



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



In the matter of:)
)
-----) ISCR Case No. 14-03838
)
Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: Matt Hughes, Esq.

02/25/2016

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny him eligibility for access to classified information. In 2013, the then 32-year-old Applicant became involved with a 14- or 15-year-old girl resulting in his conviction for contributing to the delinquency of a minor, a class 1 misdemeanor. He did not present sufficient evidence to explain and mitigate the security concerns. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 Format) on February 11, 2014.¹ About a year later on April 26, 2015, after reviewing the application and information gathered during a background

¹ Exhibit 1 (this document is commonly known as a security clearance application).

investigation, the Department of Defense (DOD)² sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information.³ The SOR is similar to a complaint. It detailed the reasons for the action under the security guidelines known as Guideline J for criminal conduct, Guideline D for sexual behavior, and Guideline E for personal conduct. Applicant answered the SOR on July 10, 2015.

The case was assigned to me on September 18, 2015. The hearing was held as scheduled on November 10, 2015. Department Counsel offered Exhibits 1–3, and they were admitted. Applicant offered Exhibits A and B, and they were admitted. No witnesses other than Applicant were called. The hearing transcript (Tr.) was received on November 18, 2015.

Findings of Fact

Applicant is a 34-year-old employee who is seeking to retain a security clearance previously granted to him. He is employed as an information-technology engineer working in support of military procurement activity. He has worked in this capacity for a succession of three companies since 2012. He has a good record of employment and favorable recommendations.⁴ He has worked in the field of information technology since about 2006.⁵ He has never married and has no children.

During July–August 2013, while holding a security clearance, Applicant became involved with a 14- or 15-year-old girl resulting in his conviction for contributing to the delinquency of a minor, a class 1 misdemeanor, which subjected him to a maximum punishment of confinement in jail for 12 months and a \$2,500 fine, either or both.⁶ In December 2013, with assistance of counsel, he pleaded not guilty (apparently it was an

² The SOR was issued by the DOD Consolidated Adjudications Facility, Fort Meade, Maryland. It is a separate and distinct organization from the Defense Office of Hearings and Appeals, which is part of the Defense Legal Services Agency, with headquarters in Arlington, Virginia.

³ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

⁴ Exhibits A and B; Enclosures 3–6 to Answer to SOR.

⁵ Exhibit 1 (employment history).

⁶ Exhibits 1, 2, and 3, and Appellate Exhibit I.

Alford plea),⁷ and he was found guilty as charged.⁸ The state court imposed a jail sentence of 6 months, which was suspended for 12 months on the conditions of good behavior, keeping the peace, and paying fines and costs. The state court issued a no-contact order between Applicant and the victim and her family members. The court also ordered Applicant to pay \$84 in costs but a fine was not imposed. Applicant served the sentence without incident. He did not have any court-ordered or self-directed evaluation, counseling, or treatment related to this incident.

Applicant explained that he was introduced to the girl by her mother, whom he met by being a regular customer at a gas station/convenience store business. The mother provided her daughter's cell phone number to Applicant. Initially, he and the girl exchanged text messages, some of which were sexual in nature, although there were no nude or lewd photographs exchanged.⁹ Eventually, they met at a restaurant and had appetizers, and they then went to Applicant's car where they talked, kissed, and he fondled the girl above the waist.¹⁰ He explained that the situation felt weird, and he cut off all communications with the girl.¹¹

Applicant did not discuss the topic of age with the girl,¹² although he had indications she was a minor. After his conversation with the girl's mother, Applicant received a text from someone (perhaps the girl's aunt) asking his age and telling him that the girl was 15 years old, and he agreed not to communicate with her due to the age difference.¹³ Applicant then received another text, apparently from the mother, who told him he could continue communicating with the girl.¹⁴ The text messages continued until they met at the restaurant.

Law enforcement became involved after the girl's father was made aware of the situation.¹⁵ Applicant cooperated with the police investigation and discussed the situation with an investigator without the assistance of legal counsel.¹⁶ During the

⁷ Tr. 44-45. An *Alford* plea simply means that a defendant does not admit guilt but concedes there is sufficient evidence to convict him.

⁸ Exhibit 3 (court records).

⁹ Tr. 36.

¹⁰ Tr. 27, 37-38.

¹¹ Tr. 28.

¹² Tr. 36.

¹³ Tr. 25-26.

¹⁴ Tr. 26-27.

¹⁵ Tr. 28.

¹⁶ Tr. 29-30.

investigation, Applicant was told the girl was 14 or 15 years old.¹⁷ Due to the incident, Applicant was fired from his job in September 2013, but he was hired by his current employer and resumed his regular duties that same month at the request of the government customers.

Security officials became aware of this incident in August–September 2013.¹⁸ Applicant disclosed the incident when he completed a February 2014 security clearance application.¹⁹ He provided additional information about the incident in an April 2014 background investigation.²⁰ He provided court records to the Defense Department in April 2015.²¹

Law and Policies

It is well-established law that no one has a right to a security clearance.²² As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²³ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.²⁴ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²⁵

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²⁶ The Government has the burden of presenting

¹⁷ Tr. 50.

¹⁸ Exhibit 2.

¹⁹ Exhibit 1.

²⁰ Exhibit 3.

²¹ Exhibit 3.

²² *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

²³ 484 U.S. at 531.

²⁴ Directive, ¶ 3.2.

²⁵ Directive, ¶ 3.2.

²⁶ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

evidence to establish facts alleged in the SOR that have been controverted.²⁷ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁸ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁹ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.³⁰ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.³¹

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.³² Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

The SOR contains a single factual allegation cross-alleged under Guideline J for criminal conduct, Guideline D for sexual behavior, and Guideline E for personal conduct. Accordingly, these matters are factually interrelated and are discussed together. Applicant's misconduct and resulting misdemeanor conviction raise serious concerns about his suitability for access to classified information. His misconduct and associated poor judgment are disqualifying under AG ¶¶ 31(a) and (c) under Guideline J, AG ¶¶ 13(a), (c), and (d) under Guideline D, and AG ¶ 16(c) under Guideline E.

Those same guidelines contain various conditions that may serve to mitigate the concerns raised by Applicant's behavior. I have considered all the mitigating conditions and conclude that none, either individually or together, are sufficient to mitigate the concerns. In particular, the offense is not so minor, nor has so much time passed, that the misconduct no longer casts doubt on Applicant's reliability, trustworthiness, and

²⁷ Directive, Enclosure 3, ¶ E3.1.14.

²⁸ Directive, Enclosure 3, ¶ E3.1.15.

²⁹ Directive, Enclosure 3, ¶ E3.1.15.

³⁰ *Egan*, 484 U.S. at 531.

³¹ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

³² Executive Order 10865, § 7.

good judgment. With that said, Applicant is credited with voluntarily reporting the information in the security clearance application and during the background investigation. He also appears to have been truthful in responding to questions during the security clearance process.

Nevertheless, I have serious doubts about Applicant's judgment and self-control. My doubts are based on Applicant's behavior in 2013, when he chose to pursue a relationship with a girl that he had good reason to believe was a 15-year-old minor. At the time, he was a 32-year-old cleared employee working for a defense contractor. Given the surrounding circumstances, Applicant's behavior in 2013 was the epitome of poor judgment. His poor judgment cannot be mitigated based on the passage of time, because he completed serving the suspended jail sentence in December 2014, which is not that long ago. Likewise, the incident is not so far in the past that it is now stale, old news of little to no security significance.

In addition, I note that I had the opportunity to observe Applicant's demeanor during the hearing. He impressed me as too nonchalant about his overall situation, and he was not particularly contrite.

Applicant's misconduct and associated poor judgment in 2013 justify current doubts about his judgment, reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I considered the whole-person concept,³³ and I gave due consideration to Applicant's favorable evidence, including his good employment record and favorable recommendations. I also weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. Accordingly, I conclude he did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline J:	Against Applicant
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline D:	Against Applicant
Subparagraph 3.a:	Against Applicant

³³ AG ¶ 2(a)(1)-(9).

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information.

Michael H. Leonard
Administrative Judge