



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



In the matter of:	)	
	)	
[NAME REDACTED]	)	ISCR Case No. 18-02931
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Allison Marie, Esq., Department Counsel  
For Applicant: *Pro se*

08/03/2020

**Decision**

MALONE, Matthew E., Administrative Judge:

The security concerns about Applicant’s 2001 sexual misconduct and subsequent felony conviction in 2005 for that misconduct are mitigated by the passage of time, successful treatment and rehabilitation, and the absence of any additional misconduct. An allegation of intentionally making a false statement to an investigator in 2017 about those matters is not supported by this record. However, Applicant did not mitigate the security concerns about his failure to pay federal taxes in 2004, 2006, and 2007. Although his tax debts may have arisen from circumstances beyond his control, Applicant has not taken any action to repay or otherwise resolve his tax debts. The security concerns about his finances are not mitigated and his request for a security clearance is denied.

**Statement of the Case**

On May 10, 2016, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain eligibility for a security clearance required for

his employment with a federal contractor. Based on the results of the ensuing background investigation, Department of Defense (DOD) adjudicators could not determine that it is clearly consistent with the interests of national security for Applicant to have a security clearance, as required by Security Executive Agent Directive (SEAD) 4, Section E.4, and by DOD Directive 5220.6, as amended (Directive), Section 4.2.

On February 19, 2019, DOD issued a Statement of Reasons (SOR) alleging facts that raise security concerns under the adjudicative guidelines for sexual behavior (Guideline D), criminal conduct (Guideline J), personal conduct (Guideline E), and financial considerations (Guideline F). The adjudicative guidelines (AG) cited in the SOR were issued by the Director of National Intelligence on December 10, 2016, to be effective for all adjudications on or after June 8, 2017.

Applicant timely responded to the SOR (Answer) and requested a hearing. I received the case on January 16, 2020, and convened the requested hearing on March 4, 2020. I received a transcript of the hearing (Tr.) on March 12, 2020. At the hearing, Department Counsel proffered Government Exhibits (GX) 1 – 5, which I admitted without objection. (Tr. 17 – 27) Applicant appeared as scheduled, testified, and presented Applicant Exhibits (AX) A and B, which I admitted without objection. (Tr. 27 – 30) Also included in the record are Hearing Exhibits (HX) 1 (*Index of Government Exhibits*) and HX 2 (*Department Counsel's Discovery Letters*, dated August 30, 2019 and January 22, 2020). (Tr. 16 – 17)

### **Findings of Fact**

Under Guideline D, the Government alleged that in November 2001, Applicant committed an indecent sexual act with his three-year-old daughter; and that in February 2005, he pleaded guilty a charge of indecency with a child, a second-degree felony (SOR 1.a) Under Guideline J (SOR 2.a) and Guideline E (SOR 3.a), the Government cross-alleged the information in SOR 1.a as disqualifying criminal conduct and personal conduct, respectively.

Under Guideline E, the Government also alleged that in January 2017, Applicant intentionally made a false official statement to the Government during a personal subject interview with an investigator about Applicant's intent during the November 2001 incident addressed in SOR 1.a (SOR 3.b).

Under Guideline F, the Government alleged that Applicant is indebted to the federal government for unpaid taxes for the 2004 (SOR 4.a), 2006 (SOR 4.b), 2007 (SOR 4.c), and 2011 (SOR 4.d) tax years totaling \$114,985. At the hearing, Department Counsel moved to withdraw SOR 4.d and it was stricken. As a result, the total amount of tax debt at issue in this case was reduced to \$58,141. (Tr. 10)

In response to the SOR, Applicant admitted with explanations SOR 1.a, 2.a, and 3.a. He denied with explanation any intent to falsify or mislead as alleged in SOR 3.b. As

to Guideline F, Applicant admitted with explanations SOR 4.b and 4.c, and denied SOR 4.a. In addition to the facts established by Applicant's admissions, I make the following findings of fact.

Applicant is 49 years old and employed as a project and logistics manager by a defense contractor for whom he has worked since January 2016. Applicant served on active duty in the United States Army between 1991 and 1995. He was trained as a medic in the Army and continued to work as an emergency medical technician and paramedic after leaving the military. From September 2003 until October 2004, Applicant worked overseas as a paramedic for a defense contractor. (GX 1; Tr. 51 – 54)

Applicant has been married twice. He and his first wife were married between 1992 and 1997. Applicant remarried in 1998 and had two children, a son, now age 16, and a daughter, now age 21. Applicant and his second wife separated in 2005 and divorced in 2007; however, in March 2010, they moved in together for financial and parenting reasons. By the terms of their divorce, Applicant has principal custody of their 16-year-old son. This arrangement appears to have been beneficial for all concerned. (GX 1; GX 5; Tr. 41)

In Section 26 of his e-QIP, Applicant disclosed that his income tax refunds for the preceding six years were applied to an \$8,000 debt for unpaid taxes from 2009. During the ensuing background investigation, investigators identified an unsatisfied tax lien against Applicant for the 2011 tax year. During a January 2017 subject interview with a government investigator, Applicant stated he had no knowledge of that 2011 tax lien; however, he confirmed his non-payment of his 2009 federal income taxes, explaining that his employer did not withhold his taxes as he had expected while Applicant worked overseas. In November 2018, in response to interrogatories from DOD adjudicators and in response to the SOR, Applicant provided information that showed he owes \$16,062.98 in unpaid taxes for 2006, and \$9,778.02 for unpaid taxes in 2007, as alleged in SOR 4.b and 4.c, respectively. (Answer; GX 1; GX 4; GX 5; Tr. 47 – 51, 56 – 58)

Applicant also has denied that he owes \$32,301 in unpaid taxes for the 2004 tax year as alleged at SOR 4.a. However, in his November 2018 response to interrogatories, he provided a May 2018 letter from the IRS showing he owed that amount for the 2004 tax year after his \$283 tax refund for 2017 was applied. At his hearing, Applicant averred he visited an IRS office in his state and was told that he did not owe any past-due taxes for 2004. Applicant did not provide any support for that claim and his explanations for not being able to corroborate his claims in this regard were not plausible. As to all of his past-due taxes, apart from diversion of his income tax refunds by the IRS to satisfy his tax debts, Applicant has not taken any identifiable action to arrange for repayment or other resolution of this matter. (Answer; GX 4; Tr. 31, 42 – 47)

The matters alleged in SOR 1.a, 2.a, 3.a and 3.b arise from a single event. On or about November 1, 2001, Applicant was home with his then-three-year-old daughter. The child came into the bathroom and saw Applicant as he was coming out of the shower.

Rather than cover himself, Applicant had his daughter touch and rub his penis for sexual gratification. In October 2003, Applicant's wife was expecting their younger child, whom they knew was a boy. At some point, his wife found herself explaining this physical differences between boys and girls. Applicant's daughter, who was then six years old, told her mother she already knew what a penis was because she had seen her father without clothes on. The child went on to describe for her mother what had transpired between Applicant and his daughter in 2001. Applicant's wife called the police and an investigation began that culminated in May 2004 with a grand jury indictment of Applicant on a charge of indecency with a child, a felony. Applicant was arrested in October 2004 when he returned from his job overseas. In February 2005, Applicant pleaded guilty to that charge and given a suspended adjudication of guilt for five years, during which he was under supervised probation, required to undergo counseling, and ordered to complete 250 hours of community service. Between February 2005 and February 2010, Applicant was prohibited from having any contact with his children or with any person under age 17. After he successfully completed probation, the felony charge was dismissed; however, Applicant then had to register as a sex offender in State A where he lived and where the offense occurred. In 2010, he moved to State B, where he still lives and works, and registered as a sex offender there as well. His status as a registered sex offender is to remain for 30 years, or until March 2040. Applicant acknowledged that he is embarrassed by his conduct but avers that he does not try to hide what he did. He testified that some of his neighbors know he is a registered sex offender either because he told them or they learned of it through online public information. Applicant is now eligible to petition State B for removal from the registry for sex offenders because he has lived and worked in State B without incident or violation for at least 10 years. As of the hearing, he had not yet filed a petition for removal. (Answer; GX 1; GX 2; GX 3; GX 5; Tr. 14, 30 – 31, 39 – 41)

