



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-04384
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Esq., Department Counsel
For Applicant: *Pro se*

March 16, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns under Guidelines D (Sexual Behavior) and J (Criminal Conduct), arising from Applicant's sexual conduct with a 13-year-old girl. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on December 19, 2007 (Government Exhibit (GX) 4). On October 10, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines D and J. 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 on October 24, 2008, and requested a determination on the record without a hearing. Department Counsel submitted the government's written case on December 31, 2008. On January 7, 2009, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the government's evidence. Applicant received the FORM on January 12, 2009, and he did not submit any additional materials. The case was assigned to me on March 3, 2009.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in the SOR. His admissions are incorporated in my findings of fact.

Applicant is a 30-year-old web developer employed by a federal contractor. He has worked for his current employer since September 2005. He has never held a security clearance.

Applicant was married in April 2005, and has a three-year-old daughter. He has a high school education and attended a community college for about six months but did not receive a degree or diploma.

During the summer of 2000, when Applicant was 21 years old, he began chatting on the internet with a girl he believed was 17 or 18 years old. Their online conversations soon became sexually explicit. After a short time, they agreed to meet at the girl's home. During the meeting Applicant discovered that the girl was only 13 years old. Nevertheless, he had sexual intercourse with her in her bedroom. After this meeting, they chatted only about once a month. In November or December 2000, they met at a high school football game, walked to a nearby wooded area, and again had sexual intercourse. Applicant's 22nd birthday was on December 3, 2000. In late December 2000, Applicant attempted to contact the girl and learned that the girl's mother had discovered the sexually explicit internet exchanges and notified the local sheriff. Applicant was arrested on December 29, 2000, and charged with committing a lewd and lascivious act in the presence of a child under the age of 16, a felony. He was jailed overnight and released on a \$10,000 bond (GX 5).

In June 2001, Applicant pleaded nolo contendere and was found guilty. He was sentenced to three years of probation, two years of community control, and a fine (GX 8). He was required to register as a sex offender. He will remain on the registered sex offender list until June 2024 (GX 3, 6).

The state law pertaining to registration of sex offenders includes legislative findings that sexual offenders who prey on children are "sexual predators," that they present an "extreme threat to the public safety," and that they are extremely likely to repeat their offenses (GX 7).

In his response to the SOR, Applicant characterized his conduct as “a single incident.” He stated that he was “saddened and disgusted” by his actions and he has complied with all the requirements for registered sex offenders, including therapy specific to his crime. He stated he has committed no crimes since his conviction in June 2001 and has no intentions of doing so (GX 3).

Policies

“[N]o 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 applicants 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 over-arching adjudicative goal is a fair, impartial and common sense 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. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. 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). "[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

The SOR alleges Applicant was arrested on December 29, 2000, charged with committing a lewd and lascivious act with a child under the age of 16, pleaded nolo contendere, was convicted, and was sentenced to three years of probation, two years of community control, a fine, and court costs (SOR ¶ 1.a). It also alleges he was required to register as a sex offender under the state Sexual Predators Act, notify state authorities of his current address every two years, and remain registered as a sex offender until at least June 2024 (SOR ¶ 1.b).

The security concern under this guideline is set out AG ¶ 12, in pertinent part as follows: "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." The relevant disqualifying conditions are AG ¶ 13(a) ("sexual behavior of a criminal nature, whether or not the individual has been prosecuted"); AG ¶ 13(c) ("sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress"); and AG ¶ 13(d) ("sexual behavior of a public nature and/or that reflects lack of discretion or judgment").

I conclude that AG ¶ 13(a) is raised because Applicant's conduct was a felony under state law. AG ¶ 13(c) is not raised because Applicant's conviction and registration as a sex offender are public records, removing his vulnerability to threats of disclosure. AG ¶ 13(d) is raised because Applicant's behavior, while not of a public nature, reflected lack of discretion and good judgment.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 13(a) and (d), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated if “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.” AG ¶ 14(b). The first prong of AG ¶ 14(b) (“happened so long ago”) focuses on whether the drug involvement was recent. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the evidence. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *Id.*

Applicant’s sexual behavior with the 13-year-old girl ended when he was arrested about eight years ago. Eight years is a “significant period of time,” raising the question whether that time period demonstrates rehabilitation. I conclude that the eight-year period without further misconduct is not sufficient to demonstrate rehabilitation, for the following reasons.

