

DATE: June 30, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21957

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant repeatedly engaged in sexual activities with a 14-year-old girl between January 1999 and March 1999. A member of the military at the time, he was convicted at a special court martial of Indecent Acts and Liberties with a Minor, a violation of Article 120 of the Uniform Code of Military Justice (UCMJ). He was jailed for five months, reduced in grade with a total forfeiture of pay, and given a bad conduct discharge. During his background investigation, he lied to an investigator about what he knew about the victim's age when he had sex with her. Clearance is denied.

STATEMENT OF THE CASE

On September 12, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant. The SOR informed Applicant that DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to continue Applicant's security clearance. [\(1\)](#) The SOR alleged facts which raise security concerns under Guideline E (Personal Conduct).

On November 15, 2003, Applicant answered the SOR (Answer) and admitted the single allegation therein. He also requested a hearing. The case was assigned to me on March 22, 2004. On April 2, 2004, DOHA issued a Notice of Hearing setting this case to be heard on April 22, 2004. At hearing, Department Counsel submitted eight exhibits, Applicant submitted three exhibits and his own testimony. All parties appeared as scheduled, and DOHA received the transcript (Tr) on May 4, 2004.

PROCEDURAL ISSUES

On March 30, 2004, Department Counsel submitted a pre-hearing motion to amend the SOR by adding the following as paragraph 2:

"2. Guideline D: Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or

emotional disorder, may subject the individual to coercion, exploitation, or duress or reflects lack of judgment or discretion.¹ Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance. Available information raising this concern shows that:

a. The allegation as set forth in subparagraph 1.a, above."

At hearing, Applicant voiced no objection to the motion and admitted the allegation. I granted Department Counsel's motion and will consider Guideline D in reaching my decision.⁽²⁾

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is a 29-year-old employee of a defense contractor. He seeks a clearance in connection with his duties as an inventory control administrator. He has held that position since July 2003, but has worked at his current employer since October 2000, when he was hired as a mailroom clerk. Applicant's father was in the military and moved his family several times as Applicant grew up. After graduating high school in 1993, Applicant joined the Air Force where he rose to the rank of senior airman (E-4). While in the Air Force, he was enrolled in various college courses. He is currently working on his associate's degree at a local community college and hopes to transfer to a four-year college in 2005 to finish his bachelor's degree. Applicant performed his Air Force duties well. His evaluations reflect generally superior marks and consistent recommendations for immediate promotion. Likewise, his performance evaluations from his current job show he is an excellent worker. Applicant also works a second job while attending school in the evenings.⁽³⁾

While in the Air Force, Applicant married another service member; however, the couple separated in June 1998 and their divorce became final in the fall of 2000. In December 1998, Applicant moved into an apartment complex near his duty station. Sometime in January 1999, a female neighbor came by his apartment and introduced her younger sister to Applicant in the hopes he would want to have sex with the younger sister. The girl was 13 years old at the time, but told Applicant she was 15 years old. Later that month, the girl came to Applicant's apartment for the first of what would be seven acts of sexual intercourse and one act of cunnilingus. These activities ended in March 1999; however, in May 1999, the girl's aunt discovered what had happened and called the county police. At some point during their relationship, Applicant became aware the girl had just turned 14 years old and bought her a cell phone as birthday present.⁽⁴⁾

Applicant confessed to police that these acts had occurred. He was arrested and charged with five counts of second degree rape (a felony) and three counts of fourth degree sexual offense (a misdemeanor).⁽⁵⁾ The county prosecutor eventually *nolle prosequi'd* and Applicant was turned over to the Air Force for prosecution. In October 1999, Applicant was convicted at a special court martial of Indecent Acts and Liberties with a Minor, a violation of Article 120 of the Uniform Code of Military Justice (UCMJ). He was sentenced to five months confinement (but served only three due to time already served). He was also reduced in grade from E-4 to E-1, required to forfeit all pay and allowances, and issued a bad conduct discharge.⁽⁶⁾

In May 2002, Applicant was interviewed by a Defense Security Service agent in connection with the current background investigation. He lied to the agent when he said the girl he had sex with told him she was 17 years old when they met.⁽⁷⁾ He made that statement because he was embarrassed by what he had done. He is still embarrassed by it. At his current job, only one other person knows about what he did; however, several friends away from the work place know about it and have submitted statements of support and recommendation.⁽⁸⁾

POLICIES

The Directive sets forth adjudicative guidelines⁽⁹⁾ to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant.

However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (Personal Conduct) and Guideline D (Sexual Behavior).

BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽¹⁰⁾ for an Applicant to either receive or continue to have access to classified information. The Government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽¹¹⁾ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. The Government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the Government.⁽¹²⁾

CONCLUSIONS

Guideline E (Personal Conduct). Under this guideline, conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.⁽¹³⁾ The government has established a *prima facie* case for disqualification under this guideline by showing Applicant deliberately engaged in compromising sexual misconduct he knew to be against the law. As a result, he is still embarrassed by what he regards as an error in judgment. This embarrassment has precluded him from disclosing this adverse information to his current employer. Guideline E DC 4⁽¹⁴⁾ applies with full effect to undermine this Applicant's suitability for continued access.

There is no basis in this record for application of any Guideline E mitigating condition. Indeed, Applicant's continued embarrassment caused him to falsify his statement to DSS in May 2000, which, as noted below under Guideline D, only serves to exacerbate the government's concerns about Applicant's suitability for access to classified information. I conclude Guideline E against Applicant.

Guideline D (Sexual Behavior). Under this guideline, sexual behavior becomes a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress or reflects lack of judgment or discretion.⁽¹⁵⁾ The government has established a *prima facie* case for disqualification under this guideline. Applicant engaged in sexual conduct he knew to be illegal and he is still embarrassed by his conduct, which he further acknowledges was a mistake in judgment. Guideline D disqualifying condition (DC) 1,⁽¹⁶⁾ DC 3⁽¹⁷⁾ and DC 4⁽¹⁸⁾ apply. By contrast, because it has been more than five years since these events took place and there is no indication of other similar conduct. Mitigating condition (MC) 2⁽¹⁹⁾ applies. However, his continued embarrassment over this event and his willingness to falsify his statement to DSS about this event lead me to conclude he has failed to mitigate the security concerns engendered by his conduct. I conclude Guideline D against the Applicant.

I have carefully weighed all of the evidence in this case, and I have applied the aforementioned disqualifying and mitigating conditions as listed under each applicable adjudicative guideline. I have also considered the whole person concept as contemplated by the Directive in Section 6.3, and as called for by a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. The Applicant is a bright, hard-working person who appears to have matured in many facets of his life since he left jail in 2000. Nonetheless, the record evidence as a whole in this case presents an unacceptable risk to the government's compelling interest in ensuring its classified information is properly safeguarded. I conclude Applicant should not be granted access to classified information.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Guideline E: AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Paragraph 2, Guideline D: AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Tr., p. 9 - 10.
3. AE B; Tr., p. 55 - 57.
4. GE 1, GE 3; Tr., p. 38 - 45.
5. GE 4, GE 6, GE 7.
6. GE 3.
7. GE 1.
8. Tr., p. 46; AE A.
9. Directive, Enclosure 2.
10. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
11. *See Egan*, 484 U.S. at 528, 531.
12. *See Egan*; Directive E2.2.2.
13. Directive, E2.A5.1.1.
14. E2.A5.1.2.4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;
15. Directive, E2.A4.1.1.
16. E2.A4.1.2.1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
17. E2.A4.1.2.3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;

18. E2.A4.1.2.4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

19. E2.A4.1.3.2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;