



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
 ----- ) ISCR Case No. 17-00682  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Nicole Smith, Esquire, Department Counsel  
For Applicant: *Pro se*  
12/13/2019

\_\_\_\_\_  
**Decision**  
\_\_\_\_\_

MARSHALL, Jr., Arthur E., Administrative Judge:

**Statement of the Case**

On July 11, 2017, the Department of Defense (DOD) Consolidated Adjudication Facility (CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline D (Sexual Behavior), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). The action was taken 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* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on or after June 8, 2017. In a July 27, 2017, response, Applicant answered the allegations and requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. I was assigned the case on June 12, 2018.

A June 19, 2018, notice was issued which set the hearing for August 23, 2018. The hearing was convened as scheduled. The Government offered four documents, accepted into the record without objection as exhibits (Exs.) 1-4. Applicant offered testimony and six exhibits, accepted without objection as Exs. A-F. The Government objected to a seventh offering, a report of a polygraph examination. The objection was sustained and the summary was not accepted. (Tr. 20-25) The record was held open

through July 5, 2018, in the event either party wished to submit additional materials. The transcript (Tr.) of the proceeding was received on September 4, 2018.

Lacking objection, Applicant's request to extend the time period for supplemental exhibits through October 15, 2018, was granted. On September 26, 2018, Applicant submitted a package of 26 additional exhibits. The Government objected to two items (numbers 24 and 25). With no response forthcoming within 15 days, the objections were sustained. The materials were accepted as Exs. G1-G23 and G26). The record was closed on October 15, 2018. Based on the testimony, materials, and record as a whole, I find Applicant mitigated sexual behavior, criminal conduct, and personal conduct security concerns.

### **Findings of Fact**

Applicant is a 50-year-old graduate of one of the U.S. military academies. He honorably served in the U.S. military for approximately 27 years. He is presently a senior account manager. In about 2003, he married a woman with six biological children from a previous marriage, including three stepdaughters who were then aged 9, 7, and 4. The couple has since added two children of their own.

The eldest of Applicant's wife's daughters had a strong bond with her biological father and, starting early on, a strained relationship with Applicant. Although Applicant did not start a romance with the mother until after the mother had divorced her first husband, the girl blamed Applicant for the failure of her parents' marriage. (Tr. 60) She also did not like that Applicant was a disciplinarian. (Tr. 57). Meanwhile, she was having difficult times fitting in with the other girls at church and at school, and was often bullied. (Tr. 59) The child also had the stress of adjusting to Type 1 diabetes, and trauma that was the result of a life-threatening car accident a couple of years earlier. (Tr. 59-60) She was known to suffer from depression. (Tr. 62) She wanted to go back to her former state and life with her natural father.

At age 14, amidst all these problems, this eldest daughter was sleeping on the ground in a basement bedroom one night. (Tr. 59) She was positioned on the floor next to her sleeping sister's bed. Applicant entered to look in on the children. In reaching out to assure she was well-covered and tucked in, his hand made contact with her backside, feeling to her "like a grab over her clothing." (Tr. 55, 58, 64) The next day, the girl was brought home from school for being distraught. The girl "blew up" at Applicant, but did not accuse him of anything. A day later, the mother read a passage in the girl's journal mentioning the touch. "By then, [the girl had] decided to move [across country with her biological father]." (Tr 56) Over time, the daughter's story has changed multiple times. (see, e.g., Exs. G10-G13; Ex. 3 at 12-13) She later acknowledged that the touch "wasn't a sexual thing." (Tr. 58)

In 2011, the girl subsequently chose to live with Applicant during college despite the availability of GI Bill benefits that could have paid for her housing elsewhere. (Tr. 61) No formal steps regarding this girl's allegation were ever pursued or instituted. (Tr. 71)

At a recent family funeral, this oldest child “came up, gave [him] a hug . . . even before, she was not much into that, but she came up and gave [him] a hug.” (Tr. 73) They were also last known to be exchanging Facebook posts and emails. (Tr. 73)

In 2011, the middle child of Applicant’s three stepdaughters traveled cross country to stay with her biological father for part of the summer. The girl enjoyed life with her biological father in a markedly different region, where her now-adult elder sister had lived since 2009 and where this girl had spent her early years. Also residing in the area was an aunt and a cousin, who was the girl’s best friend. The aunt had never approved of Applicant, resented his taking his wife and his wife’s children away from her and the biological father, and “eventually was convinced to help [the biological father] to get his children back under his complete care. . . .” (Ex. 9)

The middle girl initially delayed her relocation by not coming home at summer’s end. Then, the girl and the aunt disclosed that the child had “suppressed memories” indicating Applicant had molested her. She told this to her biological father, who was not on good terms with Applicant. (Tr. 54) It is unknown whether this middle child had actually read her elder sister’s journal or simply knew the circumstances of her departure from Applicant’s home three years earlier. (Tr. 68-69)

