



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 06-22946
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Stephanie Hess, Esq., Department Counsel
For Applicant: *Pro se*

September 23, 2009

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to sexual behavior, personal conduct, and criminal conduct. Clearance is granted.

Statement of the Case

Applicant submitted his security clearance application (SF-86) on January 30, 2002. On February 6, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines D (sexual behavior), E (personal conduct), and J (criminal conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on February 20, 2009, and requested a hearing before an administrative judge. DOHA received his response on February 23,

2009. Department Counsel was prepared to proceed on May 18, 2009, and I received the case assignment on May 21, 2009. DOHA issued a notice of hearing on May 30, 2009, scheduling the hearing for June 10, 2009. The hearing was held as scheduled.

The government offered Government Exhibits (GE) 1 through 7, which were received without objection. Applicant did not offer any exhibits, but did testify on his own behalf. I held the record open until June 26, 2009, to afford the Applicant an opportunity to submit additional evidence. Applicant submitted Applicant Exhibits (AE) A through E, which were received without objection. DOHA received the hearing transcript (Tr.) on June 17, 2009.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1 and 2 with explanations. He did not respond to SOR ¶ 3. The allegation in SOR ¶ 3 is cross-alleged with SOR ¶ 1 and reiterates the same conduct under two different security concerns. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence, I make the following additional findings of fact.

Applicant testified at his hearing, and I found his testimony to be credible. Moreover, I found him to be open and forthright throughout the entire process.

Background Information

Applicant is a 47-year-old senior safety engineer, who has been employed by a defense contractor since June 1997. Tr.14, 16, GE 1. He has successfully held a secret level security clearance since 2002. Tr. 16.

Applicant completed his undergraduate studies in May 1988, and was awarded a Bachelor of Science degree in Electrical Engineering. He attended a provisionally accredited law school part-time for the last four years and completed his course work for a Juris Doctorate in May 2009. As of the hearing date, Applicant's law school had not issued grades for the final semester that ended in May 2009. Tr. 13-15. Applicant has never married and has an adopted 21-year-old son. Tr. 15-16, GE 1.

This case centers on two separate incidents, the first alleged as a concern under Guideline D (sexual behavior), and the second alleged as a concern under Guideline E (personal conduct). The third allegation under Guideline J (criminal conduct) is cross-alleged as the same incident under Guideline D.

Sexual Behavior

The conduct alleged under this concern states that Applicant was arrested in June 2000 and charged with three class two felony counts of child molestation. The allegation further states that Applicant was acquitted by a jury of all charges in November 2000. (SOR ¶ 1.a.)

In May 1996, Applicant began working at a church-operated homeless outreach center. Applicant was a member of a small staff. He worked in the kitchen and performed minor maintenance or “whatever needed to be done.” Tr. 20, GE 1. The outreach center served an economically disadvantaged community and provided a range of social services. The outreach center primarily served an adult population; however, a small percentage of the adults brought children to the center. Tr. 21-23.

It was at the outreach center that Applicant met his adopted son (AS), who was eight years old at the time. AS’s mother was unable to care for AS. Applicant provided AS with a home during the week and ensured he received proper medical care and went to school. AS’s mother had a drug problem and was absent for significant periods of time. Applicant’s involvement with and responsibility for caring for AS increased over time and ultimately led to Applicant adopting AS, discussed *infra*. Tr. 24-25. Applicant continued to work at the outreach center until he began his present job in June 1997. GE 1, GE 3.

While at the outreach center, AS became friends with three other boys from similar backgrounds in his age group. AS asked Applicant if these three boys could spend time with AS at Applicant’s house. In October 1998 following a sleepover, the three boys accused Applicant of child molestation. The police and Child Protective Service (CPS) immediately investigated the allegations.¹ Applicant adamantly denied the charges and opined that the boys were retaliating against him for scolding them for breaking wooden shutters in his house. Tr. 9, 27-31, GE 2, GE 3, GE 5. In October 1998, Applicant received a letter from CPS advising him that “[t]he allegations of child abuse/neglect were invalid.” AE A.

The police and district attorney’s office subsequently presented the allegation of child molestation to the grand jury in August 1999, and the grand jury issued an indictment, charging Applicant with three charges of child molestation. GE 4. Neither the police nor district attorney attempted to serve the arrest warrant on Applicant. In June 2000, Applicant received a call from the adoption agency advising him that he had an outstanding warrant against him. At this point, Applicant had been pursuing adoption proceedings for AS for two-and-one-half years. The adoption agency case worker discovered the pending arrest warrant against Applicant during a routine background check. Applicant immediately contacted his adoption attorney, who contacted the police department and notified the police that Applicant would self-surrender. Applicant was subsequently arrested, placed in jail, and released. Tr. 32-36, GE 2, GE 3, GE 6. In November 2000, his case went to trial and Applicant was acquitted by a jury of all charges against him.

The adoption agency completed its background investigation of Applicant as a prospective parent and favorably endorsed his petition. On December 30, 2004, the juvenile division of the superior court found Applicant to be “a fit and proper person to

¹ The government provided a copy of the arrest report/investigation, which contained the sordid details of the allegations the three boys made against the Applicant. GE 7.

adopt the minor child (AS); and the adoption would be in the child's best interest and welfare" and granted Applicant's petition to adopt AS. AE B.

Personal Conduct

The conduct alleged under this concern states that in April 2005, approximately 30 photographs of nude, or partially clothed, juvenile males (ages 14-16) were discovered on Applicant's workplace computer. (SOR ¶ 2.a.)

In April 2005, Applicant was summoned to his human resources office. Present were several company officials, including his supervisor, facility security officer, and human resources director. They showed Applicant the pictures as described *supra*, and asked him how those pictures got on his work computer. The company officials also reminded Applicant the photos violated company internet policy. At the time he was questioned by company officials, Applicant did not know how the pictures got there.

He later surmised that the pictures, which were on his home computer, were transferred to his pocket pc while docking to download files as a back-up. He was unaware that his pocket pc also downloaded the "My Pictures" folder from his home computer and transferred stored photos from his pocket pc to his work computer while docking. Applicant was not aware the photos were on his work computer and did not view them while at work. Tr. 41-51, GE 3.

Applicant admitted that the pictures were his and fully cooperated with company officials during their investigation. The company officials advised Applicant he could keep his job as long as he sought outside counseling. Applicant was later informed that the local police department reviewed the photos and did not find anything illegal about them. Tr. 41-43. GE 3.

Applicant contacted his Employee Assistance Program and was referred to a counselor. Tr. 43. He eventually saw three different counselors. He acknowledged his having the photos on his computer was "wrong," "inappropriate," and he was "deeply sorry," adding that he would never have intentionally placed the photos on his work computer. Tr. 46, 53, 61, 72.

Applicant stated:

At this point my life is an open book. The trial on charges of child molestation is a public record, and the incidents with the pictures of naked boys have been disclosed. I am content with who I am at this point, and there is nothing in my life that can be used to coerce or blackmail me. GE 3.

Applicant submitted a letter from his counselor, a psychiatric social worker, dated June 22, 2009. His counselor provided a positive report and stated Applicant is a "well rounded individual with a positive outlook on life and appropriate goals for the future of himself and his son." AE C.

Criminal Conduct

The conduct alleged under this concern cross-alleges the conduct involved in SOR ¶ 1.a. (SOR ¶ 3.a.) The facts outlined under the subheading Sexual Behavior *supra* are incorporated under this section.

Character References

Applicant submitted two work-related references. His facility security officer submitted an e-mail stating, "I am not aware of any activity by [Applicant] since March 2006 (date he was hired at Applicant's company), which would preclude him from maintaining his security clearance." AE D. His human resources director submitted an e-mail stating, "I have no knowledge or record that [Applicant] has engaged in any inappropriate activity since an incident in 2005, (referring to the allegation in SOR ¶ 2.a.) . . . which prompted an inquiry into his background. I am not aware of any present activity that would prevent [Applicant] from maintaining his security clearance." AE E. Applicant stated that his company continues to support him. Tr. 9.

