



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



In the matter of:	)	
	)	
SSN:	)	ISCR Case No. 07-16847
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Eric H. Borgstrom, Esquire, Department Counsel  
For Applicant: Alan V. Edmunds, Esquire

October 27, 2010

**Decision**

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,<sup>1</sup> Applicant's clearance is granted.

On 9 July 2009 the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D, Sexual Behavior and E, Personal Conduct.<sup>2</sup> Applicant timely answered the SOR, and requested a hearing. DOHA assigned the case to me 4 September 2009, and I convened a hearing 7 October 2009. DOHA received the transcript (Tr.) 14 October 2009.

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<sup>1</sup>Consisting of the transcript (Tr.), Government's exhibits (GE) 1-14, and Applicant's exhibits (AE) A-K. AE K is an index of the 10 substantive exhibits, admitted solely to identify those exhibits for the record (Tr. 22-24).

<sup>2</sup>DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive (DoD) 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the adjudicative guidelines (AG) effective within the DoD on 1 September 2006.

## Findings of Fact

Applicant admitted the SOR allegations, except for SOR 1.c and 2.a. He is a 48-year-old senior principal engineer employed by a defense contractor since June 2007. He seeks to retain the security clearance he has held since April 2003, which was suspended in 2007 as a result of the behavior recorded below. He reported his mental health consultations and the adverse clearance actions by other government agencies on his clearance applications in May 2003 (GE 3), January 2007 (GE 2), and June 2007 (GE 1). He had no security lapses while his clearance was active.

In June 2005, another government agency denied Applicant's request for special access because of the issues raised in SOR 2.b, as well as for conduct cited under the criminal conduct and psychological conditions guidelines that are not alleged in the SOR (GE 12).<sup>3</sup> The decision was largely based on a May 2005 evaluation by the agency's psychological services department—not contained in the record—that diagnosed Applicant with Paraphilia Not Otherwise Specified—Telephone Scatologia (SOR 1.d). Applicant appealed the decision in October 2005 (GE 5), and the clinical psychologist who conducted the May 2005 evaluation was given the opportunity to rebut his appeal and reaffirm her original diagnosis in November 2005 (GE 6). In reaffirming her diagnosis, she pointed out that her role as a forensic psychologist differed from the roles of treating psychologists or psychiatrists. In November 2005, Applicant's appeal was denied (GE 7). He exercised his further right to appeal in December 2005 (GE 8), but the results of that appeal are not in the record. In July 1995, a different government agency also denied Applicant's request for special access for psychological reasons (GE 14).

In 1983 or 1984, Applicant was charged with making obscene telephone calls. The charges were later dropped (SOR 1.a). In 1988, he was charged again with making obscene telephone calls, and the charges were dropped when he agreed to attend counseling (SOR 1.b). In summer 2001, a deaf woman Applicant was dating obtained a restraining order against him for sending sexually-explicit text messages (SOR 1.c).

Since the late 1980s, Applicant has had counseling, therapy, and medication for mental health issues including depression, anxiety, and the sexually-inappropriate conduct noted above. The medical records from those providers (GE 9-11) were apparently available to the agency psychologist, as was the record of Applicant's interview with a government investigator in September 2004 (GE 13). Both his psychologist (GE 11) and his psychiatrist (GE 10) at the time considered him eligible for a clearance. His psychiatrist in particular noted that he responded well to treatment. Both gave him favorable prognoses. Applicant's current psychiatrist—who has been treating him since July 2007—gives him an excellent prognosis. She notes that he is symptom free on his medication, totally compliant with treatment, and shows good judgment (AE A). She has no concerns with him holding a clearance.

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<sup>3</sup>The other agency acted under regulations that use adjudicative guidelines that are virtually identical to the guidelines applicable here.

In August and September 2009, Applicant underwent a complete forensic psychological evaluation to determine his current intellectual and personality functioning (AE I). The clinical psychologist gave Applicant 20 tests, and appears to have reviewed the Government's records submitted as evidence in this case. His evaluation contains a detailed analysis of those records as well as the test results. Although he recommended Applicant continue his medications and therapy, he concluded that Applicant should have his clearance reinstated:

It is recommended, with a reasonable degree of medical certainty, that [Applicant] should be reconsidered and reinstated with his security clearance. There is no evidence, in the current test protocol, of pathological behavior that would preclude his reinstatement. It would appear that [Applicant] has experienced considerable personal growth since the incidents in 1985 and 1990. Further, the incident in 2001 was a result of a dysfunctional and ego-dystonic relationship. The probability that he would repeat such an interaction approaches zero.

Applicant has a good work record and has received several awards and certificates of achievement (AE H). His character witnesses and references (AE C-G) consider him honest and trustworthy. Both his witnesses are aware that Applicant is in therapy.

