



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



In the matter of:)
)
) ISCR Case No. 12-11687
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Esq., Department Counsel
For Applicant: *Pro se*

06/16/2017

Decision

CERVI, Gregg A., Administrative Judge:

Applicant has not mitigated the sexual behavior, personal conduct and criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant completed a Questionnaire for National Security Positions (SF 86) on July 5, 2012. On December 6, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D, sexual behavior, E, personal conduct, and J, criminal conduct.¹

¹ The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG). I decided this case using the Security Executive Agent Directive 4 (SEAD 4) AGs implemented on June 8, 2017. However, I also considered this case under the old AGs implemented on September 1, 2006, and my conclusions are the same using either set of AGs.

Applicant responded to the SOR on December 24, 2015, and elected to have the case decided on the written record in lieu of a hearing. The Government's written brief with supporting documents, known as the File of Relevant Material (FORM), was submitted by Department Counsel on May 19, 2016.

A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on December 14, 2016. He submitted extensive material² in explanation and mitigation. The Government's exhibits included in the FORM (Items 1 to 8),³ and the Applicant's exhibits (AE) collectively marked as AE A, are admitted into evidence. The case was assigned to me on May 3, 2017.

Findings of Fact

The SOR alleges three underlying events as the basis for allegations under Guidelines D, E, and J. In summary, the SOR alleges that Applicant was arrested in 2003 and charged with major assault of his oldest daughter (hereinafter "D"), a minor. It also alleges that he was investigated in 2006 for accusations of sexual abuse of D while she was a minor. Finally, it alleges he was detained in 2011 for exposing himself to an employee in a department store dressing room, and banned from the premises for one year. Applicant generally denied the conduct underlying the accusations. I have reviewed all of the evidence in this case, including Applicant's extensive submissions in response to the FORM, and make the following findings of fact.

Applicant is 48 years old. He has been employed by a defense contractor since 2010, where he received several performance awards. He is a high school graduate, and honorably served in the United States Marine Corps from 1988 to 2010, retiring as a Master Sergeant (E-8). He served at several overseas duty stations, and deployed to Iraq and Afghanistan, where he was awarded the Bronze Star Medal and two Meritorious Service Medals for his service. He has been married since 1991 and has four adult children.

In 2001, Applicant's spouse struck D with a coat hanger, leaving a welt on her cheekbone. As a result, Applicant and his spouse attended parenting and anger management classes. In 2003, Applicant was accused of child abuse when D reported to school with a bruise in the shape of a handprint on her buttocks. Applicant admitted spanking her with excessive force, and again was directed to complete an anger management course.

² In his response to the FORM, Applicant included, among other things, statements, duplicates of the FORM documents (reordered), and documents obtained from a Freedom of Information Act (FOIA) request, including an Office of Personnel Management (OPM) personnel background report of investigation (ROI).

³ Department Counsel requested I take administrative notice of facts derived from documents published by private organizations related to child sexual abuse. Applicant objected. The requested administrative notice is attenuated from the substantive evidence, and does not sufficiently illuminate or explain the record evidence. The objection is sustained.

In 2006 while stationed overseas, D, then 13 years old, disclosed to a military family advocacy professional, an adult neighbor and a child-friend, that Applicant sexually molested her 10 to 20 times when she was seven to eight years old (approximately 2000 to 2001). She also disclosed that Applicant sexually touched her when she went to her parents' bed to sleep after having a nightmare. Military law enforcement investigated the disclosure, interviewed witnesses, and reviewed D's diary. The diary had a handwritten entry from October 2005, stating that D "despised" her father, asked how she could love somebody that would "take advantage of a little girl," and "how could he make me tell him I would never tell my mother." Other entries noted her happiness and love for her father.

Applicant's spouse stated she was aware of the touching incident in Applicant's bed, and believed Applicant was asleep at the time. His spouse denied knowing about the other incidents. D claimed that she told her mother about the incidents, and that her mother told her that she had forgiven Applicant because he promised to stop. Applicant and his spouse noted that D presented disciplinary problems, was drinking alcohol, associating with older boys, and was "experimenting" with her boyfriend.⁴ D often argued with her father, who was a strict disciplinarian.

In 2006, D confided in a close friend, and the friend's mother (Applicant's neighbor), about the sexual abuse incidents. The neighbor approached Applicant's spouse with the allegations, who denied a history of sexual abuse beside the incident in the bed.⁵ The neighbor encouraged D to report the allegations of sexual abuse to military authorities. Applicant's family socialized regularly with the neighbors, also a Marine Corps family who moved-in next door to Applicant in 2003, and their children were playmates. There is no evidence of judicial or disciplinary action taken as a result of these allegations.

Applicant stated in his OPM personal subject interview (PSI), that he believed his daughter was lying to get attention, and was upset about living overseas. After she made the allegations, he sent her to live with his sister in another state until approximately July 2007. Applicant noted in his Answer to the SOR that he is not a child molester, that he walked D down the aisle at her wedding in 2015, that he sees D and her child (his grandchild) often. He claimed in his response to the FORM, that despite his recent normal interactions with D, she refused to discuss the incidents with him.

In 2011, Applicant was issued a trespass notification warning by a city police department and banned from a department store property after he was accused of inappropriately asking female employees in the store dressing room to look at him while wearing underwear.⁶ Employees interviewed by an Office of Personnel Management

⁴ Item 6, Ex. 2.

⁵ Item 6, encl. A.

⁶ Item 5.

(OPM) investigator⁷ stated that on four occasions beginning in early 2011, Applicant tried on athletic boxer brief underwear in the store dressing rooms, and, wearing only underwear, asked two employees to come into his dressing room to provide an opinion on how he looked. When they refused, he exited the dressing room and again asked them how he looked in the underwear. On the first occasion, an employee told Applicant that he could not behave that way in the store and needed to dress. On the second and third occasions of similar behavior, the employee more sternly told him to leave the store. Applicant laughed about it and treated it as a joke.

In December 2011, Applicant was observed entering the store. The two employees contacted store security. The store security manager waited outside the dressing room area and observed Applicant leave a dressing room wearing athletic underwear, shirt and socks. When the manager approached, Applicant retreated into the dressing room, then exited fully dressed and handed the underwear to an associate. When the manager asked Applicant about the incident, Applicant stated that he only wanted an opinion and he did not mean to offend anyone. At the manager's request, Applicant apologized to the employee in the area, and escorted him out of the store. They were met outside by the city police, who issued Applicant a trespass notification banning him from the property for one year. Applicant claims he was trying on athletic shorts, not underwear. He asserts that store policy prohibited patrons from trying on underwear in dressing rooms, and that they controlled the items entering the dressing rooms. There is no evidence that he exposed his genitals or anus at any time. According to the police report, the female store employees were "very uncomfortable around him," and noted that he performed similar "strange acts" in the past in the dressing room area.⁸

Applicant highlighted his long-term marriage, married children, sons-in-law and grandchildren, his military service, current work accomplishments, and participation in church and his children's sports activities. Since 2011, no evidence of security infractions, criminal activity, or other incidents has been submitted. Since Applicant elected to have this case decided on the written record in lieu of a hearing, I was unable to further inquire into these allegations, or evaluate his demeanor or credibility in response to questions.

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 are to be used in evaluating an applicant's eligibility for access to classified information.

⁷ AE A, ROI at p.83-86. The Federal Rules of Evidence serve as a guide, but relevant and material evidence may be received subject to rebuttal, and technical rules of evidence may be relaxed . . . to permit the development of a full and complete record. Directive E3.1.19. An ROI may be received and considered by the Administrative Judge with an authenticating witness and when otherwise admissible under the Federal Rules of Evidence (FRE). Directive E3.1.20. In this case, Applicant submitted the ROI as part of his response to the FORM, thereby waiving any objection to its admissibility.

⁸ Item 5.

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(a), 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.

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 clearance decision.⁹ In *Department of Navy v. Egan*¹⁰, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹¹

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 the national security." It is well-established law that no one has a right to a security clearance. As noted by the Supreme Court in *Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Under *Egan*, Exec. Or. 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.¹²

The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive and classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive or classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive or classified information.

Section 7 of Exec. Or. 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* Exec. Or. 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

⁹ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan.27, 1995).

¹⁰ *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).

¹¹ *Egan*, 484 U.S. at 531.

¹² *Egan*, 484 U.S. at 531.

Analysis

Guideline D: Sexual Behavior

AG ¶ 12 expresses the security concern:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying. The following condition may be applicable:

- (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 individual is unable to stop;
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and
- (d) sexual behavior of a public nature or that reflects lack of discretion or judgment.

Applicant's actions described in the findings of fact with regard to sexual abuse and incidents of inappropriate conduct in the department store, sufficiently raise these disqualifying conditions. SOR ¶ 1.c does not implicate sexual behavior as contemplated by this guideline, and is therefore resolved in favor of Applicant.

AG ¶ 14 provides conditions that could mitigate security concerns. I reviewed the facts against all of the mitigating conditions. I find that the following mitigating conditions potentially apply:

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

I find no mitigating condition fully applies. Applicant's actions with regard to the allegation of sexual molestation of his daughter and the repeated inappropriate conduct of a sexual nature at the department store continue to reflect a lack of judgment and a pattern of inappropriate sexual behavior. Although both allegations of sexual misconduct are aged, the occurrences were not infrequent or under unusual circumstances. Applicant has not taken responsibility for his actions or submitted to counseling, and continues to deny any inappropriate sexual conduct occurred. Based on Applicant's failure to acknowledge his conduct in the store and address the serious allegations by his daughter in professional counseling, I find no reason to believe it has permanently ceased or that it will not occur again in the future.

Guideline E: Personal Conduct

The concern under this guideline is set out in AG ¶ 15:

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 or sensitive information.

The relevant disqualifying condition under AG ¶16 is:

(c) credible adverse information in several adjudicative issues areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes but is not limited to, consideration of:

. . .

(2) any disruptive, violent, or other inappropriate behavior

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant's conduct as noted in the findings of fact, invokes an assessment of questionable judgment and personal conduct that creates a vulnerability to exploitation, manipulation, or duress. AG ¶¶ 16 (c), (d) and (e) apply.

Conditions that could mitigate personal conduct security concerns are provided under AG ¶ 17. The following are potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant's behavior, taken as a whole, shows a pattern of unmitigated sexual and other inappropriate conduct. Based on the totality of the allegations, credibility of the complainants, and continued inappropriate public conduct up to 2011, Applicant's judgment is questionable. He has not submitted sufficient evidence to alleviate those concerns. The allegations are not minor, nor did they occur in unique circumstances where they are not likely to recur. He has not taken positive steps to acknowledge or address his behavior, or eliminate the vulnerabilities that it creates. With regard to the 2003 child abuse allegation, the incident occurred after he attended a similar course in 2001, but his abusive behavior did not abate after attending that course. I find no mitigating condition is fully applicable.

Guideline J: Criminal Conduct

AG ¶ 30 expresses the security concern under 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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant's criminal conduct with regard to alleged child abuse and sexual molestation of his daughter sufficiently invokes the above disqualifying conditions.

AG ¶ 32 provides conditions that could mitigate security concerns. I reviewed the facts against each mitigating condition. The following may be relevant:

- (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;
- (c) no reliable evidence to support that the individual committed the offense; and
- (d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant has not admitted responsibility or culpability for his criminal sexual conduct, and has not sought professional counseling to address the cause and circumstances of the allegations by his daughter. He completed counseling for the abusive spanking incident in 2003, but this occurred after attending a similar counseling program in 2001. Given the seriousness of his daughter's allegations of sexual abuse, there was insufficient evidence presented to show that Applicant's overall criminal behavior is unlikely to recur or that he sought counseling to address it. The allegations of inappropriate conduct in the department store resulted in a trespass order issued by the city police. Although not cited as a criminal offense, the behavior denotes a significant lack of judgment, and calls into question Applicant's willingness to comply with laws, rules and regulations. Of note, Applicant did not submit independent character statements, or statements from family members attesting to inaccuracies in the allegations, his innocence, or rehabilitation. No mitigation is appropriate.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at Directive ¶ 2(d):

(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 the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered all of the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guidelines D, E, and J in this whole-person analysis.

My comments under each guideline serve to express my continued concerns. The Directive notes that although adverse information concerning a single criterion may not be sufficient for an unfavorable eligibility determination, the individual may be found ineligible if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or unstable behavior.¹³

Taken as a whole, Applicant's history and continued incidents of inappropriate conduct to 2011, raise serious and troubling questions about his judgment that results in unstable personal behavior, despite his exemplary military and civilian work performance. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the sexual behavior, personal conduct and criminal conduct considerations security concerns.

¹³ Directive ¶ 2(e).

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 D:	Against Applicant
Subparagraphs 1.a – 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline J:	Against Applicant
Subparagraph 3.a:	Against Applicant

Conclusion

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

Gregg A. Cervi
Administrative Judge