



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



In the matter of:)
)
-----) ISCR Case No. 12-09634
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: *Pro se*

12/01/2016

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for access to classified information. He did not present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns stemming from his involvement in a July 2009 incident of child sexual abuse of his then 14-year-old daughter. Accordingly, this case is decided against Applicant.

Statement of the Case

In May 2010, Applicant's employer submitted an adverse information report based on Applicant's release from jail after posting a \$10,000 surety bond after his arrest for two felony offenses involving sexual abuse of a minor.¹ His employer submitted another adverse information report in June 2011 when the two felony charges

¹ Exhibit 3.

were *nolle prossed* (dismissed).² Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 Format) on March 28, 2012.³ He underwent a background investigation in 2012, and he provided additional information in response to interrogatories in early 2016.⁴

Thereafter, on April 7, 2016, after reviewing the application and information gathered during a background investigation, the Department of Defense (DOD)⁵ sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information.⁶ The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guidelines known as Guideline J for criminal conduct and Guideline E for personal conduct. The sole allegation under Guideline E is a cross-allegation to the matters alleged under Guideline J. He answered the SOR with a three-page memorandum on May 23, 2016, and requested a hearing.

The case was assigned to me on July 8, 2016. The hearing was held as scheduled on September 7, 2016. Department Counsel offered Exhibits 1–7, and they were admitted. Applicant testified on his own behalf, presented four witnesses (three character witnesses and his daughter), and offered Exhibits A–C, and they were admitted. The transcript of the hearing (Tr.) was received on September 15, 2016.

Procedural Matters

At hearing, SOR ¶ 1.b was amended, without objections, to note that the charges of child sexual abuse were dismissed without prejudice.

Findings of Fact

Applicant is a 46-year-old employee who requires a security clearance for his job as a senior principal systems engineer with a company doing business in the defense industry. He has worked for this company since January 1998, and he has held a

² Exhibit 3.

³ Exhibit 1 (commonly known as a security clearance application).

⁴ Exhibit 2.

⁵ The SOR was issued by the DOD Consolidated Adjudications Facility, Fort Meade, Maryland. It is a separate and distinct organization from the Defense Office of Hearings and Appeals, which is part of the Defense Legal Services Agency, with headquarters in Arlington, Virginia.

⁶ 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 Department of Defense 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 here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006).

security clearance throughout this period. By all accounts, he has a good if not excellent record of employment as verified by the three character witnesses and performance evaluations from 2009–2015.⁷ His educational background includes a master's degree in applied mathematics awarded in 1998. His first wife, the mother of the daughter at issue in this case, passed away in 2013. He married his current spouse in 2015, and he has three stepchildren, ages 20, 16, and 15, in his household. Outside of work, Applicant serves his church as a deacon and is involved in various church activities.⁸

As alleged in the SOR, this case concerns Applicant's involvement in two incidents of criminal conduct against minor children. The first incident, which involves adjudicated criminal conduct, goes back to 1999 when Applicant was convicted of a single misdemeanor offense of assault by recklessly causing injury to a seven-year-old child during an October 1998 tour of a hay maze.⁹ Applicant admits he did not behave in an exemplary manner when he reacted badly by pushing the child off his leg after being provoked by the child's rude or bratty joke. A confrontation between Applicant and the child's father resulted in the hay-maze incident being reported to the police. Applicant pleaded not guilty, but was found guilty by the state court and ordered to pay a \$500 fine and serve 12 months of unsupervised probation. His conviction was affirmed on appeal, and he completed probation in January 2001.

The second incident, which involves unadjudicated criminal conduct, occurred in July 2009. Applicant was charged with two felonies involving child sexual abuse of his then 14-year-old daughter (criminal sexual penetration of a minor and second degree sexual contact with a minor) in 2010, but he was never tried and the charges against him were *nolle prossed* in 2011.¹⁰ Applicant has steadfastly maintained that his actions were not intentional or deliberate because he was asleep at the time.

As part of the criminal case, Applicant underwent two evaluations by forensic psychologists in 2010, and both reports were highly favorable for him.¹¹ The second and far more detailed report summed up the evaluation of Applicant as follows:

This evaluation cannot state with certainty that [Applicant] either did commit or did not commit the offense alleged by his daughter. There is a real possibility that he committed it while asleep and that he did not consciously sexually molest her. Regardless, he is significantly different from most of the sex offenders that I have evaluated. He does not have a personality disorder, which is the most common diagnosis that I have

⁷ Tr. 34–64; Exhibit C.

⁸ T. 108–109.

⁹ Exhibits 6 and 7.

¹⁰ Exhibits 2, 3, 4, and 5.

¹¹ Exhibits A and B.

observed in such cases. He presents with the lowest level of risk that I have ever observed in cases of persons accused of sexually molesting a child. His lifestyle is extremely benign and well conformed. He is probably one of a very few number of individuals for whom it is conscionable for the courts to entertain some alternative course of action that does not involve formal criminal proceedings.¹²

The charges were dismissed or *nolle prossed* on the condition that Applicant participate in counseling or treatment.¹³ The sessions with the sex offender treatment program, which were part of a juvenile dependency case involving his daughter, occurred during August–November 2011. The sessions were discontinued due to Applicant's lack of participation and unwillingness to work on the issues of the offenses.¹⁴ The counselors described Applicant as resistant and sarcastic, and it appears they were unsatisfied with Applicant's unwillingness to accept responsibility for the misconduct. Applicant attributes the discontinuation of services to a personality conflict with the counselors.¹⁵

What occurred between Applicant and his daughter in July 2009 was described in his daughter's written account of the incident. She did so in a letter to her mother in which she described the incident as follows:

It all happened on July 30, 2009. Dad asked me if I wanted a back massage to go to sleep. I said yes because it sounded great but how wrong I was. After about 15 min. Dad started nudging me asking if I was awake. I heard him but I was to [sic] tired to answer him. Then all of a sudden his hand moves from my back to my butt and he starts rubbing it. Instantly I was awake but to [sic] scared to say anything. So instead I roll over so he can't reach my butt and he started rubbing my female part and the he sticks his hand inside my underwear and starts massaging my female part with his hand. I was so scared that I just froze until he stopped. When he was finally done and he left I just sat there crying all night. You didn't hear me because you and Dad were talking to grandma because we were at her house. Sorry I didn't tell you sooner. I meant to I just knew you would be crushed and I was scared. I am BEGGING you not to talk to Dad about it because he doesn't know I know and I'm scared of what he'll do to me when he finds out. I would like you to call the cops because I can't stand it any more. Every time I'm talking to Dad I feel like throwing up. I mean you don't know what it's like for me right now. My life will never be the same. That's why I've been acting weird lately, like being

¹² Exhibit A at 20.

¹³ Tr. 97.

¹⁴ Exhibit 2 (addendum report to juvenile court).

¹⁵ Tr. 95–96.

always in a bad mood and wanting to be at friends houses all the time. So I'm asking you to call the cops because I think it's a form of child [molestation]. And I would appreciate if you wrote back instead of talking to me because it is a touchy subject for me and I don't know if I can talk about it. It was hard enough for me to write this note.¹⁶

At the hearing, Applicant's daughter stated that when she wrote the letter to her mother, she believed what she wrote was true.¹⁷ In addition, she has not retracted the statements she made in the letter.¹⁸

Her mother replied by letter and addressed the following subjects: (1) calling the police was an option, but a serious one with potential adverse consequences, including Applicant's loss of employment and a divorce; (2) she told her daughter that she believed her and recalled the night in question as she remembered Applicant coming out of the bedroom looking confused and saying something about falling asleep and not otherwise acting guilty; and (3) she suggested finding a counselor for her daughter to talk to and explore the various options.¹⁹

Applicant described himself as "horrified" when his then wife informed him about his daughter's accusations, and he could not wait to apologize to his daughter and ask for forgiveness from her.²⁰ He maintained at the hearing, as he has in the past, that his actions were not intentional or deliberate because he was asleep at the time. He recounted past sleep-behavior stories, including incidents where he touched his wife in the marital bed while asleep with no recollection of his actions.²¹ He further asserted that his daughter's account of him asking if she was awake during the incident was sleep talking.²² He describes his current relationship with his daughter as "blessedly wonderful," although any discussion of the July 2009 incident is upsetting to her, the matter has been settled in the household, and it is not further discussed.²³

¹⁶ Exhibit 5.

¹⁷ Tr. 76.

¹⁸ Tr. 76–77.

¹⁹ Exhibit 5.

²⁰ Tr. 98.

²¹ Tr. 87.

²² Tr. 100.

²³ Tr. 109–110.

Law and Policies

It is well-established law that no one has a right to a security clearance.²⁴ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²⁵ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.²⁶ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²⁷

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²⁸ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²⁹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.³⁰ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.³¹

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.³² The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.³³

²⁴ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

²⁵ 484 U.S. at 531.

²⁶ Directive, ¶ 3.2.

²⁷ Directive, ¶ 3.2.

²⁸ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²⁹ Directive, Enclosure 3, ¶ E3.1.14.

³⁰ Directive, Enclosure 3, ¶ E3.1.15.

³¹ Directive, Enclosure 3, ¶ E3.1.15.

³² *Egan*, 484 U.S. at 531.

³³ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.³⁴ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

The SOR allegations under Guidelines J for criminal conduct and Guideline E for personal conduct are factually interrelated and will be discussed together. The focus of those two guidelines is on a person's judgment, reliability, trustworthiness, and ability or willingness to comply with laws, rules, and regulations.³⁵ Accordingly, given that the allegation under Guideline E is a cross-allegation to the matters under Guideline J, a separate discussion of the Guideline E matters is unnecessary.

In analyzing this case, I considered the following disqualifying and mitigating conditions as most pertinent:³⁶

AG ¶ 31(a) a single serious crime or multiple lesser offenses;

AG ¶ 31(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, prosecuted, or convicted;

AG 31(e) violation or parole or probation, or failure to complete a court-mandated rehabilitation program;

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 [person's] reliability, trustworthiness, or good judgment;

AG ¶ 32(c) evidence that the person did not commit the offense; and

³⁴ Executive Order 10865, § 7.

³⁵ AG ¶¶ 15 and 30.

³⁶ AG ¶ 20(a)–(f).

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.

Starting first with the 1998 hay-maze incident that led to the 1999 misdemeanor conviction, I am not particularly concerned about this matter. It took place nearly 20 years ago, it is a relatively minor matter, it happened under unusual circumstances, and a similar incident has not recurred. But the same cannot be said about the 2010 charges of child sexual abuse, which were ultimately not formally prosecuted in 2011.

Applicant maintained in this proceeding, as he has since the allegations were first made, that his conduct with his daughter was unintentional and not deliberate because the incident occurred after falling asleep while giving his daughter a back massage. To accept his argument would require me to believe that he engaged in extensive fondling of his daughter (including inside her underwear), and he spoke to her (asking if she was awake) while he was asleep. After reviewing a substantial record and having an opportunity to listen to and observe the testimony of Applicant and his daughter, I cannot accept his description of events as a truthful account. In reaching this conclusion, I found his daughter's letter to be a credible and persuasive account of the 2009 incident. In addition, the discontinuation of the sessions with the sex offender treatment program in 2011 is akin to a failure to complete a court-mandated rehabilitation program.

Applicant presented a substantial case in reform and rehabilitation. He has a highly favorable employment record, he is involved in constructive community involvement as shown by his church activities, and he appears to have repaired and restored his relationship with this now 21-year-old daughter. Nevertheless, the criminal conduct at issue here is serious, he continues to deny guilt or culpability for the 2009 incident, and his explanation is not credible.

Applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.³⁷ This is the burden the law imposes upon a person seeking access to classified information. I must fairly apply that standard in all cases, regardless of the importance of Applicant's contribution to the defense effort, or whether an unfavorable clearance decision will have an adverse effect on Applicant, his family, or his employer. After a careful review of the record, I cannot conclude that Applicant has met his burden.

For the reasons discussed above, Applicant's involvement in a July 2009 incident of child sexual abuse of his then 14-year-old daughter creates doubt about his current reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due

³⁷ Directive, Enclosure 3, ¶ E3.1.15.

consideration to the whole-person concept.³⁸ Accordingly, I conclude that he did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline J:	Against Applicant
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b–1.c:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information.

Michael H. Leonard
Administrative Judge

³⁸ AG ¶ 2(a)(1)–(9).