



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



In the matter of:)
)
) ISCR Case No. 21-01737
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey M. De Angelis, Esq. Department Counsel
For Applicant: *Pro Se*

01/25/2023

Decision

KATAUSKAS Philip J., Administrative Judge:

Applicant provided sufficient evidence to mitigate the security concerns raised under Guideline D, sexual conduct, and Guideline J, criminal conduct. Eligibility is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on April 1, 2019, in connection with his employment by a defense contractor. On August 13, 2021, following a background investigation, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline D, sexual conduct, and Guideline J, criminal conduct. DOD issued the SOR under Executive Order (Exec. Or.) 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 Security Executive Agent Directive 4 (SEAD 4) *National Security Adjudicative Guidelines* (AG), which became effective on June 8, 2017.

On August 30, 2021, Applicant submitted an answer to the SOR (Answer) in which he requested a decision by an administrative judge from the Defense Office of Hearings and Appeals (DOHA) based on the administrative (written) record, in lieu of a hearing. Department Counsel submitted the Government's undated File of Relevant Material (FORM), including documents identified as Items 1 through 10. The FORM was mailed to Applicant on May 31, 2022. He was afforded an opportunity to note objections and to submit material in refutation, extenuation, or mitigation, and was given 30 days from receipt of the FORM to do so. Applicant received the FORM on June 8, 2022. DOHA received his response on June 27, 2022 (Response). Applicant did not make any objections to the Government's evidence. Department Counsel did not object to admission of Applicant's June 27, 2022 FORM response (Response). Government Items 1 and 2, the SOR and the Answer, respectively, are the pleadings in the case. Items 3 through 10 are admitted without objection, as is Applicant's Response. The case was assigned to me on September 6, 2022.

Findings of Fact

After a thorough and careful review of the pleadings, the Government's exhibits, and Applicant's Response, I make the following findings of fact.

Applicant is 66 years old and has been married since August 1982. He has an adult son and daughter and two adult stepdaughters. He earned an associate's degree in May 1982 and a bachelor's degree in December 1998. Since April 2016, he has been employed by a defense contractor. (Item 4.)

The 1992 Offense

Under AG D, the SOR alleged that in April 1992 Applicant was arrested and charged with Criminal Sexual Assault of a Family Member and Aggravated Criminal Sexual Assault of a victim less than 13 years of age. In his January 8, 2020 Personal Subject Interview (PSI), he explained that once he started the abuse he could not stop and needed to be arrested. (Item 5.) He pleaded guilty on October 26, 1992. (Item 7 at 3.) In his Answer, he admitted that he was arrested and charged, as alleged. He admitted that he was placed on four years of probation, He also admitted that he served four years of probation and never missed a meeting with his probation officer. He registered as a child sex offender for 10 years and attended mandatory professional counseling sessions for five years. (Item 3.) On July 15, 1993, the court ordered that Applicant could return to his marital home to reside with his family (his wife, his then minor son and daughter, and his two then minor stepdaughters). (Item 7 at 19.)

In his PSI, Applicant explained his understanding of the end of his 10 years of child sex offender registration. Near the end of that 10 year period (2002 or 2003), he filed his periodic registration form. The officer who processed the form told him that he no longer needed to register and was no longer subject to monitoring, as a result of his 1992 conviction. (Item 5.)

In his Response to the FORM, Applicant explained two instances when he might have violated the terms of his 1992 sentence. The first was in 2006 when his son, who is disabled, graduated from high school. Applicant attended that graduation with his wife and family members. He knew at the time that he should have gotten permission from the court. (Item 5.) The second was an instance (date not stated) when one of his daughters telephoned and asked if he and his wife could pick up her two sons (his grandsons) from school. They did so. It is not clear on this record that this latter instance violated the terms of his sentence. He volunteered those instances to the OPM investigator to be “open and honest.” (Response.)

The 2019 Offense

Under AG D, the SOR alleged that in March 2019 Applicant was arrested and charged with a misdemeanor of being as Child Sex Offender Unlawfully Present in a Public Park. On May 23, 2019, Applicant pleaded guilty to that charge and was placed on 12 months court supervision until May 22, 2020. (Item 1.) Applicant admitted that he was arrested and charged, as alleged. (Item 3.) Applicant was found guilty and sentenced to one year of court supervision and fined for fees and costs totaling \$1,247. His sentence was satisfied on September 16, 2020. (Item 9.)

Applicant did not know it was illegal for him to enter a public park for a walk with an adult companion. He had not yet exited his car when arrested. He did not knowingly or willfully violate the law. (Item 3.) Applicant pleaded guilty on advice of counsel. He questioned, however, whether the law applied to him, because it was passed in 2012, years after his 1992 offense. There were no children in the park at the time of his arrest, which is required by the current law. The Arrest Report did not note that children were present then. (Items 3, 5, 8, and 10.) Nonetheless, he pleaded guilty because at the time he “was in the process of a Federal Background Investigation [for a security clearance] and did not want that to get affected.” (Item 5.)

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The second was an instance (date not stated) when one of his daughters telephoned and asked if he and his wife could pick up her two sons (his grandsons) from school. They did so. The specific location where he and his wife picked up the grandsons is not stated. Therefore, it is not clear on this record that this latter instance violated the

terms of his sentence. He volunteered those instances to the OPM investigator to be “open and honest.” (Response.)

Under AG J, the SOR cross-alleged the allegations made under AG D. Applicant’s admissions and denials to AG D are incorporated herein by reference.

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court has noted, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. These guidelines, which are flexible rules of law, apply together with common sense and the general factors of the whole-person concept. The administrative judge must consider all available and 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.”

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 in seeking a favorable security decision.

Analysis

Guideline D: Sexual Behavior

AG ¶ 12 expresses the security concern for sexual conduct:

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.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

- (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 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 lack of discretion or judgment.

The 1992 Offense

Applicant was arrested in April 1992 and charged with criminal sexual assault of minor family members. He pleaded guilty. He was sentenced to: (1) four years of probation; (2) registration as a sex offender for 10 years; (3) attend mandatory counselling for five years. There was also evidence that he suffered some form of compulsion to do these acts. This conduct triggers AG ¶¶ 13(a), (b), (c), and (d).

The next inquiry is whether any mitigating conditions apply.

AG ¶ 14 sets forth the potentially applicable mitigating conditions for sexual conduct:

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

Applicant's 1992 conviction occurred 30 years ago. His sentence included four years of probation, which he completed. He registered as a sex offender for 10 years, which he also completed. He attended five years of mandatory professional counseling, which he also successfully completed. In 1993, not long into Applicant's sentence, the court allowed Applicant to return to his marital home to reside with his family (his wife, his

then minor son and daughter, and his two then minor stepdaughters). I conclude that Applicant's 1992 offense has been mitigated under AG ¶¶ 14(b), (c), and (e).

The 2019 Incident

The facts of this aspect of the case do not trigger disqualifying conditions AG ¶¶ 13(b) through (d). The only potentially disqualifying condition, therefore, is AG ¶ 13(a), "sexual behavior of a criminal nature." Applicant's mere presence in a forest preserve as a former child sex offender was a misdemeanor. His presence, however, was not "sexual behavior." His only sexual behavior did not happen in 2019; it happened in 1992. The circumstances of his 1992 crime, his sentence, and his successful completion of that sentence were fully discussed above. No Guideline D disqualifying conditions apply to SOR ¶ 1.a. Therefore, there is no need to discuss Guideline D mitigating conditions.

Guideline J: Criminal Conduct:

AG ¶ 30 expresses the security concern for criminal conduct:

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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying. Only the following disqualifying condition is potentially applicable:

(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.

Applicant's April 1992 and March 2019 convictions satisfy AG ¶¶ 31(b).

AG ¶ 32 sets forth the potentially applicable mitigating conditions:

(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.

The foregoing discussion of the applicable mitigating conditions under AG D is equally applicable and is incorporated herein by reference. I conclude that the 1992 and 2019 offenses have been mitigated under AG ¶¶ 32(a) and (d).

Whole-Person Concept

Under AG ¶ 2(a), 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. AG ¶¶ 2(a) and (d)(1)-(9) (explaining the “whole-person” concept and factors). In my analysis above, I considered the potentially disqualifying and mitigating conditions and the whole-person concept in light of all the facts and circumstances surrounding this case.

Applicant leaves me with no questions about his eligibility and suitability for a security clearance. Therefore, I conclude that Applicant has provided sufficient evidence to mitigate the security concerns arising under Guideline D, sexual behavior, and Guideline J, criminal conduct.

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:	FOR APPLICANT
Subparagraphs 1.a and b:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented, it is clearly consistent with the interests of national security to grant Applicant access to classified information. Eligibility for access to classified information is granted.

Philip J. Katauskas
Administrative Judge