



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
[REDACTED]) ISCR Case No. 16-0210
)
Applicant for Security Clearance)

Appearances

For Government: Allison Marie, Esq., Department Counsel
For Applicant: *Pro se*

06/11/2018

Decision

HESS, Stephanie C., Administrative Judge:

Although the sexual behavior and criminal conduct allegations arose from behavior that occurred in 2011 and 2012, Applicant's inconsistent statements and failure to accept any responsibility for his conduct remain concerns. Applicant has not paid or otherwise resolved his delinquent accounts. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on November 11, 2015. On January 19, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline D (Sexual Behavior), Guideline J (Criminal Conduct), and Guideline F (Financial Considerations). The DOD acted under Executive Order (Ex. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant submitted his Answer to the SOR on January 25, 2017, and requested a decision on the record without hearing before an administrative judge. On March 2, 2017, Department Counsel requested a hearing and notified Applicant. Department Counsel was ready to proceed on March 10, 2017, and the case was assigned to me on May 26, 2017. On November 9, 2017, DOHA notified Applicant that the hearing was scheduled for November 29, 2017. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted into evidence without objection. Applicant testified but did not submit any documentary evidence. DOHA received the transcript (Tr.) on December 8, 2017.

The SOR was issued under the AG implemented on September 1, 2006. The DOD implemented the amended AG on June 8, 2017, while this decision was pending. This decision is decided based on the amended AG effective June 8, 2017.

Findings of Fact

Applicant is a 30-year-old electronics technician currently employed by a defense contractor since October 2016. (Tr. 29.) He was previously employed by a defense contractor since July 2015. He served honorably on active duty in the U.S. Marine Corps from 2008 until May 2013, including a nine-month combat deployment. He and his wife married in 2011 and have three children ages eight, seven, and two. He was unemployed from May 2013 until July 2015. He was granted his first security clearance in 2009. (GX 1; GX 2.)

Under Guideline D, the SOR alleges that in October 2011 Applicant created a social media account to solicit underage girls. Under Guideline J, the SOR cross-alleges the Guideline D allegation, and also alleges that Applicant was charged with assault in approximately May 2012. Applicant denies these allegations.

Under Guideline F, the SOR alleges eight debts totaling \$6,312. Applicant denies that these delinquent accounts should affect his security eligibility, however, he admits that each of the debts are accurate. The delinquent debts are reflected in Applicant's December 2015 credit bureau report, and discussed during his personal subject interview. (GX 3; GX 2.)

Following his discharge from the Marine Corps in May 2013, Applicant was unemployed until July 2015. This 27-month period of unemployment had a significant impact on Applicant's finances, and it is during this period that he incurred the majority of the SOR debts. Applicant received approximately \$200 a month in unemployment payments, and during this period of time, Applicant's wife was the primary household-income earner. Applicant also attributes his financial delinquencies to youth and inexperience.

In July 2015, Applicant began working for a defense contractor and currently earns an hourly rate of \$21.40, with sporadic eligibility for overtime and bonuses. Applicant's wife was unemployed between August 2016 and March 2017, but currently earns

approximately \$14 per hour. Since returning to full-time employment in 2015, Applicant has focused on maintaining his current living expenses and not incurring any additional delinquent debt. Applicant testified that the \$2,491 delinquent debt (SOR ¶ 3.f) was the result of a 2011 or 2012 dispute with the landlord of a rental property from which Applicant was evicted. He stated that this account no longer appears on his credit report, however, he did not pay the debt. (Tr. 26-27.) Because of the uncertainty of Applicant's pending security clearance, on which his job is dependent, Applicant has not paid or otherwise attempted to resolve any of the other delinquent accounts. (Tr. 33-37.)

The SOR alleges under Guideline J that Applicant was arrested and charged with assault in 2012. Although Applicant denied this allegation in his Answer, he testified that he was in fact arrested for assault on his wife following an argument. Specifically, Applicant and his wife were engaged in a dispute, and Applicant punched a mirror. According to Applicant, the mirror shattered and a piece of the glass flew across the hallway and cut his wife's face who was standing approximately "five to eight feet away." Applicant's mother-in-law called the police, who arrived, took statements, and arrested Applicant. The charge was ultimately dropped at his wife's request. Applicant denies intentionally injuring his wife. His denial of the allegation was "because everything was dropped" and he does not consider his conduct to have been criminal in nature. (GX 2; GX 5; Tr. 60-62.)

Under Guideline D, the SOR alleges that Applicant created a social media account using a fictitious name and age whereby he solicited underage girls. This conduct is cross-alleged under Guideline J. The allegation arose from a signed sworn statement that Applicant made to Navy investigators in December 2011. In that statement, Applicant made the following assertions: That in early October 2011, after learning about an online social media site from a friend while deployed, Applicant created an account using a fictitious name, but using an actual picture for his profile. In his profile, Applicant, who was 23, stated that he was either 16 or 17 years old, and was looking for girls in the local area between 14 and 16. He further stated that he created the fictitious account because he did not want his wife to find out about it. Applicant had online conversations with 40 or 50 different people, and solicited approximately 10 girls that he knew to be underage to send him naked or sexually explicit photographs. Additionally, he asked one girl he knew to be underage if she would like to have sexual intercourse with him. He further stated that he never received any photographs from any underage girls. He told the investigator that he had deleted the fictitious account approximately a week-and-a-half prior to the interview. (GX 4.)

In his personal subject interview (PSI), Applicant was confronted by the investigator about his May 2013 non-judicial punishment and three-month ineligibility for promotion. Applicant explained that he was on a social media site connecting with former high school classmates, when his wife saw a woman on the screen who she believed to be underage, and reported Applicant to his command. Applicant was investigated, including his computer and phone. Applicant stated that he did not disclose this investigation because it was dismissed and there were no records of the incident. (GX 2.)

However, Applicant testified that the information he provided to the Navy investigator was not true. Applicant stated that he never created an online social media account using a false name or an inaccurate age, but instead opened an account using an actual picture, his name, and his age. He stated that he did not initially know why he was being questioned by Navy investigators, and that he initially denied the conduct of which he was accused. He stated that the investigator conducting the interview put words in his mouth, and that after approximately an hour and a half, he told the investigator what he “wanted to hear.” Applicant vehemently reiterated that he never created an account under a fictitious name and age, and that he did not solicit underage girls. Applicant thinks his wife is the person who initially contacted the Navy investigators. (Tr. 71-74.)

Applicant entered a plea agreement for non-judicial punishment for his conduct. As part of the plea agreement, Applicant was not eligible to reenlist at that time. He received an honorable discharge and subsequent eligibility for reenlistment. (Tr. 65-66.) Despite this plea agreement, Applicant contends that he did nothing wrong. (Tr. 66.)

Policies

“[N]o 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 applicants 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’s meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and 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 that 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.

Clearance decisions must be made “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. Thus, a decision to deny a security clearance 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline D, Sexual Behavior

The concern under this guideline is set out in AG ¶ 12:

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.

The following disqualifying condition applies:

AG ¶ 13(a): sexual behavior of a criminal nature, whether or not the individual has been prosecuted.

The following mitigating condition potentially applies:

AG ¶ 14(b): the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment.

Although Applicant's alleged solicitation of underage girls happened more than seven years ago, it is not mitigated by the passage of time. Applicant's inability to clearly and consistently recount the events that led to these allegations casts doubt on his current reliability, trustworthiness, and good judgment. None of the mitigating conditions applies.

Guideline J, Criminal Conduct

The concern under Guideline J (Criminal Conduct) is set out in AG ¶ 30:

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.

The following disqualifying condition applies under this guideline:

AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.

The following mitigating condition is potentially applicable:

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 individual's reliability, trustworthiness, or good judgment.

While Applicant's criminal conduct of fraudulently attempting to induce underage girls to provide him with naked and/or sexually explicit photographs, and in one case to have sex with an underage girl, occurred when he was 23 years old, his failure to accept responsibility for his conduct, evidenced by his completely inconsistent accounts, continues to cast doubt on his reliability, trustworthiness, and good judgment. Further, while Applicant does not deny that he was arrested and charged with assaulting his wife in 2012, he does not accept responsibility for his actions. None of the mitigating conditions applies.

Guideline F, Financial Considerations

The concern under this guideline is set out in AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

The following disqualifying conditions apply under this guideline:

AG ¶ 19(a): inability to satisfy debts; and

AG ¶ 19(c): a history of not meeting financial obligations.

The following mitigating condition is potentially applicable:

AG ¶ 20(b): the conditions that resulted in the financial problem were largely beyond the person's control (e.g. loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft, and the individual acted responsibly under the circumstances).

While Applicant's sustained period of unemployment, as well as his wife's period of unemployment, clearly qualify as conditions largely beyond his control, he did not act responsibly under the circumstances. His failure to take any action to pay or otherwise resolve his delinquent accounts continues to cast doubt on his current reliability, trustworthiness, and good judgment. None of the mitigating conditions applies.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 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.

I have incorporated my comments under Guidelines D, J, and F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but I have also considered the following:

Applicant served honorably in the military for five years, including a combat deployment. He received his first security clearance in 2009. He has not incurred any recent delinquent debt, and is current on his ongoing financial obligations. However, Applicant's unresolved delinquent SOR debts, his lack of consistency and clarity in recounting the details of his conduct, and his failure to accept responsibility for his actions remain concerns.

After weighing the applicable disqualifying and mitigating conditions under Guidelines D, J and F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his delinquent debts and conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline D (Sexual Behavior): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Paragraph 2 Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraphs 2.a – 2.b: Against Applicant

Paragraph 3, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraphs 3.a – 3.h: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Stephanie C. Hess
Administrative Judge