



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



In the matter of:)
)
-----, -----) ISCR Case No. 08-09252
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Tom Coale, Esquire, Department Counsel
For Applicant: Liane A. Janovsky, Esquire

September 16, 2009

Decision

WHITE, David M., Administrative Judge:

Applicant was indicted for Indecency - Fondling of a neighbor child and pled guilty to Injury to a Child - Bodily Injury, both felonies. He initially denied any wrongdoing, but has now admitted his guilt to his Sex Offender Treatment Providers. He is still undergoing court-ordered therapy and will remain on supervised probation subject to further deferred sentencing until April 2017. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is revoked and denied.

Applicant submitted a security clearance application on August 14, 2006.¹ On March 30, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines J (Criminal Conduct), D (Sexual Behavior), and E (Personal Conduct).² The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry*

¹Item 4.

²Item 1.

(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 in writing on April 27, 2009, and requested that his case be decided by an administrative judge on the written record without a hearing.³ Department Counsel submitted the Government's written case on May 28, 2009. A complete copy of the file of relevant material (FORM)⁴ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM.

Applicant signed the document acknowledging receipt of his copy of the FORM on July 16, 2009, and returned it to DOHA. On August 14, 2009, through counsel, he submitted Applicant's File of Relevant Materials (AFORM),⁵ which contained no objection to consideration of any evidence submitted by Department Counsel. On August 17, 2009, Department Counsel initialed a memorandum to indicate that he did not object to the admissibility into evidence and consideration of the materials submitted by Applicant. I received the case assignment on August 25, 2009.

Findings of Fact

Applicant is a 44-year-old employee of a defense contractor, where he has worked since 1989, and held a security clearance since 1991. He is married with two children, ages 13 and 11.⁶ In his response to the SOR, he admitted in part and denied in part each allegation. Applicant's admissions, including those contained in his response to interrogatories,⁷ are incorporated in the following findings.

In September 2005, an 11-year-old neighbor girl reported to a school counselor that Applicant had touched her in a way that made her very uncomfortable. In subsequent interviews with Child Protective Services and police personnel, she described an incident several years earlier during which Applicant fondled her vaginal area under her clothes after he invited her and his two children to lie on his bed with him, under a sheet, and watch a movie. She said that she immediately got out of the bed and went home, but did not tell her parents or anyone else at the time. She subsequently told a couple friends, one of whom encouraged her to tell the counselor

³Item 3.

⁴The Government submitted 11 items in support of the SOR allegations.

⁵Applicant's counsel submitted five documents in support of her discussion and arguments.

⁶Item 4 at 1, 5, 19; AFORM at 2.

⁷Item 5.

what had happened. She also said he fondled her on a second occasion, but her description of that event was inconsistent during different interviews.⁸

On October 14, 2005, a magistrate issued an arrest warrant for Applicant on the charge of Indecency with a Child-Sexual Contact. Applicant surrendered to the sheriff's department and was released on \$5,000 bond later the same day. During April 2006, a grand jury indicted him on a second degree felony charge of Indecency - Fondling, alleging that on or about January 1, 2003, he intentionally engaged in sexual contact with the girl with the intent to arouse or gratify his sexual desires.⁹

Applicant reported this charge in response to question 23 on his security clearance application which he signed and certified to be true on August 14, 2006. He listed the date of the offense as "10/2005 (Estimated)." He further stated, "Presently I am fighting this in court with a lawyer," and "I am not guilty of this offense. I am vigorously [sic] fighting this in court. If you need more information, you would have to speak with my lawyer."¹⁰

On April 7, 2007, pursuant to a plea agreement, Applicant pled guilty to the offense of Injury to a Child - Bodily Injury, a third degree felony that did not require him to register as a sex offender. The offense date was recorded as January 1, 2003. Imposition of the standard sentence of two to ten years in the state penitentiary was deferred and suspended for a period of ten years of supervised probation. Applicant was ordered to pay a fine of \$1,000, court costs of \$263, and \$60 per month in probation fees. He was ordered to have no contact with the victim, and no unsupervised contact with any child under age 17, including his own children. He was further ordered to undergo a sex offender evaluation and any programs recommended as a result of the evaluation.¹¹