There was subsequent concern about the middle child returning to live with Applicant. The girl’s biological father reported his daughter’s “suppressed memories” to the local police. This stepdaughter later detailed to county sheriff officials instances where Applicant supposedly touched her breasts and genitals in a manner “essentially very strikingly familiar to [her elder sister’s] allegation from 2009,” wherein Applicant was to have touched the sleeping girl after moving her blanket, then tucked her in for the night. (Tr. 66) She also suggested that her younger sister had been similarly abused. (see, e.g., Ex. 3 at 6; Ex. G(18))

After an investigation and review, no action was taken by the police, but this middle child remained with her biological father for the rest of her high school education. There, “she joined the same choir group, she . . . went to work at the same pizza place, she did almost everything step by step that [her elder sister] did when she moved. . . .” (Tr. 67, 69-70) Last seen a year ago, this stepdaughter and Applicant were on speaking terms during a family visit. (Tr. 73)

The youngest stepdaughter does not believe her sisters’ versions of the facts concerning the Applicant. She has consistently defended Applicant since at least 2012. (Exs. 7-9) She describes him as a committed member of their church, patriotic, patient, even-tempered, and a loving father who “provides just punishments.” (Ex. 9) She describes Applicant and her mother as “loving parents.” (Exs. 7-9) She does not believe her elder sister’s story, noting that this sibling “would have reacted sooner” if the alleged incident had really occurred. (Ex. G8) She noted that this sibling originally questioned whether the incident had ever really happened. (Ex. G8)

The youngest stepdaughter also noted that the elder sibling told at least two versions of what happened: "in one, my dear mother walked in; in the other, I told [mother of the incident along] with [my elder sister]. Two stories hints that this is a falsehood." (Ex. G8; see *also* Tr. 81-82) As for the former version, she noted "the very idea that my mother would stand by and watch her children be practically raped is complete rubbish." (Ex. G8) The elder sister had confided to the youngest girl that she had actually wanted to go to be with their father because "she was lonely and did not enjoy life in [their state], especially because she left many friends behind when [they] moved . . . . The change was too drastic for her. She also in her diary has written how she hates flying back and forth every school break; how she wished she had a normal life in a permanent home. I know she didn't go to [their biological father] for a safe haven." (Ex. G8) In the alternative, the youngest girl suggests that, given her eldest sister's track record of having bad dreams, that such a dream could have also been used as a basis for manipulation by her cousin or aunt. (Ex. G9)

The youngest child also related that Applicant often tucked the children in. However, after the allegation waged by the elder stepdaughter, he stopped. (Ex. G 8; Tr. 73) Overall, she noted that Applicant always tried to avoid being "creepy" or an "evil stepparent." (Ex. G9) This stepdaughter also reported that the aunt "often tried to tear apart [my] family and others. She would tell the kids to lie to the school or officials about our parents [Applicant and his wife]. . . . She may hate my parents." (Ex. G9) This stepdaughter's support of Applicant is corroborated by her mother, Applicant's wife. (Ex. G15) Today, the three stepdaughters are all adults living independently apart from Applicant.

Regarding the incidents allegedly involving the oldest and middle stepdaughters, a report from military legal/social services was deemed in favor of Applicant, with the favorable testimony of the oldest and youngest girls found to be substantiated. There was no referral to the sheriff or for criminal proceedings. Although not introduced into evidence, other documentation reflects that a family advocacy study adopted the stories by the oldest and the middle girl and found against Applicant, finding their tales substantiated. There is no documentary evidence reflecting a recommendation on criminal action was issued, although it was noted that the youngest girl remained contentedly in the care of Applicant. The unfavorable conclusion of the family advocacy program was the basis for the pending allegation in this matter.

## **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 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, these guidelines are applied 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 the AG, the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept, each of which must be fully considered in making a decision.

The protection of the national security is the paramount consideration. Any doubt concerning personnel being considered for national security eligibility and will be resolved in favor of the national security. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the record evidence. Under the Directive, the Government must present evidence to establish controverted facts alleged in the SOR. Under the Directive, an applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision.

A person seeking access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. This relationship transcends normal duty hours. Decisions include consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard classified information. Decisions are in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant.

## **Analysis**

### **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.

Applicant's hand made contact with his middle stepdaughter's buttock one night as she slept, leading to the involvement of military legal/social services, a family advocacy program, and the police. The family advocacy program found that two of three allegations raised were substantiated. Those allegations both involved similar fact patterns concerning Applicant's eldest and middle stepdaughters.

AG ¶ 13 provides conditions that could raise a disqualifying condition:

AG ¶ 13(a): sexual behavior of a criminal nature . . . ;

AG ¶ 13(b): pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;

AG ¶ 13(c): sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

AG ¶ 13(d): sexual behavior of a public nature or that reflects lack of discretion or judgment.

Under these circumstances, AG ¶ 13(a) - AG ¶ 13(c) apply.

In addition, AG ¶ 14 provides the following possible mitigating conditions:

AG ¶ 14(a): the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of similar nature;

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;

AG ¶ 14(c): the behavior no longer serves as a basis for coercion, exploitation, or duress;

AG ¶ 14(d): the sexual behavior is strictly private, consensual, and discreet; and

AG ¶ 14(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.

The behavior at issue occurred seven or more years ago. Once it became an issue, Applicant ceased checking in on the girls at night or tucking them in. The females involved are now adults living outside of the region where Applicant resides. There is no other indication involving any questionable actions by Applicant regarding the other six, younger, children, or any other individuals of any age or sex. Applicant has the full support of his youngest stepdaughter and his wife. He has been candid and forthcoming about his family and these incidents since the beginning.

It is true that one of three investigations found the stories of two of the three stepdaughters to be substantiated. No further action, however, was taken despite its conclusion and the youngest girl continued to live with her stepfather, the Applicant. The

facts in this matter have been fully vetted through multiple criminal or administrative functions. Of all the several characters in the drama, only the testimonies of Applicant and the youngest stepdaughter remain consistent; in contrast, the tales told by the older two stepdaughters have varied and evolved almost from the beginning. Moreover, Applicant's subtle suggestion that the two older stepdaughters were troubled teens plotting a way to go back to a happier time and place in light of these facts is not unpersuasive. Therefore, I find AG ¶¶ 14(a)-(c) apply.

### **Guideline J, Criminal Conduct**

The concern raised by 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 facts at issue under this guideline are the same as those at issue under the previous guideline and are adopted herein. Those facts raise disqualifying condition:

AG ¶ 31(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.

The following mitigating conditions are potentially relevant:

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,

AG ¶ 32(c): evidence that the person did not commit the offense; and

AG ¶ 32(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.

For the same reasons noted under Guideline D, above, I find AG ¶ 32(a), AG ¶ 32(c), and AG ¶ 32(d) apply.

### **Guideline E, Personal Conduct**

The security concern for personal conduct 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 or sensitive information.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

AG ¶ 16(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. . . .

The same facts noted under the two previous guidelines are equally applicable under this section. Therefore, AG ¶ 16(e) applies. Moreover, I have considered these facts in light of the AG ¶ 17 mitigating conditions. I find the following potentially applicable:

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; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

For the same reasons stated above under both of the previously discussed guidelines, I find these two mitigating conditions apply. I find this conclusion bolstered by the fact Applicant ceased checking in on the children in the evening so as not to have his paternal actions misunderstood.

### **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(d).

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 the three applicable guidelines in my analysis of Applicant's whole-person. I also considered Applicant's testimony, materials, and references.



The facts in this case reflect that Applicant's eldest and middle stepdaughters were unhappy with the milieu into which their mother's marriage placed them, far from their prior residence, biological father, school, church, and friends. Both girls very much wanted to return to their old lives and their old haunts. The oldest sister's version of an inappropriate touching has varied over the years, and rational alternative explanations have been explored that further raise questions over her original allegation of abuse. Furthermore, the lack of candor by the two older girls; their fundamental dislike of Applicant; and the dislike of Applicant by the girls' aunt which could well have transitioned into unconscionable coaching, provide substantial doubt that the alleged conduct actually occurred as described.

The middle girl's version of abuse came at a particularly difficult time in her life. It involved a scenario similar to that alleged by the elder sister, a scenario she saw successfully relocate her elder sister back to their former home state of residence. The middle girl's version of abuse was less subtle, and she even falsely asserted her younger sister had similarly been violated. With regard to all these allegations, the youngest stepdaughter's information credibly refutes or questions both the claims and the motives, of not just the girls, but their aunt and cousin, as well.

The SOR allegations are correct in noting that one investigative body found that the older and middle sisters' stories were substantiated. Another investigation, however, found against the middle sister and in favor of testimony by the youngest girl and the (revised) version of the elder sister's tale. Taken together, in historical context, and upon review of subsequent interactions between Applicant, his wife, and the sisters, the youngest girl's theories and explanations make the most sense out of this mixture of varying facts, both then and now. More importantly, they support Applicant's assertion that there was no intentional criminal or sexual abuse inflicted on either girl. Based on the documentary evidence and testimony provided, I conclude sexual behavior, criminal conduct, and personal conduct security concerns are mitigated.

### **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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline J:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

---

Arthur E. Marshall, Jr.  
Administrative Judge