



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 20-02702
)	
Applicant for Security Clearance)	

Appearances

For Government: Dan O’Reilly, Esq., Department Counsel
 For Applicant: *Pro se*
 09/30/2022

Decision

MARINE, Gina L., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on October 11, 2017. On November 20, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines D, J, and E. The CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (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 November 24, 2021, and requested a decision based on the written record in lieu of a hearing. On March 21, 2022, the Government sent Applicant a file of relevant material (FORM), including evidentiary documents identified as Items 1 through 6. 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 March 28, 2022, but did not respond to the FORM or object to the Government's evidence. The case was assigned to me on June 16, 2022.

Evidentiary Matters

Items 1 and 2 contain the pleadings in the case. Items 3 through 6 are admitted into evidence. Item 6 contained court records, including one page (at 105) that related to another individual who was not Applicant and was not otherwise relevant to this matter, and other pages that were unreadable. I concluded that the page at 105 was apparently inadvertently included in those records, and I did not consider that page. I also accorded no weight to the pages in Item 6 that were unreadable.

Findings of Fact

Applicant, age 72, is married with four adult children. He received his high school diploma in 1968 and an associate degree in 1984. He has been employed as an electronic technician by a defense contractor since 2007. This is his first application for a security clearance. (Item 3)

In April 1989, Applicant was charged with engaging in 34 felony counts of lewd acts upon a child. In August 1989, those charges were amended to 18 counts and then to 16 counts. In August 1989, Applicant, represented by counsel, pled guilty to 1 felony count (count #15, as amended) for which he was convicted. The other 15 counts were dismissed. The following is the count to which he pled guilty:

COUNT – 15 LEWD ACT UPON A CHILD

On and between August 1, 1988 and August 30, 1988 [Applicant] did willfully, unlawfully, and lewdly commit a lewd and lascivious act upon and with the body and certain parts and members thereof of [Child], a child under the age of fourteen years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the said defendant and the said child (to wit: Defendant touches Victim's breasts), in violation of [state law].

In support of his guilty plea, Applicant endorsed the following handwritten statement acknowledging his crime: "On or about 8/1/88 through 8/30/88, I touched the breasts of a child under the age of fourteen years with the intent of gratifying my sexual desires." (Item 3 at 48; Item 6 at 6-12, 28-29, 33, 47-53, 108-119)

In November 1989, Applicant was sentenced to six years in prison and ordered to pay a \$100 fine. The maximum penalty was eight years in prison and a \$10,000 fine. For reasons not indicated in the record, Applicant was released from prison in about November 1992, at which time he was registered as a sexual offender with no expiration

date. In his Answer, Applicant admitted that he has been a registered sex offender since November 1992. (Item 5 at 4; Item 6 at 5, 24, 28)

On his SCA, Applicant reported that he pled guilty, in about August 1989, to a felony child sex offense involving a girl under the age of 14; and that he was incarcerated from about August 1989 through September 1992. In connection with the background investigation prompted by his SCA, he was interviewed three times: twice in November 2018 and once in August 2019. He discussed matters relevant to the SOR allegations during the first interview in November 2018 (Interview 1) and the August 2019 interview (Interview 3), including his version of the facts and circumstances underlying his arrest and conviction. (Items 3, 4)

Initially during Interview 1, Applicant explained that the child sex offense for which he was arrested involved him showering with the daughter of his wife's friend, who was then only 13 years old (minor child). He claimed that he did not do anything else with the minor child. When asked to provide further information about the incident, he refused to do so on the basis that all he did was shower and could not remember all of the details since it occurred so long ago. (Item 4 at 9)

Subsequently during Interview 1, Applicant provided some additional details. He maintained that his wife's friend saw him showering with the minor child and called the police, which resulted in his arrest. He explained that his wife's friend and the minor child were living with him at the time. He believed that he was rightfully arrested and should not have been showering with someone that young. He asserted that he was not thinking at the time and afterwards realized it was a mistake. He did not know why he thought it was okay to do it at the time. He stated that, after pleading guilty to the one child sex offense, he was sentenced to three years in prison, which he served from August 1989 to September 1992. He confirmed that he was registered as a sex offender, as required. He asserted that it was a one-time offense and that he had not had any other negative interactions with law enforcement or engaged in any other criminal activity. (Item 4 at 9-10)

During Interview 3, Applicant claimed that his wife (who had then been living in another country with their children) asked him to allow her friend to live with him so that her friend could escape an abusive husband. He stated that he took his wife's friend and her two children (including the minor child and her son) in like family. (Item 4 at 11-12)

Court records reflect that the results of the prosecution's investigation largely contradicted the Applicant's version of events. The prosecution's investigation found that Applicant engaged in substantially more unlawful sexual activity with the minor child than the one for which he was convicted, and that those acts occurred over an extended period of time. Among the court records was a pleading containing a statement of facts, endorsed by Applicant's counsel, that acknowledged that Applicant was the boyfriend of the minor child's mother, and that the minor child and her mother referred to him as "father." (Item 6 at 6-12, 14-24, 47-53, 75-76, 86-87, 109-119)

Another court record revealed that Applicant's wife and four children (including two daughters, then ages 12 and 14) arrived in the United States in about July 1989. At that time, Applicant's bail conditions were temporarily modified to prohibit him from residing in the same home as his wife and children, and to require that any visitation with his children be supervised by a court-approved agency. During Interview 1, Applicant confirmed that he did not get to see his children for a long period of time. The record did not otherwise indicate the specific duration for which his residence and visitation with his children were restricted. The record also did not indicate whether any restrictions or obligations followed his release from prison, including any period of probation (besides requiring him to register as a sex offender). (Item 6 at 66, 69, 76)

In Applicant's Answer, he admitted the facts alleged under Guidelines H and J involving his arrest and conviction. In response to the Guideline E allegation (SOR ¶ 3.a) involving falsification of facts during Interview 1, he wrote "I admit." However, I construed his response as a denial because, in the explanation accompanying his response, he denied any deliberate intent due, in part, to English being his second language. He also claimed that he did his best to answer all questions during his background investigation interviews, while also stating that he "did not give them the detail of that [*sic*]."

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. 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. (ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 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 D: Sexual Behavior

The general concern under this guideline is set out in AG ¶ 18, 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 a person'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.

The record evidence establishes the following disqualifying conditions under this guideline: AG ¶ 13(a) (sexual behavior of a criminal nature, whether or not the individual has been prosecuted); and AG ¶ 13(d) (sexual behavior . . . that reflects lack of discretion or judgment).

Having considered all of the factors set forth in AG ¶ 14 that could mitigate the concern under this guideline, I find the following relevant:

(b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment.

The criminal sexual offense for which Applicant was convicted was egregious. At the time of the offense, the victim was a minor child who resided in Applicant's home and maintained a familial-type relationship with Applicant. I considered the significant time that has passed without recidivism or new criminal sexual offenses. However, the nature of the criminal sexual offense and the fact that he remains a registered sex offender preclude mitigation. Moreover, Applicant's lack of candor during Interview 1 about the nature of his sexual contact with the minor child casts doubt about his current reliability, trustworthiness, and judgment. AG ¶ 14(b) is not established.

Guideline J: Criminal Conduct

The general 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.

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.

Incorporating my comments under Guideline D, Applicant has not mitigated the concerns raised by his arrest and felony conviction involving criminal sexual contact with a minor child. That Applicant was prohibited from living in his home with his family and spending time with his own children, without supervision by a court-approved agency (for at least some period of time); was sentenced to six of the eight-year maximum prison term; and was registered as a sex offender without an expiration date, underscore the

severity of Applicant's criminal sexual conduct. I considered the significant time that has passed without recidivism or new criminal charges. However, the nature of his criminal sexual conduct and the fact that he remains a registered sex offender preclude mitigation. Moreover, Applicant's failure to be forthright about the true extent of his criminal conduct and to fully accept responsibility for his unlawful actions exacerbates the concerns about his current reliability, trustworthiness, and good judgment. AG ¶¶ 32(a) and 32(d) are not established.

Guideline E: Personal Conduct

The general concern under this guideline is set out in AG ¶ 15, as follows:

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.

Applicant's refusal to provide full, frank, and truthful answers during Interview 1 establishes the general concern of AG ¶ 15(b) as argued by the Government. I also find substantial evidence of an intent on the part of Applicant to omit or conceal materially relevant information during Interview 1, which establishes the following specific disqualifying condition under this guideline:

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.

Having considered all of the factors set forth in AG ¶ 17 that could mitigate the concern 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.

Incorporating my comments under Guidelines D and J, I conclude that Applicant has failed to mitigate the security concerns raised by his lack of candor during Interview 1. I did not find credible Applicant's explanation for his lack of candor during Interview 1 about the nature of his sexual contact with the minor child. The fact that English is Applicant's second language does not explain why he insisted during Interview 1 that he only showered with the minor child, when he pled guilty to having touched her breast. His admissions to criminal and sexual conduct in generalities on his SCA and in his Answer do not mitigate the fact that he provided not only false and misleading statements, but also omitted and concealed the extent of his sexual contact with the minor child, during Interview 1.

Applicant's failure to give full, frank, and candid answers to the government in connection with a security clearance investigation not only calls into question his ability or willingness to comply with laws, rules, and regulations, but also reveals a willingness to place his own self-interest above his security obligations. Moreover, his refusal to acknowledge or accept responsibility for the true nature of his criminal sexual contact with the minor child continues to undermine confidence in his reliability, trustworthiness, and judgment, which raises doubt about his ability to safeguard classified information. AG ¶¶ 17(c) is not established.

Whole-Person Analysis

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 commonsense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. 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 D, J, and E in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines D, J, and E, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated security concerns raised by his sexual behavior, criminal conduct, and personal conduct. 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 D (Sexual Behavior):	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Paragraph 2, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 3.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