On January 29, 2008, Applicant was interviewed by an investigator from the Office of Personnel Management (OPM). He told the investigator that he pled guilty because he thought it was the right thing to do for himself and his family. He repeatedly stated that he had done nothing wrong, had not fondled the girl, and was falsely accused but settled for a plea agreement rather than risk having to go to jail and register as a sex offender. He said he was not subject to pressure or coercion because his family and some co-workers and friends knew about the allegations and his arrest. He had not told his boss about the arrest, but had kept his company's security office informed. He expressed his concern that he could lose his security clearance and his job as a result of being falsely accused and accepting a plea agreement. On January 13, 2009, in response to DOHA Interrogatories, Applicant said that the investigator

⁸Items 6 and 7.

⁹Item 6 at 1; Item 3 at 2; Item 8.

¹⁰Item 4 at 15-17.

¹¹Item 3 at 2; Items 9, 10, 11; AFORM Documents 3 and 4.

incorrectly identified the offense to which he pled guilty as a misdemeanor, when in fact it was a third degree felony. Subject to that change, he subscribed under oath that the interview report was accurate.¹²

In his April 27, 2009, response to the SOR, Applicant never directly admitted or denied having committed the offenses for which he did admit that he was arrested, charged, and convicted after pleading guilty. He reasserted that he pled guilty for the best interest of his family, to avoid the stress and financial burden of a trial, to receive a favorable sentence with no jail time, and to eliminate the risk of having to register as a sex offender. In his response to the Guideline E allegation, however, he said, "I deny that I have failed to provide truthful and candid answers during the security clearance process. I deny that I have failed to cooperate with the security clearance process."¹³ Read as a whole, Applicant's SOR response never contradicts his previous denials of fondling or otherwise assaulting the neighbor girl, and asserts that those denials were truthful.

As a result of his court-ordered sex offender evaluation, Applicant entered a sex offender treatment program with a Licensed Sex Offender Treatment Provider in June or July of 2007. This counselor reported that Applicant has shown progression in treatment for more than 25 months. As of August 2009, his "treatment plan is more than approximately 2/3 completed with an ongoing good rating." The counselor further reported, "Due to shame and guilt, [Applicant] initially denied his offense but later retracted this denial and has been continuously remorseful." Applicant "admitted his crime and is being rehabilitated," and "identified his obsessions, cycle of abuse, and thinking errors that led to his misbehaviors [sic]." The counselor did not identify any details of the offense or offenses which Applicant admitted to him. However, based on his evaluation that Applicant "has been a good family man," has held a security clearance "for more than 21 years," and "appears to make his country, family, and his employer uncompromising priorities in his life," the counselor opined that Applicant "projects little or no threat to the defense of the United States," and "should maintain his security clearance at this time."¹⁴

In September 2008, Applicant underwent an evaluation of his treatment progress by a different Licensed Sex Offender Treatment Provider in connection with his attorney's request for the court to permit him unsupervised contact with his own children. After extensive testing, contact, and evaluation, this second Provider concluded that he was receiving an excellent course of treatment and recommended that the court order be modified to permit unsupervised contact with his children. The court accepted this recommendation and modified the order. This Provider reviewed the counselor's statements and conclusions discussed in the preceding paragraph, and expressed his agreement. He offered additional observations, including:

¹²Item 5.

¹³Item 3 at 1-5, 4.

¹⁴AFORM Document 1.

Although [Applicant] demonstrated considerable self-consternation and shame for having committed the act and not admitting culpability to [his counselor] sooner, he told me the truth regarding his act. He took full responsibility for his actions and was demonstrating progress in his recovery program. . . . [Applicant's] lack of boasting [about the nature of his work], his genuine remorse and assumption of full responsibility for his actions indicate he is free of any personality disorder. This factor alone contributes to his ability to work with and maintain secret information. . . . The fact that [Applicant] did not immediately admit his guilt is not clinically significant. Early statements of denial are common when treating offenders. Apparently [counselor] understands and applied these principles; was able to achieve a breakthrough with [Applicant] when less skilled therapists may have given up, and [Applicant's] value as a trusted employee were [sic] in turn enhanced. . . . All of the mitigating circumstances of [Applicant's] initial denial and eventual full admission speak well for his long-time prognosis. Now that all of the details of his case are fully known, there is little likelihood he could be intimidated or otherwise enticed to reveal national secrets. I have conducted a forensic practice for more than thirty-seven [sic] years and, in my opinion, [Applicant] is well on his way to recovery and is worthy of working within a place of trust and responsibility.¹⁵

Neither of Applicant's counselors' letters, nor anything else submitted by Applicant in connection with these proceedings, identify what misconduct he now admits, or to whom except these counselors he has admitted it. There is no evidence that either his supervisors at work or his family members have been told of these admissions, or what their resulting level of trust in his judgment, self-control, and reliability may be.

Applicant submitted no evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his track record with respect to classified information and observation of security procedures. Other than the aforementioned letters from the sex-offender counselors, he submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

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 (DCs) and mitigating conditions (MCs), which are to be used in evaluating an applicant's eligibility for access to classified information.

¹⁵AFORM Document 2.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides: "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

A person applying for access to classified information seeks to enter 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.

Analysis

Guideline D, Sexual Behavior

AG ¶ 12 expresses the security concern under this guideline:

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.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying:

- (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.

AG ¶ 14 provides conditions that could mitigate security concerns:

- (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.

For some unexplained reason, Department Counsel did not address Guideline D whatsoever in the FORM. Applicant's counsel, understandably, did not mention it either in her response to the FORM. Since Directive ¶ E3.1.7 requires that Department Counsel provide Applicant "a copy of all relevant and material information that could be adduced at a hearing," and 30 days in which to respond with "objections, rebuttal, extenuation, mitigation, or explanation, as appropriate," I have determined that this constitutes a withdrawal or abandonment by the Government of the SOR ¶ 2 allegation of Guideline D concerns. The actual SOR allegation does not assert any actual sexual behavior on Applicant's part, as required under the wording of each AG ¶ 13 DC, but merely asserts that he was charged with a sex offense, resulting in his arrest. The reference to SOR ¶ 1.a. incorporates his being charged with a sex offense, but convicted of an offense that does not necessarily involve any sexual behavior.

Even had Guideline D concerns been properly pled and asserted by Department Counsel as supporting security concerns, adjudication under this guideline would have been multiplicitous and redundant with analogous security concerns, DCs, and MCs under Guidelines E and J below. AG ¶ 13(b) concerns are neither alleged nor supported in this record. AG ¶ 13(a)-related security concerns are comprehensively addressed under Guideline J. AG ¶¶ 13(c) and (d) concerns about judgment and vulnerability to coercion, exploitation, or duress are fully addressed under Guideline E. Potentially applicable MCs in AG ¶¶ 14(b) and (c) have analogous provisions under Guidelines J and E, so Applicant is not harmed by adjudication under those guidelines in lieu of this one. AG ¶¶ 14(a) and (d) have no factual basis in this case. Accordingly, I conclude that due process does not require reopening the record for additional evidence or argument concerning Guideline D.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining 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.” AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying (DCs). The three Criminal Conduct DCs raised by the evidence are, “(a) a single serious crime or multiple lesser offenses;” “(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted;” and “(d) the individual is currently on parole or probation.”

Applicant was arrested and indicted for sexually fondling a neighbor girl who was a friend of his children and eight to ten years old at the time. He pled guilty to a lesser offense of Injury to a Child - Bodily Injury. This was still a felony offense, with a standard sentencing range of two to ten years in prison, which is deferred while he serves ten years of supervised probation. He eventually admitted his full culpability to his Sex Offender Treatment Program counselors, although he has not revealed those details in connection with this adjudication. These facts fully support security concerns under the DCs set forth in AG ¶ 31(a) (based on his felony conviction); ¶ 31(c) (based on his guilty plea to a third degree felony, his child-victim's allegation of, and subsequent indictment and prosecution for, a second degree felony); and ¶ 31(d) (based on his current supervised probation that will continue until April 2017).

