



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



In the matter of:)
)
) ISCR Case No. 09-01932
SSN:)
)
Applicant for Security Clearance)

Appearances

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

March 19, 2010

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated Criminal Conduct, Sexual Behavior, and Personal Conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On August 27, 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). The action was taken under Executive Order (EO) 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 (DoD) for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on October 2, 2009, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel

submitted the government's written case on December 7, 2009. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on December 14, 2009. As of February 18, 2010, he had not responded. The case was assigned to me on February 19, 2010.

Findings of Fact

Applicant is a 41-year-old employee of a defense contractor. He is seeking to retain a security clearance. He served on active duty in the United States Navy from 1986 until he retired with an honorable discharge as a second class petty officer in 2006. He attended college for a period, but it is unclear if he obtained a degree. He reported on a 2005 security clearance application that he was married since 1989. It is unclear if he is still married, but he appears to be at least separated. He reported four children, ages 20, 18, 9, and 8.¹

Applicant was drinking at a party at a friend's home in June 2008. He was drunk and went to a bedroom where a 15-year-old girl had fallen asleep after drinking alcohol. He performed inappropriate sexual acts on her while she was drunk or passed out.²

Applicant was arrested the next day and charged with the felony offenses of rape by foreign object – unconscious victim, and two counts of lewd act upon a child 14 or 15 years of age. In August 2008, he pled guilty to a lesser included offense of the first charge. He admitted to the court that he “unlawfully attempted to penetrate the sexual organ of another with [his] fingers for the purpose of sexual gratification.” In November 2008, he was sentenced to 365 days in jail with credit for 7 days, supervised probation for three years expiring in November 2011, attend counseling, pay restitution and a fine, and register as a sex offender. He is a registered sex offender and remains on probation.³

In September 2008, Applicant told a background investigator that on the night in question, he had between eight to ten drinks, a combination of beer, mixed drinks, and shots of tequila. He stated that he rarely drinks to intoxication and did not believe his drinking affected his judgment or reliability. He stated that he had reduced his drinking, and he only had alcohol on one occasion since his arrest, when he drank two beers at dinner with his girlfriend. He stated that his arrest is common knowledge and he is not susceptible to blackmail or coercion. Applicant's security officer is aware of his criminal record.⁴

¹ Items 4, 5.

² Items 3, 5-10.

³ *Id.*

⁴ Items 5, 10.

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 to be used 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, administrative judges apply the guidelines 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, 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." The applicant has the ultimate burden of persuasion to obtain 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 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 EO 10865 provides that adverse 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

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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. The following are potentially applicable:

- (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) individual is currently on parole or probation.

Applicant committed a serious crime in June 2008. He remains on probation until November 2011. All of the above disqualifying conditions have been established.

SOR ¶ 1.b alleges that Applicant is a registered sex offender. That is true, but it does not state any criminal conduct that is not already alleged in SOR ¶ 1.a. SOR ¶ 1.b is concluded for Applicant.

Four Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

- (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's criminal conduct was in June 2008, and he will be on probation until November 2011. I find under the circumstances that the conduct was recent. There was nothing so "unusual" about the circumstances leading to the crime that I can find that it is unlikely to recur. It adversely reflects on Applicant's current reliability, trustworthiness, and good judgment. AG ¶ 32(a) is not applicable. There is insufficient evidence to warrant the application of any other Criminal Conduct mitigating conditions.

Guideline D, Sexual Behavior

The security concern relating to the guideline for Sexual Behavior is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which can 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. The following disqualifying conditions are potentially applicable:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (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.

Applicant's sexual offense against a 15-year-old girl establishes all the above disqualifying conditions.

Conditions that could mitigate Sexual Behavior security concerns are provided under AG ¶ 14. The following are potentially applicable:

- (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
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress.

AG ¶ 14(b) is not applicable for the same rationale discussed above. Applicant stated that his arrest is common knowledge. That has lessened, but not eliminated, his vulnerability to coercion, exploitation, and duress. AG ¶ 14(c) is partially applicable.

Applicant's actions were so egregious that Sexual Behavior concerns remain despite the presence of some mitigation.

Guideline E, 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant's crimes led to a conviction and registration as a sex offender. That conduct created a vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶ 17(c) is not applicable for the same rationale discussed under the Criminal Conduct analysis. Applicant received some counselling as a requirement of his probation. Details were not provided. I cannot make an affirmative finding from the limited information in the record that the behavior is unlikely to recur. AG ¶ 17(d) is partially applicable. Applicant's arrest is common knowledge, which has lessened his vulnerability to coercion, exploitation, and duress. AG ¶ 14(e) is partially applicable.

In sum, I conclude that Personal Conduct concerns are still present despite the presence of some mitigation.

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 have incorporated my comments under Guidelines J, D, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I considered Applicant's honorable military service. However, he was a mature man when he sexually abused a 15-year-old girl in June 2008. He is a registered sex offender and remains on probation until November 2011. I have significant concerns about his judgment, reliability, and trustworthiness.

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 has not mitigated Criminal Conduct, Sexual Behavior, and Personal Conduct security 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
Subparagraph 1.b:	For 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 the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge