



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



In the matter of:)	
)	
)	ISCR Case No. 11-04323
)	
Applicant for Security Clearance)	

Appearances

For Government: Philip J. Katauskas, Esquire, Department Counsel
For Appellant: *Pro se*

08/23/2013

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guideline J (Criminal Conduct) and Guideline D (Sexual Behavior). Clearance is denied.

Statement of the Case

On August 31, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J and D. This action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOD could not find under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's security clearance. On September 26, 2012, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. On May 23, 2013,

Department Counsel compiled the Government's File of Relevant Material (FORM) that contained documents identified as Items 1 through 7.

The Defense Office of Hearings and Appeals (DOHA) forwarded to Applicant a copy of the FORM with instructions to submit any additional information and objections within 30 days of its receipt. Applicant received the FORM on May 28, 2013, and submitted no response. The case was assigned to me on July 23, 2013.

Findings of Fact

Applicant is a 40-year-old computer systems administrator who works for a defense contractor. He has worked for his current employer since November 2008. He graduated from high school in 1990, attended college on and off for a number of years, but has not yet received a college degree. He initially served on active duty in the U.S. Air Force (USAF) from May 1992 to May 1996 and received an honorable discharge. He then served in the USAF active reserve from August 1998 to March 2001 and received an other than honorable discharge for the conduct alleged in the SOR. He has been married twice. His first marriage was from June 1993 to June 1997. His current marriage began in August 2006. He has three children, ages 9, 16, and 18. He held a security clearance in the USAF.¹

Under Guideline J, the SOR first alleged that Applicant was charged in November 2000 with corruption of a minor and unlawful sexual conduct with a minor, both felonies. He pleaded guilty to unlawful sexual conduct with a minor and was sentenced to five years of probation and ordered to attend mental health counseling for sex offenders. The SOR also separately alleged that he has an ongoing obligation to register as a sex offender. The two Guideline J allegations were cross-alleged as a single Guideline D allegation. In his Answer to the SOR, Applicant admitted all of the allegations and provided no additional comments or explanations.²

In 1999, Applicant, who was then 27 years old, began a sexual relationship with a 13-year-old girl. This relationship lasted over a year. During that period, Applicant and the girl engaged in sexual intercourse at his residence on about 15 to 20 separate occasions. The girl's mother became aware of the relationship and reported it to the police. Applicant was charged as reflected in the SOR. On February 23, 2001, he pleaded guilty to unlawful sexual conduct with a minor, a felony of the third degree. The corruption of a minor charge was dismissed. On April 24, 2001, he was sentenced as alleged in the SOR.³

In responding to interrogatories on January 30, 2012, Applicant stated that he "learned the true cost of making the wrong choice . . ." He stated that he found a way to become a productive contributor in support of the United States and its interests and

¹ Items 5 and 6.

² Items 1 and 4.

³ Items 4, 5, 6, and 7.

is using his past as a lesson and not as a crutch. In this proceeding, he has not provided any probation reports, mental health treatment reports, employment evaluations, or letters of reference.⁴

Policies

The President of the United States has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AGs. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that 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. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines

⁴ Item 6.

presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 sets out the security concern relating 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.

I have considered the disqualifying conditions under criminal conduct AG ¶ 31 and the following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

In February 2001, Applicant was convicted of unlawful sexual conduct with a minor, a felony, and was sentenced to five years of probation. He was also required to register as a sex offender. The evidence was sufficient to establish the above disqualifying conditions.

I have considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and the following 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 has admitted the alleged misconduct, which happened over ten years ago. While the intervening period since his misconduct is significant, little or no evidence was presented to establish that Applicant has reformed and rehabilitated himself. Specifically, he presented no probation reports, mental health treatment reports, employment evaluations, or character references. Since he elected to have a decision without a hearing, I was unable to observe his demeanor, assess his credibility, or inquire into any actions he has taken to rehabilitate himself. Based on the information provided, I am unable to conclude that his criminal behavior is unlikely to recur and does not cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 32(a) and 32(d) partially apply, but do not mitigate the alleged security concerns.

Guideline D, Sexual Behavior

AG ¶ 12 expresses the security concern pertaining to sexual behavior:

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, 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 sexual orientation of the individual.

Four sexual behavior disqualifying conditions are listed under AG ¶ 13:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;
- (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.

For the reasons stated under the disqualifying conditions for Guideline J, AG 13(a) and 13(d) apply.

Four sexual behavior mitigating conditions are listed under AG ¶ 14:

(a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;

(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;

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

(d) the sexual behavior is strictly private, consensual, and discreet.

For the reasons stated under the mitigating conditions for Guideline J, none of the Guideline D mitigating conditions fully apply. Of note, AG ¶ 14(d) has limited application to a sex offense, particularly one involving a minor.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an appellant's security eligibility by considering the totality of the appellant'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.

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 have incorporated my comments under Guidelines J and D 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 Appellant's military service and work history as provided in his security clearance application. Little other whole-person evidence was presented. In the absence of sufficient evidence showing reform or rehabilitation, the record evidence leaves me with questions and doubts about Appellant's eligibility and suitability for a security clearance. I conclude Appellant has not mitigated the security concerns arising under the criminal conduct and sexual behavior guidelines.

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:

Paragraph 1, Guideline J: Subparagraphs 1.a – 1.b:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline D: Subparagraph 2.a:	AGAINST APPLICANT Against Applicant

Decision

In light of all the circumstances presented by the record, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

James F. Duffy
Administrative Judge