



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



In the matter of:)
)
) ISCR Case No. 17-02592
)
Applicant for Security Clearance)

Appearances

For Government: Mary Margaret Foreman, Esq., Department Counsel
For Applicant: Sean Timmons, Esq.

10/22/2018

Decision

Gregg A. Cervi, Administrative Judge:

Applicant failed to mitigate the personal conduct concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 21, 2016, seeking a Department of Defense (DOD) security clearance. On April 24, 2018, the DOD issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E (Personal Conduct). Applicant responded to the SOR on April 30, 2018, and requested a hearing before an administrative judge.¹

The case was assigned to me on August 20, 2018. Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 20, 2018, scheduling the hearing for August 27, 2018. The hearing was convened as scheduled. Government

¹ The DOD CAF acted under Executive Order (Exec. 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 the DOD on June 8, 2017.

Exhibits (GE) 1 through 10 were admitted in evidence without objection. Applicant testified and submitted Applicant Exhibits (AE) A through DDD, which were admitted without objection. Applicant's counsel's brief, marked as Hearing Exhibit (HE) 1, was also appended to the record. DOHA received the hearing transcript (Tr.) on September 6, 2018. After the hearing, Applicant's counsel requested an expedited decision.

Findings of Fact

Applicant is a 49-year-old clerk for a defense contractor, employed since 2016. He served in the Army National Guard from 1986 to 1989, and on active duty in the U.S. Army, from 1989 to 2004, when he was put on the temporary disability retired list. He was medically retired in 2009 with an honorable discharge. He was awarded an associate's degree in 2013. He was married 1989 and divorced in 1994. He remarried in 1997. He has three children and one stepchild. He does not have a current security clearance.

The SOR alleges under Guideline E, that Applicant committed indecent acts with a child in 1993; rape and indecent acts with a child in April and May 1994; indecent acts with a child and contributing to the delinquency of minors in April and May 2000; disobeying an order to stop flirtatious conduct with a female soldier in 2002 and 2003; and dereliction of duty when Applicant failed to supervise a subordinate while driving a military vehicle that resulted in the death of the driver. In addition, when interviewed by an Office of Personnel Management (OPM) investigator in 2016, Applicant claimed he was cleared of the 2000 allegations of inappropriately touching a child and serving alcohol to minors when in fact he received a reprimand. Finally, the SOR alleges Applicant falsified his statements to an OPM investigator in 2017 when he denied inappropriate conduct with a minor and having sexual intercourse when in fact he previously admitted to the conduct. Applicant denied the SOR allegations except for SOR ¶ 1.c, regarding disobeying orders.

SOR allegations ¶¶ 1.a-1.c, involve allegations from a teenage girl that Applicant's spouse took into their home. In 1994, the girl reported that Applicant indecently assaulted her after he inappropriately touched her in 1993 and 1994, and had sexual intercourse with her while she was asleep in 1994. During questioning by Army investigators and after a polygraph, Applicant admitted to sexual intercourse with the girl, but claimed it was consensual. In addition, a witness overheard Applicant on the phone admit to the conduct. He has since denied the allegations and claimed that the girl was retaliating against him. Investigators reported to Applicant's command that there was probable cause to determine that the acts alleged were committed, but acknowledged the weakness in the evidence to obtain a conviction. In November 1995, Applicant was reprimanded by his command for the misconduct. In his 2017 OPM interview, Applicant denied the allegations despite his previous admissions to Army investigators.

In June 2000, Applicant received a general officer's letter of reprimand for indecent acts upon a child between April and May 2000, where he was found to have inappropriately touched a 13-year-old girl at his home, and serving alcohol to two other teenage girls on various occasions. The allegations brought forward by the girl's parents include inappropriate touching of more than one child and an allegation of rape. Army

investigators were unable to develop sufficient evidence of rape. Applicant denied the allegations and indicated in a 2017 OPM interview that the allegations arose from a June 2006 event when he hosted neighborhood children at his home to play outdoor games. He claimed that two teenage girls attended but were disruptive, spoke to him inappropriately, and yelled at each other. He ordered them to leave the home, and two weeks later he was transported to the military police station to be interviewed on the allegations. During his 2016 OPM interview, Applicant claimed he was cleared of the allegations after the investigation. In his 2017 OPM interview, he could not recall any disciplinary action for the incidents, but stated it was possible he received a reprimand. In his answer to the SOR, Applicant claimed that this incident was also a case of retaliation for strictly correcting the children.

Applicant admitted to disobeying orders in 2002 and 2003 to cease flirtatious comments to female soldiers. In testimony, he claimed that one incident involved innocently handing out leaflets at the base front gate inviting members of his unit and their families to a party at his home. He gave the flyer to the spouse of a soldier in another unit, who complained that Applicant was making flirtatious comments to her. He was referred to non-judicial punishment under Article 15, UCMJ,² for sexual harassment, was found guilty and reduced in rank from E-6 to E-5.

In 2003 Applicant was supervising an Army private while riding in a high mobility multi-purpose wheeled vehicle (HMMWV; also known as a HUMVEE), driven by the private. Appellant was a 34-years-old sergeant who had been in the Army for 17 years. Applicant allowed the soldier to drive the vehicle at a high rate of speed without a helmet and seatbelt. The vehicle left the road and rolled over, while ejecting the occupants. The private was killed in the accident, and Applicant suffered head injuries. As a result of this incident, Applicant was accused of dereliction of duty. In November 2003, an Army psychiatrist noted Applicant suffered significant head injuries as a result of the accident and had “total amnesia for the accident and several hours thereafter.” The doctor also noted Applicant’s significant problems with concentration and comprehension when attempting basic mental tasks, and therefore lacked the ability to participate effectively in his own defense. No disciplinary action was taken and Applicant was retired from the Army. Of note, the Army investigative report disclosed that Applicant was previously involved in a drunk driving traffic accident in 1991 while stationed overseas, and was disciplined.

At the hearing in this case, Applicant claimed that he did not remember specifics about events that occurred before the 2003 accident, however he was able to give clear recitations of facts to the OPM investigators in 2016 and 2017 interviews, and provided exculpatory testimony and adamant denials of the allegations during the hearing. He was also able to provide a detailed personal history, included in the record as AE D.

Applicant claimed that after he was demoted as a result of the orders violations, he changed his life. He is now a deacon in his church and is involved in several leadership positions, along with activities involving male and female youth. He is also a certified track

² Uniform Code of Military Justice.

and field coach for youth and high-school age children since 2010. He provided numerous military commendation, achievement, and good conduct awards; certifications and training certificates; along with letters of support from a doctor associated with his church and a friend. They attest to his good reputation, compassion, and trustworthiness. The church member noted Applicant's volunteer efforts including coaching a summer league track club for teenage boys and girls, and hosting Super Bowl parties at his home. However, Applicant testified that the church members know little about his past, even though he now works with youth. He noted that no church member has accused him of inappropriate conduct. Applicant acknowledged in his answer to the SOR, that he is not perfect, and that decisions and choices he made in his past have not always been good ones, but he did not specify his poor decisions. He pointed out that he dedicated his life to his religious faith in 2004, and started a non-profit youth track and field team in 2008.

Law and Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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.

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(c), 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.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

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 decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information.

Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

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

Analysis

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying conditions are potentially applicable:

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(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; and

(e) personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, 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.

Applicant’s history of inappropriate, negligent and/or illegal conduct while in the Army, and his deliberate concealment of the facts and circumstances of such conduct

during government interviews, implicate the security concerns in AG ¶ 16 (b), (c), and (e). The record evidence and testimony, despite Applicant's claimed memory problems, are sufficient to raise the concerns alleged in the SOR and satisfy the government's burden of proof. Applicant was less than truthful when interviewed by government investigators, and intentionally provided false and misleading information regarding his past sexual misconduct and the Army's adjudication of the evidence.

Guideline E includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

(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;

(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.

Appellant's actions while in the Army constitute serious misconduct, and taken as a whole, carry the indicia of reliability. His explanations and denials do not overcome the totality of the evidence showing a history of inappropriate sexual behavior and implicate Applicant in more than one credible allegation of inappropriate sexual contact with minors. When this behavior is combined with two incidents of orders violations and sexual harassment, along with dereliction of duty when negligently supervising a junior soldier resulting in his death, the application of mitigation based on the passage of time or lack of seriousness of the incidents is untenable.

Applicant has not specifically acknowledged his past behavior, nor has he received counseling or taken other action to address his history of inappropriate sexual conduct with minors. Rather, he continues to coach young women and has not disclosed his past to the church authorities that sponsor his youth activities. I am not convinced that similar inappropriate conduct and continued lapses in judgment will not recur in the future. In addition, Applicant's intentional downplaying of the allegations, inconsistent statements, continued denials and deceptive recitation of the facts asserted during his OPM interviews, raise significant questions about his current judgment, honesty, and trustworthiness. Applicant's claims of memory loss prior to 2003 are not substantiated by the evidence or through his statements and testimony. Medical evidence he submitted

supports a loss of memory related to the accident and shortly thereafter, but no medical evidence of continued memory loss or an inability to recollect significant accomplishments or incidents during his pre-accident Army career are apparent.

I believe that Applicant's past untrustworthy and inappropriate behavior has not been sufficiently mitigated to alleviate concerns that it will not recur in the future. I have significant doubts about his judgment, reliability, and willingness to comply with rules and regulations, and those doubts have not been resolved through actions taken since leaving the Army. Mitigation credit under AG ¶¶ 17(c), (d), (e), and (f) is not warranted.

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 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis.

I considered Applicant's military accomplishments, his current position in the church, his volunteer activities, the answer, his testimony, and the documentary evidence presented. Applicant has not taken responsibility for his actions as alleged in the SOR, and has not provided sufficient evidence to refute or mitigate the allegations.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance.

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 E:	Against Applicant
Subparagraphs 1.a-1.h:	Against Applicant

Conclusion

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

Gregg A. Cervi
Administrative Judge