



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



In the matter of:	)	
	)	
	)	ISCR Case No. 19-02735
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Bryan Olmos, Esq., Department Counsel  
For Applicant: J. Cameron Cowan, Esq.

03/09/2021

**Decision**

CERVI, Gregg A., Administrative Judge

This case involves security concerns raised under Guideline D (Sexual Behavior) and Guideline J (Criminal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on June 19, 2015. On October 28, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines D and J. The DOD CAF acted under Executive Order (Exec. Or.) 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 on June 8, 2017.

Applicant responded to the SOR on November 26, 2019, and requested a hearing before an administrative judge. The case was assigned to me on January 27, 2020. The Defense Office of Hearings and Appeals issued a notice of hearing on February 11, 2020,

for a hearing to be convened on March 25, 2020, in Applicant's metropolitan area. The hearing was subsequently canceled due to COVID-19 related cessation of travel and courtroom availability. Once hearing facilities reopened, DOHA issued a notice of video teleconference on October 7, 2020, and the hearing was convened on November 10, 2020.

Government Exhibits (GE) 1 through 5 with an exhibit list were admitted into evidence without objection. Applicant Exhibits (AE) A through P were admitted into evidence without objection. Department Counsel's discovery letter was marked as HE 1 and appended to the record. The hearing transcript was completed on November 23, 2020.

### **Findings of Fact**

Applicant is a 49-year-old aircraft painter for a defense contractor, employed since 2015. Applicant graduated from high school in 1991. He was married in 1992 and divorced in 2009. He remarried in 2012 and was divorced in 2018. He has one adult child. His second spouse had a daughter that lived with them until 2018. Applicant currently has a secret security clearance.

The SOR alleges under Guideline D (Sexual Behavior) that Applicant was arrested in January 2016 and charged with felony indecency with a child/sexual contact. He pleaded guilty and is on community supervision until August 2024. The SOR alleges the same facts under Guideline J (Criminal Conduct).

Applicant's second spouse had a 15-year-old daughter that suffered from Postural Orthostatic Tachycardia Syndrome (POTS) caused by poor blood flow. This condition apparently caused pain in her arms and legs. To relieve symptoms, Applicant often rubbed her arms, legs, and scalp, at her request and often in front of his spouse. On one occasion in December 2015, Applicant intentionally grazed the side of the girl's breast over her shirt while riding together in a truck. On another occasion in January 2016, Applicant stated he was alone with the girl and began rubbing her while she was in bed sleeping. During this occurrence, he used his hand to touch the bottom of her breast and between her legs several times. He did not penetrate her or pass over her breasts or vagina. Shortly thereafter, he was concerned about the criminality of his conduct, and apologized to her.

The girl reported the incidents to her school authorities, and the police were notified. A warrant was issued for Applicant's arrest and he turned himself into police on January 20, 2016. Applicant was not indicted, but entered a guilty plea to an information charging him with injury to a child with intent to commit bodily injury (injury to child), a third degree felony. Applicant received a deferred finding of guilt, and was placed on community supervision for seven years, known as deferred adjudication probation. The conditions of probation include *inter alia*, submission to a clinical assessment and treatment program with a court-appointed sex offender treatment provider; complete clinical polygraph examinations as directed by the therapist; have no contact with children

under 17 years old; submit a DNA sample; submit to alcohol and drug testing; permit a probation officer access to his residence for examination of computers and electronic media; and refrain from access to pornography, certain places, and personal use of the internet. Applicant's probation period ends in August 2024.

Applicant began counseling with the court-appointed provider on January 19, 2016. He completed 185 treatment sessions and one year of aftercare on August 2, 2020. He will continue to attend one group session per month until 2024 when his probation ends. Applicant was initially evaluated as having an "excellent chance of successfully completing treatment and community supervision," and had a "low risk to re-offend." She noted that from the beginning, he "took full responsibility for his actions and has been completely honest in all matters." Applicant complied with state standards for sex offender treatment, and successfully passed several maintenance polygraphs throughout treatment, the last in February 2020. The polygraphs are intended to measure the honesty and complying with conditions of treatment and supervision. Applicant also passed a sex history polygraph that indicated that he had no other victims or abhorrent sexual behavior. Finally, Applicant took a penile plethysmograph to assess his sexual arousal. The results showed that Applicant "did not have any deviant sexual arousal."

The counselor noted that Applicant was the "most compliant client I have ever had in my 38 years of experience." She noted that it was very rewarding to work with such a motivated client atypical of the majority of offenders she has treated. The counselor reported that Applicant has no other victims, was successfully rehabilitated, and represents an extremely low risk to re-offend. She noted that due to his openness and honesty, he does not present a security risk. She stated that this was Applicant's first and only offense, and there is no evidence of questionable judgment, irresponsibility, or emotional instability. (AE A, B, D)

Applicant's probation officer noted that he is in full compliance of the conditions of probation, successfully completed sex offender treatment, and has no concerns pertaining to Applicant. (AE C, E) County policy requires Applicant to remain in maintenance group sessions once per month until his discharge from probation on August 23, 2024. (AE C)

Applicant disclosed his conduct to his family and friends. After the incidents, the victim's mother wrote a letter to the criminal court judge in support of Applicant to retain his employment and avoid severe criminal penalties. She noted that Applicant had been a "wonderful father" to her children, and that he is "truly remorseful" and in unbearable pain for his conduct. She divorced him two years later and she and her daughter live apart from him. His sister-in-law noted that Applicant made a mistake in judgment, expressed regret and remorse to the girl, and he has been "completely honest and upfront about what has transpired with the courts, his family, and his counselor." Similar sentiments and support were expressed by Applicant's father, daughter, brother, brother-in-law, cousins, and friends.

Applicant lives alone in a home located in a remote rural environment. He has no contact with the victim or her family, and does not allow unaccompanied contact with children or personal internet access. The victim is now an adult attending college and Applicant has not had contact with her since the incidents. Applicant paid a \$20,000 settlement to her in exchange for a waiver of any claims. Applicant stated that he is well liked at work, but does not get regular written evaluations. Applicant did not report his arrest to security personnel at his company until January 5, 2017, almost one year after his arrest, on advice of his counsel. He has not disclosed the incidents to his supervisor or coworkers for fear of retribution and ridicule.

### **Policies**

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

National security eligibility is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider a person’s stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *Egan*, 484 U.S. at 531. “Substantial

evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See, e.g., ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See, e.g., ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see, AG ¶ 1(d).

## **Analysis**

### **Guideline D: Sexual Behavior**

The security concern under this guideline 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.

The relevant disqualifying conditions under AG ¶ 13 include:

- (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 or that reflects lack of discretion or judgment.

The record evidence supporting the SOR allegations and Applicant’s admissions and testimony are sufficient to establish the disqualifying conditions listed above.

The following mitigating conditions under AG ¶ 14 are potentially relevant:

(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 or 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 sexual behavior alleged in the SOR occurred in 2016. It has not been repeated, but its occurrence casts doubt on Applicant's judgment and destroyed the trust given to him by the victim and her mother. Applicant has successfully completed extensive treatment, and his counselor considers him an extremely low risk of re-offending. He has no continuing or unaccompanied contact with children, and the victim in this case no longer lives with him. Applicant disclosed his conduct with his family and friends, but delayed disclosing it to his employer for almost a year leaving him vulnerable to coercion and exploitation.

Applicant has demonstrated ongoing and consistent compliance with his treatment plan, and received a favorable prognosis from his court-appointed counselor. However, I find that Applicant has not fully mitigated the sexual behavior concerns. Applicant committed a felony sexual abuse crime, and he breached the trust given to him by the victim and his spouse. Despite her initial support for him to retain his employment status and avoid severe criminal penalties, she divorced Applicant and she and her daughter live apart from him. Applicant remains on probation for a felony offense with significant restrictions to his lifestyle and personal freedoms. His substantial delay in reporting his arrest to his employer exposed security vulnerabilities, and his community standing is severely tarnished. No mitigating condition fully applies to overcome his behavior and ongoing probationary status.

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

The Security concern under this guideline 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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following are potentially applicable:

(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

(c) individual is currently on parole or probation.

Applicant's admissions, testimony, and the documentary evidence in the record concerning his criminal conduct and current probation status are sufficient to establish the disqualifying conditions above.

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;

(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.

The discussion above under Guideline D are incorporated herein. Applicant's criminal behavior occurred almost five years ago, and has not been repeated. Applicant has acknowledged the wrongfulness of the conduct, and successfully completed treatment in 185 sessions, was determined to be rehabilitated, and continues to attend aftercare sessions. He is no longer in an environment where a relapse is likely to occur, has an acceptable work history, and is in full compliance with the terms of his probation. However, he continues to be under community supervision restrictions for a felony offense until August 2024, and is subject to home searches, DNA, blood, and urine sampling, restricted access to certain persons and places, and personal use of the internet. Although AG ¶ 32 (a) and (d) are partially applicable, no mitigating conditions overcome the impact of Applicant's felonious criminal conduct and continuing probationary status. His criminal conduct continues to impugn his status in the community, and shows a serious lapse in judgment and trust that has not yet been mitigated with time or treatment.

### **Whole-Person Concept**

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the 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).

I considered all of the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guidelines D and J, in my whole-person analysis. I find that Applicant was well served by counseling and treatment, and has shown rehabilitation for his offenses. However, I do not believe his sexual behavior or criminal conduct has been fully mitigated as he continues to be subject to court supervision and probationary restrictions, and there are continuing doubts about his judgment and trustworthiness.

Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national security interest of the United States to grant or continue his eligibility for access to classified information.

### **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: Subparagraph 1.a:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline J: Subparagraph 2.a:	AGAINST APPLICANT Against Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the national interest of the United States to grant or continue Applicant's eligibility for access to classified information. Applicant's security clearance is denied.

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Gregg A. Cervi  
Administrative Judge