



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



In the matter of:)	
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SSN: -----)	ISCR Case No. 08-10576
)	
Applicant for Security Clearance)	

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: Cate O’Callahan, Esquire¹

September 18, 2009

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and transcript, Applicant’s request for a security clearance is denied.

On May 15, 2008, Applicant submitted a Questionnaire for Sensitive Positions (SF 86) to renew a security clearance required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding² that it is clearly consistent with the national interest to continue Applicant’s access to classified information. On February 11, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns

¹ Counsel for Applicant withdrew from this case after the hearing.

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

addressed in the revised Adjudicative Guidelines (AG)³ under Guideline J (criminal conduct) and Guideline D (sexual behavior).

On March 20, 2009, Applicant responded to the SOR and requested a hearing. The case was assigned to me on May 7, 2009. I convened a hearing on June 10, 2009, at which the parties appeared as scheduled. The government presented seven exhibits (Gx. 1 - 7), which were admitted without objection. Applicant testified, proffered four exhibits (Ax. A - D), and presented five witnesses. DOHA received the transcript of hearing (Tr.) on July 1, 2009.

Findings of Fact

Under Guideline J, the government alleged Applicant was arrested on August 2, 2005, and charged with Solicitation of a Child by Computer to Commit an Unlawful Sex Act, a felony; that on August 7, 2006, he pleaded guilty to Attempted Solicitation of a Child by Computer to Commit an Unlawful Sex Act, a misdemeanor, for which he was sentenced to 90 days in jail (suspended), placed on 36 months of supervised probation, was assessed a fine and court costs, and was ordered to complete counseling and treatment, and to have no contact with the victim or the victim's family. (SOR ¶ 1.a) The government also alleged that Applicant's probation was to run through August 6, 2009. (SOR ¶ 1.b)

Under Guideline J, the government also alleged that Applicant pleaded *nolo contendere* to a misdemeanor loitering and prowling charge in 1992, when he was 18 years old. (SOR ¶ 1.c) However, at the hearing, Department Counsel indicated there would be no information presented about this allegation. (Tr. 13) Accordingly, that allegation is resolved for the Applicant.

Under Guideline D, the government alleged the same information as contained in SOR ¶ 1.a. Applicant admitted both SOR allegations under Guideline J, but did not directly respond to the allegation under Guideline D. After reviewing the pleadings, the transcript, and exhibits, I have made the following findings of relevant fact.

Applicant is 36 years old. He served in the U.S. Army Special Forces from January 1993 until he received a General Discharge under Honorable Conditions in September 2007. He was hired by his current employer in May 2008. (Gx. 1) Several witnesses from his company testified in glowing terms about Applicant's performance and reliability. The company co-owner stated that he has been "a model employee" who has exhibited "exemplary judgment" during his tenure there. (Tr. 54) While on active duty, Applicant distinguished himself in combat during the early days of Operation Iraqi Freedom in 2003. (Ax. D)

Applicant has been married twice. He and his current wife were married in June 2002 and are raising her 10-year-old child from a previous marriage. Applicant's first

³ The revised Adjudicative Guidelines were approved by the President on December 29, 2005, and were implemented by the Department of Defense on September 1, 2006.

marriage began in January 1997 and ended through divorce in January 2001. Applicant and his first wife had one child (now age 9) together. (Gx. 1; Tr. 98 - 100) During the later stages of his first marriage, Applicant suspected his ex-wife was having an affair. To confirm his suspicions, Applicant began contacting her using his internet service provider's instant messaging (IM) program, a near real-time on-line "chatroom," to pose as someone else, ostensibly so he might trick her into an admission of adulterous conduct. While he was unsuccessful in that effort, Applicant became a habitual user of IM to chat with all manner of people on the internet. (Gx. 5)

In April 2005, Applicant initiated an on-line IM conversation with an 11-year-old girl. He estimates that he and the girl chatted had at least 30 IM conversations between April and late July 2005. (Answer to SOR; Tr. 115 - 118) At least three times (on May 12, May 23, and June 27, 2005), Applicant asked the girl if she wanted him to perform oral sex on her or if she wanted to do the same for him. (Gx. 3) He also attempted to arrange a meeting with the girl at least three times. (Gx. 3; Tr. 116 - 117) At some point, the girl's mother became aware of the sexual nature of Applicant's conversation and called the police. In July 2005, while he was unknowingly communicating with a parent or a law enforcement officer instead of the child, Applicant arranged what he thought would be a meeting with the girl, but no meeting actually happened. On August 2, 2005, police executed a search warrant at Applicant's house and he was arrested. He was initially charged with Solicitation of a Child by Computer to Commit an Unlawful Sex Act, a felony. (Gx. 1; Gx. 2; Gx. 5)

A year later, Applicant negotiated a plea bargain through which he pleaded guilty to the lesser included misdemeanor offense of attempting the same offense. He was given a suspended 90-day jail sentence and placed on supervised probation for 36 months. (Answer to SOR; Gx. 1) He completed his probation on August 6, 2009. (Tr. 123; Gx. 4) He was also ordered to complete counseling and therapy, which he did after attending group sessions between November 2006 and August 2008. (Ax. B; Ax. C; Tr. 106 - 107) As a result of his conviction, Applicant was administratively discharged from the Army despite the fact an earlier administrative separation board around the time of his arrest recommended he be retained in the service. (Gx. 5; Tr. 95, 102 - 105)

Applicant's witnesses testified they were aware of his arrest and conviction. He spoke with three of them about details of his arrest, but it appears he told them that he thought the person on the other end of his IM chats was an adult (Tr. 44 - 45, 56 - 57, 67 - 68) He also told a government investigator during his background investigation that he thought he was conversing with an adult. He has also suggested that he never intended to meet anyone and that he was interested in "role-playing entertainment." (Tr. 95 - 96, 125; Gx. 5) However, a transcript of his IM chats with the victim shows that he knew and was attracted by the fact she was a minor. For example, on April 5, 2005, Applicant asked how old she was and was told she was "11." That day, the girl's mother was also present with the girl and the conversation was benign. On May 12, 2005, he again confirmed she was 11 years old and, after being told her mother was not home, asked the girl if she liked oral sex. The session that day ended when the girl indicated her father was home. On June 27, 2005, after being told the girl's mother was not home, he again suggested he wanted to perform oral sex on her. (Gx. 3) Finally, Applicant knew at the time what he was doing was illegal and inappropriate. On June 29, 2005,

Applicant said, “[M]y wife would not like me talking to a hot little [sic] 11y/o...you can’t tell ANYONE!” (Gx. 3; emphasis in original)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁴ for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁵ and consideration of the pertinent criteria and adjudication policies in the revised Adjudicative Guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole person” concept, those factors are:

(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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under AG ¶ 12 (Guideline D - Sexual Behavior) and AG ¶ 30 (Guideline J - Criminal Conduct).

The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government’s case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Thus, the government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ Directive. 6.3.

⁶ See *Egan*, 484 U.S. at 528, 531.

national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the government.⁷

Analysis

Criminal Conduct

The security concern raised by the allegation about possible criminal conduct by the Applicant is that such conduct “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 ¶ 30.

The government’s information is sufficient to show, as alleged in SOR ¶ 1.a, that Applicant was charged with a felony sexual crime and was convicted of a lesser included misdemeanor offense of attempting the same sexual crime. He was given a suspended jail sentence and was placed on supervised probation for three years. The record requires application of the disqualifying conditions listed at AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*).

At the time of the hearing, Applicant was still on probation as alleged in SOR ¶ 1.b. This would require application of the disqualifying condition at AG ¶ 31(d) (*individual is currently on parole or probation*). However, his probation was scheduled to end on August 6, 2009, while this decision was pending. Available information tends to show that he has completed all probation requirements, and it is likely that his probation ended on time. I resolve SOR ¶ 1.b for the Applicant.

In response, Applicant argued that his conduct was isolated and is now more than four years removed. He also points to the successful completion of his probation and counseling requirements, and to the excellent reputation he enjoys at work despite apparent knowledge by his colleagues of his past adverse conduct. Such information requires consideration of whether to apply the mitigating conditions at AG ¶ 32(a) (*so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment;*) and AG ¶ 32(d) (*there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*).

I conclude that Applicant does not benefit from these adjudicative factors. Between August 2005 and August 2009, Applicant’s conduct was regulated, first by his pending criminal prosecution, then by his probationary status, 21 months of court-ordered counseling, and by his 90-day jail sentence, which could have been reinstated if he broke the law before his probation ended. He has not established a sufficient record

⁷ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

of acceptable conduct purely of his own volition that would support a finding that he will not repeat his criminal conduct in the future. On this score, I have also considered the statement by Applicant's counselor that he is "a low level risk for recidivism." (Ax. C) Aside from the fact that Applicant went through 21 months of counseling and the counselor's conclusion itself, there is insufficient information about the probability for recidivism. This statement, taken in context of the record as a whole, is not persuasive.

More important, however, is Applicant's continued minimization of his conduct through his statements to a government investigator and to the witnesses who testified for him at the hearing. Questions persist about his rehabilitation and, going forward, his judgment and candor. The information contained in Gx. 3 is directly at odds with Applicant's statements and his testimony about his intent to have unlawful sexual contact with a minor. In light of all of the information bearing on whether Applicant's past criminal conduct does not cast doubt on his "reliability, trustworthiness, or good judgement," I do not conclude that either AG ¶ 32(a) or AG ¶ 32(d) apply. On balance, I conclude Applicant has not met his burden of persuasion and has failed to mitigate the facts established by the government's information.

Sexual Behavior

Another security concern raised by Applicant's arrest and conviction for a 2005 sexual offense is, as stated in AG ¶ 12, that:

[s]exual 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 the Guideline may be raised solely on the basis of the sexual orientation of the individual.

Over a three-month period in 2005, Applicant knowingly and repeatedly tried, through internet instant messaging, to engage an 11-year-old girl in inappropriate sexual conversation, telling her he wanted to have oral sex with her and suggesting she could do the same for him. He tried several times to arrange a meeting with her to actually engage in those sex acts. He was arrested and charged with a felony sexual criminal offense, and later pleaded guilty to a lesser included misdemeanor charge. Part of his sentence required him to participate in extensive counseling for sex offenders. The foregoing requires application of the disqualifying conditions at AG ¶ 13(a) (*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*) and AG ¶ 13(d) (*sexual behavior of a public nature and/or that which reflects lack of discretion or judgment*). As to AG ¶ 13(d), Applicant was over 30 years old and a long-serving member of the Army. He, too, is a parent with a young child. His conduct in this regard reflected significant flaws in his discretion and judgment. Those flaws have been preserved by his current attempts to minimize the true scope of his conduct.

Based on the same information Applicant presented to mitigate the criminal conduct concerns discussed above, I have weighed the applicability of the mitigating

conditions listed at AG ¶ 14(b) (*the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*), and AG ¶ 14(c) (*the behavior no longer serves as a basis for coercion, exploitation, or duress*). For the same reasons AG ¶ 32(a) and AG ¶ 32(d) do not apply, AG ¶ 14(b) does not apply. Applicant has attempted to minimize his conduct and he has not established that he will continue to eschew such behavior in the future without fear of the potential consequences of probation and a suspended jail sentence. I also decline to apply AG ¶ 14(c). While it may be that his arrest was the subject of a local news article, it also appears he knowingly misled three of his witnesses, in part, to help his response to the government's case, and, in part, because he did not want the true scope and nature of his conduct to be known at work. All of the information bearing on this issue of whether to apply any of the Guideline D mitigating conditions shows that the Applicant has not met his burden of persuasion in response to the government's case.

Whole Person Concept

I have evaluated the facts presented and applied the appropriate adjudicative factors under Guidelines D and J. I have also reviewed the record before me in the context of the whole person factors listed in AG ¶ 2(a). Applicant is 36 years old and served his country for 14 years in the most honorable and arduous way. Aside from the adverse information alleged in the SOR, he appears to have conducted himself professionally and responsibly in both his military and his civilian capacities. His colleagues and his supervisors at work and from his Army career regard Applicant as an excellent, courageous soldier, and as a reliable, trustworthy, and valuable employee. However, none of the positive recommendations presented herein appears to have been fully informed about his conduct. It may be that even with full disclosure of his conduct, those same witnesses and references would not change anything they have said about Applicant. But because he has not been forthcoming about his conduct, reasonable doubts remain about whether his past adverse conduct and poor judgment will recur. Because protection of the national interest is paramount in these determinations, such doubts must be resolved in favor of the government.⁸

⁸ See footnote 7 *supra*.

Formal Findings

Formal findings 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

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Paragraph 2, Guideline D: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is denied.

MATTHEW E. MALONE
Administrative Judge