During his January 2017 subject interview with a government investigator, Applicant discussed his conduct with his daughter. SOR 3.b alleges that he deliberately withheld information from the investigator in an attempt to mislead the government about his conduct. Specifically, it was alleged that Applicant "lied . . . by stating that [he] inadvertently exposed [himself] to [his] daughter, while, in truth, [he] deliberately had [his] daughter touch [his] genitals." The summary of interview states, in relevant part, only that "[Applicant] exposed self to daughter." It then goes on to recount what happened after Applicant's conduct became known to his wife and he was convicted of indecency with a child. The summary of the January 2017 interview does not reflect any discussion of his intent at the time of his misconduct. In short, there is no basis for the Government's allegation that Applicant intended to make a false statement or representation about anything material to an examination of his sexual behavior with daughter. (GX 5; Tr. 60)

During Applicant's probation, he complied with all of the court-ordered conditions of his sentence. He paid all fines and costs, completed his community service, and he has not violated any laws or ordinances since his conviction. He also received court-ordered sex offender counseling during which he examined not only his own conduct, but factors that may have contributed to it. Prominent among those factors was Applicant's

own experience as a victim of sexual molestation. Applicant has not sought or been referred for any additional counseling or treatment since 2010. Applicant also avers that he now has a good relationship with his daughter. Additionally, Applicant has a good reputation for reliability with his current employer. (AX A; Tr. 31, 38 – 39, 55 – 56, 63)

### **Policies**

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). (See Directive, 6.3) Decisions must also reflect consideration of the factors listed in ¶ 2(d) of the guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest for an applicant to either receive or continue to have access to classified information. (Department of the Navy v. Egan, 484 U.S. 518 (1988))

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion. (See Egan, 484 U.S. at 528, 531) A person who has access to classified information enters 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 one who will protect the national interests as his or her 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. (See Egan; AG ¶ 2(b))

## Analysis

### Sexual Behavior

The adverse information about Applicant's sexual behavior reasonably raised the security concern stated at AG ¶ 12:

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 committed an indecent act with his daughter, a child of tender years who trusted her father to care for and protect her. His conduct constituted a felony offense for which he was required to register as a sex offender for 30 years. His presence on that registry presents the possibility for undue influence or coercion because Applicant is still embarrassed by his conduct. Accordingly, the following AG ¶ 13 disqualifying conditions apply:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted; and
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

By contrast, Applicant's conduct occurred nearly 20 years ago. He complied with all court-ordered sentencing requirements, including counseling, and the charges were dismissed when he completed probation. Applicant has not committed any other misconduct of any kind, and he has a good relationship with his daughter, as well as with his son and his second ex-wife. Applicant's conduct is isolated and unlikely to recur. The sole issue remaining is whether his behavior still presents the potential for undue influence or coercion. Applicant was credible in his assertion that, although his conduct still embarrasses him, he does not hide what happened from his neighbors. All of the forgoing supports application of the following AG ¶ 14 mitigating conditions:

- (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.

The record evidence as a whole regarding Applicant's sexual behavior supports a conclusion that he is unlikely to engage such conduct in the future and that his past misconduct cannot be used as a means of coercion or influence. Available information is sufficient to mitigate the security concerns under this guideline.

### **Criminal Conduct**

The information about Applicant's conviction for a felony sex offense reasonably raised a security concern about criminal conduct that is expressed at 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.

More specifically, the record requires application of the disqualifying condition at 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). By contrast, for the same reasons that support application of AG ¶¶ 14(b), 14(c), and 14(e), above, I find that the record supports application of the following AG ¶ 32 mitigating conditions:

(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.

On balance, the record evidence as a whole supports a conclusion that the security concerns under this guideline are mitigated.

## Personal Conduct

Applicant denied the allegation at SOR 3.b that he intentionally made false statements to an investigator during a January 2017 subject interview. Accordingly, that allegation remained a controverted issue of fact and the burden remained on the Government to present sufficient reliable information to support that allegation. (Directive, E3.1.14) The information presented by the Government did not meet that burden and SOR 3.b is resolved for the Applicant.

Nonetheless, information about Applicant's sexual behavior and related criminal conduct, as cross-alleged in SOR 3.a, reasonably raised a security concern about personal conduct stated, in relevant part, at 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.

More specifically, information supporting the SOR allegations about Applicant's sexual behavior and related criminal conduct requires application of the disqualifying condition at AG ¶ 16(c):

credible adverse information in several adjudicative issue 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.

For the same reasons that support application of the mitigating conditions at AG ¶¶ 14(b), 14(c), 14(e), 32(a), and 32(e), above, I find applicable the following AG ¶ 17 mitigating conditions:

(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.

For the same reasons provided in support of mitigation under Guidelines D and J, I conclude Applicant's information is sufficient to mitigate the security concerns under this guideline.

### **Financial Considerations**

Applicant did not timely pay his federal income taxes for the 2004, 2006, and 2007 tax years. As a result, he owes at least \$58,141 in unpaid taxes. This information reasonably raised a security concern about Applicant's finances that is expressed, in relevant part, at AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

Applicant's tax debts remain unresolved and he has not engaged the IRS in any meaningful way to pay or otherwise resolve these matters. Accordingly, the record requires application the following AG ¶ 19 disqualifying conditions:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

In response, Applicant averred that his tax problems arose when his employer did not withhold income taxes from his pay as he had expected. This information satisfies the first prong of the mitigating condition at AG ¶ 20(b) (*the conditions that resulted in the financial problem were largely beyond the person's control . . .*). Applicant did not present any information to support his claims that the IRS told him he does not owe anything for the 2004 tax year, and he did not establish that he is taking action to resolve his 2006

and 2007 tax debts. The only payments that have been made consist of involuntary diversions by the IRS of his income tax refunds to his 2004 tax debt. The record evidence as a whole does not support the second prong of AG ¶ 20(b) (*and the individual acted responsibly under the circumstances*). I also have considered the following pertinent mitigating conditions under AG ¶ 20:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

The record does not support application of any of these mitigating conditions. Applicant has not made a good-faith effort to resolve his tax debts. Those debts are recent, in that they are still due and unresolved. Applicant has not received any financial counseling or other professional assistance in addressing his tax debts, and he has not documented a basis on which he could dispute the validity of those debts. Finally, even though Applicant may have consulted in person with the IRS, he did not show that any arrangements have been made to resolve those debts. On balance, Applicant did not meet his burden of production or persuasion in response to the Government's *prima facie* case for disqualification. The security concerns under this guideline are not mitigated.

I also evaluated this record in the context of the whole-person factors listed in AG ¶ 2(d). Applicant mitigated the Guideline D, J, and E concerns largely through the passage of time and the absence of any additional misconduct. Nonetheless, as to Guideline F, Applicant's failure to repay or otherwise try to resolve his past-due taxes reflects adversely on his judgment and willingness to abide by rules and regulation, thus raising as yet unresolved doubts about his suitability for access to classified information. Because protection of the interests of national security is the principal focus of these adjudications, those doubts must be resolved against the Applicant's request for clearance.

### **Formal Findings**

Formal findings 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 E:	FOR APPLICANT
Subparagraphs 3.a – 3.b:	For Applicant
Paragraph 4, Guideline F:	AGAINST APPLICANT
Subparagraphs 4.a – 4.c:	Against Applicant
Subparagraph 4.d:	Withdrawn

### **Conclusion**

It is not clearly consistent with the interests of national security for Applicant to have access to classified information. Applicant's request for a security clearance is denied.

MATTHEW E. MALONE  
Administrative Judge