



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



In the matter of: )  
)  
) ISCR Case No. 21-00698  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Kelly Folks, Esq., Department Counsel  
For Applicant: Joseph L. Goff, Jr., Esq.

01/31/2022

**Decision**

HARVEY, Mark, Administrative Judge:

In 2016, Applicant asked a law enforcement officer posing as a 15-year-old girl to meet him for sexual intercourse and sodomy while her mother was out of her apartment. He was convicted and sentenced to 30 days in jail and one year of probation. He is a registered sex offender. Guideline D (sexual behavior) security concerns are not mitigated. Guideline E (personal conduct) security concerns are refuted. Eligibility for access to classified information is denied.

**Statement of the Case**

On March 28, 2016, Applicant completed and signed a Questionnaire for National Security Positions or security clearance application (SCA). (Government Exhibit (GE) 1) On June 21, 2021, the Department of Defense (DOD) Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security

clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guidelines D and E. (HE 2) Applicant provided an undated response to the SOR. (HE 3) On October 14, 2021, Department Counsel was ready to proceed.

On October 29, 2021, the case was assigned to me. On November 10, 2021, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for December 7, 2021. (HE 1) The hearing was held as scheduled.

At hearing, Department Counsel offered four exhibits; Applicant offered 12 exhibits; there were no objections; and all proffered exhibits were offered into evidence. (Transcript (Tr.) 13-17; GE 4; AE A-AE L) On December 16, 2021, DOHA received a transcript of the hearing. After the hearing, Applicant provided three additional exhibits. (AE M-AE O) There were no objections, and the three exhibits were admitted into the record. (AE M-AE O) The record closed on December 24, 2021. (Tr. 63, 131)

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

### **Findings of Fact**

In Applicant's SOR response, he denied the SOR allegations. (HE 3) He did not explain why he denied the SOR allegations.

Applicant is a 33-year-old project engineer, who has worked for a defense contractor since January 2019. (Tr. 20, 25, 80; GE 1) In 2008, he graduated from high school. (Tr. 22) In high school, he was in honors academics and participated in track and cross country. (Tr. 22) He graduated from a university with a bachelor's degree in mechanical engineering and a minor in mathematics. (Tr. 23, 81) In 2016, he received a master's degree in mechanical engineering with a concentration in design and manufacturing. (Tr. 23) In 2020, he received a master's degree in business administration (MBA). (Tr. 23) In June 2016, he married, and he does not have any children. (Tr. 23, 81) He has never served in the military. (Tr. 81) He has held a security clearance since 2010. (Tr. 24, 82) There is no evidence of any security violations.

### **Sexual Behavior and Personal Conduct**

The history of Applicant's sexual development is detailed in his polygraph interview. (AE L) Prior to September 2016, there is no evidence of illegal sexual conduct with minors. (*Id.*) His polygraph result was no deception indicated for questions pertaining to sexual abuse of minors and viewing child pornography, aside from the offense in September 2016. (*Id.*)

In 2016, a large defense contractor employed Applicant. In June 2016, Applicant and his spouse moved to the East Coast. (Tr. 28-30) Shortly after he married, his employer moved him to the West Coast for three months, and he was unable to visit his

spouse, who remained on the East Coast, except for a brief visit in July 2016. (Tr. 29-31, 83) Applicant was unable to make friends near his work location on the West Coast, and he became lonely and depressed. (Tr. 32-33, 75, 84) He tried to meet others; however, his overtures were repeatedly rejected. (Tr. 35)

In September 2016, Applicant had been married for three months. (Tr. 78) He said he wanted to meet someone he could socialize with, but not to date. (Tr. 87) He went to several websites on the Internet. (Tr. 87-88) He clicked a category on the Internet called "Wet and Lonely" or words to that effect. (Tr. 86, 88) An advertisement suggested that a female wanted to meet someone to watch Netflix with her; however, the advertisement included the "context of wanting to be taken care of sexually." (Tr. 89) He responded to the advertisement indicating "I'll be glad to take care of you or something like that." (Tr. 89) He communicated with V on the Internet, who seemed lonely and abandoned. (Tr. 36, 45) He said his intent was for a platonic relationship, and he pursued the contact because he was lonely and bored. (Tr. 89) He repeatedly denied that he intended to have sex with V. (Tr. 123-125) He acknowledged that a fair interpretation of his response to V was that he offered to satisfy her sexually. (Tr. 90)

V said her mother was going to be out of town, and she wanted him to stay over at her residence. (Tr. 39, 115) V said she was almost 16 years old. (Tr. 38, 90) He convinced himself that V was joking about her age being only 15. (Tr. 90) She asked for marijuana; however, Applicant "shrugged it off." (Tr. 115) Applicant said he was not aware at the time he communicated with V that his conduct was criminal or "legally bad." (Tr. 91) He "shrugged off" the possibility that V was a minor, and did not think about how he might be hurting a minor. (Tr. 92) He denied that he intended to have sex with V. (Tr. 92) He said that he might not even meet with her. (Tr. 115) He said he just wanted to go for a drive. (Tr. 116) He told the detectives who interviewed him after his arrest that a fair interpretation of V would be that he wanted to have sex with her; however, he claimed he planned to sit in his car and think about it, and then "he would have changed his mind and left but 'didn't get the chance'" to leave without having sex with V. (AE O at 24)

I requested that Applicant provide the police report or court records pertaining to the allegation in light of his statements about his lack of intent to engage in sexual activity with V. After the hearing, he provided the police report. The police report said that Applicant wrote in emails or texts several comments to V of a sexual nature, for example, he said that he "wanted V's wet p\_\_\_\_y tightly around [his] throbbing c\_\_\_\_;" and he "wanted to eat her p\_\_\_\_y to make her wet for him;" and in response to her comment about being 15, he said that he liked "younger girls." (AE O at 9, 12, 21, 30, 52, 54-55) He responded to V stating she was 15, that her age was not a problem for him. (AE O at 9, 12, 21, 30, 52)

V was actually a law enforcement officer who was acting as a 15-year-old girl. She suggested that Applicant engage in oral sex with her. (Tr. 114) Applicant agreed to meet V for sex prior to driving to her apartment. He had been drinking four to six beers over about five hours, and he considered himself to be "definitely buzzed," and he had been taking his medication for ADHD. (Tr. 94-97) However, he said he did not drive while intoxicated or impaired when he went to see V. (Tr. 97-98)

Applicant drove about 30 minutes to the location where he was supposed to meet V. (Tr. 98) He had a condom in his wallet before he got into the car, and he took the condom out of his wallet. (Tr. 117) He did not bring any condoms, alcohol, or marijuana for his meeting with V. (Tr. 116-117) He parked in a parking lot near V's building, and the police arrested him for Communication with a Minor for Immoral Purposes via Electronic Communications, a felony. (Tr. 40, 98) His father-in-law provided his bail. (Tr. 47) He informed his boss of his arrest the morning after he was released from jail. (Tr. 47) As a condition of release pending disposition of the charge, Applicant agreed not to use the Internet, and his employer placed him on a leave of absence. (Tr. 27)

In October 2018, Applicant pleaded guilty to Communication with a Minor for Immoral Purposes via Electronic Communications, and he was sentenced to 30 days in jail, a year of probation, an \$800 fine and court costs, and to register as a sexual offender. (Tr. 53-55) Applicant denied that his purpose was to engage in sexual activity with V. (Tr. 41) He was unclear about the "immoral purpose" involved in his offense.

SOR ¶ 1.b alleged that Applicant violated the rules for sex-offender registration when he resided within 1,000 feet of a school. Violation of this rule is a Class D felony. See state M Rev. Stat. § 566.1407.

