



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



In the matter of:

ISCR Case No. 15-03915

Applicant for Security Clearance

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel

For Applicant: Bradley P. Moss, Esq.

11/03/2016

Decision

Harvey, Mark, Administrative Judge:

Applicant engaged in sodomy with a 15-year-old child. He was charged with a felony, and he pleaded guilty to a misdemeanor-level offense. He is currently on probation. Personal conduct concerns are mitigated as a duplication; however, criminal conduct and sexual behavior security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On March 25, 2014, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (GE 1) On March 2, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (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 for Determining Eligibility for Access to Classified Information* (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. (Hearing Exhibit (HE) 2) The SOR alleged security concerns under Guidelines J (criminal conduct), D (sexual behavior), and E (personal conduct). (HE 2)

On April 21, 2016, Applicant responded to the SOR. On June 29, 2016, Department Counsel was ready to proceed. On August 8, 2016, the case was assigned to me. On August 31, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for September 22, 2016. (HE 1) Applicant's hearing was conducted as scheduled.

During the hearing, Department Counsel offered four exhibits; Applicant offered three exhibits; and all proffered exhibits were admitted without objection. (Tr. 11-13; Government Exhibits (GE) 1-4; Applicant Exhibits (AE) A-C) On September 30, 2016, DOHA received a copy of the transcript of the hearing. Applicant was authorized until October 4, 2016, to submit post-hearing evidence. (Tr. 7, 88) Applicant submitted two post-hearing documents, which were admitted without objection. (AE D-E)

Findings of Fact

Applicant's SOR response admitted with explanations the underlying factual predicate for all of the SOR allegations. (HE 3) He also provided extenuating and mitigating information. (HE 3) His admissions are accepted as findings of fact.

Applicant is a 32-year-old senior cyber security engineer employed by a defense contractor. (Tr. 7-9; GE 1) In 2006, he graduated from a university with a bachelor of science degree. (Tr. 39) Applicant has worked for federal contractors and federal government agencies from 2008 to present. (Tr. 39) He has held a security clearance since 2008. (Tr. 39) He does not use illegal drugs or abuse alcohol. (Tr. 49) There is no evidence of a security violation.

Criminal Conduct, Sexual Behavior, and Personal Conduct

In April 2013, Applicant made contact with the 15-year-old female through an internet-dating website. (Tr. 40-41) He assumed she was 18 years old or older because the website indicated it was for adults (age 18 and older) and required a credit card for access. (Tr. 40-41, 63-64; AE E) Applicant claimed the victim told him that she was a high school graduate, and that she was over the age of 18. (Tr. 41-42)

In early May 2013, Applicant was 28 years old. (Tr. 62) He was allowed to enter the victim's parents' residence by the victim. (Tr. 40, 48) After about ten minutes, Applicant and the victim went into the garage, where they engaged in consensual sexual activity. (Tr. 70, 74-75) Applicant was in the house about 30 minutes, when the victim's parents arrived. (Tr. 70) The victim's parents called the police and alleged Applicant was hiding in their garage. (GE 3 at 1) The victim's mother told Applicant that

the victim was only 15 years old, and Applicant responded “that he thought she did look kind of young.” (GE 3 at 1)

When the police arrived, Applicant waived his rights, and was questioned. (Tr. 72) The police report indicates “The defendant would not first admit a genital contact even without penetration. He did admit that he touched the victim on her backside and on her breasts.”¹ (Tr. 78; GE 3 at 4) The police suspended interrogation of Applicant and collected additional evidence, including the victim’s statement that he ejaculated on her face and chest. (GE 3 at 4) The police informed Applicant that she said he ejaculated on her, and then Applicant admitted “to ejaculating on her lips and into her mouth.” (GE 3 at 5) Applicant admitted that he removed the victim’s clothing, and the victim was naked. (Tr. 80; GE 3 at 5) Later Applicant claimed she put his ejaculate into her mouth. (GE 3 at 5) At his hearing, Applicant claimed he was truthful to the police. (Tr. 72) Applicant’s statement to the police was videotaped. (GE 3 at 4-5) Applicant did not provide a copy of the videotape or a transcript of the police interview or his guilty plea proceeding.

