



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



In the matter of:)
)
) ISCR Case No. 08-06873
)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esq., Department Counsel
For Applicant: *Pro Se*

October 2, 2009

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated Personal Conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On March 11, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, Personal Conduct. The action was taken under Executive Order (EO) 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 (DoD) for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on April 26, 2009, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted

the government's written case on July 7, 2009. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on July 17, 2009. He responded to the FORM on August 9, 2009. Department Counsel did not object to his response. Applicant's response to the FORM contained ambiguous language suggesting that he may have wanted a hearing. Department Counsel called and left a voice mail for Applicant and sent him a letter on August 28, 2009, asking him if he wanted a hearing. The case was assigned to me on September 2, 2009. I asked Department Counsel to verify that Applicant did not desire a hearing. Department Counsel submitted a memorandum on September 16, 2009, indicating that he spoke with the Applicant, and Applicant confirmed that he did not want a hearing.

Evidentiary Rulings

Applicant submitted a motion in limine objecting to the admission of certain of the government's evidence. Item 4 of the FORM consists of various documents from another government agency regarding the agency's determination of Applicant's eligibility for access to Sensitive Compartmented Information (SCI). Applicant objects on the grounds of hearsay and the denial of his right to confrontation. Applicant specifically objects to the "polygraph exam report," as a report of investigation (ROI), and therefore inadmissible under the Directive. There is no evidence in the FORM of the specific results of a polygraph. The objection to any results of a polygraph test is sustained. Applicant presumably is objecting to the various reports of statements made by Applicant and other individuals included in the file. Applicant adopted his statements and their accuracy in 2005, in his response to the revocation of his access to SCI. His attorney stated in that response, with Applicant's express written approval, "[t]he events occurred basically as reported in the report of the 23 and 24 August 2004 interviews and the 10 September 2004 polygraph examination; however [Applicant] denies forcing the teen to perform oral sex on him during a trip to [amusement park] in 1987." When he responded to the SOR, Applicant provided a copy of the 2005 response to the revocation of his access to SCI. Applicant's objection to the ROIs that report his statements to investigators is overruled, with the limitation that any indication that Applicant forced the teenager to perform oral sex on him during a trip to an amusement park in 1987 will not be considered.

Applicant's objection to the admission of the ROIs of other individuals is sustained. Those ROIs will not be considered in this decision. Included in the investigative file from the other government agency is a letter reportedly sent to Applicant in about 2003, by the man who Applicant allegedly had a sexual relationship with when the man was a teenager. Also included is a handwritten eight-page note from the man apparently to the Applicant. The note was provided to the agency's investigator by the man's attorney. Applicant did not specifically object to the letter and the note. The letter and note are accepted for the limited purpose of the fact the letter was sent and the note was written by the man. They are not accepted for the truth of the matters set forth therein. Therefore, the hearsay objection to the letter and note is overruled.

Included in Item 4 is the decision and supporting memorandum revoking Applicant's access to SCI. The decision and memorandum are accepted for the limited purpose of establishing that Applicant's access to SCI was revoked. They are not accepted for the truth of the facts set forth therein.

Findings of Fact

Applicant is a 51-year-old employee of a defense contractor. He has a Masters of Engineering degree. He has been married since 1988. He has two children, ages 19 and 17.¹

Applicant was a member of the Boy Scouts of America when he was a youth. He maintained his association with the Boy Scouts as an adult and served as a scout leader in the 1980's. He first met one of his scouts (A) in about 1984 or 1985, when the boy was about 13 years old. Applicant took an interest in the boy and befriended him. During the period of about 1986 to 1987, Applicant became involved sexually with the boy. The first incident occurred on a Boy Scout camping trip in 1986, during which Applicant and the boy shared a tent. The boy was 15 years old at the time, and Applicant was about 28 years old. Between 1986, when the boy was 15, and 1987, when he was 16, Applicant and the boy had seven incidents involving sexual contact. Three of the incidents occurred when the boy was 15, and four occurred when he was 16. Three of the incidents occurred during official scouting trips, and four occurred either at Applicant's home or during trips they took with approval of the boy's parents. The incidents took place in four different states. Several of the incidents occurred when Applicant and/or the boy had been drinking alcohol. Applicant provided A with alcohol on more than one of the occasions. The sexual contact involved fondling of the penis and fellatio on at least one occasion.²

Applicant met his wife in 1987. His friendship with A continued after he met his wife, but there were no further sexual incidents. He stated they remained friends, and A was an usher in Applicant's wedding and babysat for his oldest child. There is no evidence of any inappropriate sexual acts by Applicant after his sexual relationship with A ended.³

Applicant received a phone call in about September 2003 from an old girlfriend of A. She told him that she was in possession of some letters that indicated that Applicant had sexually abused A. She asked to meet Applicant to discuss the letters. He told her that he did not want to meet and ended the phone conversation. Several days later, Applicant's wife received a phone call from the same woman. She stated that Applicant sexually molested A when he was a Boy Scout. Applicant's wife told the woman that it was a "sick lie" and not to call their house again. In about March 2004, Applicant

¹ Item 6.

² Items 3-5.

³ *Id.*

received an envelope in the mail containing an article about child abuse. The envelope did not have a return address. In about May or June 2004, Applicant received another envelope in the mail. This letter had A's return address. It contained another article about child abuse and a short handwritten note.⁴

In August and September 2004, Applicant was interviewed on three occasions by investigators on behalf of a government agency for a determination of his eligibility for access to SCI. He admitted his sexual involvement with A. In about August 2004, Applicant told his wife about his sexual relationship with A.⁵

In 2005, the government agency issued a letter indicating its intent to revoke Applicant's access to their Top Secret/Sensitive Compartmented Information (TS/SCI). Applicant appealed the decision and submitted a psychological evaluation by a licensed psychologist. The evaluation was conducted over a period of months and involved multiple clinical interviews, formal psychological testing, and meetings with Applicant's wife.⁶ The psychologist found no Axis I or Axis II diagnosis. He concluded:

In summary, it appears that [Applicant] has grown considerably in the eighteen years since the inappropriate relationship occurred. Outside of that incident, [Applicant] has apparently lived a clean life without any personal, legal, financial, occupational, psychological or behavioral problems. In those years he has developed an impressive personal and professional record while successfully holding a security clearance for over twenty years.

Given the time that has passed, the lifestyle [Applicant] has developed and the maturation he has shown in his personal growth, there is very little likelihood that anything like this incident could ever happen again. As there are no psychological reasons otherwise and due to his overall history of stability, reliability, consistency and trustworthiness, it would seem more than reasonable to consider [Applicant] for continuation of his longstanding security clearance and professional employment.⁷

The decision to revoke Applicant's access to TS/SCI was sustained by the agency in June 2005. Applicant appealed that decision and submitted a supplemental report by the licensed psychologist who conducted his evaluation. The psychologist reiterated his previous report. He reported that Applicant was not a pedophile and had never engaged in pedophilia, as A was post-pubescent during the sexual acts. The results of Applicant's appeal are not in the FORM, but Applicant left employment with the agency in about October 2005, and indicated on his Questionnaire for National

⁴ Items 3, 4.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

Security Positions (SF 86) submitted in March 2008, that his access to SCI was revoked in October 2005.⁸

When he submitted his response to the SOR, Applicant submitted a copy of the 2005 appeal of his SCI revocation. There were a number of character letters attached to his appeal package. Co-workers and supervisors praised Applicant for his outstanding job performance, judgment, competence, loyalty, and reliability. There were also a number of letters from people who knew him from the Boy Scouts. They wrote that Applicant was a great husband and father; they noted his commitment and dedication to the Boy Scouts; and they stated how much they trusted him with their children. None of the letters stated that the authors were aware of Applicant's sexual relationship with a scout.⁹

There is little in the FORM or from Applicant to indicate what has occurred since 2005. Because Applicant did not elect a hearing, I was unable to ask him if there has been any further contact with A or his girlfriend. Applicant was a scout leader in 2005. He admitted SOR ¶ 1.e, which alleged that "[a]s of at least 2005, [Applicant was] still an adult leader with the Boy Scouts of America, and [his] past behavior was not known to current youth parents or the Boy Scouts of America professional leadership." Nothing in Applicant's response indicates that he has disassociated himself from the Boy Scouts, or that they are now aware of his past actions with a scout.¹⁰

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 to be 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, administrative judges apply the guidelines 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.

⁸ Items 3-6.

⁹ Item 3.

¹⁰ *Id.*

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. 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 the 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 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 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.

Section 7 of Executive Order 10865 provides that adverse 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 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions 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 . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant's conduct with the scout could also have been alleged under the Sexual Behavior and Criminal Conduct guidelines. That behavior, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, and unwillingness to comply with rules, regulations, and the law. AG ¶ 16(c) is applicable. That behavior and Applicant's apparently ongoing relationship with the Boy Scouts also constitute personal conduct and concealment of information about his conduct that could create a vulnerability to exploitation, manipulation, or duress. AG ¶ 16(e) is applicable.

Applicant admitted that he was denied SCI access by another government agency in about 2005, as alleged in SOR ¶ 1.d. He was denied SCI access because of the information that is also alleged in the SOR. SOR ¶ 1.d does not allege distinct personal conduct by Applicant. It alleges the agency's response to his conduct. That conduct is adequately addressed under other allegations. SOR ¶ 1.d is concluded for Applicant.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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; and

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

Applicant engaged in an inappropriate and criminal sexual relationship with a boy under his care and supervision in 1986 and 1987. He married shortly thereafter, and there is no evidence that this type behavior has been repeated. It has been 22 years since the conduct. Applicant told his wife in 2004 about his actions, which lessened, but

did not eliminate, his vulnerability to exploitation, manipulation, and duress. Applicant is apparently still heavily involved as a scout leader in the Boy Scouts. I question the judgment of someone who would remain connected to the Boy Scouts, after betraying the organization and going against everything it stands for. The many letters Applicant submitted with the appeal of his SCI revocation do not help his case, because the parents of the children he was supervising clearly were unaware of Applicant's inappropriate actions with a scout. I am also concerned about the efforts of A and A's old girlfriend to contact Applicant and his wife in 2003 and 2004. The girlfriend's motivations in contacting Applicant are unclear, but it was possibly part of an attempt to blackmail him.

Questions remain unanswered about this case. I find that Applicant remains vulnerable to exploitation, manipulation, and duress. His actions continue to cast doubt on his reliability, trustworthiness, and good judgment. With my many unanswered questions, I am unable to make an affirmative finding that the behavior is unlikely to recur. The Personal Conduct concerns are still present despite the presence of some mitigation.

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. I have incorporated my comments under Guideline E in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment. Applicant is a 51-year-old married father of two. He has been involved with the Boy Scouts for much of his life, either as a scout or a scout leader. When he was in his late 20's, he became sexually involved with a teenage scout who was under his care and supervision. The sexual incidents occurred when the boy was 15 and 16, with a number of the incidents involving alcohol supplied by Applicant. The incidents occurred in four states, and

happened during official scouting trips, at Applicant's home, or during trips they took with approval of the boy's parents. Applicant crossed state lines prior to engaging in his illegal sexual acts with the minor.

Applicant met his wife in 1987. They married in 1988. There is no evidence of any additional inappropriate sexual behavior by Applicant. He informed his wife of his actions in 2004. However, Applicant apparently is still associated with the Boy Scouts. The Boy Scouts and the parents of his scouts are unaware of his inappropriate sexual actions with a scout under his care. That in itself shows questionable judgment. He must know that the parents of the scouts he supervises would not have the same trust in him if they were aware of his past actions. The girlfriend of the boy he abused contacted Applicant and his wife in 2003. Her motivations for the contact are not completely clear, but it could have been an extortion attempt. Little is available in the FORM about what has occurred since 2005. I was unable to ask Applicant important questions about this case. Applicant's criminal actions are likely barred by the various state and federal statutes of limitations. However, even if he can no longer be prosecuted, Applicant remains vulnerable to pressure, coercion, exploitation, and duress.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated Personal Conduct security concerns.

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 E:	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

Edward W. Loughran
Administrative Judge