AG ¶ 32 provides conditions that could mitigate security concerns (MCs). These are:

(a) 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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(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.

Applicant did not assert that the MCs set forth in AG ¶¶ 32(a), (b), and (c) apply in his case. I have independently considered the potential applicability of each of them, and conclude that they supply no mitigation on this record. Neither the time since Applicant's crime nor the circumstances surrounding it make it unlikely to recur or alleviate resulting concerns about his reliability, trustworthiness and judgment. He was under no pressure or coercion to abuse this child. He did assert on his August 2006 security clearance application and during his OPM interview (conducted in January 2008 and verified to be true under oath in January 2009), that he was falsely accused and had done nothing wrong. However, these statements are uncorroborated, and are contradicted by his guilty plea and conviction of a felonious touching of the child who he was indicted for indecently fondling. His denials are further contradicted by his full admission of his criminal conduct to his two counselors.

Applicant asserts that the evidence supports mitigation under AG ¶ 32(d). After more than 25 months, Applicant has only completed about 2/3 of his court-ordered sex offender treatment plan, however. His counselors place great significance on his eventual acknowledgment and full disclosure of his criminal sexual conduct as demonstrating his remorse and rehabilitation. However, Applicant made no showing that he has acknowledged or disclosed that information to his family or professional associates, and consistently evaded every opportunity to admit it in connection with the investigation and adjudication of his security clearance eligibility. Finally, his ongoing supervised probation, with conditional suspension of substantial imprisonment until 2017, weakens the probative weight of the absence of additional criminal conduct in establishing rehabilitation. He paid his fines, but made no showing of restitution or other expression of remorse to his victim or his family. Similarly, he provided no evidence of a good employment record or constructive community involvement. The mitigation established by rehabilitation evidence to date is minimal.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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 under this guideline. Department Counsel mentioned “whole-person” concerns under AG ¶ 16(d). The “whole-person” analysis will be addressed below. The specific Guideline E concerns raised by the SOR allegation include:

(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;

and the judgment, reliability, and trustworthiness issues the Appeal Board has found to be inherent under AG ¶ 15.

Applicant’s crime against a neighbor child and concealment of his true culpability from others whose knowledge of it would adversely affect his personal, professional, and community standing, create ongoing vulnerability to exploitation, manipulation, and duress. He physically abused a young friend of his own children. This girl was entrusted to his care and supervision by her parents, who were neighbors and family friends. This breach of trust and confidence raises serious concerns about Applicant’s judgment, reliability and trustworthiness.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns:

(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.

Applicant asserted that his acknowledgment of his criminal conduct and participation in weekly counseling provide mitigation of concerns over his trustworthiness, reliability, and inappropriate behavior under MC 17(d) above. He claims further mitigation under MC 17(e) based on his counseling and supervision by his probation officer and sex offender treatment program, his acknowledgment of his past offense, and the absence of subsequent misconduct. Applicant's position has merit, in that successful completion of these remedial measures will reduce the personal conduct security concerns discussed above. The mitigating effect of his commendable progress to date is insufficient to completely alleviate those concerns, and he failed to demonstrate full acknowledgment and disclosure of his offense to all concerned parties.

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 relevant 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 relevant facts and circumstances surrounding this case. Applicant is a mature individual who is responsible for his entirely voluntary choices and conduct that underlie security concerns expressed in the SOR. He engaged in felonious abuse of a young child who trusted him as a family friend. He was convicted of Injury to a Child - Bodily Injury, and is serving ten years of supervised probation that will continue until 2017. He has successfully completed part of his court-ordered sex offender treatment program. His motivation for the conduct was his personal gratification. He did not disclose this activity to significant people in his life or on his most recent security clearance application, and accordingly remains subject to duress. The record contains insufficient other evidence about his character or responsibility to mitigate these concerns, or tending to make their continuation less likely.

Overall, the record evidence creates substantial doubt as to Applicant's present eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from criminal conduct and personal conduct considerations.

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:	WITHDRAWN
Subparagraph 2.a:	Withdrawn
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 the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is revoked and denied.

DAVID M. WHITE
Administrative Judge