



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



In the matter of:)	
)	
)	ISCR Case No. 10-02980
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: Albert B. Shahid, Esquire

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Statement of the Case

On September 24, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to upgrade a security clearance for access to classified information required for his employment with a defense contractor. After an investigation conducted by the Office of Personnel Management (OPM), the Defense Office of Hearings and Appeals (DOHA) issued an Interrogatory to Applicant to clarify or augment potentially disqualifying information in his background. After reviewing the results of the background investigation and Applicant's responses to the Interrogatory, DOHA could not make the preliminary affirmative finding required to issue a security clearance. DOHA issued a Statement of Reasons (SOR), dated August 8, 2011, to Applicant detailing security concerns for criminal conduct under Guideline J. These actions were 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 adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

On August 24, 2011, Applicant, through his attorney, answered the SOR admitting the factual allegation, under Guideline J, that he was arrested for second degree sexual conduct, but denied that the case had not been set for trial. It was noted by Applicant's attorney that the case would be dismissed in the future. Department Counsel was prepared to proceed on December 9, 2011, and the case was assigned to me on February 2, 2012. DOHA issued a Notice of Hearing on February 6, 2012, scheduling a hearing for February 27, 2012. I convened the hearing as scheduled. The Government offered six exhibits marked and admitted without objection as Government Exhibits (Gov. Ex.) 1 through 6. Applicant and one witness testified. Applicant offered nine exhibits marked and admitted without objection as Applicant Exhibits (App. Ex.) A through I. DOHA received the transcript of the hearing (Tr.) on March 13, 2012.

Findings of Fact

Applicant admitted the factual allegation that he was arrested for criminal sexual conduct in the second degree. Applicant's admission is included in my findings of fact. After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is a 24-year-old college graduate with a bachelor's degree in computer science, and is employed by a defense contractor for approximately one year as a systems engineer. He is single. (Gov. Ex. 1, e-QIP, dated September 24, 2009)

While attending college, Applicant was an intern for a defense contractor and was granted access to classified information. He worked about 8 to 16 hours per week for the contractor while attending school. Applicant required a higher level of access and submitted the September 24, 2009 e-QIP. He worked with the original defense contractor until he was hire by his present employer in November 2010. His performance rating from his present employer was an overall successful performance. (App. Ex. B, Performance Rating, dated January 15, 2012)

On October 24, 2009, a month after submitting his security clearance upgrade application, Applicant was arrested and charged with criminal sexual conduct-second degree. Applicant was 21 years old at the time and was apprehended by police while engaged in consensual sexual intercourse in a wooded area with a 14-year-old girl. The girl told the apprehending police officer that she was a willing and consensual partner in the sexual intercourse. Applicant was held overnight by police, and released on bail to his parents the next day. The girl's father appeared at the bond hearing requesting that Applicant be released on bail. The case was nolle prosequi by the State Circuit Solicitor on September 9, 2011. (Gov. Ex. 2, Arrest Warrant, dated October 24, 2009; Gov. Ex. 3, Response to Interrogatory, dated July 9, 2010; Gov. Ex. 5, State Criminal Statute for Criminal Sexual Conduct; App. Ex. C, Bail Proceedings, dated October 25, 2009; App.

Ex. D, Statement, dated October 24, 2009; App. Ex. H, Court disposition, dated October 5, 2011)

Applicant lived in a house owned by his parents with other roommates while attending college. He joined a martial arts group when he started college in 2006. He initially attended the club three nights a week, but eventually spent almost every night and week-end with the group. The martial arts group became Applicant's close circle of friends. He even referred to them as his second family. He spent most of his non-school and non-work time with them. His normal activities were school, work, and martial arts. The martial arts group consisted of older men in their 30s who were basically the instructors, college students and others in their late teens and early 20s, and the senior instructor's daughter who was 11 years old when Applicant joined the group in 2006. (Tr. 26-33, 37-38)

Applicant became a friend of the instructor's minor daughter when he started with the martial arts group. By the summer of 2009, they started a romantic involvement. They had attended a martial arts summer camp with the members of the group and the girl rode home from the camp in Applicant's car. The girls' father knew they were together in the car and he trusted them together. They started riding together to other events. They would either talk on the phone or text frequently. Applicant knew at the time that the girl was 13 years old and would turn 14 in August 2009. Applicant does not believe that the girl's father, other member of the martial arts group, or his friends knew the extent of their talking, texting, or relationship. He was not concerned about anyone learning of the relationship, and he did not attempt to hide the relationship. The couple was not affectionate in public. They first kissed in July or August 2009. The incident of consensual sexual intercourse leading to his arrest on October 24, 2009, was their first sexual contact. The girl told the police officer that arrested them that she was 17 years old and born in 1993. Applicant then told the police officer that the girl had lied and that she was only 14 years old. (Tr. 33-47)

Applicant was required to attend psychological counseling after the incident. He attended individual counseling with a psychologist once a week for about a year after the incident. After a year, the frequency of his counseling was changed to once every two weeks. He continues to see the psychologist about once a month. The psychologist used several tests to render an initial assessment of Applicant's psychological condition. The tests show that Applicant is in the low nominal risk category for sexual recidivism, low current risk for sexual and violent recidivism, and low risk for general criminal activity. Applicant's sexual interests seem to be in adult and adolescent females. His greatest level of arousal was to the adult female. He does not have a persistent sexual attraction to children, does not appear to have an interest in sadistic/masochistic sexual behavior, and does not appear to have chronic sexual interest in deviate sexual stimuli. He appears to be emotionally delayed regarding romantic interests. He does not meet the diagnostic criteria for pedophilia. The psychologist concluded his report by opining that Applicant can be safely maintained in the community, provided that he is in treatment with a qualified provider and is monitored regarding his contact with the

victim. He does not pose a threat to children and adolescents. (Gov. Ex. 6, Psychosexual Evaluation Report, Dated December 4, 2009.¹)

Applicant was prohibited from having any contact with the young girl after the incident. He agreed to a consent restraining order for non-contact. He has not seen or been in contact with her since the incident. He made an inquiry of how she was doing to her father but was advised by his psychologist he should not even make such an inquiry. He has not had much contact with the martial arts group since the incident. He was not able to concentrate on his studies after the incident, so he dropped out of school for a semester and worked full time for the original defense contractor. He later returned to school, completed his studies, and earned his computer science degree. His circle of friends is now his co-workers at the defense contractor. He was recently able to purchase a house and has invited his friends to his house. He continues with the counseling from his psychologist, and has matured greatly. He has thought a lot about the incident and the consequences of his actions. He has thought about what he wants from life and he has concentrated on getting his life back on track. (Tr. 33-37, 48-53; App. Ex. I, Consent Restraining order, undated)

One of the adult members of the martial arts groups, who has known Applicant for five years and the girl her entire life, wrote that he never questioned Applicant's honorable intentions or nature. He knows Applicant made an error in judgment which is not indicative of his true character. He explained that the members of the martial arts group were very close and spent a lot of time together. Applicant had little experience with females, was lonely, and constantly in the presence of a relatively mature girl. The relationship should have been avoided but an emotional connection formed. He has had many discussions with Applicant since the incident and believes Applicant matured significantly and gained wisdom and understanding about life. The incident strengthened Applicant's integrity and made him a more admirable person. (App. Ex. A, Statement, dated February 6, 2012)

Applicant's father testified that he and his wife, Applicant's mother, were totally crushed when they learned of Applicant's actions with the young girl. They could not believe he made such a mistake and was so thoughtless. They were pleased that the girl's father and others in the martial arts groups attended the bond hearing to make sure Applicant was able to make bail and pay the bond. They and their other son advised Applicant to immediately report the incident to the security personnel for his employer. They did not know the details of the incident since that was between Applicant and his attorney. They were surprised that Applicant became so depressed about the incident and dropped out of school for a semester. They were pleased that he worked his way through the incident with the help of counseling, and graduated only six months late. His personality has returned to where it was before the incident. He has matured greatly and understands the consequences of his actions. He has expanded his circle of friends to other than the martial arts group. (Tr. 54-65)

¹ This same report was submitted as App. Ex. I.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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.

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 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.

Analysis

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 ¶ 30). Appellant was arrested in October

2009 for second degree sexual conduct for having sexual intercourse with a female under the age of 16. The charge has been subsequently nolle prosequi. This criminal act raises Criminal Conduct Disqualifying Conditions 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).

Applicant raised by his testimony Criminal Conduct Mitigating Condition 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). These mitigating conditions apply. The incident happened over two and a half years ago. This is the only criminal activity Applicant has been involved in and there has been no recurrence of any criminal activity. The circumstances resulting in an inappropriate sexual encounter were somewhat unusual. Applicant was sexually immature and was in a relationship situation with a girl that he was not emotionally able to manage. He is now more mature and understands the consequences of his actions. There is significant evidence of rehabilitation. Applicant completed college and earned a computer science degree. He is successfully employed by a defense contractor. He saved money and purchased a house. He completed psychological counseling but still continues to see the psychologist. He understands the consequences of his action. He is more mature, and he has broadened the circle of his friends and acquaintances. This type of incident is not likely to happen again because of his maturity, counseling, and understanding of the consequences. It does not cast doubt on his reliability, trustworthiness, or good judgment. I find for Applicant under the criminal conduct guideline.

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all relevant circumstances. An 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 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 considered that Applicant is considered a trusted and valued employee who does an excellent job. Applicant's criminal action is mitigated since it happened over two years ago and there has not been other criminal activity. He completed counseling, has matured, and shown an understanding of the reasons for past criminal action. He has taken steps to follow the guidance of his counselor, followed the order to not contact the girl, and broadened the scope of his friends and acquaintances. Applicant's clear and positive actions to understand the reasons for his past criminal conduct and to rehabilitate himself indicates he will be concerned, responsible, and careful regarding classified information. Overall, the record evidence leaves me with no questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated security concerns arising from criminal conduct and should be granted access to classified information.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

THOMAS M. CREAN
Administrative Judge