



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



In the matter of:	)	
	)	
SSN:	)	ISCR Case No. 07-14097
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Alison O' Connell, Esquire, Department Counsel  
For Applicant: *Pro se*

September 30, 2009

**Decision**

MASON, Paul J., Administrative Judge:

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

**Statement of the Case**

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) (Item 5), on August 22, 2006. On March 17, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under sexual behavior (Guideline D), criminal conduct (Guideline J), and personal conduct (Guideline E). 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 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 provided his response to the SOR on April 15, 2009, and requested a hearing. On June 2, 2009, Applicant furnished notification of his intent to withdraw his request for a hearing because his employer did not provide an attorney to represent him. I interpret his statements as a request for a decision be made on the record in lieu of a hearing. A copy of the Government's File of Relevant Material (FORM, the government's evidence in support of the allegations of the SOR) was sent to Applicant on July 2, 2009. He received the FORM on July 10, 2009. His response to the FORM, which was received on August 4, 2009, includes Applicant's position statement and eight character statements. The case file was assigned to me on August 19, 2009.

### **Findings of Fact**

Applicant submitted his answer (Item 4) to the SOR on April 15, 2009. He admitted the sexual behavior allegation under paragraph 1, the two criminal conduct allegations under paragraph 2, and the personal conduct allegation under paragraph 3. Next, he essentially abandoned his admission to SOR 3.a. (personal conduct) by indicating he had not been told he had been charged with a felony in 1987, and should have asked his military lawyer more questions. Then, Applicant indicated that with no criminal record either in the Army or as a civilian, he was not knowledgeable about the Uniform Code of Military Justice (UCMJ) or the criminal justice system. He knew that if there was a problem during the security investigation, his military records would be checked and he would be notified. Applicant stated, "What I am trying to say is I was not trying to hide anything because I knew my Military records would be checked[.] I would have to be crazy to think my records would not be looked at." At a later point in his answer to the SOR, Applicant stated:

Once again in hind sight if I thought that by answering "No" to question 22.a. on the (E-QUIP) investigation form would be taken as dishonest I would have answered "Yes" to the question. I was wrong[.] I just assumed that if there was any problem with my Military record[,] I would just be contacted to explain. But I was not trying to hide anything.

Applicant is 52 years old and married with two daughters. He has been married since July 1991. He also has two children from his first marriage which ended in June 1990. Applicant served in the United States Army from October 1975 until his general discharge under honorable conditions in December 1987. Before he was charged with the sexual behavior in November 1986, he had been promoted to Sergeant First class, E7 pay grade. Applicant has been employed on the same civilian, defense contract as a computer programmer since 1988.

### **Sexual Behavior/Criminal Conduct**

On November 22, 1986, Applicant was on active duty in the United States Army. He had been drinking with friends for more than four hours before the sexual behavior with his daughter, 12 years old at the time (Item 7). He recalled consuming a six-pack of

beer and two or three glasses of wine. He considered himself under the influence of alcohol. He arrived home about two or three in the morning of November 23, 1986 (*Id.*)

Applicant went to the bedroom of his 12-year-old daughter. He became sexually aroused after kissing her on her cheek. He got in her bed, rolled her on her back, and engaged in oral sex for about five minutes (*Id.* at 2). He did not recall engaging in any other kind of sexual behavior with her. Then, he went to his room and fell asleep.

The next day Applicant was taken to the Criminal Investigative Division (CID) and charged with attempted rape and sodomy. In explaining the circumstances of the charge, Applicant stated, "I had a charge read to me by the CID, and the major presented written papers to me, but those were the only written charges regarding the matter." (*Id.* at 5) Although Applicant did not recall committing any additional sexual acts on his daughter, he was sure he did not commit sodomy (*Id.* at 2). The agent interviewing Applicant indicated that he would not put handcuffs on Applicant but warned him against an escape attempt (*Id.* at 2).

Applicant accompanied the CID agent to the base hospital. He assumed the purpose of the trip was to complete evidence of a rape kit sample (*Id.* at 2). Applicant recalled a doctor removed some pubic hair from his body. He told the doctor he felt like killing himself. Then, he was transferred to the psychiatric unit of the hospital where he stayed for the next two months (*Id.* at 3). He recalled participating in group counseling sessions, but no individual therapy (*Id.*). Finally, while in the hospital, Applicant's military attorney told him not to talk with the person conducting the sexual offender class. Applicant did not enroll in a sexual offender program. When the two months ended, Applicant was released and returned to his unit. He recalled apologizing to his former wife and the victim on several occasions over the next few years (*Id.* at 4).

On July 1, 1987, a Memorandum for the Director, US Army Crime Record Center (Item 9), was filed by a special agent of the CID. The Memorandum chronicled details of the investigation. Witnesses, including the victim, were interviewed. During an investigation of the crime scene, Applicant's note of apology to the victim was discovered. The medical official found no signs of physical injuries, trauma, or sperm on the victim. Finally, various officials in Applicant's command agreed that he be charged with attempted rape (Article 80, UCMJ), indecent acts with a child (Article 134, UCMJ), and sodomy (Article 125, UCMJ).

From the beginning of his hospitalization until October 1987, Applicant indicated he was never approached about the case. At an undisclosed time in 1987, Applicant attended drug and alcohol awareness classes for six months (*Id.* at 4).

At the end of October 1987, Applicant was called to the office of the Judge Advocate General (JAG), and told by his military attorney that because he was an excellent Sergeant, he would receive a general discharge under honorable conditions, an option recommended over the other option of going to court. Applicant recalled

signing the paperwork accepting the conditions of his discharge. He was discharged from the Army in December 2007 (Item 10).

### **Personal Conduct**

Applicant submitted a Questionnaires for Investigation Processing (e-QIP) on August 22, 2006. In response to question 23.a. (Have you ever been charged or convicted of any felony offense (include those under the Uniform Code of Military Justice)?, Applicant answered "No." In his answer to the SOR 3.a., he answered "I admit," acknowledging he deliberately failed to disclose he had been charged with felony offenses under the UCMJ.

However, at a subsequent location in his answer explaining the reasons for his responses to the SOR, Applicant immediately provided other explanations for his "No" response to question 23.a. (SOR 3.a.) He claimed he misunderstood question 23.a. The only information provided by his military attorney in 1987 was that he would receive a chapter discharge. Applicant was not knowledgeable about the corresponding status of criminal cases under the UCMJ, and he knew he did not have a felony in his civilian life. Then, Applicant stressed that he was not trying to hide anything because he knew his military records would be looked at, and he would be crazy to think his military records would not be reviewed. Applicant would have answered "Yes" to the question had he thought the "No" answer would be interpreted as dishonest. He ended his sworn statement (Item 7) with the following statement:

I did not claim this activity on my case papers (e-QIP) because I never went to jail, I was never officially charged with this matter, and the way the questions were asked, none of the events, I thought, fit the questions. I never intended to hide this activity, I just did not know how to record it or mention it on my case papers.

In his response to the FORM, Applicant also stated that if his DD Form 214, which states that his discharge occurred "for commission of a serious offense, had said "felony," then he would have answered "Yes" to question 23.a. (response to FORM, position statement; Item 10 at 3). Had Applicant seen Item 8 and/or Item 9 of the FORM, he would have answered "Yes" to question 23.a. of his e-QIP (response to FORM, position statement). I am unable to accept Applicant's alternative rationales for deliberately providing false information on the e-QIP in August 2006.

### **Character Evidence**

In his response to the FORM, Applicant provided eight character references from his family, friends, and coworkers. Applicant's current wife considers Applicant to be honest. Applicant told his wife about the sexual behavior with his daughter from his first marriage. One of two daughters of Applicant's current wife insisted that he accompany her down the aisle in her wedding. Applicant has always been supportive of his current wife's two daughters and their children.

Applicant's 35-year-old daughter from his first marriage, furnished a statement indicating she forgives Applicant for his sexual behavior committed against her in November 1986. Applicant has always been supportive of her and her three daughters. He calls her weekly and sends cards indicating he is thinking about her family.

