



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



In the matter of:)
)
) ISCR Case No. 22-00142
)
Applicant for Security Clearance)

Appearances

For Government: Dan O’Reilly, Esq., Department Counsel
For Applicant: Winnie Eilert, Esq.

01/31/2024

Decision

Hyams, Ross D., Administrative Judge:

Applicant failed to mitigate the sexual behavior and criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 28, 2021. On March 15, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline D (sexual behavior) and Guideline J (criminal conduct). He responded to the SOR on an unknown date and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on February 2, 2023.

The hearing was originally scheduled for July 19, 2023. Applicant requested a continuance, and the hearing was rescheduled for September 19, 2023. Another continuance was granted, and the hearing was rescheduled and convened on October 18, 2023. Department Counsel submitted Government Exhibits (GE) 1-5, which were admitted in evidence without objection. Applicant submitted Applicant’s Exhibits (AE) A-E, which were admitted in evidence without objection.

Findings of Fact

In his answer, Applicant admitted SOR ¶¶ 1.a and 2.a. His admissions are incorporated into the findings of fact. After review of the pleadings, testimony, and evidence submitted, I make the following additional findings of fact.

Applicant is 54 years old. He has three adult children. He married in 2003 and divorced in 2005. He married a second time in 2005 and divorced in 2007. He married a third time in 2008 and divorced in 2010. He earned a bachelor's degree in 2016, and a master's degree in 2019. He has been employed by a defense contractor as a senior manufacturing planner since about 2021. (Tr. 14-19; GE 1)

In 2007, Applicant was 37 years old and married. His children were teenagers, although they were not living with him. During this time, he conversed with women that he met online. In March of that year, he sent an instant message to a person in a chatroom that he believed to be a 14-year-old girl. He asked her sexually explicit questions, sent and requested photos, and discussed sexual topics with her through instant messages over a two-week period. She messaged him several photos of a fourteen-year-old girl. He also had several phone calls with her and discussed a meeting in person. (Tr. 19-61; GE 2, 3)

After arranging a meeting, Applicant drove 30 miles to her house. He testified that he had no intention to have sex with her, but rather was going to take her to the movies. However, he had a condom with him in his car. He claimed that he told her to ask her parents if she could go with him, however the chat log shows that she told him that her parents were away, and only a sibling was home. (Tr. 19-61; GE 2, 3)

Applicant claimed that he called her to let her know he was there when he arrived at her house. He claimed that over the phone she invited him in, but he declined the invitation. He attempted to leave, but his car was blocked by several police officers. Applicant was arrested in a sting operation targeting persons sexually soliciting minors on the internet. (Tr. 19-61; GE 2, 3)

Applicant was arrested and charged with three felonies: computer statements for purpose of sexual conduct; use of computer services to seduce, solicit, a child; and attempt lewd or lascivious battery: engage in a sex act. He reported that prosecutors wanted him to register as a sex offender. Applicant spent about a year in jail and pled *nolo contendere* to a misdemeanor charge of contributing to the delinquency of a child. He was found guilty and sentenced to time served and a fine. He stated that he was not required to participate in probation or counseling. (Tr. 19-61; GE 2, 3, 4, 5)

Applicant stated that he never participated in any counseling or rehabilitation programs and does not need any because "he is not sick in the head". He asserted that this was a onetime mistake and that he is remorseful. He claimed that he has not had any prior or subsequent criminal conduct or sexual offenses. (Tr. 19-61)

Applicant claims that he is loyal to the United States and wants a security clearance for growth opportunities in his job. He claimed that he reported this conduct and conviction to his employer when applying for his job, and to the U.S. Government when he applied for citizenship in 2016. He submitted documentation about his performance at work, academic transcripts, and two character letters. He reported that he is still chatting with women that he meets online but has been dating someone recently. (Tr. 19-61)

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 financial considerations 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 13. The following are potentially applicable in this case:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted; and
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

SOR ¶ 1.a is supported by Applicant’s admissions, court and police records, and his background interview. AG ¶¶ 13(a) and 13(c) apply.

Conditions that could mitigate the 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 judgment;
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress; and

(d) the sexual behavior is strictly private, consensual, and discreet.

AG ¶ 14(b) does not apply. Applicant's testimony was not credible, and he tried to minimize his behavior throughout the hearing. The evidence shows that he used the internet to solicit a girl he believed to be 14 years old for sex, and later traveled a considerable distance to have sexual relations with her. Since he failed to exhibit candor and maintained a false narrative of the events at the hearing, I am unable to find that it occurred under such unusual circumstances that it is unlikely to recur, and that it does not cast doubt on his current reliability, trustworthiness, and judgment.

AG ¶ 14(c) does not apply. Applicant's solicitation of a minor for sex on the internet, and attempt to meet her for sexual relations, and his continued false narrative of his conduct, shows his continued vulnerability to coercion, exploitation, and duress.

AG ¶ 14(d) does not apply. Applicant's solicitation of a minor for sex on the internet and attempt to meet her for illegal sexual relations is not private or discreet. His behavior came to the attention of the police, which resulted in his arrest, jail time, and conviction on a related charge.

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 31. The following are potentially applicable in this case:

(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.

SOR ¶ 2.a cross-alleged the allegation in ¶ 1.a, which was established under Guideline D. AG ¶ 31(b) applies.

I have considered the mitigating conditions 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 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.

AG ¶¶ 32(a) and 32(d) do not apply. Applicant's behavior was criminal in nature, and he was arrested for it, spent time in jail, and was convicted on a related charge. Although the conduct occurred in 2007, he continues to maintain a false narrative about the circumstances and minimizes his conduct. There is insufficient evidence to find there is mitigation by the passage of time, or that it is unlikely to recur. It continues to cast doubt on his reliability, trustworthiness, and judgment. While Applicant provided some evidence of subsequent schooling and employment performance, he did not provide sufficient evidence to find that there has been successful rehabilitation, or mitigation by the passage of time or other factors.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered his character references. I have incorporated my comments under Guidelines D and J in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility for a security clearance. I conclude that Applicant has not mitigated the sexual behavior 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 D:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline J:	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's eligibility for access to classified information. Applicant's eligibility for a security clearance is denied.

Ross D. Hyams
Administrative Judge