



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



In the matter of:	)	
	)	
	)	ISCR Case No. 07-11547
SSN:	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Melvin A. Howry, Esquire, Department Counsel  
For Applicant: *Pro se*

March 31, 2008

**Decision**

MASON, Paul J., Administrative Judge:

Applicant submitted his security clearance application (SCA) on February 17, 2007. On November 19, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under the criminal conduct guideline (Guideline J). The action was taken pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and made effective within the Department of Defense for SORs issued on or after September 1, 2006.

Applicant submitted his notarized answer to the SOR on November 29, 2007. He elected to have his case decided administratively without a hearing. A copy of the government's File of Relevant Material (FORM, the government's evidence in support of the SOR) was sent to Applicant on December 27, 2007. Applicant received the FORM on January 02, 2008. Applicant's response was due by February 1, 2008. No response was received. The case was assigned to this administrative judge on March 13, 2008.

Based upon a review of the FORM and the entire case file, Applicant's eligibility for access to classified information is denied.

### **Findings of Fact**

Applicant admitted the one allegation under paragraph 1 (criminal conduct). Applicant is single, 26 years old, and employed by a defense contractor as a software developer/systems analyst. He seeks a security clearance.

On September 26, 2004, Applicant (age 22) was arrested and charged with (1) Rape, Unconscious Victim (Felony 1), (2) INDSI<sup>1</sup> Person Unconscious (Felony 1), (3) Sexual Assault (Felony 2), (4) Aggravated Indecent Assault (Felony 2), and (5) Indecent Assault, Person Unconscious (Misdemeanor 2).<sup>2</sup> On January 18, 2006, he pled guilty to the fifth count, and the other four were dismissed. On January 26, 2006, Applicant was sentenced to two years probation, 72 hours of incarceration, a fine, and nine months of house arrest. The sentence was amended on January 30, 2006 by ordering Applicant to pay restitution of \$806.00 to the victim or the victim's compensation program, or both.

In his answer to the SOR, Applicant denies a judgment was entered against him for nonpayment of the court fine. Applicant provided no evidence in support of his claim.

According to an interview Applicant had with an investigator from the Office of Personnel Management (OPM) on May 31, 2007 (Item 7), he invited the victim to his university apartment for a weekend. He has known her since he was 15 years old. He dated her for seven months before he entered the university in 2000. Further, she had visited in 2001 for a weekend.

She arrived on Saturday evening at 6:00 P.M. During about a two-hour period at his apartment, they had two or three shots of rum and vodka. At 9:00 P.M., they continued drinking at a bar until around midnight. Applicant did not believe the victim consumed as much as he did at the bar, but he did not think her consumption level was far behind.

Applicant then took the victim to a friend's apartment where he consumed five shots of alcohol and she consumed one or two. Some time later, Applicant discovered the victim and a male went into an adjoining room and locked the door. Applicant became angry, but did not want to do anything foolish. So, he left the friend's apartment. He returned at 2:00 A.M. and took the victim back to his apartment.

From about 2:30 A.M. to 4:30 A.M. Applicant and the victim kissed and fondled each other. No intercourse occurred. Applicant believed he and the victim were intoxicated, though he thought the victim was responsive and participatory in their

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<sup>1</sup> The acronym is defined in the Pennsylvania Penal Code as "involuntary deviate sexual intercourse."

<sup>2</sup> The allegation appears in subparagraph 1.a. of the SOR.

sexual activities. Applicant removed the victim's clothes and took several photographs of her naked.

The victim awoke at around 6:30 A.M. When she discovered she was naked, she assumed she had engaged in sexual intercourse.<sup>3</sup> She left the apartment suddenly, and by 12:30 P.M., had not returned. Applicant initiated a short search, but returned to his apartment at about 1:00 P.M., where he was met by several state troopers. They executed a search warrant, and interviewed him. He was not arrested until two weeks later.

Applicant was charged with five offenses. He pled guilty to indecent assault, a misdemeanor. Applicant recalled having three sessions with a psychologist who determined he was not a threat to society. Item 4 and Item 7 reflect Applicant's payment of restitution and applicable court fines.

Even though given an opportunity to provide evidence regarding his criminal conduct, he provided none. Applicant also declined to provide character evidence about his work experience or his lifestyle in the community.

### **Policies**

When evaluating an applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information. These guidelines are flexible rules of law that are applied in conjunction with the general policy factors of the whole person concept.

The protection of the national interest is the paramount consideration. AG ¶ 2b. requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

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<sup>3</sup> Applicant disputes this part of the interview (Item 7, question 3) indicating the victim was naked when she awoke. He claims instead, that when she awoke, her underwear was on the floor, but she had some outer garments on her body.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship is not restricted to normal duty hours. Rather, the relationship is an around-the-clock responsibility. The Government places a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

### **Criminal Conduct (CC)**

Criminal behavior casts doubts concerning a person's judgment and trustworthiness.

### **Analysis**

30. The *Concern*. Criminal activity creates doubt about a person's judgment, reliability. By its very nature, it calls into question a person's ability to comply with laws, rules and regulations.

Applicant's criminal conduct on September 26, 2004 falls within criminal conduct (CC) disqualifying condition (DC) 31.a. (*a single serious crime or multiple lesser offenses*) On September 26, 2004, Applicant took advantage of an intoxicated, unconscious victim by committing sexual misconduct and/or other sexual acts. Though it is impossible to discern how the plea bargain culminated in all felony charges being dismissed, the most credible reason is that the prosecution may have concluded their case was not as strong as originally estimated in the investigation. The fact that Applicant knew the victim since she was 15, and that he had been dating her for seven months before he entered college in 2000, and that she visited him under similar circumstances in 2001, may have caused the prosecution to reassess the merits of their case.

However, after reviewing Applicant's interview in May 2007, the only blame Applicant admits is causing the victim to become very intoxicated. He claims the victim was a willing participant throughout the whole escapade on September 26, 2004. His position removes CC mitigating condition (MC) 32.a. (*so much time has elapsed since the criminal behavior occurred, 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*) from consideration. The crime took place less than four years ago, and Applicant was discharged from probation in June 2007. Applicant's minimization of the offenses continues to cast doubt on his trustworthiness and judgment. CC 32.b. (*the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life*) does not apply.

CC MC 32.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)* only applies as far as restitution is concerned. There is documented basis to believe Applicant satisfied his restitution. (Item 4) The passage of more than three years since the offense occurred cannot be considered in a vacuum. Rather, Applicant was on probation during the period, aware that a violation of a term of probation could mean reinstatement of the original charges. Though Applicant made restitution, the record contains no indicators of remorse for his actions. There is no evidence of his job performance or lifestyle. The CC guideline is resolved against Applicant.

### **Whole Person Concept (WPC)**

Applicant has not met his burden of persuasion under the CC guideline. The same conclusion is reached even after the circumstances of this case are evaluated in the context of the whole person. Rehabilitation begins with the person comprehending the seriousness of their conduct. Toward that end, an applicant should adduce not only evidence of remorse, but also evidence of other behavioral adjustments that demonstrate the conduct will not happen again. While Applicant admitted SOR 1.a., he supplied no evidence showing contrition or his reputation at work or in the community. Applicant has not met his ultimate burden of persuasion under the CC guideline.

### **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 (Criminal Conduct, Guideline J):	AGAINST APPLICANT
Subparagraph 1.a.	Against Applicant

### **Conclusion**

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

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Paul J. Mason  
Administrative Judge