



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



In the matter of:)	
)	
REDACTED COPY)	ISCR Case No. 17-01547
)	
Applicant for Security Clearance)	

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
For Applicant: *Pro se*

04/06/2018

Decision

RIVERA, Juan J., Administrative Judge:

In light of the seriousness of Applicant's criminal behavior and the period after Applicant's release from supervised probation, his evidence is insufficient to demonstrate his successful rehabilitation and that his criminal behavior is unlikely to recur. Sexual behavior, criminal conduct, and personal conduct security concerns are not mitigated. Clearance is denied.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on October 9, 2015. He was interviewed by government investigators on January 17, 2013, and October 19, 2016. After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued a Statement of Reasons (SOR) on June 29, 2017, alleging security concerns under Guidelines D (sexual behavior), J (criminal conduct), and E (personal conduct). Applicant answered the SOR on August 11, 2017, and requested a decision based on the written record in lieu of a hearing.

A copy of the Government's file of relevant material (FORM), submitting the evidence supporting the security concerns, was provided to Applicant by letter dated

October 19, 2017. Applicant received the FORM on October 31, 2017. He was allowed 30 days to submit any objections to the FORM and to provide material to refute, extenuate, and mitigate the concerns. Applicant did not respond to the FORM. The case was assigned to me on March 20, 2018. Lacking any objections, I admitted and considered the Government's proposed evidence.

Findings of Fact

Applicant admitted all of the SOR allegations (§§ 1.a and 1.b, 2.a, and 3.a). His admissions are incorporated herein as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 48-year-old employee of a large federal contractor. He graduated from high school in 1987, and attended college for about two years, but did not earn a degree. He enlisted in the Army in 1987, and served honorably until his discharge in 2000. He married his wife in 1988. They have two sons, ages 27 and 22.

Applicant has been intermittently working for federal contractors since he left the service in 2000. He has held a top-secret clearance with access to sensitive compartmented information (SCI) since 1995. His clearance was suspended in February 2011, after he was charged with the felony offenses alleged in the SOR. His clearance was terminated when he was fired from his job after he was convicted of the felony offenses in 2013. He seeks reinstatement of his clearance, which is required for his employment with a federal contractor.

In June and September 2010, Applicant chatted on the Internet with a person he believed was a 13-year-old female. (The person was in fact a police officer recording the conversations.) On both occasions, Applicant engaged in sexually explicit conversations with the "13-year-old," and emailed to her web-cam clips and pictures of him fondling his penis, showing his erect penis, and of a man and a woman having oral sex. (FORM, Item 5)

In January 2013, Applicant pleaded guilty and was convicted of two charges of dealing in materials harmful to a minor, a third degree felony. Three other felony charges were dismissed pursuant to the guilty plea agreement. He was sentenced to a term of 153 days in jail, to pay fines and court fees, to attend sex offenders' treatment, and supervised probation for 36 months. The probation was later extended for another year. Applicant completed probation in January 2017. Upon Applicant's motion, the court later amended both charges from a felony to a Class A misdemeanor. (FORM, Item 6)

Applicant began sex offenders' treatment in April 2013, and successfully completed it in about June 2016. According to the counselor's report, Applicant took responsibility for his criminal conduct, achieved significant progress in healing, and has a working relapse prevention plan in place. His tests scores placed him in a low

category for re-offense. In the counselor's opinion, it is very unlikely that Applicant will have any further issues of a sexually deviant nature. (FORM, Item 2) Applicant believes that his counseling was of great benefit to him. He believes he is a better person now and understands himself better. (Answer)

Policies

The SOR was issued under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Eligibility for access to classified information may be granted "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. 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).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.

"[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

In June and September 2010, Applicant engaged in sexually explicit conversations with a person whom he believed was a 13-year-old girl. He emailed to the "girl" web-cam clips and pictures of him fondling his penis, showing his naked erect penis, and of a man and a woman having oral sex. Applicant was convicted of two felony charges for his sexually deviant criminal conduct in January 2013.

The SOR cross-alleged the same facts and criminal behavior that raised the Guideline D security concerns under Guidelines J and E. For the sake of brevity and to avoid repetition of the same facts and analysis, the disqualifying conditions and mitigating conditions under Guidelines D, J, and E will be addressed together. Applicant's criminal behavior raises security concerns under the sexual behavior, criminal conduct, and personal conduct guidelines as follows:

Guideline D: Sexual Behavior

AG ¶ 12 sets forth the security concern as follows:

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. 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 provides conditions that could raise a security concern and may be disqualifying:

- (a) sexual behavior of a criminal nature . . . ;
- (b) 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.

Guideline J: Criminal Conduct

AG ¶ 30 states the security concern as follows:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 31 provides a condition that raises a security concern and may be disqualifying: "(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."

Guideline E: Personal Conduct

AG ¶ 15 sets forth the security concern as follows:

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

AG ¶ 16 provides a condition that may be disqualifying: "(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, could affect the person's personal, professional, or community standing"

The record established the above disqualifying conditions, requiring additional inquiry about the possible applicability of the applicable mitigating conditions.

Under **Guideline D, Sexual Behavior**, I considered the following mitigating conditions provided by AG ¶ 14:

(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 judgment;

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

(e) the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and consistent compliance with the treatment plan, and/or has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

Under **Guideline J, Criminal Conduct**, I considered the following mitigating conditions outlined by 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; 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.

Under **Guideline E, Personal Conduct**, I considered the following mitigating conditions set forth by AG ¶ 17:

(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

The following mitigating conditions were raised by the evidence, but for reasons explained further in this decision, they do not mitigate the security concerns: AG ¶ 17(e), AG ¶ 32(d), and AG ¶¶ 17(d) and (e). I specifically considered that the offenses occurred in 2010; Applicant pleaded guilty and was sentenced in 2013; and his probation ended in January 2017. He successfully completed the sexual offenders' treatment mandated by the court. Applicant also receives credit for his 13 years of honorable military service, his long-term work for federal contractors, and for taking his first steps towards rehabilitation through his guilty pleas.

Notwithstanding, in light of the seriousness of Applicant's criminal behavior – acting as a sexual predator against a “13-year-old girl” – his evidence is insufficient to demonstrate that he is no longer a sexual predator and that his psychological problems are resolved and unlikely to recur. Applicant was under the scrutiny and threat of the criminal court system between 2010 and the end of his supervised probation in January 2017. He had no choice but to behave and comply with the court's mandates. He has been out of the court's supervision for over one year. More time without supervision is needed for Applicant to demonstrate his successful rehabilitation and that reoccurrence of his criminal behavior is unlikely. The sexual behavior, criminal conduct, and personal conduct security concerns are not mitigated.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶¶ 2(a) and 2(d). I have incorporated my comments under Guidelines D, J, and E in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant, 48, has been employed with federal contractors since 2000, and held a clearance between 1995 and 2011. He appears to be on the road to a full rehabilitation. Nevertheless, it is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. Unmitigated security concerns lead me to conclude that granting a security clearance to Applicant is not warranted at this time.

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 and 1.b:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for a security clearance. Clearance is denied.

JUAN J. RIVERA
Administrative Judge