The senior pastor of Applicant's church has known Applicant since 1990, and has found him to be dependable and trustworthy. Applicant's friend of 21 years believes Applicant is dedicated and trustworthy, and a very responsible foster parent in providing a wholesome living environment for two foster children. Applicant's coworker of 14 years considers Applicant to be knowledgeable. Two fellow church members have known Applicant since 1990. They consider him a problem solver and very involved in the objectives of the church (response to FORM).

Applicant's current supervisor has known Applicant since 1995. He recommends Applicant for a position of trust based on his honesty and habit of getting the job done as planned (Id.).

### **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 required to be considered in evaluating an applicant's eligibility for access to classified information. These guidelines are applied in conjunction with the variables listed in the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. Reasonable 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.

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 between an applicant and the federal government. 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 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.

## Analysis

### Sexual Behavior

¶ 12. *The Concern.* “Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may 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. No adverse inference concerning the standards in this Guideline may be raised on the basis of the sexual orientation of the individual.”

Applicant’s sexual misconduct constitutes criminal sexual behavior within the scope of sexual behavior (SB) disqualifying condition (DC) ¶ 13.a. (*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*). The investigative reports, supported by Applicant’s admission, establish that he engaged in unlawful behavior with his daughter who was 12 years old in November 1986. Applicant’s misconduct is also disqualifying under SB DC ¶ 13.d. (*sexual behavior of a public nature and/or that reflects lack of discretion or judgment*) because of the poor judgment Applicant exhibited to satisfy his sexual desires. The fact that he was under the influence of alcohol is not mitigating.

However, after a careful review of the record and SB MC ¶ 14.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 good judgment*), I conclude Applicant’s sexual behavior is mitigated. The sexual act(s) occurred more than 22 years ago. Applicant’s two-month period of hospitalization in late 1986 and early 1987 (where he received group counseling), and the absence of any indication he has repeated this conduct since November 1986, weighs in his favor. He has a stable and supportive relationship with his former wife’s family, particularly the victim. He has a close relationship with his current wife’s family, including her daughters and granddaughters. This favorable character evidence results in a finding for Applicant under the sexual behavior guideline.

## **Criminal Conduct (CC)**

¶ 30. *The Concern.* “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.”

Criminal conduct CC disqualifying conditions (DC) ¶ 31.a. (*a single serious crime or multiple lesser offenses*) and CC DC ¶ 31.c. (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*) apply in this case. Under SOR 2.a. Applicant was charged with criminal violations of Articles 80 (attempt to commit rape), 134 (indecent acts with a child), and 125 (sodomy). He avoided criminal prosecution under those UCMJ Articles by accepting a discharge under honorable conditions. By engaging in illegal sexual misconduct with his 12-year- old child, Applicant breached the most important duty that all parents owe to their children which is the duty to care and protect them.

CC DC ¶¶ 31.a. and 31.c. apply to Applicant’s deliberate falsification of his e-QIP in August 2006. His falsification was material in that he was trying to conceal relevant information the government has a legitimate right to know about in making a security clearance determination.

Two of the five mitigating conditions (MC) under personal conduct apply to mitigate SOR 2.a. of the SOR. CC MC 32.a. (*so much time has passed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment*) clearly applies to the circumstances of this case as Applicant’s criminal sexual misconduct occurred more than 22 years ago. There is no evidence to infer or suggest the criminal sexual behavior has occurred since then, or that it could surface in the future.

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 development*) provides substantial mitigation. In addition to the passage of time without the recurrence of criminal activity, Applicant has convinced me he is truly remorseful for his misconduct. He has established a stable lifestyle with his current wife, her children, and his grandchildren. He enjoys strong ties with the victim and her children. SOR 2.a. is resolved in Applicant’s favor.

SOR 2.b. has not been mitigated. The intentional falsification occurred approximately three years ago. Applicant continues to deny his falsification was deliberate. The favorable character evidence from his family, his coworkers and his church, does not mitigate his continuing denial that he falsified the e-QIP. Applicant’s denial he falsified his e-QIP establishes a violation of 18 U.S.C. § 1001. Accordingly, SOR 2.b. and the CC guideline is resolved against Applicant.

