



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



In the matter of: )  
 )  
 REDACTED ) ISCR Case No. 13-00785  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Gina Marine, Esq., Department Counsel  
For Applicant: *Pro se*

12/16/2013

**Decision**

MENDEZ, Francisco, Administrative Judge:

Applicant is a federal contractor applying to regain his security clearance, which was suspended after he was arrested for sexually assaulting his minor daughter. He failed to mitigate the criminal conduct and sexual behavior security concerns arising from his arrest and subsequent conviction. He also did not mitigate the concerns stemming from his troubled finances. Clearance is denied.

**Statement of the Case**

On July 23, 2013, the Department of Defense (DoD), in accordance with DoD Directive 5220.6, as amended (Directive), issued Applicant a Statement of Reasons (SOR), alleging security concerns under Guideline J (Criminal Conduct), Guideline D (Sexual Behavior), and Guideline F (Financial Considerations). Applicant answered the SOR and requested a decision on the written record (Answer). Department Counsel timely requested a hearing before an administrative judge.

On September 16, 2013, I was assigned Applicant's case and after coordinating with the parties, scheduled the hearing for November 13, 2013.<sup>1</sup> At hearing, Department Counsel offered Government Exhibits (Gx.) 1 – 7 in its case-in-chief.<sup>2</sup> Applicant testified and reoffered the exhibits attached to his Answer, which were marked Applicant's Exhibits (Ax.) A – C. All exhibits were admitted into evidence.<sup>3</sup> In rebuttal, Department Counsel called the lead detective who investigated the underlying criminal charges.<sup>4</sup> The record was kept open to allow Department Counsel and Applicant an opportunity to submit post-hearing briefs, which they timely submitted.<sup>5</sup> The hearing transcript (Tr.) was received on November 21, 2013, and the record closed on November 26, 2013.

### **Findings of Fact**

Applicant, 43, has worked as a federal contractor for nearly eight years. His access to classified information was suspended following his recent criminal arrest. He submitted a security clearance application in January 2012, looking to regain his eligibility to classified information. (Gx. 1, 3)

Applicant graduated high school in 1988 and two years later enlisted in the U.S. Navy. He served for 10 years, receiving an honorable discharge. Despite this discharge characterization, Applicant's military service was marred by instances of misconduct. Notably, he was accused of sexual harassment by two female subordinates. He claims the sexual harassment charges were in retaliation for reprimanding the subordinates. He testified that the sexual harassment charges were ultimately dropped. Applicant was court-martialed for unauthorized absence. Notwithstanding his claims of innocence, Applicant testified that he pled guilty to the charge. He claims a military judge dismissed the charge after he entered his plea of guilty. He served some period of confinement and was demoted to E-4, which hastened his discharge from the military.<sup>6</sup> (Gx. 3 at 2-3; Tr. at 105-112, 139-143)

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<sup>1</sup> Scheduling of the hearing was delayed due to the recent Government shutdown and restrictions on travel necessitated by the sequester.

<sup>2</sup> The Government's list of exhibits was marked Hearing Exhibit (Hx.) I.

<sup>3</sup> Applicant did not object to the admission of Gx. 1 – 6. He objected to the admission of Gx. 7, the criminal complaint. I admitted the exhibit over Applicant's objection and gave it the weight I deemed appropriate. (Tr. at 17-19, 28-29)

<sup>4</sup> Applicant did not object to the detective's testimony or request additional time to prepare his cross-examination.

<sup>5</sup> Department Counsel and Applicant's post-hearing briefs were marked (Hx.) III and IV, respectively. My ruling on the Government's motions to amend the SOR and to keep the record open for the submission of additional evidence was marked Hx. V, and is incorporated herein by reference.

<sup>6</sup> No independent evidence regarding Applicant's military service and court-martial were provided. His purported misconduct in the military was not alleged in the SOR, and is only being considered for the limited purpose of considering his mitigation case and credibility.

Applicant has been married for nearly 20 years. He and his wife have four children, ages 10 through 18. Applicant blames his financial problems and recent criminal conviction on his wife and their rocky relationship. They are currently separated. (Gx. 1, Gx. 3 at 6, 11; Tr. at 32-35)

Applicant claims his financial problems date back to 1994, when he married his wife. He claims that he routinely lived beyond his means, agreeing to extravagant purchases for his wife. When they would separate, he would stop paying their financial obligations.<sup>7</sup> In 2000, his debts, totaling approximately \$100,000, were discharged through bankruptcy. This bankruptcy discharge came on the heels of a previous separation during which Applicant stopped paying his financial obligations. After the bankruptcy discharge, Applicant's finances normalized until 2003, when he suffered a year-long period of unemployment. He has been employed full time since 2004 and was hired by his current employer in 2006. He purchased a home in 2008, but was unable to afford the monthly mortgage payments. Since purchasing the home, Applicant has made only four payments and it is in foreclosure. Applicant claims that he is willing to work with his lender to rehabilitate the loan, but is purportedly unable to resolve his mortgage debt because his estranged wife is uncooperative. Tr. at 185-186. *But see*, Gx. 3 at 6 (Applicant provided a sworn statement in 2012, wherein he states "[m]y spouse gave up her rights to the family home . . .")

Applicant admits 12 of the 14 delinquent debts listed in the SOR. He claims to have either resolved or made payments towards satisfaction of two minor SOR debts, which total approximately \$500.<sup>8</sup> The 12 delinquent debts he admits owing total over \$280,000 and remain unresolved. Applicant testified that he stopped paying his non-mortgage related debts after his recent separation from his wife.<sup>9</sup> He is unwilling to address his overdue debts until a court assigns responsibility for the debts as part of his pending divorce. He disclosed his past-due debts on his SCA, and blamed his estranged wife's reckless spending habits or miscommunication with his creditors for his dire financial predicament. He now claims his financial problems are partially attributable to a loss in income occasioned by the suspension of his security clearance. He has not sought or received financial counseling. (Gx. 1 – 3; Tr. at 112-135, 181-187)

In August 2011, Applicant was arrested on felony charges related to his alleged sexual assault of his then ten-year-old daughter. Several days prior to his arrest, Applicant's daughter confided to her siblings that Applicant anally sodomized her with his finger. The victim's siblings told their mother, who shortly thereafter contacted the authorities. The police interviewed the victim, as well as Applicant's other children and his wife. They were all interviewed separately. The lead detective, who has over 25

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<sup>7</sup> See, e.g., Gx. 3 at 13 ("Our financial problems were exacerbated by my spouse's behavior because when we separated or talked of separation, I stopped paying debts my spouse incurred or for items my spouse had in her possession.")

<sup>8</sup> Specifically, SOR ¶¶ 1.a and 1.i.

<sup>9</sup> *But see*, Tr. at 129-130 (admits the delinquent debts listed on SOR have been overdue since at least 2008 and he has made no efforts to contact creditors to resolve the debts).

years of experience investigating these types of crimes, interviewed the victim directly. Prior to interviewing the victim and the other children, the police made certain that each understood what the truth meant and the need to tell the truth. The victim told the lead detective that, while asleep in her parent's bed, she awoke to feel her father inserting his finger in her anus, over her clothes. (Tr. at 148-176) The lead detective testified that the victim was "very clear in her facts." (Tr. at 155) Applicant's other children and his spouse told police that the victim immediately reported the assault the next morning. All the witnesses' recollections of what the victim told them was fully consistent with the details that she provided to the police.<sup>10</sup> (Tr. at 167-168)

Based on the victim's statements, the lead detective swore out a criminal complaint against the Applicant. He was arrested and then interviewed by the police. He initially denied the charges. He then attempted to explain his actions by claiming that, while still asleep, he might have rolled over on top of his daughter and inappropriately touched her. He told the lead detective that he is a heavy sleeper and, if he did touch his daughter inappropriately, it would have occurred while asleep, in a dream-like state.<sup>11</sup> He also informed the detective that it was not unusual for him and his wife to engage in similar type of sexual activity consensually. He was subsequently charged with aggravated sexual battery of a minor, a felony. (Tr. at 164-168; Gx. 4, Gx. 7)

Applicant pled guilty to lesser charges of contributing to the delinquency of a minor and domestic assault and battery, both misdemeanors. Applicant was sentenced to 12 months on each of the charges and placed on supervised probation for twenty-four months. (Gx. 2 at 21, Gx. 4; Ax. A) He is currently on probation. (Tr. at 145-146) In accepting the plea to the lesser charges, Applicant agreed "that under no circumstances will he move or request of this Court that his pleas of guilty be withdrawn." He also agreed to waive "any other post-conviction relief whatsoever, including, but not limited to, claims of actual innocence." (Ax. A, ¶ 5; Tr. at 79)

Applicant was also ordered by the criminal court to have only supervised contact with the victim and his other children. (Ax. A, ¶ 4.C) He claims a family court recently granted him unsupervised visits with his children. He further claims that he now has physical custody of his minor children, to include the victim. (Tr. at 92-96, 205-206) He did not submit documentation to substantiate his claims.