In 2017, Applicant and his spouse purchased a house (H). (Tr. 56, 101-102) When he attempted to register as a sex offender in 2018, his registration was rejected because the address he provided for H was within 1,000 feet of a school. (Tr. 57) He attempted to lease several apartments; however, the state's computer rejected his applications to register as a sex offender because of their proximity to schools. (Tr. 57) Eventually, he found an apartment he could lease that met the school-distance criteria, and he was able to complete his registration as a sex offender. (Tr. 58-59, 100) His spouse lives at H, and Applicant spends about half of his time at H. (Tr. 69, 103) He keeps his valuable items at H. (Tr. 103) He uses the mailing address of H. (Tr. 69-70) He keeps his clothing at his apartment and at H. (Tr. 103) He considered the apartments he leased to be his residences. (Tr. 70-72) He is aware that the legal standard for residence for sex-offender registration in his state is the location where he sleeps. (Tr. 104) He slept in H on the following occasions: when his spouse had a medical emergency; when the heat was not working in his apartment; and on a couple of other occasions with the permission of his probation officer. (Tr. 104-107) He contacts his former probation officer if he has questions about what he is permitted to do under the state's sex-offender registration restrictions. (Tr. 105-106)

In 2017, Applicant attended church-sponsored therapy and counseling. (Tr. 62, 110) During his post-trial probation, Applicant attended weekly sex-offender treatment sessions (Tr. 60-62; AE E and AE F) In April 2019, he successfully completed his probation and paid all fines and court costs. (Tr. 66-67; AE G; AE H) After completion of one year of probation, he continued to attend therapy and counseling sessions even though he was not legally required to continue with therapy and counseling. (Tr. 65-66; AE E) His counselor said, he "is currently at no/low risk to reoffend. It is this writer's opinion that [Applicant] is making the necessary changes to live a good and productive life." (AE E) On January 18, 2021, his counselor wrote that he "successfully completed

the treatment requirement of his psychotherapy.” (AE F) Applicant’s family, including his spouse and in-laws, have been very supportive of Applicant’s rehabilitation. (Tr. 59-60, 67-68, 77) His spouse was approved to be his supervisor when he is around minors, for example, when he attended a major league baseball game. (Tr. 68-69)

Applicant disclosed his conviction and why he left his previous employment to his current employer and his facility security officer. (Tr. 73-74) Aside from the offense in September 2016, Applicant has not communicated with any minors about sex. (Tr. 50) He did not engage in sexual behavior with minors after September 2016 because it would upset his wife; he lacks sexual interest in minors; and it is unlawful. (Tr. 50-51) He has never viewed any child pornography. (Tr. 52) In January 2021, he was diagnosed with, and he has been receiving treatment for, depression and anxiety. (Tr. 84-85) He regrets his bad decision that resulted in his conviction. (Tr. 44) His marriage is important to him. (Tr. 44) He has learned to communicate better with his spouse. (Tr. 50, 76) He has learned coping mechanisms to address his feelings when he is lonely. (Tr. 75) He is more religious now. (Tr. 44)

### **Character Evidence**

Applicant is dedicated to self-improvement, and he loves his employment and wants to contribute to his country through his employment. (Tr. 126-127) He participated in several volunteer activities in his community. (AE D) He held multiple leadership roles related to his employment and national defense. (*Id.*) He received excellent performance evaluations, and he made important contributions to his employer. (AE I; AE J) He received an award from his university for his success during the 10 years after he graduated from the university. (AE K)

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant’s 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.

Eligibility for a security clearance 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, these guidelines are applied 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 all available, reliable information about the person, past and present, favorable and unfavorable.

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 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 “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI 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. See *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 Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant’s security eligibility. Direct or objective evidence of nexus is not required.” ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020) (citing ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018)).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## **Analysis**

### **Criminal Conduct**

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “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 two conditions that could raise a security concern and may be disqualifying in this case, “(a) a single serious crime or multiple lesser offenses,” and “(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

AG ¶¶ 31(a) and 31(c) apply. In October 2018, Applicant pleaded guilty to Communication with a Minor for Immoral Purposes via Electronic Communications.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

(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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶¶ 32(a) partially applies and 32(d) fully applies. The offenses were committed during September 2016, and are not particularly recent. However, his employer might temporarily reassign him or he might otherwise be separated from his spouse and family, and the unusual circumstances involving his loneliness might recur, making him vulnerable to poor judgment and decisions. He served his sentence and successfully completed probation, therapy, and counseling. He has learned from his mistakes, and is unlikely to repeat the particular charged offense to which he pleaded guilty. He is well educated, diligent, and successful in his employment. He engaged in constructive community involvement. He expressed remorse for his criminal offense.

The evidence against mitigation is more persuasive. Applicant committed a serious criminal offense. He solicited sexual intercourse and sodomy with a person he believed to be 15 years old. His vulgar communications with her showed a clear desire to engage in sex with her. She agreed to engage in sexual activities with him, and he drove 30 minutes to her location. After he parked near her building, the police arrested him.

After careful consideration of the Appeal Board's jurisprudence on criminal offenses, and all the facts and circumstances, I have continuing doubts about the risks that Applicant will make poor decisions. While there is no evidence of criminal conduct before or after September 2016, it is too soon to conclude poor decisions or compromise of classified information is unlikely to recur. Not enough time has elapsed without serious premeditated misconduct to eliminate doubt about Applicant's current reliability, trustworthiness, and good judgment. Criminal conduct concerns are not mitigated.

## **Personal Conduct**

AG ¶ 15 explains why personal conduct is a security concern stating:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The LOR alleges three disqualifying conditions in AG ¶ 16 that are relevant in this case. AG ¶¶ 16(c), 16(d)(3), and 16(e)(1) read:

(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 person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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 person may not properly safeguard protected information. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as



(1) engaging in activities which, if known, may affect the person's personal, professional, or community standing . . . .

AG ¶¶ 16(c) and 16(d)(3) do not apply. SOR ¶ 2.a indicates Applicant violated state sex-offender rules when he maintained a residence within 1,000 feet of a school. Violation of this rule is a criminal offense. Guideline J is the most appropriate guideline for Applicant's alleged violation of the sex-offender registration statute. The previous sections indicate sufficient evidence for an adverse determination. AG ¶ 16(e) does not apply because his registration as a sex offender is publicly available, and his family, security, law enforcement, and employer are aware of that he is a registered sex offender. He discussed his conduct at his hearing. Moreover, Applicant complied in good faith with residence requirements for his state registration as a sex offender. He understands there is significant jeopardy if he sleeps overnight in H without permission of his former probation officer or other state officials. Personal conduct security concerns are refuted.

### **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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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 have incorporated my comments under Guidelines J and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a 33-year-old project engineer, who has worked for defense contractors since 2010. He graduated from a university with a bachelor's degree in mechanical engineering and a minor in mathematics. In 2016, he received a master's degree in mechanical engineering with a concentration in design and manufacturing. In 2020, he received an MBA. In June 2016, he married, and he does not have any children. He has held a security clearance since 2010, and there is no evidence of a security violation.

Applicant is dedicated to self-improvement, and he loves his employment and wants to continue to contribute to his country through his employment. He participated in

several volunteer activities in his community. He held multiple leadership roles related to his employment and national defense. He received excellent performance evaluations, and he made important contributions to his employer. He received an award from his university for his success during the 10 years after he graduated from the university.

The factors weighing against continuation of his security clearance are more substantial than the mitigating circumstances. In October 2018, Applicant pleaded guilty to Communication with a Minor for Immoral Purposes via Electronic Communications in September 2016, and he was sentenced to 30 days in jail, a year of probation, to pay a fine and court costs, and to register as a sexual offender. After making lewd comments to someone he believed to be a 15-year-old girl in September 2016 and agreeing to engage in sexual activity with her, he drove 30 minutes to be with her after she informed him that her mother was out, and she was willing to engage in intercourse and sodomy with him. He was arrested before he could enter her building. His actions demonstrated exceptionally poor judgment and cause lingering concerns that his judgment might be compromised in the context of protection of classified information. I am not confident that he would disclose compromise of classified information in the event that his own career would be jeopardized.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Personal conduct security concerns are refuted; however, criminal conduct security concerns are not 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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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MARK HARVEY  
Administrative Judge