Applicant provides ongoing support for his son. AS is completing his GED, and plans to continue his studies at community college. AS has a girlfriend of three years, is "very much into music," and wants to do something with his band. AS's mother works for a traveling carnival and AS speaks to her several times a week. Applicant has supported AS in locating his biological father and step-siblings. Tr. 78-79.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant’s allegiance, loyalty, or patriotism. It is merely an indication that 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. See *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. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 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). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Conclusions

Guideline D, Sexual Behavior

The security concern relating to the Guideline for sexual behavior is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. 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 delineates four disqualifying conditions under AG ¶ 13:

- (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 person is unable to stop or that may be symptomatic of a personality disorder;
- (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.

Whether or not a disqualifying condition is applicable under this concern depends on the validity of the allegations. More often than not, allegations of this nature have been adjudicated in a reliable venue and determined to be valid. In this case, the allegations of child molestation were thoroughly investigated and prosecuted. In October 1988, three boys from an outreach center made allegations that Applicant molested them during a sleepover that his adopted son had arranged. The police and CPS thoroughly investigated the allegations. In October 1988, CPS concluded the allegations of child abuse/neglect against Applicant were invalid.

In August 1999, the district attorney referred the matter to the grand jury and the grand jury issued an indictment of three felony counts of child molestation against Applicant. Nothing further happened until June 2000. In June 2000, Applicant received a call from a social worker from the adoption agency advising him there was an outstanding arrest warrant against him. Applicant immediately contacted the attorney handling his adoption for AS, who in turn contacted the police to arrange for a self surrender. Applicant was subsequently arrested and released. In November 2000, Applicant went to trial by jury on the three felony counts of child molestation and was acquitted of all charges.

The adoption agency subsequently completed its background check of Applicant and in December 2004, Applicant's petition to adopt AS was granted. The court specifically found Applicant to be "a fit and proper person to adopt the minor child (AS)." Applicant adamantly and consistently denied the allegations against him.

To find against Applicant under this concern, I would have to substitute my judgment over CPS, the adoption agency, a jury of his peers, and, to a lesser extent, the superior court judge who found Applicant to be a fit parent and granted his request to adopt AS. CPS, the adoption agency, and the jury all had the opportunity to assess the accusers' credibility. Unexplained are the significant delays from offense to indictment and arrest warrant to arrest. The pending felony arrest warrant was apparently discovered during Applicant's background check in conjunction with his petition to adopt AS. Having evaluated all of the available facts under this concern, and

having had an opportunity to hear Applicant's testimony, I do not find there to be a basis in fact to support the allegations contained in SOR ¶ 1.a.

Having concluded there is no basis in fact to support the allegations under this concern, a discussion of mitigating conditions is not warranted.

Guideline E, Personal Conduct

The security concern relating to the Guideline 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 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 government established its case under Guideline E through Applicant's admissions and evidence presented that photos of nude, or partially clothed, juvenile males (ages 14-16) were discovered on his workplace computer in April 2005.

Of the seven personal conduct disqualifying conditions listed under ¶ AG 15, two are potentially applicable:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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 person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations;

(4) evidence of significant misuse of Government or other employer's time or resources; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such

as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant's conduct violated company internet policy and the content of the photos had the potential to serve as a basis for exploitation or to cause him to be vulnerable to exploitation, manipulation, or duress. AG ¶¶ 16(d)(3), and 16(e) are applicable.

Of the seven personal conduct mitigating conditions listed under AG ¶ 17, three 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 caused 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.

Although Applicant's possession of the photos on his work computer was unintentional, he accepted responsibility for the photos being there and acknowledged that his behavior was inappropriate. At the time company officials confronted Applicant in April 2005, they advised him that they would be retain him as an employee if the photos were not illegal and he sought counseling. The police did not find the photos to be illegal and Applicant sought counseling. His counselor provided a favorable assessment of Applicant's current well being. Four years have elapsed since the incident in question with no further recurrences. Applicant's company officials are fully aware of the photo incident. Personal conduct mitigating conditions AG ¶¶ 17(c), 17(d), and 17(e) are applicable.

Guideline J, Criminal Conduct

The security concern relating to the Guideline for criminal conduct is set out in AG ¶ 30:

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 government cross-alleged the conduct involved in ¶ 1.a. under this concern. The analysis and comments contained in the subheading Sexual Behavior, *supra*, are incorporated under this subheading.

Of the six criminal conduct disqualifying conditions listed under AG ¶ 31, two are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was charged with three felony counts of child molestation. He went to trial on these charges in November 2000. AG ¶¶ 31(a) and 31(c) are applicable.

Of the five criminal conduct mitigating conditions listed under AG ¶ 32, one is applicable:

- (d) evidence that the person did not commit the offense.

Applicant was acquitted at a jury trial of all charges in November 2000. The analysis and comments contained in the subheading Sexual Behavior, *supra*, are incorporated under this subheading. AG ¶ 32(d) is applicable.

Whole Person Concept

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related to the whole person concept under Directive ¶ E2.2.1. “Under the whole person concept, the Administrative Judge must not consider and weigh incidents in an applicant’s life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant’s security eligibility by considering the totality of an applicant’s conduct and circumstances.”² The directive lists nine adjudicative process factors (APF) that are used for “whole person” analysis.

I have carefully considered seriousness of the overall conduct alleged. The comments contained under subheadings Sexual Behavior, Personal Conduct, and Criminal Conduct are incorporated under this section. As such, further discussion of the sexual behavior and criminal conduct concerns are not warranted. However, further discussion of personal conduct is appropriate. Weighing against Applicant is the conduct alleged under Personal Conduct. Applicant’s acquisition of the photos in question was problematic on several levels. It had the potential of exposing him to

² ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (quoting ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003)); ISCR Case No. 05-02833 at 2 (App. Bd. Mar. 19, 2007) (citing *Raffone v. Adams*, 468 F.2d 860 (2nd Cir. 1972) (taken together, separate events may have a significance that is missing when each event is viewed in isolation).

criminal liability and almost cost him his job. Also, the nature of the photos and their being on his workplace computer could have placed him in a compromising position.

There is mitigating evidence that weighs in favor of granting Applicant's security clearance. He promptly acknowledged that the photos were his and he fully cooperated with his employer to include seeking counseling. Applicant has worked for his defense contractor for 12 years and has successfully held a security clearance for seven years. Applicant adopted a disadvantaged youth and provided him with a positive environment. He is a home owner, has stable employment, and is a contributing member of society. Applicant's human resources director and facility security officer did not disclose any adverse information precluding Applicant from being granted a security clearance. The evidence contains no derogatory record evidence about the Applicant. I considered Applicant's character evidence, years of loyal and honorable service working for a defense contractor, his candor and cooperation throughout the security clearance process, and his potential for future service.

This case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. This analysis must answer the question whether there is a legitimate concern under the facts presented. After weighing the disqualifying and mitigating conditions and all the facts and circumstances in the context of the whole person, I conclude Applicant has mitigated the security concerns pertaining to sexual behavior, personal conduct, and criminal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"³ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated or overcome the government's case. For the reasons stated, I conclude he is eligible for access to classified information.

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: Subparagraph 1.a.:	FOR APPLICANT For Applicant
Paragraph 2, Guideline E: Subparagraph 2.a.:	FOR APPLICANT For Applicant
Paragraph 3, Guideline J: Subparagraph 3.a.:	FOR APPLICANT For Applicant

³See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is granted.

ROBERT J. TUIDER
Administrative Judge