



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



In the matter of: )  
 )  
XXXXXXXXXX, XXXXX ) ISCR Case No. 12-08752  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Chris Morin, Esq., Department Counsel  
For Applicant: *Pro se*

02/29/2016

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guidelines E (personal conduct). Clearance is denied.

**Statement of the Case**

On February 6, 2012, Applicant submitted a Questionnaire for National Security Positions (SF-86). On December 12, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline E (personal conduct). The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted or denied.

On January 20, 2015, Applicant responded to the SOR, and requested a decision based on the administrative record, without a hearing before an administrative judge. On February 23, 2015, Department Counsel requested a hearing pursuant to Paragraph E3.1.7 of the Additional Procedural Guidance of Enclosure 3 of the Directive. On June 1, 2015, Department Counsel was ready to proceed on Applicant's case. On June 5, 2015, DOHA assigned Applicant's case to me.

On June 11, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for July 10, 2015. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5, which were received into evidence without objection. Applicant testified, did not call any witnesses, and did not offer any exhibits. On July 20, 2015, DOHA received the hearing transcript (Tr.).

### **Findings of Fact**

In his SOR answer, Applicant admitted the sole SOR allegation. His SOR answer is incorporated in my findings of fact.

### **Background Information**

Applicant is a 50-year-old test engineer employed by a defense contractor since September 1986. He seeks a security clearance to enhance his position within his company. Applicant previously held a security clearance from 1987 to 1996. (GE 1; Tr. 14-16)

Applicant was awarded his GED in 1981. He was awarded an associate of science degree in electronic technology in June 1986. (GE 1; Tr. 17-18) Applicant was married from June 1986 to February 1992. That marriage ended by divorce. Applicant remarried in February 1996. He has two adult sons from his previous marriage and three children from his current marriage -- an 18-year-old son, a 13-year-old son, and a 9-year-old daughter. Applicant's wife is not employed outside the home. (GE 1; Tr. 18-32) Applicant did not serve in the U.S. armed forces. (GE 1; Tr. 18)

### **Personal Conduct**

In August 1996, at age 31, Applicant was convicted of handling and fondling a child under the age of 16, a 2<sup>nd</sup> degree felony. He was sentenced to two years of community control, placed on supervised probation for ten years, ordered to pay a fine and court costs, make restitution to his victim, complete sex offender counseling, have no contact with the victim or her family, and required to register as a sex offender. (SOR ¶ 1.a) Applicant completed all requirements of his sentence, but remains a registered sex offender. Applicant and the victim's mother are employed by the same company and he sees her at work, but does not speak to her. (GE 2, GE 3; Tr. 23-24, 28, 31)

As a registered sex offender, Applicant is required to report to the local sheriff's office twice a year for address verification and is also subject to two unannounced

annual home visits. He is required to register his vehicles as well as his home and work e-mail addresses and his driver's license is annotated. Applicant is subject to certain travel restrictions. Community control is the equivalent of house arrest. While on community control, he was required to inform his probation officer of his daily whereabouts seven days in advance. State law requires that Applicant remain a registered sex offender for life. However, he may apply to be removed from the registry 25 years after completing probation in 2033. (GE 4, GE 5; Tr. 24-31)

## **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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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. See *also* Executive Order 12968 (Aug. 2, 1995), § 3.1.

Thus, nothing in this Decision should be construed to suggest that I have based this decision, 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 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. 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 (4<sup>th</sup> 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 ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 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

### Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16 provides two disqualifying conditions that could raise a security concern and may be disqualifying with respect to Applicant’s felony conviction for gross sexual imposition.

(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; and

(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.

The evidence establishes the disqualifying conditions in AG ¶¶ 16(c) and 16(d), requiring additional inquiry about the possible applicability of mitigating conditions.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions fully apply. At the time of Applicant's conviction, he was 31 years old and the victim was under 16 years old and the daughter of a fellow employee. Applicant's questionable judgment at the time of committing the felonious act that led to his conviction is so egregious that it is not mitigated by the passage of time. Moreover, the offense was not minor, and the circumstances under which it occurred cast doubt on Applicant's good judgment. Applicant has completed all requirements of his sentence, but remains a registered sex offender and will remain so for the

foreseeable future. His home state also considered his offense serious enough to require “eyes on” address verification, annotation of his driver’s license, registration of his vehicles, e-mail addresses, and telephone numbers, and imposition of travel restrictions.

After weighing the relevant disqualifying and mitigating conditions, and evaluating the evidence in light of the whole-person concept,<sup>1</sup> I conclude Applicant did not present sufficient evidence to explain, extenuate, and mitigate the Guidelines E security concerns. Accordingly, Applicant has not met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant his eligibility for access to classified information.

### **Formal Findings**

Formal findings For or Against the 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 E:                   AGAINST APPLICANT

Subparagraph 1.a:                           AGAINST APPLICANT

### **Conclusion**

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

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Robert J. Tuider  
Administrative Judge

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<sup>1</sup> AG ¶ 2(a) (1)-(9).