



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



In the matter of:)	
)	
)	ISCR Case No. 23-01684
)	
Applicant for Security Clearance)	

Appearances

For Government: Brian Farrell, Esq., Department Counsel
For Applicant: *Pro se*

04/16/2024

Decision

BENSON, Pamela C., Administrative Judge:

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

Statement of the Case

On September 5, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J (criminal conduct), Guideline D (sexual behavior), and Guideline E (personal conduct). The DCSA CAS 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 implemented by the DOD on June 8, 2017.

In Applicant's September 28, 2023 response to the SOR (Answer), he denied all of the allegations (SOR ¶¶ 1.a, 2.a, 3.a, and 3.b). He did, however, admit a portion of SOR ¶ 1.a; specifically, in about October 2021, the U.S. Air Force issued him a letter of reprimand, and in about August 2022, the U.S. Air Force discharged him under other than

honorable conditions. He requested a decision by a Defense Office of Hearings and Appeals (DOHA) administrative judge based upon the written record in lieu of a hearing. (Answer)

On October 16, 2023, Department Counsel submitted a file of relevant material (FORM) and provided a complete copy to Applicant. Department Counsel's FORM includes eight Items, which I have identified as Government Exhibits ("Items") 1 through 8. In the FORM, Department Counsel provided Applicant notice that failure to respond to the FORM may be considered a waiver of any objections to the admissibility of Items 1 through 8.

On November 17, 2023, Applicant received the FORM and its attachments. Applicant did not respond or submit any information within the 30-day time period after receipt of the FORM. This case was assigned to me on February 27, 2024. Items 1 through 8 are admitted without objection.

Findings of Fact

Applicant is 31 years old. He graduated from high school in 2010, and he was active duty in the U.S. Air Force from October 2012 until his August 2022 discharge from service under other than honorable conditions. He is unmarried and does not have any children. A DOD contractor is currently sponsoring him for his security clearance eligibility so that he can perform specific employment duties. (Items 3, 7)

Criminal Conduct, Sexual Behavior, and Personal Conduct:

In October 2020, Applicant, at the age of 28 and the rank of Staff Sergeant, was a mentor for an Air Force Base Chapel's "Life Teen" program. His role as a mentor was to give youth confidence and guidance, based on his life experience, so that they could confront challenges in their lives and come up with their own solutions. He mentored a 17-year-old female and took her out for dinner and to play pool at a local establishment. He purchased two glasses of wine for the teenager and let her use his vape. She reported that she felt "buzzed" after they left the café. When they were in his car, the teenager asked Applicant if he wanted to have sex with her, and he replied "yes." He unbuckled her seat belt and told the teenager to unbutton her pants. She got out of the car to urinate, and when she got back in the car, she put Applicant's wallet inside her bra, and placed his money on the other side of her bra. He grabbed the teenager's wrists and pinned her arms down. He kissed her lips, neck, left breast and the teenager stated she "froze like a deer" caught in headlights. He unbuttoned her pants, fondled, and digitally penetrated her vagina. The teenager then moved away from Applicant and buttoned-up her pants, and he returned the teenager to her home. When Applicant was later questioned about the incident by law enforcement, he accused the teenager of being the aggressor and denied touching her inappropriately. (Item 4)

The U.S. Army Criminal Investigations Laboratory found Applicant's deoxyribonucleic acid (DNA) on the interior area of the teenager's left bra cup, the exterior

zipper and button of her jeans, and the exterior crotch area of her underwear. Once Applicant discovered that criminal proceedings were being initiated against him, he destroyed a letter he wrote with the intent to obstruct the administration of justice. (SOR ¶ 3.b) Applicant admitted in his Answer that he burned the letter after he was advised that anything he said could be used against him. On October 1, 2021, the Department of the Air Force issued him a letter of reprimand for (1) sexual assault and (2) obstruction of justice. He was charged with offenses with a view toward a court-martial. (Items 2, 4, 5)

The teenager no longer wanted to participate as a witness against Applicant following a preliminary hearing, which stopped the court-martial process. Applicant's commander initiated administrative discharge proceedings, and the discharge board found, by a preponderance of evidence, a basis to separate Applicant from the Air Force with an other-than-honorable characterization. Applicant was represented by legal counsel, and he testified before the discharge board. Through a majority vote, the discharge board found Applicant had "committed a generalized sexual assault." He was not found to have committed obstruction of justice. (SOR ¶ 1.a) (Items 2, 7, 8)

In a May 2022 statement, Applicant claimed the October 2020 incident was not a sexual assault but rather a "consensual encounter." Since the court-martial proceeding was stopped and the charges were dismissed, he stated that he was not convicted which mitigated the adverse information. He was denied the ability to defend himself in court and to show that the teenager had provided false information through cross-examination by his legal counsel. "I maintain that I have never been found guilty of an offense and that this allegation is false." Applicant also clarified in his Answer that he did not provide alcoholic drinks to the teenager, he merely paid for them. (Items 2, 6, 8)

Policies

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(a), 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive 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 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 record evidence supports application of AG ¶¶ 31(b) and 31(e).

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 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.

Applicant was 28 years old, more than a decade older than the minor, at the time of the sexual encounter. When questioned by law enforcement, he denied that he had inappropriately touched the minor, but in his May 2022 statement he claimed that it was consensual. His inconsistent statements demonstrate that his credibility is questionable. Although the court-martial did not take place and the charges were dismissed against him, it is important to note that the dismissal of charges does not establish innocence and does not preclude a Judge from concluding that the underlying conduct occurred. Applicant appeared before the discharge board with his counsel and testified. The discharge board, by a majority vote, found that he had committed a sexual assault, and I agree with their decision. Applicant has not accepted responsibility for his criminal conduct with a minor and therefore his overall rehabilitation and use of good judgment remain problematic. He did not mitigate the criminal conduct security concerns.

Guideline D: Sexual Behavior

AG ¶ 12 sets out the security concerns relating to sexual behavior:

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 sets out the conditions that could raise a security concern, and the following conditions may be disqualifying in this case:

(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 ... that reflects lack of discretion.

Applicant's behavior causes him to be vulnerable to coercion, exploitation, or duress, especially since Appellant continues to deny that he was involved in the sexual misconduct with a minor, he maintains that the allegation is false, and he also stated that the sexual contact was consensual. The sexual contact was a criminal offense and reflects a lack of discretion. The record evidence establishes the disqualifying conditions listed above.

AG ¶ 14 describes conditions that could mitigate security concerns raised under this guideline. Three of them potentially apply:

(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.

There is insufficient evidence to establish mitigation under any of the above conditions. In October 2020, Applicant was a mentor for a "Teen Life" program. Mentors are placed in a position of authority and trust, and they are expected to provide a safe place for kids and teens to be themselves while also learning valuable life skills.

Applicant violated his duty as a mentor when he purchased alcoholic drinks for the minor and allowed any form of sexual contact to take place with his mentee. This shows a serious breach of trust and continues to cast serious doubts concerning his overall reliability, trustworthiness, and good judgment. He has not addressed the underlying concerns about his sexual misconduct with a minor, nor is there any evidence that he obtained treatment to address this troubling behavior. He did not present evidence of counseling, or a favorable prognosis from a qualified mental health professional indicating that his behavior is under control. Applicant failed to mitigate the sexual behavior security concerns.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. The following disqualifying condition is potentially applicable in this case:

(e) personal 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.

The record evidence supports application of AG ¶ 16(e)(1). The guideline also includes conditions that could mitigate security concerns arising from personal conduct. The following mitigating conditions under AG ¶ 17 are potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or 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

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressor, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

In October 2020, Applicant engaged in inappropriate sexual behavior with his mentee, a minor. He has not accepted responsibility for his misconduct and there is insufficient evidence in the record to show that he obtained counseling or treatment to prevent a recurrence of this behavior. In addition, he destroyed a letter after he was made aware that the contents could be used against him during the criminal investigation, which remains troubling. His overall behavior raises questions about his reliability, trustworthiness, and ability to follow law, rules, and regulations. Applicant failed to mitigate the personal conduct security concerns.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a position of trust 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 position of trust 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 have incorporated my comments under Guidelines J, D, and E, and the factors in AG ¶ 2(d) in this whole-person analysis.

There is insufficient evidence showing Applicant's successful rehabilitation and changed circumstances. The U.S. Air Force no longer had confidence or faith in him after his actions constituted a significant departure from the conduct expected of airmen, and he was discharged in August 2022 under other than honorable conditions. Overall, the record evidence leaves me with doubts as to Applicant's eligibility and suitability for a security clearance. Applicant failed to mitigate the security concerns arising under the criminal conduct, sexual behavior, and personal conduct guidelines.

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
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a and 3.b.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, I conclude that it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge