



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



In the matter of:)
)
) ISCR Case No. 08-09480
SSN:)
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: J. Alexander Atwood, Esq.

November 9, 2009

Decision

MASON, Paul J., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Statement of the Case

On February 8, 2008, Applicant submitted a security clearance questionnaire (SCA). On April 15, 2008, Applicant was interviewed by an investigator from the Office of Personnel Management (OPM). On April 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under sexual behavior (Guideline D), personal conduct (Guideline E), and criminal conduct (Guideline H). 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 made effective within the Department of Defense for SORs issued on or after September 1, 2006.

Applicant answered the SOR on April 23, 2009. DOHA issued a notice of hearing on June 3, 2009, and the hearing was held on June 23, 2009. At the hearing, four government exhibits (GE 1 through GE 4) were admitted in evidence. Applicant objected to a portion of GE 2 (the investigating officer's affidavit) as hearsay (Tr. 13-15). That objection was overruled. While the affidavit in GE 2 contains hearsay, it is admitted in evidence as a business record generated by a police officer in the normal course of his job duties and sworn to under oath before a state magistrate. It is well settled that relevant hearsay may be admitted in DOHA administrative proceedings because the Federal Rules of Evidence (FRE) serve as a guide. I find the affidavit contains relevant hearsay evidence of the surrounding circumstances of the criminal offense on April 28, 2007, and, along with the remainder of GE 2, is admitted in evidence.

Applicant and two witnesses testified. Two exhibits (AE A, AE B) were admitted in evidence without objection to support Applicant's case. DOHA received a copy of the hearing transcript on July 7, 2009.

Administrative Notice

Applicant was prosecuted under a state statute defining the victim as "any child under the age of 16 years." The criminal prosecution was dismissed because the victim was 16 years old when the enticement occurred. I have taken administrative notice of the existence of another state statute that applies to victims under the age of 18. This statute, which was enacted in 1992, was in effect in April 2007, when Applicant enticed his nephew for indecent purposes. For unknown reasons, the state did not indict Applicant under the correct sexual offense statute.

Findings of Fact

The SOR contains three allegations under the sexual behavior guideline, one allegation under the personal conduct guideline, and one allegation under the criminal conduct guideline. Applicant admitted the factual allegations of SOR ¶ 1, but denied his conduct constituted sexual behavior as set forth in the guideline. He noted the charge was dismissed and he was not given a hearing (answer to SOR). He admitted the factual allegations of paragraph 2 and 3. Applicant's admissions will be incorporated in the following factual findings.

Applicant, 45 years old, has been married to his wife for 14 years. He has three children, ages 19, 15, and 13. He has been employed as a fleet mechanic by a defense contractor since October 1988. He has held a security clearance since March 2004. He seeks reinstatement of his security clearance.

Sexual Behavior

Applicant's 16-year-old nephew moved into Applicant's home in November 2005 after the nephew's father was incarcerated for murdering the nephew's mother (Tr. 36). Applicant's wife thought their home would be a good location for the nephew (Tr. 38).

On May 10, 2007, an investigator from the county sheriff's department interviewed Applicant's 16-year-old nephew (victim). That interview is contained in an affidavit attached to the booking report (GE 2). The victim stated that on April 28, 2007, he was sitting in the living room watching a sexually explicit video involving young women. Applicant sat down beside the victim and asked about four times if he could sodomize or have oral sex with the victim (*Id.*). During the time Applicant was making these requests (he made two requests while on his knees), he explained to the victim that males sodomize better on other males than females do on males because males are more aware of the feeling. The victim became sexually aroused by Applicant's stories and displayed his penis, but was concerned about the activity being detected. Applicant locked all the doors to the home, and repeated his request to sodomize the victim while he watched the video. The victim did not permit Applicant to sodomize him (*Id.*).

In his interview with the OPM investigator in April 2008, Applicant claimed that he never solicited the victim for indecent purposes (GE 3, April 15, 2008 interview of Applicant, at 4). Throughout the interview, Applicant essentially claimed that the criminal charge resulted from a conversation he had with his nephew where he attempted to address each sexual issue in a direct manner (*Id.* at 4-5).

There is no admission in his April 2008 interview that Applicant admitted he tried to give oral sex to his nephew. Rather, he stated that he learned through treatment that because of his own childhood sexual experiences, he had been too direct in discussing sexual issues with his nephew (GE 3, April 15, 2008, at 4-5), and he found more appropriate ways of talking about sexual issues (*Id.*).

Applicant explained at the hearing that the enticement for oral sex (though he did not use the words identifying the criminal offense) occurred in an attempt to be as direct as he could in explaining sexual issues to the victim, including what a 'blow job' was (Tr. 42). In addition, Applicant caught the victim masturbating earlier that day (Tr. 43). Until his therapy (May 2007 to September 2008), Applicant testified he did not believe an adult's sexual relationship with a child was wrong because it was an event in life that felt good (Tr. 44). Applicant never engaged in this kind of behavior with his children (Tr. 44-45). Applicant appeared to change his position about the enticement for indecent purposes by testifying that he knew at the time he attempted to engage in the conduct with the victim in April 2007 that it was wrong (Tr. 48).

On May 10, 2007 (SOR ¶ 1.a.), Applicant was arrested and charged with enticing a child for indecent purposes. The charge was dismissed on November 21, 2007 because (1) the state declined to prosecute, and (2) the elements of the offense were not met (AE A).¹ At the time of the sexual behavior, the victim was 16 years old, over

¹ The State code provides "a person commits the offense of enticing a child for indecent purposes when he solicits, entices, or takes any child under the age of 16 years to any place whatsoever for the purpose of child molestation or indecent acts."

the age set forth in the statute. Following the second reason for the state's decision not to prosecute is the sentence, "Defendant is in treatment" (*Id.*).

Under SOR ¶ 1.b., Applicant attended individual treatment once a week from May 2007 to December 2007 (AE 3; Tr. 21). The licensed clinical social worker (LCSW) advised that group therapy would also benefit Applicant therapeutically. Applicant's insurance paid for the first 6 months of treatment, but he used his own funds to pay the remaining 10 months of treatment as required by his treatment administrators (Tr. 23). Applicant recalled the LCSW recommended that he attend about four months of group therapy, but Applicant participated in group therapy for nine months (SOR ¶ 1.c.). However, in a letter to DOHA describing Applicant's participation in individual and group therapy, the LCSW indicated that Applicant agreed to participate in treatment until the LCSW determined he had completed treatment (GE 4, December 15, 2008, letter from LSCW to DOHA). In concluding that Applicant did not successfully complete treatment, the LSCW advised that Applicant's "ability to participate in power struggles and be oppositional to authority is definitely an issue he will have to work on. We see this as a significant deficiency" (*Id.*).

Once every week for an hour between 3 p.m. and 6 p.m. in the afternoon (Tr. 39), Applicant drove to the individual/group therapy location about 35 miles from his house and 45 miles from work (Tr. 39-40). He discontinued therapy in September 2008 when his wife needed help in caring for her parents who had been injured in a terrible car accident (Tr. 21, 23).

During individual treatment in November 2007, Applicant took the **Abel Assessment Test for Sexual Interest Interpretation (Abel Sex Test)**, GE 4; Tr. 26). The test is designed to assess the sexual interest of the testee based on reaction times after viewing and rating slides of adults and children in different kinds and stages of dress, and in different scenarios or situations. At the hearing, Applicant restated most of the critical findings of the test. The most important finding of the test, as restated by Applicant, was that he was sexually interested in adult females only (Tr. 27; GE 4).

The objective interpretations of the **Abel Sex Test** (GE 4) showed that Applicant's greatest sexual interest was in adult females and "does not appear to have a persistent sexual attraction to children or adolescent males/females" (*Id.* at 4).

Applicant believed that there were sexual incidents in his early life that led to his behavior in April 2008 (Tr. 28). When he was 12 or 13 years old, his brother molested him for about four months (Tr. 29). At age 15, one or two women in their 30s had sexual relations with him for more than a year (*Id.*). His LCSW intimated that these earlier incidents of molestation were misinterpreted by Applicant to be conventional, sexual encounters during his teenage years (GE 4, **Abel Sex Test** at 4-5).

When Applicant filled out the SCA, he answered one or two of the criminal conduct questions incorrectly (GE 2). The reason for the errors is because of his reading comprehension difficulties (Tr. 32).

Applicant has never had disciplinary problems at work (Tr. 25), and only one minor arrest in 1983 (Tr. 26). He has never been involved in this kind of sexual behavior in the past (Tr. 34). He has never had psychiatric or psychological counseling (Tr. 19).

Character Evidence

Witness 1 is the group lead technician with 23 years of seniority. Applicant began working at their employer in 1988, and, according to Witness 1, has been a good employee, although Witness 1 has only seen Applicant sparingly in the last 10 years. (Tr. 61) Witness 1 did not think there was much substance in the reason why Applicant was put in jail in May 2007 (Tr. 59). He heard from other people the charges were dismissed (Tr. 60).

Witness 2 is the operations manager who has known Applicant for about 20 years. He has supervised Applicant for the last six years (Tr. 65), and they alternatively invite each other over for occasional cookouts (65-66). Witness 2 is aware that criminal charges against Applicant were dropped (Tr. 69).

Applicant's yearly performance evaluations from 1991 through 2008 (AE B) reflect favorable assessments as a self starter who exceeds requirements and learns quickly. He demonstrates he is well informed and produces a product that shows good workmanship (*Id.*).

Policies

When evaluating an applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are flexible rules of law. Recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's ultimate adjudicative goal is a fair, impartial, and commonsense decision. According to the AG, the entire process is a careful, thorough evaluation 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. If residual doubts still remain concerning personnel being considered for access to classified information, those doubts 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining 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 is not restricted to normal duty hours. Rather, the relationship is an-around-the-clock responsibility between an applicant and the federal government. 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 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.

Analysis

Sexual Behavior

¶ 12 of the AG sets forth sets forth the security concern related to sexual behavior:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects a lack of judgement 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 th standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

The sexual behavior guideline has two disqualifying conditions that apply to this case:

AG ¶ 13(a) (*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*); and

AG ¶ 13(c) (*sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*).

Applicant’s enticement of his nephew on April 28, 2007, was sexual behavior of a criminal nature, even though the state charges were dismissed. Applicant could have been prosecuted under the childhood sexual abuse statute for enticing a child under age 18 for indecent purposes. AG ¶ 13(a) applies.

By enticing the victim for indecent purposes, Applicant violated his duty of care and protection for his nephew to satisfy his own sexual desires. GE 2 conclusively demonstrates Applicant would have accomplished his objective had his nephew succumbed to Applicant's constant appeals for sex. Applicant's minimization of the seriousness of his behavior, i.e., not admitting his sexual misconduct, continues to leave him vulnerable to coercion and pressure as defined by in AG ¶ 13(c).

The sexual behavior guideline lists two mitigating conditions that may be applicable to this case:

AG ¶ 14 (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); and

AG ¶ 14(c) (the behavior no longer serves as a basis for coercion, exploitation, or duress).

The enticement occurred in April 2007, less than three years ago. In February 2008, Applicant reported the charge on his SCA. In April 2008, Applicant provided an interview and referred to the criminal offense as nothing more than a conversation he had with his nephew where he attempted to explain sexual issues. Applicant even denied he solicited his nephew. In December 2008, his LCSW wrote that Applicant did not successfully complete treatment, and explained that he disagreed with Applicant's decision to stop treatment as there were power and authority issues he needed to deal with.

In his answer to the definition of sexual behavior set forth in SOR ¶ 1, Applicant unambiguously stated that he did not entice his nephew for indecent purposes. His denial and minimization of serious misconduct continue to cast doubt on his judgment and reliability. His denial that the enticement occurred continues to serve as a basis for exploitation and duress. AG ¶¶ 14(c) and 14(d) do not apply. Applicant's favorable job performance since 1991 has been examined along with the positive testimony from Witnesses 1 and 2. Neither is sufficient to find the sexual behavior guideline in Applicant's favor.

Personal Conduct (PC)

¶ 15 of the AG sets forth the concern of the personal conduct guideline:

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 personal conduct guideline (AG ¶ 16) has one mitigating condition that may apply:

AG ¶ 16(e) (personal conduct, or concealment of information about one's conduct, that creates 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 U.S. and may serve as the basis for exploitation or pressure by the foreign country or intelligence service or group).

Applicant's poor judgment in enticing his nephew for indecent purposes in April 2007, and then subsequently minimizing the seriousness of the conduct, causes him to be vulnerable to coercion and duress as outlined in AG 16(e).

The personal conduct guideline (AG ¶ 17) lists three mitigators that may apply to the circumstances of this case:

AG ¶ 17(a) (the offense was 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); and

AG ¶ 17(d) (the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate stressors, circumstances, or factors that caused untrustworthy, unreliable or other inappropriate behavior, and such behavior is unlikely to recur); and

AG ¶ 17(e) (the individual has taken steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress).

AG ¶ 17(a) does not apply because the sexual behavior occurred less than three years ago even though the behavior occurred on only one occasion. Applicant's equivocal statements about enticing his nephew in April 2007 continue to cast doubt on his trustworthiness and judgment.

AG ¶ 17(d) does not apply. Though Applicant acknowledged in his April 2008 interview that he had a conversation about sex with his nephew, Applicant claimed he never solicited his nephew, a claim he repeated in his answer to the SOR. Though he has participated in 16 months of counseling between May 2007 and September 2008, the documentation from the treatment organization verifies that he did not successfully complete the counseling. In addition, his LCSW believed he still had power struggles and authority issues that had not been reconciled when he discontinued group therapy. AG ¶ 17(d) applies on a limited basis because of his treatment. ¶ 17(e) does not apply.

With Applicant's belief he did not entice his nephew, he has not shown that he has taken the necessary steps to reduce his vulnerability to coercion. AG ¶ 15 is resolved against Applicant.

Criminal Conduct (CC)

¶ 30 of the AG sets forth the security concern related to criminal conduct:

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 criminal conduct guideline has two applicable disqualifying conditions:

AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*); and

AG ¶ 31(c) (*allegation of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*).

On April 28, 2007, Applicant engaged in criminal conduct when he tried to give his nephew oral sex. While his nephew may have asked Applicant several questions about sexual acts, including oral sex, Applicant exhibited extremely poor judgment in repeatedly trying to show his nephew what oral sex was, even descending to a kneeling position to achieve his objective. AG ¶¶ 31(a) and 31(c) apply even though the charges were dismissed. As noted in Administrative Notice, Applicant's conduct meets the elements of the state childhood sexual abuse statute applying to victims under the age of 18.

The criminal conduct guideline has two mitigating conditions that may apply.

AG ¶ 32(a) (*so much time has passed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*); and

AG ¶ 32 (d) (*there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community development*).

Applicant's enticement of his nephew occurred less than three years ago. His denial of the full scope of his criminal misconduct sparks continuing concern about his judgment that has not been lessened by his exculpatory statements during and after his treatment between May 2007 and September 2008. AG 32(a) does not apply.

AG ¶ 32(d) identifies some elements of successful rehabilitation. Successful rehabilitation hinges on whether the individual fully realizes the consequences of his actions. Applicant has not demonstrated he is fully cognizant of the seriousness of his conduct. Applicant's 16 months of treatment helped him understand the inappropriateness of his past sexual experiences with his brother and older women, while discovering more appropriate ways of discussing sexual issues. However, the LCSW found that Applicant did not successfully complete treatment. Applicant's favorable job performance justifies limited application of AG ¶ 32(d), but does not overcome the adverse evidence under AG ¶¶31(a) and 31(c).

Whole Person Concept

¶ 2(c) indicates the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the whole person concept. Nine general policy factors under AG ¶ 2(a) define the Whole Person Concept as follows:

- (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 the participation is voluntary;
- (6) the presence or absence of rehabilitation;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and,
- (9) the likelihood of continuation or recurrence.

Applicant's record of good employment weighs in his favor. The testimony of Witness 1 and 2 substantiate his good performance evaluations. His favorable evidence and lack of a criminal record show some evidence of mitigation.

However, Applicant's criminal, sexual misconduct was serious. His strong belief he did not solicit or entice his nephew in April 2007 is contradicted by his admission at the hearing that knew the conduct was wrong. The contrasting statements foster continuing concern that Applicant does not accept the gravity of his conduct. Given his failure to successfully complete his treatment, Applicant has provided insufficient evidence for me to confidently conclude this kind of conduct will not be repeated in the future. Applicant's evidence in mitigation does not overcome the adverse evidence under the sexual behavior, personal conduct, and criminal 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 (Sexual behavior, Guideline D): AGAINST APPLICANT

Subparagraph 1.a.	Against Applicant
Subparagraph 1.b.	Against Applicant
Subparagraph 1.c.	Against Applicant

Paragraph 2 (Personal Conduct, Guideline E): AGAINST APPLICANT

Subparagraph 2.a.	Against Applicant
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Paragraph 3 (Criminal Conduct, Guideline J) AGAINST APPLICANT

Subparagraph 3a.	Against Applicant
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Conclusion

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

Paul J. Mason
Administrative Judge