A psychiatrist directly evaluated Applicant for 11 hours, conducted extensive testing, and concluded Applicant was not a sexual predator. (Tr. 47; AE C) He does not have any psychiatric disorder, and he is not sexually attracted to children or minors. (Tr. 47; AE C) He is intelligent, and he regrets his offense. (AE C) One test puts Applicant “into the bottom 1%, suggesting at most an 11.7% chance of re-offense within a year.” (AE C at 5) Thus, he credited Applicant with being unlikely to reoffend. (AE C) No treatment or medication was recommended. (Tr. 48; AE C)

Applicant was charged with the felony-level crime of third degree sexual assault.² (Tr. 46) In January 2014, Applicant entered a guilty plea to a misdemeanor-level crime

¹Applicant’s SOR does not allege that Applicant lied to the police when initially questioned about the scope of his sexual conduct with the victim. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

(a) to assess an applicant’s credibility; (b) to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). The allegation that he initially lied to the police will not be considered for any purpose because Applicant has not had adequate notice and a full opportunity to collect and present evidence of mitigation regarding this information.

²The offense of “sexual offense in the third degree” prohibits a person from “engag[ing] in a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old.” (HE 4) The statutory penalty states, “A person who violates this section is guilty of the felony of sexual offense in the third degree and on conviction is subject to imprisonment not exceeding 10 years.” (HE 4) If Applicant were convicted of the crime of sexual offense in the third degree, he would have been required to register as a sex offender. *See Ochoa v. Dep’t of Pub. Safety & Corr. Servs.*, 430

of oral sex as a perverted practice,³ and he was sentenced to probation for three years with ten years suspended. (Tr. 45, 50, 59) In accordance with his pretrial agreement, Applicant admitted that he and the victim engaged in fellatio or oral sex. (Tr. 77)⁴ His probation will end in January 2017. (Tr. 60) He complied with the terms of his probation. (Tr. 59) He was not required to register as a sex offender because of the level of his conviction. (Tr. 46, 60) See also notes 2 and 3, *supra*. Applicant has not communicated with the victim since the incident, and he does not maintain access to any dating websites. (Tr. 45) He has dated two women, ages 25 and 31, after his arrest. (Tr. 60) He denied criminal intent; however, he accepted responsibility for behaving in a reckless manner.

Character Evidence

Applicant's father has a distinguished career in education and government service. (Tr. 16) Applicant lives with his parents. (Tr. 18) Applicant has complied with the terms of his probation. (Tr. 18, 23) He does not use illegal drugs, abuse alcohol, or commit criminal offenses (except for the SOR conduct). (Tr. 18-19) Applicant exhibits exceptional talent with music, computers, and aircraft. (Tr. 19) Applicant was unaware the minor was under the age of consent, and he feels remorse for his conduct with the minor. (Tr. 19-21)

A company vice president and facility security officer made a statement on Applicant's behalf. (Tr. 26-27) Applicant was hired for his current sensitive position as a senior engineer in February 2016. (Tr. 27-29) The hiring official was aware of Applicant's criminal offense because Applicant disclosed it. (Tr. 29, 33-34) Applicant has access to classified information. (Tr. 29) Applicant said he was unaware of the age of the minor; she invited him to meet with her; and he was found guilty of a misdemeanor. (Tr. 30) He did not read the police report supporting the criminal charge. (Tr. 37) Applicant received compliments for his work, professionalism, and diligence. (Tr. 32, 37) His statement supports Applicant's continued access to classified information. (Tr. 27-32)

Md. 315, 61 A.3d 1, 2013 Md. LEXIS 19 (2013). In the state where Applicant's offense occurred, engaging in a sexual act with a 15-year-old is a "strict criminal liability" offense with respect to the defendant's knowledge of the 'victim's' age, that the offense had no '*mens rea* element' in this regard, and that 'the availability of a defense of reasonable mistake of age cannot be read into the carnal knowledge between a fourteen or fifteen year old victim and a defendant who is age twenty-one or older.'" See *Moore v. State*, 388 Md. 623, 644, 882 A. 2d 256, 268 (2005).

³He pleaded guilty to committing an "unnatural or perverted sexual practice." This offense prohibits: "(1) tak[ing] the sexual organ of another or of an animal in the person's mouth; (2) plac[ing] the person's sexual organ in the mouth of another or of an animal; or (3) commit[ing] another unnatural or perverted sexual practice with another or with an animal." (HE 5) The statutory penalty states "A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding \$ 1,000 or both." (HE 5) Applicant said he was not aware of whether he admitted or was required to admit that his penis was placed into the victim's mouth. (Tr. 78)

Four witnesses, including his godfather, a friend, his lawyer in his criminal case, and a supervisor, provided character statements on Applicant's behalf. (AE A, B, D, E) Applicant is trustworthy, responsible, diligent, and law abiding. The statements support reinstatement of his security clearance.

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 that, "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 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 and modified.

Eligibility for a security clearance is predicated upon meeting the criteria contained in the adjudicative guidelines (AG). 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Adverse clearance decisions are made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned." See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision on any express or implied determination as to 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

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining 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."

AG ¶ 31 describes three conditions that could raise a security concern and may be disqualifying in this case: "(a) a single serious crime or multiple lesser offenses;" "(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;" and "(d) individual is currently on parole or probation."

AG ¶¶ 31(a), 31(c), and 31(d) apply. In April 2013, Applicant engaged in sodomy with a 15-year-old female. He committed a serious offense, even though he was allowed to plead guilty to a misdemeanor-level offense. See notes 2 and 3 *supra*. His probation will end in January 2017.

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.

Although none of the mitigating conditions fully apply, there are important mitigating factors. A psychiatrist determined: Applicant was not a sexual predator; he does not have any psychiatric disorder; he is not sexually attracted to children or minors; he is unlikely to reoffend; and no treatment or medication was recommended. He has an excellent employment record. He expressed regret and remorse concerning his sexual offense.

Significant factors weighing against mitigating criminal conduct concerns remain. He committed a serious criminal offense. In April 2013, Applicant engaged in sodomy with a 15-year-old female. His crime is relatively recent. He continues to be on probation. More time must elapse before there is enough assurance that criminal conduct security concerns are 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 two conditions that could raise a security concern and may be disqualifying in this case: "(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;" and "(d) sexual behavior . . . reflects lack of discretion or judgment." AG ¶¶ 13(a) and 13(d) apply for the reasons stated in the previous section.

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 for the reasons stated in the criminal conduct section. Sexual behavior security conditions are not mitigated.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case:

(c) credible adverse information in several adjudicative issue 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 person may not properly safeguard protected information; and

(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 person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

The SOR cross-alleges under the personal conduct guideline the same conduct alleged and discussed under the criminal conduct guideline. His sodomy with a 15-year-old under Guidelines J and D is sufficient to warrant revocation of his security clearance without incorporating or applying Guideline E. The concerns under Guidelines J, D, and E address identical issues involving judgment, trustworthiness, and reliability. All personal conduct security concerns described in the SOR are directly related to his criminal conduct and sexual behavior with the 15-year-old victim. Personal conduct security concerns as alleged in the SOR constitute an unwarranted duplication of the concerns under Guidelines J and D, and accordingly personal conduct concerns are 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, D, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) warrant additional comment.

Applicant is a 32-year-old senior cyber security engineer employed by a defense contractor. In 2006, Applicant graduated from a university with a bachelor of science degree. Applicant has worked for federal contractors and federal government agencies from 2008 to present. He has held a security clearance since 2008. Applicant does not use illegal drugs or abuse alcohol. There is no evidence of a security violation.

A company vice president and facility security officer, Applicant's father and godfather, his friend, his lawyer in his criminal case, and a supervisor provided character statements on Applicant's behalf. He has an excellent employment record. The general sense of their statements is that Applicant is professional, diligent, trustworthy, responsible, and law abiding, except for his sodomy of a 15-year-old in 2013. Their statements support Applicant's continued access to classified information.

A psychiatrist concluded that Applicant does not have any psychiatric disorder, and he is unlikely to reoffend. Applicant is an intelligent person, who understands the importance of compliance with security rules. His acknowledgement of crime, guilty plea, and his evident remorse are important steps towards rehabilitation and mitigation of security concerns.

The evidence against approval of Applicant's clearance is more substantial and persuasive. Applicant committed a serious offense, sodomy with a 15-year-old female in April 2013. His criminal conduct is recent, and he is still on probation. There are unresolved questions about Applicant's reliability, trustworthiness, and ability to protect classified information. More time without criminal conduct is necessary to fully mitigate security concerns.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude personal conduct security concerns are mitigated; however, criminal conduct and sexual behavior security 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
Subparagraphs 1.a to 1.c:	Against Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For 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