



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



In the matter of:)
)
) ISCR Case No. 14-06917
)
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esquire, Department Counsel
For Applicant: *Pro se*

February 4, 2016

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

On April 30, 2014, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP). On June 30, 2015, the Department of Defense Consolidated Adjudications Facility (DODCAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J (Criminal Conduct) and E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR in writing on July 17, 2015. Applicant requested his case be decided on the written record in lieu of a hearing.

Department Counsel submitted three Items in support of the SOR allegations. Item 3 is inadmissible. It will not be considered or cited as evidence in this case. It is the summary of an unsworn interview of Applicant conducted by an interviewer from the Office of Personnel Management in April 2014. Applicant did not adopt it as his own statement, or otherwise certify it to be accurate. Under Directive ¶ E3.1.20, this Report of Investigation summary is inadmissible in the absence of an authenticating witness. In light of Applicant's admissions, it is also cumulative.

A complete copy of the file of relevant material (FORM), consisting of Items 1 to 4, was provided to Applicant on September 4, 2015. He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the file on September 17, 2015. Applicant did not file a Response to the FORM within the 30 day time allowed that expired on October 17, 2015.

I received the case assignment on November 10, 2015. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Findings of Fact

Under Paragraph 1, Criminal Conduct, Applicant admitted that in March 1999 he was charged with First Degree Child Molestation. He pled guilty and was placed on probation for ten years in connection with a suspended sentence, was ordered to attend counseling, and was required to register with his state as a sexual offender. Under Paragraph 2, the same conduct was alleged to raise security concerns under Personal Conduct. He failed to state whether he admitted or denied the allegation under Paragraph 2. (Item 1.)

Applicant is 34 years old. He is a high school graduate. He has been employed with a Federal Contractor since March 2014. He reflected on his e-QIP that he married in August 2002, but separated from his wife in February 2013. He has two children, ages 14 and 10. (Item 2.)

Under "Section 22-Police Record" on his e-QIP, Applicant disclosed that in May 1999 he was arrested and convicted of Felony First Degree Child Molestation. As a result of this conviction, he was on probation from June 1999 to June 2009. Applicant was 17 years old at the time of the offense. (Item 2.)

In his Answer, Applicant indicated that there has been no subsequent conduct of a similar nature. He also stated that such conduct is unlikely to recur. (Answer.)

Applicant provided no evidence concerning the quality of his job performance. He submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

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 useful 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, the administrative judge applies the guidelines in conjunction with the factors listed in AG ¶ 2 describing 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 access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 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. See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, 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 five that could raise a security concern and may be disqualifying. One condition applies:

(a) a single serious crime or multiple lesser offenses.

Applicant was convicted of Felony First Degree Child Molestation, a serious crime. He was placed on probation for ten years for his offense, and is required to register with his state's sex offender registry. His conduct raises security concerns under DC 31(a), and shifts the burden to Applicant to rebut, extenuate, or mitigate those concerns.

AG ¶ 32 provides four conditions that could 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.

Applicant failed to present evidence to establish full application of any of the above mitigating conditions. In his Answer, he cited the passage of time without recidivism and the fact that his criminal conduct took place when he was an adolescent. While these are factors that provide some mitigation, he failed to meet his burden to show how his past actions no longer cast doubt on his reliability, trustworthiness, and judgment. As a result MC ¶ 32(a) does not fully apply. He did not establish that he was pressured into his criminal acts or that there was evidence that he did not commit the

offense. MC ¶¶ 32(b) and 32(c) do not apply. Finally, He presented little evidence of rehabilitation. While the passage of time without recurrence of similar criminal activity has been established, he failed to show any remorse or restitution, job training or higher education, good employment record, or constructive community involvement. MC ¶ 32(d) has not been fully established.

Guideline E, Personal Conduct

The security concern for the Personal Conduct 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 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 conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group; and

Applicant's felony conviction First Degree Child Molestation and status on his state's sex-offender registry creates a vulnerability to exploitation, manipulation, or duress and affects his personal, professional, or community standing. AG ¶16(e) is applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. 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; and

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

Applicant did not meet his burden to establish mitigation. As noted above, he did not present evidence to show how his past actions no longer cast doubt on his reliability, trustworthiness, and judgment. He did not present documentation to show he completed the court ordered counseling to change the behavior or show he has taken other positive steps to alleviate the stressors, circumstances, or factors that caused his untrustworthy, unreliable, and inappropriate behavior. He did not establish that he has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress. None of the above mitigating conditions fully apply.

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 facts and circumstances surrounding this case. Applicant committed a serious criminal offense at the age of 17. He is now 34 years old. He is required to register as a sex offender in his state of residence for the rest of his life. He failed to present sufficient evidence of rehabilitation or other permanent behavioral changes to show that he would not be susceptible to pressure, coercion, exploitation, or duress. Overall, the record evidence leaves me with questions or substantial doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the guidelines for Criminal Conduct and Personal Conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.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 national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Jennifer I. Goldstein
Administrative Judge