



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



In the matter of:)	
)	
)	ISCR Case No. 07-13454
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert E. Coacher, Esq., Department Counsel
For Applicant: *Pro Se*

September 22, 2009

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guidelines D (sexual behavior), and E (personal conduct). Clearance is denied.

Statement of the Case

Applicant submitted his Questionnaire for National Security Positions (SF-86) on December 14, 2006. On March 8, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines D (sexual behavior), and E (personal 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.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and it recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On June 1, 2009, Applicant responded to the SOR allegations, and he elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated July 21, 2009, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.¹ Applicant submitted information within the 30-day time period after receiving a copy of the FORM. The case was assigned to me on September 2, 2009.

Findings of Fact

Applicant admitted all of the SOR allegations. His admissions are incorporated herein as findings of fact. I make the following additional findings of fact:

Background Information

Applicant is a 34-year-old software engineer who has been employed by a defense contractor since February 2001.² He seeks a security clearance in conjunction with his employment.

Applicant was married to his first wife from November 1997 to August 2001, and that marriage ended by divorce. He has a 12-year-old daughter from his first marriage. He remarried in July 2005. He has a two-year-old daughter from his second marriage, discussed *infra*.³

Applicant attended college from August 1993 to December 1998, and was awarded a Bachelor of Science degree. He served in the U.S. Army as an enlisted person from March 1995 to March 2001 in the active reserves, and from March 2001 to July 2004 in the inactive reserves.

Sexual Behavior

Applicant admitted the facts under this concern, which are corroborated by the government's evidence. Applicant had sexual contact with his two sisters from about

¹ DOHA transmittal letter is dated July 21, 2009, and Applicant received the FORM on August 3, 2009. The DOHA transmittal letter informed Applicant that he had 30 days after receipt to submit information.

² All background information pertaining to the Applicant was derived from his December 2006 SF-86, unless otherwise stated.

³ Current data regarding children from his second marriage was obtained from Applicant's Response to FORM.

1987, when they were ages 7 to 11, to at least 1989. He became sexually aroused when his former girlfriend's six-year-old daughter sat in his lap in about 2001. He became sexually aroused when his daughter sat in his lap in about 2004. He engaged in sexual activity with his first wife without her consent in about 1998. He engaged in sexual activity with his first wife in the presence of their infant daughter in about 1998. He placed his daughter's fingers in his first wife's vagina while engaging in sexual activity in about 1998.⁴ (SOR ¶¶ 1.a. – 1.f.)

Applicant explained, “[m]ost of these events occurred more than 10 years ago.” He stated that he began “[his] professional career in January 1999, prior to that I was primarily a student. From that point I have made every effort to make judgments that would not interfere with my ability to hold employment or maintain my quality of life.” He added that he has “matured a great deal since graduating college, going through a divorce and raising a child. I am now married a second time and have another child, a girl who is now two years old with another child due in October. Being a parent is a position of trust which my current wife has allowed me with full knowledge of the admitted behaviors/events and based on her observation of my character/person.”⁵

Personal Conduct

Applicant admitted the facts under this concern, which are corroborated by the government's evidence. The SOR cross-alleged the conduct described under sexual behavior. (SOR ¶ 2.a.) Applicant's eligibility for access to Sensitive Compartmented Information (SCI) was denied by another agency in about January 2005. (SOR ¶ 2.b.) The rationale for the denial was based in large part on the conduct described under sexual behavior.⁶

There is no evidence that Applicant has sought professional help to deal with any of these issues.

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.

⁴ Response to SOR, Items 3, 5, and 6.

⁵ Response to FORM.

⁶ Item 6.

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 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 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).

Analysis

Guideline D, Sexual Behavior

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

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.

The government established through Applicant's admissions and evidence presented the allegations in SOR ¶¶ 1.a. – 1.f. Under Guideline D, the evidence supports application of sexual behavior disqualifying conditions AG ¶¶ 13(a) – 13(d).

The Guideline delineates four mitigating conditions under AG ¶ 14:

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;
- (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 good 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.

The behavior described *supra* spanned a significant period of time beginning when Applicant was an adolescent and continued into his adulthood. Applicant did not present evidence sufficient to warrant application of any sexual behavior mitigating conditions.

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 Guideline delineates seven disqualifying conditions under AG ¶ 16:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(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;

(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;

(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;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

The government established through Applicant's admissions and evidence presented the allegations in SOR ¶¶ 2.a. – 2.b. His behavior displays lack of judgment and creates a vulnerability to exploitation. Additionally, another government agency has determined that Applicant's behavior raises such security concerns that it denied him access to SCI. Under Guideline E, the evidence supports application of personal conduct disqualifying conditions AG ¶¶ 16(c) – 16(e).

The Guideline delineates seven mitigating conditions under AG ¶ 17:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

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

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

I specifically considered all Guideline E Mitigating Conditions and conclude that none apply. Applicant's conduct spans a significant period of time and there is no evidence that he has sought professional help in addressing the conduct described. His favorable information is not sufficient to apply any of the mitigating conditions.

For the reasons outlined under the discussions of Guidelines D and E, I conclude Applicant's behavior shows questionable judgment, lack of reliability, and untrustworthiness.

To conclude, Applicant presented little or no evidence to explain, extenuate, or mitigate the sexual behavior and personal conduct security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, I gave due consideration to the whole person concept and that analysis does not support a favorable decision.

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"⁷ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

⁷ See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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
Subparagraphs 1.a. – 1.f.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a. – 2.b.:	Against Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge