



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



In the matter of:)	
)	
)	ISCR Case No. 08-08342
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jennifer I. Goldstein, Esquire, Department Counsel
For Applicant: Pro Se

November 23, 2009

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted a security clearance questionnaire (SF 86), on March 3, 2009. On June 23, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline J, Criminal Conduct, Guideline D, Sexual Behavior, and Guideline 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.

On July 16, 2009, Applicant answered the SOR and requested a determination be made in his case without a hearing. On August 25, 2009, Department Counsel prepared a File Of Relevant Material (FORM). The FORM was mailed to Applicant on August 27, 2009. Applicant received the FORM on September 2, 2009. He had thirty days from the receipt of the FORM to submit additional matters. He did not submit additional matters. The case was forwarded to the hearing office on November 2, 2009

and assigned to me on November 3, 2009. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, Applicant admits the allegation in SOR ¶ 1.a, and denies the allegations in SOR ¶¶ 2.a, and 3.a.

Applicant is a 47-year-old employee of a Department of Defense contractor seeking to obtain a security clearance. He is an industrial electronic technician and has worked for his current employer since January 2008. In response to question 26(a) of his security clearance questionnaire, he indicated that he applied for a security clearance in June 1990. It is not clear whether he has held a security clearance continuously since that time. He is single and has no children. (Item 4)

On October 16, 2001, Applicant was arrested and charged with Stalking, a class 5 felony. Applicant was infatuated with an 11-year-old girl who lived across the street from his residence. He first met the girl and her family at a candle light vigil for the September 11th attacks. He came over frequently during the family's garage sale which was held in early October 2001. She told police that Applicant gave her some candy and tried to get her to go away with him out of her parents' view. On October 15, 2001, Applicant made a shrine to the girl on her front porch. The shrine contained six small red roses, a balloon that said "I love you," a necklace, several pens, some candy, and a note to the girl. On October 16, 2001, Applicant knocked on the 11-year-old girl's residence at 7:45 am. No one answered the door. The girl's father was in the shower. Once he got out of the shower, he looked out his bedroom window and saw Applicant sitting on their backyard fence wall. He went outside to ask what Applicant was doing. Applicant said he was watching the sunrise and wanted to speak to the 11-year-old girl. The girl's father called 911 and Applicant was arrested. (Item 7)

When he was arrested, Applicant possessed another two-page letter addressed to the 11-year-old girl, a compact disc with a romantic song on it, and a picture of the shrine he left on the 11-year-old girl's front porch the previous day. During his arrest Applicant referred to his 11-year-old neighbor as his goddess. He said that he loved her and wanted to marry her. The letters mentioned that he loved the girl and wanted to marry her. In one letter, Applicant indicated that he was sick with love for her and felt like he was going to explode. He indicated that the only way he could relieve the tension was to masturbate. He also stated that she will "become a woman on Halloween." (Item 7)

On March 28, 2002, Applicant was found guilty of Attempting Stalking, a class 6 undesignated felony. His punishment included lifetime probation, a \$1,770 fine, and 500 hours community service. He was ordered to have no contact with the victim, abide by the Interstate Compact Terms Addendum to Terms of Probation, abide by the Mental Health Addendum to Terms of Probation, abide by the Sex Offender Addendum to

Terms of Probation, to take all prescribed medication for his mental issues, and participate in ongoing therapy throughout probation. (Item 9)

In September 2007, Applicant filed a motion to terminate his probation and a motion to designate the offense a misdemeanor. On September 21, 2007, the court discharged Applicant from probation and designated the offense a misdemeanor upon Applicant's avowal that he will continue taking his medications prescribed by his doctor. (Item 6)

In his response to the SOR, Applicant admits that he was arrested in October 2001 and convicted of Attempted Stalking. He explains that he gave two gifts and letters to the 11-year-old girl to help her feel less sad. He claims there was no sexual behavior in the relationship. Although he admits trespassing to give the girl the gifts, he claims the prosecutor was tougher on his case because another criminal was abducting children in the area at the time of his arrest. He states that a mental breakdown caused his unusual behavior. He accepts the fact that his mental instability provides a reasonable uncertainty as to his ability to keep national security information secret because his illness affects his judgment. For this reason, he does not contest the decision not to give him a security clearance. (Item 3, Response to SOR)

Although references are made to Applicant's mental health issues throughout the record, his mental health condition is not specified other than Applicant's response to question 21 on his security clearance questionnaire which asks whether an applicant has consulted a mental health professional within the last 7 years. Applicant answered in the affirmative and listed the names of two doctors with whom he has consulted. He indicated that he was being treated for bi-polar illness. (Item 4, question 23)

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 required to be considered 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, these guidelines are applied 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.

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.

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 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 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

Criminal Conduct

The security concern raised under the criminal conduct guideline is set forth in ¶ 30 of the Revised Adjudicative Guidelines:

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.

There are two Criminal Conduct Disqualifying Conditions (CC DC) which apply to Applicant’s case. CC DC ¶ 31(a) (a single serious crime or multiple lesser offenses) and CC DC ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted) apply with respect to Applicant’s arrest and conviction for Attempted Stalking, a class 6 felony.

Since the government produced substantial evidence to raise disqualifying conditions under the criminal conduct concern, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (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. September 22, 2005)).

The following Criminal Conduct Mitigating Conditions (CC MC) potentially apply to Applicant's case:

CC MC ¶ 32(a) (so much time has elapsed 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)

CC MC ¶ 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 involvement)

Neither mitigating condition applies because even though more than eight years have passed since the offense, Applicant does not appear to appreciate the gravity of his conduct. He claims he wrote letters and gave two gifts to the 11-year-old girl to help her feel less sad. He indicates that there was no sexual behavior in the relationship. While there is no evidence that Applicant touched this 11-year-old neighbor inappropriately, his letters indicate his sexual feelings for the girl. In the letters he professed his love for her, implied that she would lose her virginity on Halloween, and that he wanted to make her his bride. He mentioned that the only way he could relieve tension over his love for her was to masturbate. While Applicant's mental health condition was a factor in his conduct, he still minimizes his actions and denies his expressed sexual intentions towards the 11-year-old girl. While the offense was downgraded to a misdemeanor and he was released from probation in September 2007, his lack of awareness about the seriousness of his conduct precludes me from applying either mitigating condition.

Sexual Behavior

The security concern raised under the sexual behavior guideline is set forth in ¶12 of the Revised Adjudicative Guidelines:

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 following disqualifying conditions are relevant to Applicant's case:

Sexual Behavior Disqualifying Condition (SB DC) ¶ 13(a) (sexual behavior of a criminal nature, whether or not the individual has been prosecuted)

SB DC ¶ 13(c) (sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress)

SB DC ¶ 13(d) (sexual behavior of a public nature and/or that reflects lack of discretion or judgment)

Applicant's arrest and conviction for Attempted Stalking raise all three disqualifying conditions. Applicant's sexual infatuation with his 11-year-old neighbor girl resulted in the criminal stalking offense. His conduct made him vulnerable to coercion, exploitation, or duress because of its inappropriate and offensive nature. He was 39-years-old at the time of the offense. His expressed feelings of love for his 11-year-old neighbor and his related conduct reflected a lack of discretion and judgment.

Concerns raised under Sexual Behavior can be mitigated. The following mitigating conditions potentially apply to Applicant's case.

Sexual Behavior Mitigating Condition (SB MC) ¶ 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)

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

None of the mitigating conditions apply for the same reasons stated above in the criminal conduct section. In his response to the SOR, Applicant denied he had sexual feelings towards his 11-year-old neighbor girl. The letters he wrote to her clearly express his sexual desire for her. Although the arrest and conduct occurred more than eight years ago, the offense is one that makes an individual vulnerable to coercion, exploitation, or duress regardless of the passage of time. There is insufficient evidence in the record for me to conclude Applicant's current reliability, trustworthiness, and judgment are sound.

Applicant has not met his burden of proof to mitigate the concerns raised under sexual behavior.

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.

Of the Personal Conduct Disqualifying Conditions (PC DC), ¶ 6(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) applies. Applicant's past conduct which caused him to be arrested and convicted of Attempted Stalking makes him vulnerable to exploitation, manipulation, or duress because the conduct affects his personal, professional and community standing.

The following Personal Conduct Mitigating Conditions (PC MC) potentially apply to Applicant's case:

PC MC ¶ 17(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)

PC MC ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress)

Neither mitigating condition applies. Applicant committed a serious offense in October 2001. The nature of the offense and the underlying conduct continues to cast doubt on Applicant's reliability, trustworthiness, or good judgment. It also continues to make him vulnerable to exploitation, manipulation, or duress.

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 considered that Applicant has not been arrested since October 2001. I considered that the court released him from probation in 2007 and reduced the felony conviction to a misdemeanor. Regardless, a concern remains because of Applicant's minimization of his conduct and his denial that he had any sexual feelings towards his 11-year-old neighbor. Applicant admits that his mental instability provides a reasonable uncertainty as to his ability to keep national security information secret because his illness affects his judgment. Although Applicant's mental health issues were not raised in the SOR, it certainly is a factor to consider under the whole person. The government established a prima facie case to raise concerns under criminal conduct, sexual behavior, and personal conduct. As such, the burden switched to Applicant to mitigate the security concerns raised. He did not mitigate the 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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3 Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	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. Eligibility for access to classified information is denied.

ERIN C. HOGAN
Administrative Judge