



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



In the matter of:)
)
) ISCR Case No. 21-02395
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: Jeffrey D. Billett, Esq.

02/17/2023

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the security concerns under Guidelines D (sexual behavior), E (personal conduct), and J (criminal conduct). Eligibility for access to classified information is denied.

Statement of the Case

On March 10, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D, E, and J. Applicant responded to the SOR on May 5, 2022, and requested a hearing before an administrative judge. The case was assigned to me on October 28, 2022.

The hearing was convened as scheduled on December 7, 2022. Government Exhibits (GE) 1 through 5 were admitted in evidence without objection. Applicant testified, called a witness, and submitted Applicant's Exhibits (AE) I, J, and K (AE A through H were submitted with the response to the SOR), which were admitted without objection.

Findings of Fact

Applicant is a 34-year-old new employee of a defense contractor. His start date was scheduled to be in January 2023. He worked for a different defense contractor in 2022. He served on active duty in the U.S. military from 2012 until he was discharged with an under other than honorable conditions discharge in 2021. He seeks to retain a security clearance, which he has held since his time in the military. He has a bachelor's degree earned in 2010, and he has taken graduate courses in pursuit of a master's degree. He is married with two children. (Transcript (Tr.) at 7-8, 22-28; Applicant's response to SOR; GE 1, 4, 5; AE G)

Applicant deployed to Afghanistan for about nine months in 2016 through 2017. He was stationed in a foreign country from 2017 until his discharge. From that duty station, he deployed to another foreign country in 2018. The multiple deployments and overseas tour led to marital stress. In January to February 2019, he was on temporary duty at a military installation in State A in the United States. While there, he met an individual online who identified "herself" on multiple occasions as a 13-year-old girl. It was actually a police officer from State A running a sting operation to catch potential child predators. (I will refer to the individual with feminine pronouns even though it was actually a male.) Applicant and the individual engaged in a series of graphic sexual messages. (Tr. at 27-33, 38-40, 55-57, 60-62, 68-70; Applicant's response to SOR; GE 1, 5; AE A, H)

Applicant returned to his foreign duty station. He continued to have graphic sexual communications with the individual who identified herself as a 13-year-old girl. He sent a video of himself masturbating and two photographs of his penis. He requested that she send him sexually explicit images of herself, which, if she was truly an underage girl, would have been child pornography under 18 U.S.C. §§ 2252 and 2256. He stated that he wanted to perform sexual acts on her, and he planned to travel to State A to do so. (Tr. at 39-42; Applicant's response to SOR; GE 5; AE H)

A military criminal investigation was initiated in April 2019 based upon a report from State A law enforcement. Applicant waived his right to remain silent and was interviewed. He admitted that he exchanged sexual messages with a female who lived in State A, and that he was aware that she was 13 to 15 years old. He explained that he did not believe everything on the Internet, "nothing's real," and that it would be weird for a 13-year-old to be on the Internet actively participating in their interactions like she did. He admitted that they discussed things that he would like to do to her, but he had no intention of actually doing anything. He also admitted that he sent her a video of himself in which he was naked. (Tr. at 45; Applicant's response to SOR; GE 5; AE H)

A forensic examination was conducted of Applicant's cell phone. It was reported that "[a]n image of suspected child pornography was located, but appeared to be associated with malicious software, as no additional indications were found [that] the user intentionally searched for, or possessed child pornography." (GE 5; AE F)

Applicant was charged in November 2020 with multiple offenses under the Uniform Code of Military Justice (UCMJ), including three specifications of attempting to commit lewd acts on a child under the age of 16; soliciting the detective to send him images of child pornography; and possessing child pornography. The charges were referred to a general court-martial in February 2021. (Tr. at 43; Applicant's response to SOR; GE 5; AE F)

Applicant requested an under other than honorable conditions discharge in lieu of trial by court-martial. In his request, he admitted that he was "guilty of one or more of the specifications against [him] or of a lesser-included offense contained therein which also authorizes the imposition of a bad conduct discharge or dishonorable discharge." The request was approved, and he was discharged in April 2021. (Tr. at 48-49, 66-67; Applicant's response to SOR; GE 5)

Applicant responded to interrogatories in February 2022. He answered "True" to the following statement, "Between February and April 2019 you admitted you exchanged messages, photos and a video (all sexual in nature) with an individual whom you believed to be a female between the age of 13 and 15 years old residing in [State A]." He added, "All information above is correct. I did exchange photos and video with a person I thought to be a female." (GE 5)

Applicant testified that he went on the Internet for adult companionship, and that he was not looking for an underage girl. He stated that people lie about their age on the Internet, as he did, and he assumed that the "girl" was lying. He asserted that he had no intention of meeting her. He denied ever possessing child pornography. (Tr. at 37-44, 53, 62, 66-69)

Applicant expressed remorse for his conduct. His wife is aware of his actions, the charges against him, and his discharge. Many of his friends are aware of the charges. The defense company that previously hired him and the company for which he was to start work in January 2023 are unaware that he was discharged with an under other than honorable discharge. Applicant stated that he was never asked by his employers about his discharge, and he believes they would have hired him anyway. He sought counseling from a chaplain while he was still on active duty. He has since had additional therapy, which is ongoing. His therapist wrote that it was evident that Applicant "was remorseful for the past incident and has been making great effort to move forward with improving his marriage and family life." Applicant considers himself completely rehabilitated, and he assured that similar conduct would never recur. (Tr. at 46-47, 49-55, 62-65, 67-68; Applicant's response to SOR; AE K)

Applicant was evaluated at his own expense in July 2022 by a licensed psychologist with extensive experience in forensic and clinical psychology. A report of the evaluation was issued in August 2022. The psychologist determined that Applicant did not have a mental health condition. He concluded that Applicant's "illegal actions are not, in fact, a sign of moral turpitude or any aberrant sexual impulses." He accepted that Applicant was not seeking an underage partner when he entered the chat room, and

that Applicant presumed the person was lying about her age. (Tr. at 71-86; AE J, K) The psychologist concluded:

[Applicant's] encounter with this purported young teenager was impulsive, rather than planned. [Applicant] has since experienced the consequences of his behavior. To a great degree of psychological certainty, I have concluded that [Applicant] is rehabilitated and will never again engage in such foolish behavior. [Applicant's] behavior was not part of any compulsion. There is no known reason to expect that such behavior is something that [Applicant] is motivated to repeat or has any particular interest in doing.