Applicant claims he is innocent of all criminal charges. (Gx. 3 at 4) He claims that his wife fabricated the charges to get custody of their children. (Tr. at 34; Gx. 3 at 6) He insists that he only pled guilty to the misdemeanor charges to spare his children from having to testify and because he was informed his plea would not affect his job. (Tr. at 144) He maintains that if he did touch his daughter inappropriately it could only have

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<sup>10</sup> Applicant's two other daughters also reported that they had been sexually assaulted or molested by their father in the past, but these claims did not result in criminal prosecution.

<sup>11</sup> *But see*, Tr. at 70-71 (testifies that, as a parent, his body is trained and attuned to his kids' presence and, even if asleep, he wakes up when they enter a room).

occurred while he was asleep because he is a heavy sleeper and tends to toss and turn in bed. (Tr. at 48-50, 179)

Applicant testified that his daughter denied he touched her inappropriately in court. (Tr. at 45-46; Gx. 3 at 5) He submitted no documentation to corroborate this latest claim of innocence. He did submit a letter from the state agency for child protective services (CPS), which states that the allegations of “abuse/neglect” were determined to be “unfounded.” (Ax. B) However, the lead detective testified that CPS’s civil investigation is independent of the police department’s criminal investigation. (Tr. at 158-159, 173-174) The CPS letter was issued before Applicant entered his plea of guilty to the misdemeanor charges, and it is unclear whether CPS had all the evidence gathered by the police and state prosecutors. Applicant has not received counseling because he maintains he is innocent. (Tr. at 102-103)

### **Policies**

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are only eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry*, § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant’s eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a common sense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an 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.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.<sup>12</sup>

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<sup>12</sup> See also, ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (“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.”) (citing *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991)).

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. 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 an 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.<sup>13</sup>

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.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

## Analysis

### Guideline J, Criminal Conduct

The criminal conduct concern is set forth 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.

Applicant's arrest on felony charges of sexually assaulting his minor daughter and later conviction on lesser charges raises this concern. Applicant maintains he is innocent of all criminal charges. I do not find Applicant's protestations of innocence credible. In pleading guilty to the misdemeanor charges, Applicant knowingly and voluntarily entered a plea of guilty. He also knowingly and voluntarily agreed not to challenge his conviction in the future, including raising a claim of actual innocence.<sup>14</sup> Furthermore, I found his attempt to explain away his conduct, i.e., that while asleep he rolled over on his daughter and digitally sodomized her, incredulous. I have taken into account the CPS's civil finding and the marital circumstances surrounding Applicant's arrest. However, after considering the testimony of the lead detective, the immediate reporting of the crime by the victim, the consistency of the details provided by the victim to her family and the police, I find that Applicant sexually assaulted his then ten-year-old daughter in August 2011, a serious criminal offense.<sup>15</sup> Also, after having an opportunity

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<sup>13</sup> See ISCR Case No. 11-13626 (App. Bd. Nov. 7, 2013) (security clearance adjudications are predictive in nature). See also, *Kaplan v. Conyers, et al.*, 2013 U.S. App. LEXIS 17278 at \*\* 23-24, 40-51 (Fed. Cir. Aug. 20, 2013) (federal courts will generally defer to such predictive judgments).

<sup>14</sup> ISCR Case No. 11-09637 at 3 (App. Bd. Jan. 10, 2013) (“a defendant's admission in open court, made with the advice and assistance of counsel, is powerful evidence of the matter asserted.”)

<sup>15</sup> ISCR Case No. 11-03025 (App. Bd. Jan. 6, 2012) (due to the different evidentiary standards involved, an administrative judge may properly find that an applicant committed the alleged criminal

to observe Applicant's demeanor at hearing and considering his inconsistent statements, I find his testimony not credible.

Applicant's deviant criminal conduct and evidence produced at hearing establishes the following disqualifying conditions:

AG ¶ 31(a): a single serious crime or multiple lesser offenses;

AG ¶ 31(c): allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and

AG ¶ 31(d): individual is currently on parole or probation.

An applicant may mitigate the criminal conduct concern by establishing one or more of the mitigating conditions listed under AG ¶ 32. I have considered all the mitigating conditions and none apply. Despite his plea of guilty, Applicant continues to deny responsibility for his criminal conduct. He continues to blame his wife for his criminal acts. His criminal behavior and lack of remorse continue to raise concerns about his judgment, reliability and trustworthiness, as well as the potential for recurrence of similar conduct in the future.

#### **Guideline D, Sexual Behavior**

The security concern for sexual behavior is addressed at AG ¶ 12:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which can subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.

Applicant's sexual assault of his minor daughter raises the sexual behavior security concerns. His conduct also establishes the following disqualifying conditions:

AG ¶ 13(a): sexual behavior of a criminal nature, whether or not the individual has been prosecuted; and

AG ¶ 13(d): sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

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offense, even if the criminal charges were dismissed or did not result in conviction); ISCR Case No. 07-17559 (App. Bd. Dec. 19, 2008 ("a prosecutor's decision to accept a plea agreement does not necessarily suggest that an offense is minor, particularly in cases such as this one, where a child victim would have to testify against her [parent.]").

I hereby incorporate my analysis under the criminal conduct concern and for similar reasons find that none of the sexual behavior mitigating conditions apply.

## **Guideline F, Financial Considerations**

The security concern relating to financial problems is articulated at AG ¶ 18:

Failure or inability 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 information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Applicant's long standing practice of not paying his debts reflects his complete disregard for his financial obligations. Such irresponsible behavior raises the concern that Applicant may similarly disregard his security obligations. Applicant's *modus operandi* of reckless spending, followed by an unwillingness to pay his debts when his marriage started to crumble, directly implicates the financial considerations security concerns. The record evidence also establishes the following disqualifying conditions:

AG ¶ 19(a): inability or unwillingness to satisfy debts,

AG ¶ 19(b): indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt; and

AG ¶ 19(c): a history of not meeting financial obligations.

Applicant may mitigate the security concerns arising from his financial problems by establishing one or more of the following potentially relevant mitigating conditions:

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;

AG ¶ 20(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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

AG ¶ 20(c): the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;



AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(e): the individual has a reasonable basis to dispute the legitimacy of the past-due debt and provides documented proof to substantiate the basis of the dispute.

None of the mitigating conditions apply. Applicant has consistently spent well beyond his means and then failed to take responsibility for his financial problems. He continues to blame his financial predicament on his spouse or purported “miscommunication” with his creditors. Although his unemployment in 2003 was a matter outside of his control, he has been employed full time since 2004 and has been with his current employer for nearly eight years. His decision to purchase a home that he could not afford and other reckless purchases in a vain attempt to curry favor with his wife were not matters beyond his control. His recent separation and the financial fallout from the separation were also not matters outside his control, but directly related his criminal conduct. He has not sought or received financial counseling and has made no genuine effort to resolve his past-due debts. Applicant’s financial situation raises a concern about his judgment, reliability, and trustworthiness.

### **Whole-Person Concept**

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of an applicant’s conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).<sup>16</sup> I specifically considered Applicant’s nearly eight years of service as a federal contractor, the majority of that time while holding a security clearance. I also considered Applicant’s unsubstantiated claims that a family court granted him unsupervised contact with his children and that he is raising his minor children. However, this favorable evidence and other favorable record evidence, does not mitigate the security concerns at issue. The seriousness and recency of Applicant’s deviant criminal conduct, coupled with his lack of sincerity and attempts to minimize his criminal behavior and his complete disregard for his financial obligations, leaves me with *significant* doubts about his continued eligibility for a security clearance.

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<sup>16</sup> The non-exhaustive list of adjudicative 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.

### **Formal Findings**

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct):                   AGAINST APPLICANT

    Subparagraphs 1.a – 1.c:   Against Applicant

Paragraph 2, Guideline D (Sexual Behavior):                 AGAINST APPLICANT

    Subparagraph 2.a:   Against Applicant

Paragraph 3, Guideline F (Financial Considerations):       AGAINST APPLICANT

    Subparagraphs 3.a – 3.o:   Against Applicant

### **Conclusion**

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant continued access to classified information. Applicant's request for a security clearance is denied.

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Francisco Mendez  
Administrative Judge