



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



In the matter of:)
)
-----) ISCR Case No. 12-03036
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro se*

10/31/2013

Decision

HARVEY, Mark, Administrative Judge:

On April 10, 2010, Applicant engaged in sexual intercourse with a 15-year-old girl. On January 10, 2011, he pleaded guilty to the first class misdemeanor-level offense of contributing to the delinquency of a minor. Criminal conduct and sexual behavior concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On December 2, 2011, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86). (Item 3) On June 28, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guidelines J (criminal conduct) and D (sexual behavior). (Item 1) The SOR detailed reasons why DOD could not make the

affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (Item 1)

On July 24, 2013, Applicant responded to the SOR allegations and waived his right to a hearing. (Item 4) A complete copy of the file of relevant material (FORM), dated August 29, 2013, was provided to him on September 12, 2013. He was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation.¹ Applicant did not respond to the FORM. The case was assigned to me on October 28, 2013.

Findings of Fact²

In Applicant's response to the SOR, he admitted the underlying facts about engaging in sexual activity with a minor; however, he denied that his conduct warranted denial of his security clearance. (Item 4) His admissions are accepted as findings of fact.

Applicant is a 27-year-old welder, who has worked at a shipyard since 2005.³ In 2004, he graduated from high school, and in 2010, he received a welder certificate. He has never served in the military. He has never married. He has an infant daughter and is in a committed relationship. (Item 4, SOR response) He disclosed his consensual sex with a minor on his SF 86, and he stated he was sentenced to "60 days work release program and probation while undergoing therapy classes" as well as incarceration from January 2011 to March 2011. (Item 5 at 22) There is no evidence of use of illegal drugs or alcohol abuse. There are no allegations of security violations.

On April 10, 2010, Applicant engaged in sexual intercourse with a 15-year-old girl after a party at his neighbor's home.⁴ Applicant said he was not aware that she was only 15 years old and she presented herself as older than her actual age. (Item 4, SOR response) Her mother called the police, and on November 1, 2010, the police arrested Applicant. On January 10, 2011, he pleaded guilty to the first class misdemeanor-level offense of contributing to the delinquency of a minor. He was sentenced to 12 months in

¹The DOHA transmittal letter is dated September 5, 2013, and Applicant's receipt is dated September 12, 2013. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

²Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

³Unless stated otherwise, Applicant's August 4, 2011 SF 86 is the basis for the facts in this paragraph. (Item 5)

⁴Unless stated otherwise, the sources for the information in this paragraph are Applicant's January 11, 2012 Office of Personnel Management (OPM) personal subject interview (PSI) and court records. (Item 6 at 4-8, 12-13) The police report of the offense and Applicant's therapy records are not part of the file.

jail with 8 months suspended, \$250 fine or 25 hours of community service, 2 years of probation,⁵ and required to attend classes for sex offenders.

Applicant admitted that his conduct with the minor showed poor judgment.⁶ Applicant complied with the terms of his sentence. He has learned from therapy and avoids situations where he might be arrested. His crime is a matter of record in his security file, the state criminal justice system, and the Federal Bureau of Investigation records system.

The July 30, 2013 DOHA letter conveying the FORM to Applicant invited him to “submit any material you wish the Administrative Judge to consider or to make any objections you may have as to the information in the file.” Applicant did not provide any response to the FORM.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President 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.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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 overarching 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.

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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

⁵The SOR indicates Applicant was on probation for two years, and the FORM indicates Applicant was on probation from March 2011 to March 2012. (FORM at 4) Applicant did not contest either statement about his probation.

⁶The source for the information in this paragraph is Applicant’s SOR response. (Item 4)

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), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant 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 presume a nexus or rational connection between proven conduct under any of the criteria listed therein 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

The relevant security concerns are under Guidelines J (criminal conduct) and D (sexual behavior).

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct as follows: “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 ¶ 31 describes two conditions that could raise a security concern and may be disqualifying in this case, “(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.”

AG ¶¶ 31(a) and 31(c) apply. On April 10, 2010, Applicant engaged in sexual intercourse with a 15-year-old girl after a party at his neighbor’s home. On January 10, 2011, he pleaded guilty to the first class misdemeanor-level offense of contributing to

the delinquency of a minor. He was sentenced to 12 months in jail with 8 months suspended, \$250 fine or 25 hours of community service, 2 years of probation, and required to attend classes for sex offenders.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

(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.

The Appeal Board concisely explained the Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Although none of the mitigating conditions fully apply, the record contains evidence of several important mitigating factors. Applicant's offense occurred 42 months ago and the offense is an isolated incident. He received some sexual offense counseling. He has been continuously employed for six years by the same employer. He expressed regret and remorse concerning his sexual offense.

Significant factors weighing against mitigating criminal conduct concerns remain. Applicant was 24 years old when he engaged in sexual activity with a 15-year-old girl. He did not provide documentation or a recommendation from his therapist or his employer. More time must elapse before there is enough assurance that criminal

conduct raising security concerns is unlikely to recur. Applicant is not ready to be entrusted with access to classified information at this time.

Sexual Behavior

AG ¶ 12 describes 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 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 lists four conditions that could raise a security concern and may be disqualifying including:

- (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.

On April 10, 2010, Applicant engaged in sexual intercourse with a 15-year-old girl after a party at his neighbor's home. He was convicted of the first class misdemeanor-level offense of contributing to the delinquency of a minor. His sexual offense does not make him vulnerable to coercion, exploitation, or duress because he has disclosed this sexual activity to security officials and it is a matter of record in the state criminal justice system and the Federal Bureau of Investigation records system. His sexual activity with a minor reflects a lack of discretion and judgment. AG ¶¶ 13(a) and 13(d) apply and consideration of mitigating conditions is required.

AG ¶ 14 provides four conditions that could mitigate security concerns including:

- (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.

None of the mitigating conditions fully apply. AG ¶ 14(c) partially applies because Applicant disclosed his criminal offense on his SF 86, and law enforcement and judicial officials are fully aware of his offense.

As indicated under the criminal conduct guideline, important factors weigh against mitigating security concerns. It is a serious offense for a 24-year-old adult to engage in sexual intercourse with a 15-year-old girl. The circumstances are not usual, and the offense is still somewhat recent. There is insufficient evidence that such conduct is unlikely to recur, and the sex offense continues to cast doubt on Applicant's current reliability, trustworthiness, and good judgment. Sexual behavior concerns are not mitigated.

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 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.

There are some facts supporting mitigation of security concerns under the whole-person concept; however, they are insufficient to fully mitigate security concerns. Applicant is a 27-year-old welder employed by the same defense contractor for the previous eight years. There are no allegations of security violations, illegal drug use, or

alcohol abuse. He received therapy to address his sex crime. His acknowledgement of his offense at his trial, on his SF 86, to the OPM investigator, and in his SOR response are important steps towards rehabilitation and mitigation of security concerns.

The evidence against approval of Applicant's clearance is more substantial at this time. On April 10, 2010, Applicant engaged in sexual intercourse with a 15-year-old girl. He pleaded guilty to the first class misdemeanor-level offense of contributing to the delinquency of a minor, and he was sentenced to 12 months in jail with 8 months suspended. His criminal conduct is somewhat recent. There were no employment evaluations, therapy evaluations, or character statements. There are unresolved questions about Applicant's reliability, trustworthiness, and ability to protect classified information because of his criminal conduct and sexual behavior. More time without criminal conduct and similar sexual behavior is necessary to fully mitigate security concerns.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude sexual behavior and criminal conduct concerns are not mitigated. For the reasons stated, I conclude he is not eligible for 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

Mark Harvey
Administrative Judge