### **Policies**

The adjudicative guidelines (AG) list factors to evaluate a person's suitability for access to classified information. Administrative judges must assess disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also show a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(a). The applicability of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific guidelines should be followed when a case can be measured against them, as they are policy guidance governing the grant or denial of a clearance. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guidelines are Guidelines D (Sexual Behavior) and E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, disputed facts alleged in the SOR. If it does, the burden shifts to applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a

compelling interest in ensuring each applicant possesses the required judgement, reliability, and trustworthiness of those who must protect national interests as their own. The “clearly consistent with the national interest” standard compels deciding any reasonable doubt about an Applicant’s suitability for access in favor of the Government.<sup>4</sup>

### Analysis

The Government established a case for disqualification under Guideline D, but, Applicant mitigated the security concerns. Although the record evidence suggests that some aspects of his behavior may have been consensual, particularly with regard to the text messages, the only applicable disqualifying condition relates to criminal sexual behavior.<sup>5</sup> However, his misconduct was not compulsive,<sup>6</sup> is sufficiently known so does not potentially subject him to duress,<sup>7</sup> and did not involve public behavior.<sup>8</sup> While there are factual discrepancies between details of the sexual behavior reported by Applicant and those recorded by various interviewers and medical professionals, those variances are insignificant in the context of this decision because the medical assessments are largely based on the most serious version of events and because the last recorded incident of sexual behavior was in 2001.

Conversely, two mitigating conditions are applicable to Applicant’s conduct. The conduct was infrequent and not recent, although at the time not under particularly unusual circumstances.<sup>9</sup> Further, Applicant has received counseling, therapy, and medication, and continues in treatment with his psychiatrist and is completely compliant with her treatment recommendations. There have been no further incidents since 2001. The fact that the conduct is sufficiently known among personal and professional connections limits the potential for duress.<sup>10</sup> Finally, it appears that in each instance, the behavior may have begun as consensual behavior before Applicant overstepped the boundaries.<sup>11</sup> I resolve Guideline D for Applicant.

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<sup>4</sup>See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>5</sup>¶ 13.(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

<sup>6</sup>¶ 13.( b) a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;

<sup>7</sup>¶ 13.(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;

<sup>8</sup>¶ 13.(d) sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

<sup>9</sup>¶ 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;

<sup>10</sup>¶ 14.(c) the behavior no longer serves as a basis for coercion, exploitation, or duress.

<sup>11</sup>¶ 14.(d) the behavior is strictly private, consensual, and discreet.

The Government established a case for disqualification under Guideline E because of Applicant's poor judgment in the sexual behavior admitted by Applicant and documented by the Government's evidence.<sup>12</sup> However, Applicant mitigated the security concerns raised by his conduct. This incident is sufficiently known in his personal and professional circles, alleviating the potential vulnerability to exploitation, manipulation, or duress. Further, without minimizing the seriousness or distastefulness of the conduct, the judicial system resolved it as relatively minor incidents. The incidents occurred over nine years ago, and are unlikely to recur.<sup>13</sup> Given the favorable prognoses of both his current psychiatrist, and the evaluating psychologist, I find that Applicant's circumstances warrant continuation of his clearance. I resolve Guideline E for Applicant.

I have particularly considered the fact that Applicant obtained his September 2009 psychological evaluation (AE I) specifically to address the allegations in the SOR. However, I give it persuasive weight for a variety of reasons. The evaluator's extensive resume and the thoroughness of not only the testing and records review, but the thoroughness of his explanations of how those results influenced his conclusions, leads me to believe the conclusions stated are reliable. Those conclusions are consistent with Applicant's current treating physician (AE A) and his earlier providers (GE 10, 11). Finally, without disparaging the conclusions of the agency psychologist in May and November 2005 (GE 6)—when the behavior was much more recent and the treatment perhaps neither as long nor as thorough as it is now—I note that her conclusions in November 2005 appear to be a rebuttal of the stinging rebuke submitted by Applicant's then-counsel in his October 2005 appeal (GE 5) not an impartial forensic examination. Further, her November 2005 responses include a significant amount of speculation about facts not contained in the record. In addition, the clinical psychologist who did Applicant's September 2009 evaluation specifically criticized her evaluation for not conducting the kind of tests designed to facilitate the diagnosis she was making.

It would be easy to translate visceral distaste for Applicant's conduct into denial or revocation of his clearance. Such a reaction would be equivalent to a per se denial under the circumstances of this case. However, security clearance determinations are

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<sup>12</sup>¶ 16.(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. . . ; (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 . . . ;

<sup>13</sup>¶ 17.(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;

not designed to reward or punish applicants for past conduct that raises security concerns. They are designed to be a clear-eyed assessment of the current risk that a given applicant might deliberately or inadvertently disclose protected information to individuals not entitled to it. Given the judicial resolution of these incidents, the favorable psychiatric prognoses, and Applicant's past record of access to protected information without incident, his adverse conduct presents little likelihood that he would waver from that record.

**Formal Findings**

Paragraph 1. Guideline D: FOR APPLICANT

Subparagraphs a-d: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraphs a-b: For Applicant

**Conclusion**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance granted.

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JOHN GRATTAN METZ, JR  
Administrative Judge