



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 08-10875

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro Se*

November 30, 2009

Decision

HOWE, Philip S., Administrative Judge:

On October 4, 2005, Applicant submitted his Security Clearance Application (SF 86) in electronic form (e-QIP). On March 24, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J (Criminal 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.

Applicant acknowledged receipt of the SOR on April 6, 2009. He answered the SOR in writing on April 9, 2009, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on June 1, 2009, and I received the case assignment on June 6, 2009. DOHA issued a Notice of Hearing on June 26, 2009, and I convened the hearing as scheduled on July 14, 2009. The Government

offered Exhibits 1 through 5, which were received without objection. Applicant testified and submitted Exhibits A through O, without objection. DOHA received the transcript of the hearing (Tr.) on July 23, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, dated April 9, 2009, Applicant admitted the factual allegations in ¶ 1.a of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 32 years old. He has one child with his wife. He has two children with his former girlfriend, with whom he lived from 1999 to 2005. He works for a defense contractor as a supply technician. His employee evaluations rate him as exceeding expectations in almost all categories. Applicant submitted two service awards and one certificate of appreciation to demonstrate his work ethic. He also tendered two character statements describing Applicant as an asset to his employer, being a dedicated and hard-working employee. His security officer knows of the 2006 criminal situation. (Tr. 34, 38, 42, 43; Exhibits 1, L to O)

The state police received a report that Applicant had engaged in sexual activity with a minor female. On March 3, 2006, the state police obtained a search warrant for Applicant's home seeking 19 categories of evidence pertaining to the alleged crimes. The search warrant was supported by an affidavit from the police officer that he received information from child protective services agent about the alleged crimes. Applicant's home was searched and evidence was found. His computer was seized for analysis. Applicant was indicted on May 18, 2006, for third degree sodomy on or about January 7-8, 2006. He was also indicted at the same time for third degree rape allegedly occurring on or about January 12 to 16, 2006. Both charges are felonies under the state law of Applicant's residence. In both incidents Applicant was 28 years old, and his sexual partner was a 14-year-old female, the sister of his girlfriend who was the mother of his two children. Bail was set at \$10,000. Applicant turned himself into the police. (Tr. 67; Exhibits 2, 3, D)

On June 12, 2008, Applicant entered an agreement with the state prosecutor, agreeing to a procedure under state law known as a pretrial diversion of a class D felony. The felony charges were reduced to misdemeanors and listed as "sexual misconduct (acts)." Applicant had the assistance and advice of an attorney before he entered this agreement. Applicant entered an "Alford" plea, not admitting guilt but acknowledging that the evidence available to the state strongly indicated Applicant's guilt, and that it was in his best interest to enter the agreement. Applicant was placed on 24 months of unsupervised diversion, subject to the conditions further imposed by the Probation and Parole Division, and ordered not to commit any other offenses. Applicant shall remain free of drug and alcohol consumption during the 24 months subject to random testing. Court costs of \$150 were also assessed. Applicant will not complete his 24 months of diversion until June 2010. At the successful conclusion of the

diversion, Applicant will have the charges “designated as Dismissed-Diverted” under state law. (Tr. 47-53; Exhibits 4 and K)

Applicant admitted that the information he gave the government investigator about these events on October 3, 2006, was accurate. He stated in the interrogatory answer that “The case is over and I have forwarded the dismissal paperwork to the security office.” Applicant further agreed in the interrogatory answer that his statement might be admitted into evidence at a hearing to determine security clearance eligibility. (Tr. 73; Exhibit 5)

Applicant repeatedly stated during the hearing that the case “would be in a pending status until a certain date and then would go into dismissal.” He denied committing the specific sexual acts alleged in the affidavit and the indictment. His reason for accepting the diversion was to keep joint custody of his two children. Applicant believes the allegations arose because he tried to obtain a protective order against his girlfriend in February 2006 after his children were exposed to a fight among his girlfriend’s family members. The state court judge denied Applicant’s petition for a protective order on February 28, 2006. (Tr. 35, 45, 48, 49, 53-59; Exhibits A, B)

Applicant’s explanations of why he entered the diversion agreement while continuing to deny his sexual acts with a 14-year-old female are not credible or persuasive. His rote repetition of his reason for the agreement diminishes his credibility further.

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 useful 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. 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, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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

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 five conditions that could raise a security concern and may be disqualifying. Three conditions may apply to Applicant:

- (a) a single serious crime or multiple lesser offenses;
- (b) discharge or dismissal from the Armed Forces under dishonorable conditions ;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
- (d) individual is currently on parole or probation; and

(e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant was indicted on two felony charges, one of sodomy and the other of rape. His sexual actions were with a 14-year-old partner, the sister of his girlfriend. He pled guilty under an agreement with the state prosecutor, and received 24 months diversion under state law. If Applicant commits no other offenses during the diversion term ending June 2010, the charges will be dismissed under the diversion procedure. Applicant denies he had sexual relations with the 14-year-old female. After accepting the diversion agreement and making an “Alford” plea, he cannot now claim he did not commit the acts to which he pled guilty, merely for the purpose of obtaining a security clearance. He is collaterally estopped from doing so. AG ¶ 31 (a), (c), and (d) apply under these facts.

AG ¶ 32 provides four conditions that could mitigate security concerns. One condition may apply to Applicant to some extent:

(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 has not committed any other offenses since March 2006. His employment record is good. However, his statements and attitude at the hearing, denying that he committed the alleged acts, demonstrate his lack of remorse or contrition for his actions. His explanations for his actions are not credible. AG ¶ 32 (d) has limited applicability.

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.

AG ¶ 2(c) requires each case must be judged on its own merits. 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. The evidence overwhelmingly proves that Applicant engaged in sexual acts with a 14-year-old female. These were serious criminal actions. Applicant accepted a diversion plea agreement with the state after consulting with legal counsel of his choosing. His actions, sexual and legal, were voluntary. He was 28-years old at the time he committed the criminal acts. He has not shown remorse or sufficient rehabilitation. The potential for pressure, coercion, exploitation, or duress exists because of the nature of these offenses, even though his security manager and family know of the allegations.

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 did not mitigate the security concerns arising from his Guideline J, Criminal Conduct. I conclude the "whole-person" concept against Applicant.

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

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.

PHILIP S. HOWE
Administrative Judge