In sum, I have concluded that [Applicant] has learned from his mistake, has benefitted from the consequences he experienced and from the psychotherapy that he received, and that this behavior will not recur. I consider [Applicant] to have been rehabilitated and to be currently fit to hold a security clearance. (AE I)

Applicant submitted documents and letters attesting to his excellent military service, job performance, and moral character. He was described as "an exemplary Soldier." He is praised for his leadership, dedication, work ethic, honesty, trustworthiness, professionalism, humility, reliability, judgment, proficiency, generosity, compassion, empathy, maturity, and integrity. He received numerous medals and commendations while he was on active duty and while working for a defense contractor. (GE 5; AE A-E)

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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 to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching 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.”

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 the 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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).

Analysis

Guideline D, Sexual Behavior

The security concern for sexual behavior is set out in AG ¶ 12:

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;

(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

(d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

The SOR alleges the court-martial charges. Applicant's criminal sexual behavior reflected a severe lack of judgment and made him vulnerable to coercion, exploitation, and duress. AG ¶¶ 13(a), 13(c), and 13(d) are applicable. I do not find by substantial evidence that Applicant intentionally possessed child pornography. The part of the allegation alleging possession of child pornography is concluded for Applicant.

Conditions that could mitigate sexual behavior security concerns are provided under AG ¶ 14. The following are potentially applicable:

(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 good judgment;

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

(d) the sexual behavior is strictly private, consensual, and discreet; 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 sexual behavior occurred about four years ago, and there have been no additional incidents. He is receiving counseling. He received a favorable psychological evaluation, and his character evidence is excellent. However, Applicant committed serious sexual offenses involving someone who identified herself as a 13-year-old child. It was actually an adult police officer. Individuals on the Internet do lie about themselves, including their age and gender, but common sense dictates that when someone says they are a 13-year-old child, it should be presumed to be true, not the other way around.

The stigma that attaches when one is charged with a sexual offense against a child, or even someone pretending to be a child, is not easily cast off. Applicant's wife, friends, and some other individuals are aware of his conduct and his under other than honorable conditions discharge. His past and current employers are not. Applicant may

be telling the truth that the employers never asked about his discharge. He is more optimistic than I am that he would have been hired anyway if they knew the details of his conduct and discharge.

Applicant's conduct continues to serve as a basis for coercion, exploitation, and duress; and it casts doubt on his current reliability, trustworthiness, and good judgment.¹ AG ¶¶ 14(b), 14(c), and 14(d) are not applicable. AG ¶ 14(e) has some applicability, but it is insufficient to completely mitigate the behavior. I find that sexual behavior concerns remain despite the presence of some mitigation.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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. The following are 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; and

(e) discharge or dismissal from the Armed Forces for reasons less than "Honorable."

The above discussion about Applicant's criminal conduct under sexual behavior is incorporated here by reference. In addition to what was discussed under that guideline, Applicant was discharged in lieu of trial by court-martial with an under other than honorable conditions discharge. The above disqualifying conditions are applicable.

I do not find by substantial evidence that Applicant intentionally possessed child pornography. The part of the allegation alleging possession of child pornography is concluded for Applicant.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur

¹ See ISCR Case No. 09-03233 (App. Bd. Aug. 12, 2010). The Appeal Board determined that an applicant's child molestation offense "even though it occurred long ago, impugn[ed] his trustworthiness and good judgment."

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.

It has been about four years since the criminal conduct and almost two years since the discharge. Nonetheless, I have unmitigated concerns under the same rationale discussed in the sexual behavior analysis.

Guideline E, Personal Conduct

The security concern for personal conduct 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 the national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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.

SOR ¶ 3.b cross-alleges the criminal conduct allegation. Applicant's criminal conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. The conduct also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(c) is not perfectly applicable because

Applicant's conduct is sufficient for an adverse determination under the sexual behavior and criminal conduct guidelines. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

I do not find by substantial evidence that Applicant intentionally possessed child pornography. The part of the allegation alleging possession of child pornography is concluded for Applicant.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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;

(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; and

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

Under the same rationale discussed above for sexual behavior, Applicant's conduct continues to make him vulnerable to exploitation, manipulation, and duress; and it casts doubt on his current reliability, trustworthiness, and good judgment. Personal conduct security concerns are not mitigated.

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 eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines E, D, and J in my whole-person analysis. I also considered Applicant's favorable character evidence.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the sexual behavior, personal conduct, and criminal conduct security concerns.

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 J:	Against Applicant
Subparagraph 1.a:	Against Applicant (except for the language about possession of child pornography, which is concluded for Applicant)
Paragraph 2, Guideline D:	Against Applicant
Subparagraph 2.a:	Against Applicant (except for the language about possession of child pornography, which is concluded for Applicant)
Paragraph 3, Guideline E:	Against Applicant
Subparagraph 3.a:	Against Applicant (except for the language about possession of child pornography, which is concluded for Applicant)

Conclusion

It is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge