8 are admitted into evidence. Item 8 was not authenticated as required by Directive ¶ E3.1.20. However, I conclude that Applicant waived any objection to Item 8. The Government included in the FORM a prominent notice advising Applicant of his right to object to the admissibility of Item 8 on the ground that it was not authenticated. Applicant was also notified that if he did not raise an objection to Item 8 in his response to the FORM, or if he did not respond to the FORM, he could be considered to have waived any such objection, and that Item 8 could be considered as evidence in his case. Applicant did not respond to the FORM or object to Item 8.

I *sua sponte* took administrative notice of the documents discussed below, which are identified in the record as Administrative Exhibits (AX) I through IV.

Administrative Notice

A 1991 sexual battery statute and its 1993 amended version were referenced in the record. Because the statute underlay the 1994 conviction alleged in the SOR, the text of the statute and its amended versions are relevant to my decision. Since they were not submitted by either party, I *sua sponte* took administrative notice of the statute and its amended version, as well as the legislative history of the amendment, and appended copies to the record as AX I through IV.

The 1991 statute contained a separate section pronouncing that “[a]ny person who [stood] in a position of familial or custodial authority to a child 12 years of age or older but less than 18 years of age” and who “engage[d] in sexual activity with that child is guilty of a felony of the first degree.” “Sexual activity” was defined as “the oral, anal, or vaginal penetration by, or union with, the sexual organ of another” The separate section was removed and its substance was incorporated into the provisions of the amended 1993 statute. Specifically, the incorporated provisions declared that it was a felony of the first degree for a person who was “in a position of familial or custodial authority to a person less than 18 years of age” to engage “in any act with that person while that person is 12 years of age or older but less than 18 years of age which constitutes sexual battery.” Although the term “sexual activity” was no longer referenced in the 1993 amended statute, the term “sexual battery” was similarly defined as “oral, anal, or vaginal penetration by, or union with, the sexual organ of another” (AX I, III)

Presumably Applicant was convicted upon the 1991 statute in effect at the time of his criminal conduct. However, the statutory references in the record created confusion on that issue. Applicant's plea agreement dated July 1994 (Item 5 at 12-13) referenced the 1991 statute (AX I), while his arrest record dated March 1994 (Item 5 at 3) and court records (Item 5 at 1-2) referenced the 1993 amended statute (AX III). Because the 1991 and 1993 versions of the statute are substantially similar, that ambiguity is

inconsequential in the matter before me. The 1992 version of the statute (AX II), which did not contain a provision or section about persons in a position of custodial authority, was included merely for reference. The legislative history (AX IV) was included to highlight the changes between the 1991 and 1993 versions of the statute.

Findings of Fact

Applicant, age 59, married his second wife in 2013. His first marriage of six years ended by divorce in 2009. He has one adult son from his first marriage. The record did not indicate his educational history. He has been employed as a senior information technology administrator by a defense contractor since April 2003. Applicant previously held a security clearance during his military service. He served in the U.S. Air Force from 1989 through 1996, when he reportedly received an honorable discharge. (Item 3)

The SOR alleged identical facts, under Guidelines J and E, concerning Applicant's 1994 conviction for felony sexual offenses involving a minor. In his SOR answer, Applicant admitted the Guideline J allegation. Although he did not respond to the Guideline E allegation, I consider it admitted given his Guideline J response. (Items 1, 2)

Applicant had contact with the victim as an advisor to their church's youth group, in which she served as president. A criminal investigation was initiated after the victim reported that Applicant raped her. Applicant stated: "Apparently, [the victim] had sought counseling and revealed our prior relationship to her counselor and subsequently, her parents." Throughout the record, Applicant repeatedly referred to his sexual contact with the victim as consensual and, aside from his guilty plea, never acknowledged raping her or any other nonconsensual sexual contact. (Item 7 at 1-2; Item 8 at 3)

Applicant reportedly told the victim that if she told anyone that he raped her, it would ruin the church and her family. According to one witness (Witness A), Applicant admitted that he raped the victim. During a phone call he initiated to Witness A, Applicant indicated that the victim accused him of rape. Witness A then asked Applicant whether he raped the victim. Believing that his reply would be kept in confidence, Applicant admitted to Witness A that he raped the victim. During a subsequent call Applicant initiated to Witness A a few days later, Applicant asked Witness A to see if the victim would be willing to meet with Applicant and talk about the possibility of an out-of-court settlement. (Item 5 at 3, 9, 10)

In March 1994, Applicant was arrested and charged with multiple felony sexual offenses after an investigation indicated that he raped the victim on four occasions between August 1992 and August 1993, and attempted to rape her in September 1992. The charges reflected Applicant's custodial authority over the victim because of his role as the church's youth group advisor; and that the victim was a minor. Applicant stated that she was age "16 years and 9 months" at the time of the offenses for which he pleaded guilty. (Item 5 at 3; Item 7 at 2; Item 8 at 3; Item 2)

Applicant was originally charged with four counts of engaging in sexual activity with a victim age 12 to 18 years old as a person in a position of custodial authority; and one

count of attempting sexual activity as a person in a position of custodial authority. In July 1994, Applicant pleaded guilty to amended charges pursuant to a plea agreement in exchange for which certain charges were *nolle prossed*. In August 1994, the court accepted Applicant's plea and sentenced him to five years of prison followed by ten years of probation, and ordered him to undergo counseling and register as a sex offender. The charges to which Applicant pleaded guilty were: two counts of sexual activity by a custodial authority (a first-degree felony); and one count of attempting sexual activity by a custodial authority (a second-degree felony). Special conditions of his probation included that Applicant could not: 1) have either direct or indirect contact with the victim; 2) have unsupervised contact with females under 18 years of age; or 3) supervise anyone under age 18, unless approved by his probation officer. (Item 5 at 1-2,12-13; Item 7 at 4; Item 8 at 3)

Although it is unclear for how long Applicant remained incarcerated or the date his probation ended, the record indicated that he was released on good behavior from prison about two and one-half to three years into his sentence and successfully completed probation in about November 2009. Immediately following his release from prison, he was required to report to his probation officer on a monthly basis, and then was transitioned, in about May 2000, to an administrative probation, which afforded him the freedom to travel. He underwent court-ordered counseling with a sex-offender therapist in connection with his probation, weekly at first and then monthly, for an undefined period. (Item 5; Item 7 at 3-4; Item 8 at 3)

Throughout the record, Applicant expressed remorse, and professed to have accepted full responsibility, for his criminal conduct. He also insisted that he had been open and honest about it in his personal and professional life. Conversely, he repeatedly characterized the sexual contact underlying his conviction as consensual and claimed to have had a romantic relationship with the victim based on a mutual attraction.

In a November 2004 signed sworn statement (apparently provided in connection with a previous background investigation), Applicant stated:

I am deeply remorseful for my actions in 1992 that led to the criminal charge and subsequent incarceration and probation. At the time [the victim] told me that if our relationship was discovered she would tell the authorities that she consented. I realize under [my home state's laws] she was not legally recognized as being of the age to grant consent and I hold no ill will against her for the charge brought against me due to our relationship. I have not had any contact with her since right after the break-up and I do not plan to ever have contact with her in the future. . . My 1994 charge of sexual battery/coercion is common knowledge to my family, friends, and co-workers. . . . As a registered sexual offender, my offense is a public record, which is something I have come to accept through my incarceration and therapy. (Item 7)

Applicant also averred that his 1994 conviction resulted from a "relationship" he had with the victim. He claimed that they "started out as friends and then developed a

mutual attraction which led to a sexual relationship over a period of about two months in early 1992.” He asserted: “I ultimately ended the relationship because I felt guilty and knew it was not a healthy union for either of us. I also left the church to put some distance between us.” He maintained: “At the time of my extra-marital affair my wife had no knowledge of it. After I was charged was when she found out and she subsequently left me and filed for divorce.” His ex-wife was granted custody of their son. (Item 7)

Applicant explained in his 2004 statement that he was experiencing marital problems during his self-described consensual relationship with the victim, yet also stated: “I realized that does not excuse my behavior.” Applicant contended: “I have rebuilt my life and done everything in my power to ensure I am never involved in a situation that could lead to criminal charges in the future.” (Item 7 at 2, 4)

During his August 2019 security clearance interview (in connection with the current background investigation), Applicant reiterated that he had an extra-marital affair with the victim. While he acknowledged having sexual relations with the victim on three separate occasions, he maintained that they were consensual. He claimed that he ended the relationship with the victim after deciding that it was inappropriate. He characterized the “criminal activity” for which he was convicted as sexual battery/coercion of a female age 17. Although he acknowledged that he had no justification for this “criminal activity,” he also rationalized that it occurred because he had low self-esteem and was struggling with his wife and marriage. He averred that he had spent 10 years trying to figure out what happened. He affirmed that he would not ever allow his criminal activity to recur, avoided any and all risky environments or any perceived evil, no longer volunteered or had any contact associated with a vulnerable population. (Item 8 at 3)

In his SOR answer, Applicant stated:

I came to the conclusion [*sic*] long time ago that my past is something I can't change or hide from. Furthermore, my criminal history is public information. I have always been upfront and forthcoming about my past to my employer, supervisors and anyone else that should be aware of my past. [About] 27 years ago I stepped up and paid my debt to society and faced my past with brutal honesty. The brief consensual affair with the [] victim []was illegal and morally wrong. I fully acknowledge that I was the adult in the situation and I should have recognized the situation for what it was.

Applicant proffered that he has been entrusted with the protection and integrity of unclassified data and company proprietary information for more than 17 years and has received praise from cyber-security professionals. He asserted that his “advanced skill sets and deep experience” could serve the national interests if he were granted a security clearance. He proclaimed that he served with distinction in the Air Force because he maintained a clearance and received numerous awards. He received the Airman’s Medal for swimming hundreds of yards while attempting to save a drowning man. In just three years of service, he was awarded the Air Force Achievement Medal, Air Force Good Conduct Medal, and the Airman of the Year Award (for the Air Force Security Police). (Item 2)

Applicant also declared:

. . . I have lived my life with determination to avoid letting that moment in time to define me. I have doggedly strove to grow and become the man I was supposed to be, and to honor the trust and respect of those around me who continue to put me in a position of trust in my personal and professional life. . . . If given the chance, I will not disappoint you. I will carry out my responsibilities with distinction and honor the trust and respect you have shown me by considering this request.

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.” (*Egan* 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.” (EO 10865 § 2).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. 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.” (EO 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. (*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. (ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993)). 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. (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; AG ¶ 2(b)).

Analysis

Guideline J: Criminal Conduct

The concern under this guideline 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 record establishes 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.

Having considered all of the factors set forth in AG ¶ 32 that could mitigate the concerns under this guideline, I find the following relevant:

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.

The sexual offenses for which Applicant was convicted were egregious, particularly given the victim's age and his position as an advisor to the church's youth group. I did not find credible his protestations of a benign relationship with the victim. There is substantial evidence that his sexual contact with the victim was not consensual. I found the evidence

that Applicant reportedly admitted to raping the victim compelling. Even assuming *arguendo* that Applicant had not had sexual intercourse with the victim against her will, the charges for which he pleaded guilty and was convicted together with the special conditions of his probation denote the severity of Applicant's criminal conduct. The fact that he was a member of the U.S. military at the time of these offenses further exacerbates the security concern with his criminal conduct. I considered the significant time that has passed without recidivism or new criminal charges. However, the nature of his criminal conduct and the fact that he remains a registered sex offender preclude mitigation. Moreover, Applicant's failure to be forthright about his criminal conduct and to fully accept responsibility for his unlawful actions casts doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 32(a) and 32(b) are not established.

Guideline E (Personal Conduct)

The security concerns under this guideline, as set out in AG ¶ 15, include: "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."

In its FORM, the Government argued that the disqualifying conditions set forth in paragraphs 16(a) and 16(b) under Guideline E are established by the evidence in the record, presumably based on Applicant's lack of candor about the nature of his sexual contact and relationship with the victim. However, the Government did not allege facts surrounding his lack of candor in the SOR. Thus, I will consider those facts only to evaluate mitigation and the whole-person concept.

None of the other listed disqualifying conditions under Guideline E applies to the facts alleged in the SOR given my adverse determination under Guideline J, including AG ¶ 16(d) as argued by the Government in its FORM. However, the facts alleged in the SOR establish the general concerns involving Applicant's questionable judgment and unwillingness to comply with rules and regulations.

Having considered all of the factors set forth in AG ¶ 17 that could mitigate the concerns under this guideline, I find the following relevant:

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

AG ¶ 17(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.

Incorporating my comments under Guideline J, the security concerns raised under this guideline have not been mitigated. Applicant's lack of candor about the nature of his sexual contact and relationship with the victim further magnifies the security concerns about his personal conduct. AG ¶¶ 17(c) and 17(d) are not established.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. In evaluating the relevance of an individual's conduct, an 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.

I have incorporated my comments under Guidelines J and E in my whole-person analysis, and considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines J and E, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated the security concerns raised by his 1994 conviction for felony sexual offenses involving a minor. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the interests of national security to grant him eligibility for access to classified information.

Formal Findings

Formal findings 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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

Gina L. Marine
Administrative Judge