First, Applicant did not engage in a “single incident” as he asserts in his answer to the SOR; it was a six-month course of conduct with two separate incidents of sexual intercourse. His attempt to minimize his conduct in his answer militates against a finding that he is rehabilitated. Second, Applicant did not voluntarily terminate his relationship with the girl. It was terminated by his arrest after the girl’s mother reported the sexually explicit email exchanges to the local sheriff. Third, although Applicant refers to his therapy in his answer to the SOR, he has submitted no evidence of the nature or duration of the therapy, and there is no evidence of the prognosis for recurrence. Fourth, as recognized by the state legislature, Applicant’s six-month period of preying on a 13-year-old girl is a crime for which the recidivism rate is high. Fifth, because Applicant requested an administrative determination without a hearing, I have had no opportunity to evaluate his credibility and sincerity.

Finally, Applicant has been under close surveillance during the past eight years, facing severe criminal penalties for any recurrence. The state has determined that he should remain on the register of sex offenders until June 2024. Whether he would repeat his predatory sexual behavior in the absence of close monitoring cannot be determined from this record. Based on the evidence of record, I conclude that insufficient time has passed to justify a conclusion that Applicant is rehabilitated.

The second prong of AG ¶ 14(b) (“so infrequently”) is not established because Applicant engaged in a six-month relationship with the 13-year-old girl that included frequent sexually explicit conversations and two acts of sexual intercourse. The third prong is not established because Applicant’s conduct did not arise from unusual circumstances that are unlikely to recur. Finally, his conduct casts doubt on his current reliability, trustworthiness, and good judgment. Accordingly, I conclude AG ¶ 14(b) is not established.

Security concerns arising from sexual behavior also may be mitigated if “the behavior no longer serves as a basis for coercion, exploitation, or duress.” AG ¶ 14(c). This mitigating condition is established, because the public record of Applicant’s conviction and registration as a sex offender eliminates his vulnerability to threats to disclose his behavior.

Finally, security concerns under this guideline may be mitigated if “the sexual behavior is strictly private, consensual, and discreet.” AG ¶ 14(d). Applicant’s behavior was private, but it was not consensual or discreet. The 13-year-old girl was incapable of consent as the term is used under this guideline. Carrying on a sexual relationship with a 13-year-old girl and engaging in sexual intercourse in her bedroom and in the woods near a football stadium was not discreet behavior.

Guideline J, Criminal Conduct

The SOR ¶ 2.a cross-alleges Applicant’s arrest, conviction and sentencing alleged in SOR ¶ 1.a under Guideline E. The security concern regarding criminal conduct is set out in AG ¶ 30 as follows: “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.” Conditions that could raise a security concern and may be disqualifying include “a single serious crime or multiple lesser offenses” and “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.” AG ¶¶ 31(a) and (c). Applicant’s felony conviction alleged in SOR ¶ 1.a raises the disqualifying conditions in AG ¶¶ 31(a) and (c) under this guideline.

Security concerns arising from criminal conduct may be mitigated if “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” AG ¶ 32(a). For the reasons set out above in the discussion of AG ¶ 14(b) under Guideline D, I conclude this mitigating condition is not established.

Security concerns under this guideline also may be mitigated if “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 involvement.” AG ¶ 32(d). Applicant expressed sadness and disgust about his behavior in his answer to the SOR, which is tantamount to remorse. He asserted that he has a good employment record and is pursuing several certifications related to his employment, but he has submitted no evidence in terms of performance appraisals, diplomas, certificates, or character reference letters to establish his good employment record and job training efforts. He has presented no evidence of community involvement. For these reasons as well as the reasons set out above in the discussion of AG ¶ 14(b), I conclude this mitigating condition is not established.

Whole Person Concept

Under the whole person concept, an 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. An 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guidelines D and J in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under these guidelines, but some warrant additional comment.

Applicant was an adult when he commenced his sexual relationship with a 13-year-old girl. He continued the relationship and twice had sexual intercourse with her even after learning of her tender age. He did not voluntarily terminate the relationship and likely would have continued it for a time if he had not been arrested. He is now 30 years old, married, and the father of a daughter. He has presented no evidence from medical professionals or others to show that he does not fit the state legislature's description of sexual predators who prey on children. Whether he would revert to old behavior if released from the constraints of the sex offender registration program cannot be determined.

After weighing the disqualifying and mitigating conditions under Guidelines D and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on sexual behavior and criminal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline D (Sexual Behavior):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline J (Criminal Behavior):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge