



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



In the matter of:)
)
) ISCR Case No. 10-11231
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

06/29/2012

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for a security clearance to work in the defense industry. Applicant initiated and developed a relationship with a 13-year-old girl, which resulted in his conviction for endangering the welfare of a child. He failed to mitigate the criminal conduct and personal conduct concerns raised by his actions. Clearance is denied.

Statement of the Case

Acting under the relevant Executive Order (EO) and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) on

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines contained in Enclosure 2 to the Directive.

October 28, 2011, notifying Applicant that it was unable to find that it is clearly consistent with the national interest to grant him access to classified information and recommended that his case be submitted to an administrative judge for a determination whether to deny his clearance. The SOR detailed the reasons for the action under criminal conduct and personal conduct guidelines.

Applicant answered the SOR and requested a decision without a hearing. However, Department Counsel timely requested a hearing under DoD Directive, Additional Procedural Guidance ¶ E3.1.7.² The case was assigned to me on February 7, 2012. The hearing proceeded as scheduled on April 4, 2012. Department Counsel offered Government's Exhibits (GE) 1 through 6, which were admitted without objection. Applicant did not submit any documents. I received the transcript (Tr.) on April 11, 2012.

Findings of Fact

Applicant, 49, is an employee of a federal contractor. He has worked for his employer since November 2009. He is engaged with no children.³

In 2005, a then 45-year-old Applicant joined a popular social networking site to monitor his teenaged nephews' online activities. In the process of monitoring his nephews, he met a 12-year-old girl in a religious-themed chat room on the site. Although he did not immediately know her age, he guessed she was a minor by the information on her profile and the language she used during their chats. Soon after, the two began to exchange e-mails and she sent Applicant a picture. After nine months of on-line communication, the girl asked Applicant for his telephone number, which he provided. Initially they communicated electronically several times a week and talked on the phone at least three times a month. Eventually, Applicant and the girl spoke on the phone daily. She always called him. He never called her home. Applicant contends he maintained contact with the girl, who he believed to be troubled, to provide her encouragement and to watch out for her wellbeing.⁴

In February 2006, the girl, who had recently turned 13, invited Applicant to attend a recital at her school. He drove 70 miles to attend the program. At their first meeting, Applicant presented the child with a bracelet to celebrate an award she received. The two also exchanged a hug. Because the child's ride did not pick her up immediately after the program, Applicant and the girl sat in his car for a few hours. She was not properly dressed for the cold weather and Applicant wanted to make sure she stayed warm. He made a second trip to the girl's school a few months later, also at her invitation, to attend another recital. This time, the child introduced Applicant to several people as her father. After the program, he drove the girl home. Although his memory is

² Tr. 8.

³ Tr. 14-16.

⁴ Tr. 16 -24.

not clear given the passage of time, he believes that he and the girl exchanged a hug and no other physical contact during that visit.⁵

In February 2007, Applicant made his final visit to the girl's school, because she wanted to give him a birthday present. Applicant arrived at the school, identified himself as the child's father, and attempted to check her out of school. However, an administrator intercepted him after being warned by a school counselor that the girl told someone that her internet friend was coming to the school to pick her up. The administrator escorted Applicant to an office where he was asked to wait. In the meantime, the administrator contacted the child's parents and the sheriff's deputy assigned to the school.⁶

Upon questioning from the deputy, Applicant stated that he was the 13-year-old's foster father and that he planned on adopting her when she turned 16 years old. The police officer informed Applicant that he knew the child was not up for adoption. Applicant then explained that the girl had invited him to the school. The deputy escorted Applicant to his car and advised him that the child's parents did not want him to have any further contact with their daughter. After the deputy noticed a set of directions dated December 2006 in Applicant's car, Applicant informed the deputy that he used the directions to get to the school on previous occasions.⁷

After an investigation by the local sheriff's department, Applicant was arrested in June 2007 on two charges of endangering the welfare of a child and two charges of unlawful imprisonment. In July 2008, Applicant pleaded guilty to one count of endangering the welfare of child, citing his financial inability to go to trial. As part of his sentencing he agreed to have no further communication with his victim. He completed his three years of probation in 2011.⁸

At hearing, Applicant maintained that he did not engage in any improper conduct with his victim and that there was nothing inappropriate about their relationship. He believes that she is a wonderful person who needed him as a positive role model. He explained that he cultivated a relationship with the child because he believed her to be troubled. He was concerned that she was engaged in acts of self-mutilation, in addition to suffering from mental health issues, and abuse from her parents. He felt he needed to develop a relationship of trust with the girl so that he could alert the proper authorities. However, he never reported his concerns about the girl to authorities because he knew that their relationship would be viewed with suspicion. In hindsight, he believes he could have handled the relationship differently.⁹

⁵ Tr. 23-24, 28-32.

⁶ GE 4.

⁷ GE 4.

⁸ GE 4-5.

⁹ Tr. 22, 32-34, 45-48.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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.

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 of 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 raised under the criminal conduct guideline is set forth in AG ¶ 30:

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.

Under AG ¶ 31, the following disqualifying condition applies:

(a) a single serious crime or multiple lesser offenses.

In 2008, Applicant pleaded guilty to one charge of endangering the welfare of a child. None of the mitigating conditions available under AG ¶ 32 apply. Although, the events leading up to Applicant's arrest and subsequent conviction occurred seven years ago, they continue to cast doubt on Applicant's current security worthiness. Applicant exhibited poor judgment when he initiated a relationship with a 12-year-old girl he met on-line and groomed her by maintaining frequent contact, visiting the her at school on multiple occasions, allowing her into his car, and masquerading as her father. He continues to show poor judgment in his attempts to legitimize his behavior by casting himself as a concerned adult acting in the best interest of what he believed to be a troubled child.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

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.

The following disqualifying condition under ¶ AG 16 is relevant to this case:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country, but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Despite his attestations to the contrary, the nature of Applicant's relationship with his 13-year-old victim is perverse on its face and serves as a potential source of vulnerability. Furthermore, if his behavior became publicly known it would diminish his personal, public and community standing. For the same reasons discussed under the criminal conduct guideline, above, none of the mitigating conditions available under AG ¶ 17 apply to this case.

Accordingly, I have reservations and doubts about Applicant's ability to protect classified information. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2. Applicant's contention that he maintained a relationship with his victim to look out for her is disingenuous. He engaged in predatory behavior toward a seemingly troubled child. Even now, he continues to display unrepentant affinity for his victim. Instead of taking responsibility for his actions, Applicant blames his victim for escalating the relationship to the level that resulted in Applicant's criminal conviction. Applicant's actions and his attitude regarding his behavior are evidence that he does not possess the good character or judgment required of individuals who have access to classified information. Clearance is denied.

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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a. – 2.d.:	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 a security clearance. Eligibility for access to classified information is denied.

Nichole L. Noel
Administrative Judge