



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



In the matter of: )  
)  
) ISCR Case No. 20-00132  
)  
Applicant for Security Clearance )

**Appearances**

For Government: A. H. Henderson, Esq., Department Counsel  
For Applicant: *Pro se*

08/04/2021

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the sexual behavior, personal conduct, and criminal conduct security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On June 12, 2020, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D (sexual behavior), E (personal conduct), and J (criminal conduct). Applicant submitted an undated response to the SOR with attached documents and requested a hearing before an administrative judge. On March 18, 2021, Applicant changed his request to a decision based on the written record in lieu of a hearing.

The Government's written case was submitted on March 19, 2021. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on April 5, 2021. As of May 19, 2021, he had not responded. The case was assigned to me on July 20, 2021.

The Government exhibits included in the FORM, which include the documents attached to Applicant's SOR response, are admitted in evidence.

### **Findings of Fact**

Applicant is 41 years old. He has been employed by a defense contractor since February 2017. He served on active duty in the U.S. military from 1999 until he was honorably discharged in 2003. He attended college for a period, and he has several certificates. The most recent information available indicates that he has never married, and he has no children. (Items 2, 3)

Applicant was arrested in 2003 and charged with felony soliciting a child via computer and sending harmful material to a minor by electronic device. He was convicted of the first offense and sentenced to confinement for one year and probation for three years. He served about eight to nine months in jail. He was also ordered to register as a sex offender. (Items 1-4)

Applicant stated in his response to the SOR that he had recently been discharged from the military and was visiting his mother before moving to another state:

While I was there, I was on the computer one day chatting with people in Yahoo chatrooms. I was contacted by an officer posing as a 15-year-old teenage girl. I planned to head to a GNC nutrition store at the mall to pick up some protein shakes for my work out later that day. I told who I was speaking with in the chatroom that if she wanted to meet, we could meet for a bit outside of the GNC store. Next thing I know I had two plain clothes officers grab me and take me to the back of the store where I was arrested.

Applicant gave additional facts when he was interviewed for his background investigation in October 2018. He stated that he smoked marijuana two to three times a week while he was at his mother's house. The "girl" (actually a police officer) did not have a profile picture. He gave varying accounts as to her age. He initially stated that he did not know her age; he later stated that he did know her age; and he also stated that he could not recall if he knew her age. He admitted that he sent the girl a video of a man's genitalia. When asked why he pursued the interaction with the girl, he said that he was high and wanted sex. (Item 3)

Applicant was arrested in January 2007 and charged with violating his probation. He stated that he was stopped by the police while riding his motorcycle, and he did not realize that he was outside the county line in violation of his probation. The judge decided not to revoke his probation and send him to jail. He pleaded guilty in May 2007 to misdemeanor reckless driving. He was sentenced to a \$230 fine and \$68 court costs. (Items 1-4)

Applicant presented a 2013 letter from his current state's Attorney General's office stating that he was no longer required to register as a sex offender in that state.

He completed extensive psychosexual treatment while he was on probation. He has a good job that he loves. He fully reported his criminal record on his SF 86. Applicant admitted that he lied on job applications if the application asked if he was a convicted felon. He did not remember if he lied on the application for his current job. During his background interview in October 2018, he stated that his parents and sister knew about his felony record, but his employer and live-in girlfriend did not. In his response to the SOR, he reported that his steady girlfriend of three years knew all about his criminal history. (Items 1-3)

## **Policies**

This case is adjudicated under Executive Order (EO) 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), which became effective on June 8, 2017.

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 D, Sexual Behavior**

The security concern for sexual behavior is set out in 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.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

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

Applicant’s behavior that resulted in a conviction of felony soliciting a child via computer reflected a severe lack of judgment and made him vulnerable to coercion, exploitation, and duress. The above disqualifying conditions have been established.

Conditions that could mitigate sexual behavior security concerns are provided under AG ¶ 14. The following are potentially applicable:

- (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 good judgment;

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

(d) the sexual behavior is strictly private, consensual, and discreet; 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.

Applicant's sexual behavior occurred more than 18 years ago. He completed extensive psychosexual treatment while he was on probation. He is no longer required to register as a sex offender in his state. He has a long-time girlfriend and a good job that he loves.

Applicant gave inconsistent statements as to whether he knew the age of the "girl." He lied on job applications if the application asked if he was a convicted felon. He did not remember if he lied on the application for his current job. During his background interview in October 2018, he stated that his parents and sister knew about his felony record, but his employer and live-in girlfriend did not. In his response to the SOR, he reported that his steady girlfriend of three years knew all about his criminal history.

The stigma that attaches when one is convicted of a sexual offense against a child is not easily cast off. Applicant has attempted to avoid that stigma by withholding the information from potential employers and his current employer. The conduct continues to serve as a basis for coercion, exploitation, and duress; and it casts doubt on Applicant's current reliability, trustworthiness, and good judgment.<sup>1</sup> AG ¶¶ 14(b), 14(c), and 14(d) are not applicable. AG ¶ 14(e) is partially applicable. I find that sexual behavior concerns remain despite the presence of some mitigation.

## **Guideline J, Criminal Conduct**

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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 conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

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<sup>1</sup> See ISCR Case No. 09-03233 (App. Bd. Aug. 12, 2010). The Appeal Board determined that an applicant's child molestation offense "even though it occurred long ago, impugn[ed] his trustworthiness and good judgment."

(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; and

(d) violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant's felony conviction after his 2003 arrest and his 2007 probation violation establish the above disqualifying conditions.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(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.

It has been more than 18 years since Applicant was arrested for the crimes against a child and more than 14 years since the probation violation. Nonetheless, I have unmitigated concerns under the same rationale discussed in the sexual behavior analysis.

### **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. Of special interest is any failure to cooperate or provide truthful and candid answers during the national security investigative or adjudicative processes.

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

(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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, 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 criminal conduct, which included a crime that required him to register as a sex offender, reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(c) is not perfectly applicable because Applicant's conduct is sufficient for an adverse determination under the sexual behavior and criminal conduct guidelines. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

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 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.

Under the same rationale discussed above for sexual behavior, Applicant's conduct continues to make him vulnerable to exploitation, manipulation, and duress; and it casts doubt on his current reliability, trustworthiness, and good judgment. I find that personal conduct concerns remain despite the presence of some mitigation.

## **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):

(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 Guidelines D, E, and J in my whole-person analysis. I also considered Applicant's honorable military service.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the sexual behavior, personal conduct, and criminal conduct security concerns.

### **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:	Against Applicant
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraphs 2.a-2.b:	Against Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraph 3.a:	Against Applicant



## **Conclusion**

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.

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Edward W. Loughran  
Administrative Judge