



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



In the matter of:)
)
) ISCR Case No. 08-11147
)
)
Applicant for Security Clearance)

Appearances

For Government: Gregg A. Cervi, Esquire, Department Counsel

For Applicant: *Pro se*

September 11, 2009

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the case file, pleadings, and exhibits, I conclude that Applicant has not mitigated the security concerns raised under the guidelines for sexual behavior, criminal conduct and personal conduct. Accordingly, his request for a security clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP), signed on July 11, 2008, to request a security clearance required as part of his employment with a defense contractor (Item 5). 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 finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

On April 9, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) (Item 1) that specified the basis for its decision: security concerns addressed in the Directive under Guidelines D (Sexual Behavior), J (Criminal Conduct), and E (Personal Conduct) of the Revised Adjudicative Guidelines (AG).

Applicant received the SOR on April 16, 2009. He signed a notarized Answer on April 29, 2009, and requested a decision without a hearing. In his Answer, Applicant admitted to all allegations in the SOR. On June 10, 2009, DOHA Department Counsel submitted a file of relevant materials (FORM) in support of the government's preliminary decision to deny Applicant's request to be granted a security clearance. The FORM contained ten documents, identified as Items 1 through 10. The FORM and attached Items were forwarded to Applicant on June 12, 2009, and he received the package on June 23, 2009. Applicant was given 30 days from the date he received the FORM to respond. He did not provide a response by July 23, 2009. The case was assigned to me on September 3, 2009, for an administrative decision based on the record.

Findings of Fact

Applicant's admissions in response to the SOR are admitted as fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the FORM, I make the following additional findings of fact.

Applicant, 24 years old, is a single high school graduate with no children. He has worked for the same defense contractor since 2004. As of the date he completed his security clearance application, he held the position of security officer.

Applicant had been friends with another boy for about eight years. On June 25, 2005, he dressed in black pants, black shoes, and a black turtleneck sweater, and climbed onto the roof of his friend's house near the bedroom window of his friend's 14-year-old sister. She heard movement on the roof and called her mother, who was downstairs. When she arrived, the mother saw hands on the gutter above her daughter's bedroom window, as well as part of a pants leg, which was black. Both she and her daughter saw that the person on the roof was holding a mirror, which the mother said "was being moved as if to get a view of [victim's] room." The mother called the police to report a burglary (Items 9, 10).

When the police arrived, Applicant told them that he was on the roof to play a trick on his friend by writing a "scary" message on his bedroom window. He was not carrying writing instruments. Applicant said that he was going to write it in the dirt on the window. He also told police that his friend might be away from home visiting someone. Applicant said he was looking into the sister's room only to check if she was close enough to catch him on the roof. The police report noted, "When asked if he was looking in [victim's] room for purposes of his own sexual gratification, [Applicant] looked at the ground, paused for a short time and then stated, "It's nothing like that." Applicant was handcuffed, taken in to custody in a patrol unit, and at the police station, he was

fingerprinted, photographed, and charged with Unlawful Sexual Contact, a misdemeanor (Items 7, 9, 10).

Applicant pled guilty to the charge and received a deferred sentence. He was also required to register as a sex offender, serve two years unsupervised probation, pay a fine, and complete a sex offense treatment program. Applicant paid the fine and completed treatment. According to the investigator's report of investigation, the charge was dismissed in November 2007. Applicant is required to register each year at the police department. His most recent report date was July 5, 2009. He notes that his parents and girlfriend are aware of the arrest. The file is silent as to whether other family members, coworkers, or Applicant's supervisor know of the offense (Items 6, 7, 8).

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).² Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the "whole person" concept. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. 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 Guidelines D, J, and E.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest³ for an applicant to either receive or continue to have access to classified information. 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.⁴ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national

² Directive. 6.3.

³ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁴ See *Egan*, 484 U.S. at 528, 531.

interests as his or his own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the government.⁵

Analysis

Guideline D, Sexual Conduct

AG ¶ 12 expresses the security concern under Guideline D:

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.

Under Guideline D, the following disqualifying conditions are relevant: 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 reflects lack of discretion or judgment*). Applicant was arrested for and pled guilty to a sexual crime. As a result, he is listed on his state’s registry of sex offenders and is required to update his registration annually. His conduct demonstrates not only a lack of discretion, but also a willingness to commit an illegal act to satisfy his own desires. Both disqualifying conditions apply.

Two mitigating conditions are relevant: (AG ¶ 14(a) (*the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature*) and 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*)). Applicant’s behavior occurred about 10 days before his 20th birthday. Although he should have been mature enough at that age to avoid engaging in such conduct, he may have been immature for his age, and some partial mitigation is available. As to AG ¶ 14(b), the offense occurred four years ago, and there is no evidence of similar conduct since that time. However, the file contains no indication that Applicant has admitted the offense. It appears that he continues to contend that he was playing a prank on his friend, and not trying to see into the sister’s bedroom. His failure to accept responsibility for his actions indicates a lack of rehabilitation, which raises questions as to future offenses and casts doubt on his current trustworthiness. AG ¶ 14(b) cannot be applied. On the whole, the favorable mitigation is insufficient to outweigh the disqualifying conditions. I find against Applicant on Guideline D.

⁵ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

Guideline J, Criminal Conduct

The security concern pertaining to criminal conduct is that

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 ¶ 30).

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*) apply, based on Applicant's arrest and guilty plea to a misdemeanor sexual offense.

Three mitigating conditions under Guideline J have potential application: 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 and 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*) and AG ¶ 32(c) (*evidence that the person did not commit the offense*).

The mitigating condition AG ¶ 32(a) is similar to AG ¶ 14(b) under the Sexual Behavior guideline, and the analysis is the same as discussed previously: although four years have passed since the offense, the fact that Applicant continues to contend that he was playing a prank on his friend, and was not involved in sexual misconduct, undermines his current trustworthiness. AG ¶ 32(a) cannot be applied. Along with Applicant's lack of admission and remorse for the effect of his actions on his victim, the file contains no evidence of other rehabilitation, such as community involvement, or character references from his employer, co-workers or friends. AG ¶32(d) is not available to mitigate Applicant's conduct. Finally, AG ¶ 32(c) does not apply. The file contains strong evidence that Applicant committed the offense. Applicant pled guilty to it, despite his continuing contention that he did not engage in inappropriate viewing of a minor in her bedroom. His excuse that he intended to write on his friend's window is undermined by his lack of writing instruments, his apparent knowledge that his friend was not home to see the writing, as well as his presence near the sister's bedroom, and not the friend's bedroom. I find against Applicant on Guideline J.

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.

SOR ¶ 3.a. under Guideline E cross-references the 2005 sexual offense cited under Guideline D, Sexual Behavior. Guideline E's focus on conduct that indicates questionable judgment or unwillingness to comply with rules and regulations is relevant to Applicant's behavior. His decision to view a minor female without her knowledge or permission, and to take planned steps to accomplish that goal—wearing dark clothes, carrying a mirror, climbing to a location near her bedroom—all show an intent to violate his friend's trust, and to break the law, and constitute behavior that is disqualifying under Guideline E.

The relevant mitigating condition, AG ¶ 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*), cannot be applied. Applicant committed a criminal offense, which cannot be considered minor misconduct. He also undermined an eight-year relationship with his friend and his friend's family in order to satisfy his own desires. His lack of remorse reflects poorly on his current trustworthiness. I find against Applicant on Guideline E.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. I have evaluated the facts presented and have applied the appropriate adjudicative factors under the cited guidelines. I have also reviewed the record before me in the context of the whole-person factors listed in 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 that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. Under each guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant was almost 20 years old when he deliberately entered the premises of his good friend and climbed to the roof in order to view his friend's minor sister in her

bedroom. His act is not recent, and he may have been immature for his age. But Applicant's continued contention that he was simply playing a prank when all indications are otherwise, his willingness to break the law, and to violate the trust of his long-time friend and that friend's family, all raise questions as to his trustworthiness and good judgment.

For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guidelines. A fair and commonsense assessment of the available information bearing on Applicant's suitability for a security clearance shows he has not satisfied the doubts raised by criminal sexual conduct. Such doubts must be resolved in favor of the government.

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 as follows:

Paragraph 1, Guideline D:	AGAINST Applicant
Subparagraph 1.a.	Against Applicant
Paragraph 2, Guideline J:	AGAINST Applicant
Subparagraphs 2.a. and 2.b.	Against Applicant
Paragraph 3, Guideline E:	AGAINST Applicant
Subparagraph 3.a	Against Applicant

Conclusion

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

RITA C. O'BRIEN
Administrative Judge