## Personal Conduct (PC)

¶ 15. *The Concern.* “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.”

This guideline applies to intentional attempts to conceal or omit information during the course of a security investigation. PC DC ¶ 16.a. (*deliberate omission or falsification of relevant facts from any personnel security questionnaire to determine security clearance eligibility or trustworthiness*) applies to Applicant’s deliberate falsification of his e-QIP in August 2006. In not disclosing his sexual misconduct in the security form, Applicant concealed material information the government has a right to know about to make an informed security clearance determination. His deliberate concealment of information is a violation of 18 U.S.C. § 1001.

Though Applicant admitted in his answer to the SOR that he falsified his e-QIP in August 2006, he immediately disowned his answer with a plethora of explanations/rationalizations for his “No” answer. In the face of his claim of supposedly not knowing he was charged with felonies, he stated that on the day of the offense, a charge was read to him at the CID office because he recalled hearing sodomy and attempted rape.

Applicant also claimed that if his DD Form 214 had contained the word “felony” as the reason for his discharge, or if he had been aware of Item 8 and/or Item 9 before answering the e-QIP in August 2006, he would have answered “Yes” to question 23.a. I do not accept this claim because I believe Applicant had enough information available in August 2006 to answer question 23.a. correctly. The fact that he chose to terminate his military career to avoid being prosecuted under the UCMJ should have been one of the compelling reasons for him to disclose rather than conceal the missing information.

Applicant repeatedly claimed that if there was problem during the security investigation with the information provided, he would be notified, and that he would “crazy” to believe there would not be a follow-up investigation. Applicant’s subjective beliefs about the security investigation are misplaced. An applicant must be candid and forthright during all phases of the investigation. Every applicant has a duty to furnish truthful answers to all questions on a security form. Applicant did not, yet he certified with his signature at the end of his e-QIP that the information was accurate and supplied in good faith. Even if I were to accept Applicant’s confusion about where to supply the information in his e-QIP (which I do not), he could have proceeded to the “Additional Comments” space of his e-QIP, just before the certification section, and disclosed the missing information. He declined.



There are three mitigating conditions (MC) that are potentially applicable to the circumstances in this case. Those conditions are: PC MC ¶ 17.a. (*the individual made prompt, good-faith efforts to correct the omission, concealment or falsification, before being confronted with the facts*); PC MC ¶ 17.c. (*the offense was 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*); and, PC MC ¶ 17.d. (*the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate stressors, circumstances, or factors that caused untrustworthy, unreliable or other inappropriate behavior, and such behavior is unlikely to recur*). I conclude that the mitigators do not apply.

### **Whole Person Concept**

I have examined the evidence utilizing the disqualifying and mitigating conditions of the SB, CC, and PC guidelines. I have resolved the SB guideline for Applicant, and the CC and PC guidelines against Applicant. The case still must be weighed within the context of nine variables known as the whole person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors:

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 the participation was 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.

Applicant was 29 years old when he committed the criminal sexual behavior against his daughter who was 12 years old in November 1986. The passage of more than 22 years without recurrence of conduct of a similar nature warrants a finding for Applicant under the SB guideline.

But, Applicant's intentional falsification of his August 2006, security form has not been mitigated by the positive family and job evidence. Against his original admission to SOR 3.a., the abundance of follow-up explanations denying his falsification was intentional undermines Applicant's credibility while reinforcing my ultimate findings against Applicant under the CC and PC guidelines.

## **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 (Sexual Behavior, Guideline D): FOR APPLICANT

Subparagraph 1.a. For Applicant

Paragraph 2 (Criminal Conduct, Guideline J): AGAINST APPLICANT

Subparagraph 2.a. For Applicant

Subparagraph 2.b. Against Applicant

Paragraph 3 (Personal Conduct, Guideline E): AGAINST APPLICANT

Subparagraph 3.a. Against Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the 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