



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



In the matter of:)
)
) ISCR Case No. 14-02462
)
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Russell W. Farr, Esq.

05/23/2016

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline J, criminal conduct The Guideline D, sexual behavior, and Guideline E, personal conduct, security concerns was not established. Applicant’s eligibility for a security clearance is granted.

Statement of the Case

On February 13, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J, E, and D. DOD acted under Executive Order 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) effective within the DOD on September 1, 2006.

Applicant answered (Answer) the SOR on March 30, 2015, and requested a hearing before an administrative judge. The case was assigned to me on October 7, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 9, 2015, and the hearing was convened as scheduled on December 7, 2015. The Government offered exhibits (GE) 1 through 4, which were admitted into the record (an objection to GE 3 was overruled). Department Counsel's discovery letter, which included a listing of exhibits, was marked as Hearing Exhibit (HE) I. Applicant testified, called two witnesses, and offered exhibits (AE) 1 through 6 that were admitted into the record without objection. DOHA received the hearing transcript (Tr.) on December 29, 2015.

Findings of Fact

In Applicant's answer to the SOR, he denied all the allegations. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 49 years old. He has worked for a defense contractor for about eight years. He was married in 1986. He has four children. He has a high school diploma and has taken some college courses. He served 20 years in the Navy, retiring in 2007, in the paygrade of E-6 with an honorable discharge. He held a security clearance while in the Navy and as a contractor, apparently without incident.¹

Applicant's conduct raised in the SOR includes being arrested and charged with a felony offense of sexual assault (rape, forcible sodomy, and forcible sexual abuse) in June 2011. This conduct is alleged under Guideline J, Guideline E, and Guideline D.

In May 2011, Applicant's daughter², AB, disclosed at school that she had been sexually abused by her father (Applicant). AB was asked to write a paper about her father for a class she was taking. She was in tenth grade at this time. When she started the assignment, with the assistance of her peer-tutor (AB is mentally and developmentally challenged as will be more fully explained *supra*), she began crying and according to the peer-tutor, AB related that she had been touched inappropriately by her father and that it happened when she was also in the sixth and eighth grades. AB told the peer-tutor that AB's mother did not know about this. The peer-tutor told all the above information to a police officer during the course of an investigation into this incident. The peer-tutor immediately notified a teaching assistant. The teaching assistant related to a police officer that AB told her that her father touched her inappropriately and she was afraid of him. AB further stated she had been touched in

¹ Tr. at 32, 123-124; GE 1.

² AB was adopted by Applicant and his wife when she was two years old. AB's biological mother is Applicant's wife's sister. AB's biological mother abused drugs and AB was taken into custody by the Department of Child and Family Services (DCFS) before the adoption. There is some evidence to indicate AB was sexually abused by her biological father at some point in time. Both biological parents' rights were terminated. See Tr. at 32-35; AE 1.

her lower area (vaginal area) and her upper area (breast area). AB did not disclose this information to her mother because she thought her mother would get mad at her. School officials notified DCFS and the police.³

A police officer and a representative from DCFS jointly interviewed AB on May 19, 2011. The interview was summarized in a police report. No direct statement by AB was included in the record. What follows is the information AB provided during the interview as summarized by the police officer. AB stated she refused to write a class paper about her father because he touched her inappropriately. She stated he walked behind her and touched her breasts sometime between the ninth and tenth grade. She further stated that earlier in time, her father made her get naked and lie on the bed. He then would put her legs over his shoulders and lick her vagina. This happened when her mother was not home and after school. He told her not to tell anyone about what happened or he would go to jail. He also put his hands on her thigh and she did not like that. She also stated he touched her when she was in the sixth grade and they lived in a different state. This included putting his penis in her vagina. She remembers there being white stuff between her legs after it was over. She washed it off in the shower. No one was home when this occurred.⁴

The day after AB's interview, she was given a medical examination. No examination results were included in the record. The police report described a further disclosure made by AB during the exam. She stated her father used a black object to touch her vagina. She said it was small, black, and had a button to turn it on. He would rub between her legs with it and stick it inside her. He kept it under the bed on his side. With this information, the police eventually obtained a search warrant, which they served and found two small vibrators. One was purple and the second was silver. They both had on/off switches. No testing of the vibrators was indicated.⁵

In June 2011, the county attorney's office filed criminal charges against the Applicant for rape, forcible sodomy, and forcible sexual abuse. In November 2011, the presiding judge dismissed the charges due to "witness problems." No further explanation was given in the police report. In February 2012, a family court judge ordered the state DCFS to "unsubstantiate" the finding of abuse by Applicant.⁶

In June 2011, AB (at age 15 years and 11 months) was evaluated and tested by a clinical and forensic neuropsychologist. The testing showed her to have an IQ score of 47 (intellectually deficient). Her academic abilities in word reading measured at the kindergarten (K) level, sentence comprehension was at less than K level, spelling was at grade level 1.2, and math computation was at grade level 1.5. She also showed

³ Tr. at 32-35; GE 3; AE 1.

⁴ GE 3.

⁵ GE 3.

⁶ GE 3; AE 6.

“severe impairment” in the areas of cognitive flexibility and memory abilities. She was diagnosed with moderate mental retardation. The psychologist said, “AB will never be able to live independently, hold a job, or engage in higher education.” The psychologist further stated, “AB will likely continue to demonstrate significant behavioral problems and her sexual behavior is likely to be promiscuous or irresponsible in the future. AB’s current preoccupation with boys and sexual matters may also place her in a vulnerable position as a potential victim for others and she is likely to display irresponsible sexual behavior with persons her own age.” AB did not bring up the allegations of abuse by her father during the evaluation. In January 2011, a DCFS-approved therapist began working with AB’s family. After the allegations were made and Applicant was removed from the home, the therapist worked more closely with AB. In referring to the allegations, AB told the therapist that “people put words in her mouth” and she “was not correctly understood.” Later in August 2011, AB told the therapist, one of the people in her head “. . . knows the truth. He knows my Dad did not touch me.”⁷

AB has been hospitalized three times (August 2011, October 2011, and October 2012) because she has expressed homicidal auditory hallucinations. She refers to being told by a man in her head to “kill all the people that I love.” No injuries have ever been inflicted on any one. The doctor’s clinical impression stated after her last hospital visit was that she was experiencing conversion disorder, bipolar disorder, and schizophrenia.⁸

Applicant’s wife (CD) testified at the hearing and stated that AB told her the allegations against Applicant were not true. AB told CD she made up the allegations because she was mad at her parents for taking away her iPod the day before as a disciplinary measure. CD denied coaching AB to recant the allegations. CD was asked where AB may have learned some of the sexual terms she used in her disclosure. CD responded that AB may have learned them in school or by watching TV. She was in a traditional sex education class, not a special education class. The family became aware that AB was watching adult TV shows without their knowledge. They contacted their cable provider and stopped the service. CD also stated that the vibrators found were hers. They were kept in her bedroom. AB had seen them before, and brought them out and asked questions about them.⁹

CD related that Applicant was involved in the personal hygienic care for AB. Because AB was not independent with her hygienic care, she had to be monitored to ensure she properly wiped her bottom so that it did not rash or chaff. When CD was not around Applicant would do it. He even changed her tampon on occasions when it was necessary. If CD was around when Applicant assisted AB in this manner, she never

⁷ AE 1, 5.

⁸ Tr. at 53-54; AE 3-4.

⁹ Tr. at 41-43, 55-58, 60-62, 123-124; GE 1.

noticed that he appeared aroused from his actions. She said he was just a dad helping his child.¹⁰

AB testified at the hearing. She is now 20 years old. I asked her if she knew the difference between telling the truth and telling a lie. She answered affirmatively. An example was used to show the difference between the truth and a lie and she seemed to understand it. She was asked about her earlier allegations that Applicant touched her in inappropriate places. She stated that those earlier statements were lies. She referred to the statements she made to school personnel, DCFS personnel, and the police as all being untrue. When asked why she made such untruthful statements she replied, "I had a bad day." She further explained that statement by saying she was mad at her parents for taking away her iPod and made those statements to get her parents in trouble. She admitted knowing what a penis is and further stated that she has never touched Applicant's penis and he has never touched her with his penis. He also has never touched her vagina. She stated that she is not scared of Applicant and wants to continue to live with him and her mother. I specifically asked her if anyone told her what to say at the hearing and she denied that she was coached to testify in any certain way. She also talked about the voice in her head. He is the one who told her to kill her family. She does not hear his voice when she takes her medicine.¹¹

Applicant testified and denied touching AB in any inappropriate manner at any time. He stated that before she made the allegations against him, he helped her with hygienic issues, such as wiping her bottom, because even though she was 15 years old chronologically, her life-skills were that of a five or six year old. He did this to ensure she stayed hygienically clean. Since AB made these allegations, he now leaves all of those personal issues for his wife to handle.¹²

This case turns on which version of AB's statements regarding her father's alleged actions are more credible. Although AB made seemingly similar initial disclosures about being abused by her father to school officials, a DCFS official, and the police, there was no direct statement from AB describing the events. All I was presented with was a summarized police report. In conflict with the summary of AB's disclosures was her direct recanting of her earlier statements during the hearing. During her testimony, I was able to ask direct questions, view her demeanor, and assess whether she may have been coached into giving certain testimony. Additionally, I considered the evidence presented about her psychological conditions in evaluating her past statements and hearing testimony. Weighing all these factors, along with all the other evidence in the case, I find AB's hearing testimony more credible than her earlier disclosures concerning alleged abuse by her father.

¹⁰ Tr. at 37-40.

¹¹ Tr. at 72-90.

¹² Tr. at 92-93, 97, 101, 112.

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 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, these guidelines are applied 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 access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 that an applicant may deliberately or inadvertently fail to 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.

Section 7 of Executive Order 10865 provides that 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 relating to the guideline 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 in this case. The following 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.

In June 2011, Applicant was arrested and charged with felony counts of sexual abuse against AB. In November 2011, all charges were dismissed by the District Court because of "witness problems." I find that both the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

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

Based upon a consideration of all the evidence and the credibility finding above, substantial evidence exists that Applicant did not commit the offense. AG ¶ 32(c) applies.

Guideline D, Sexual Behavior

AG ¶ 12 expresses the security concern:

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.

I have considered all of the sexual behavior disqualifying conditions under AG ¶ 13 and the following is potentially applicable:

(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

There is insufficient credible evidence to determine that Applicant engaged in any criminal sexual behavior with AB. AG ¶ 13(a) does not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. Two 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 person may not properly safeguard protected information; 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;

Based upon a consideration of all the evidence and the credibility finding above, substantial evidence exists that Applicant did not commit the offense. AG ¶¶ 16(c) and 16(e) do not apply.

AG ¶ 17 provides conditions that could mitigate security concerns:

(f) the information was unsubstantiated or from a source of questionable reliability.

Even if any of the disqualifying conditions were established under Guideline E, the mitigating condition at AG ¶ 17(f) applies under these facts.

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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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. Applicant provided sufficient evidence to mitigate the criminal conduct security concern. The sexual behavior and personal conduct security concerns were not established. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance.

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

Conclusion

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

Robert E. Coacher
Administrative Judge