



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 07-16854
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Jennifer Goldstein, Esquire, Department Counsel  
For Applicant: *Pro Se*

November 28, 2008

**Decision**

WESLEY, Roger C., Administrative Judge:

**Statement of Case**

On June 10 2008, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, and Department of Defense (DoD) Regulation 5200.2-R, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on June 27, 2008 and requested a hearing. The case was assigned to another judge on July 22, 2008, and reassigned to me on September 5, 2008. It was scheduled for hearing on October 7, 2008. A hearing was held on October 7, 2008, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, or deny, Applicant's application for a security clearance. At hearing, the Government's case consisted of seven exhibits; Applicant relied on four witnesses (including himself) and two exhibits. The

transcript (R.T.) was received on October 15, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Summary of Pleadings**

Under Guidelines J and D, Applicant is alleged to have been convicted of annoying or molesting a child under 18 years of age (a misdemeanor), for which he was placed on summary probation until June 2010 and ordered to register as a sex offender.

For his answer to the SOR, Applicant admitted each of the allegations covered by Guideline J with explanations. He explained that he could have used a better choice of words when communicating with the minor, but his words were not intended to be taken in a sexual or inappropriate manner. He claimed he was convicted of a single misdemeanor charge of annoying a minor (not a molesting charge). He claimed he has been fully compliant with his summary probation (the lowest form of probation) and complied with the court's wishes in registering as a sex offender. He claimed that he will move to dismiss his conviction when his probation is completed in June 2010, which if successful will eliminate his need to register as a sex offender.

Responding to the Guideline D allegations, Applicant denied any sexual dysfunction or compulsion associated with his actions. He explained that the whole situation from his point of view stemmed from an unfortunate misunderstanding.

### **Findings of Fact**

Applicant is a 35-year-old-security guard for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Applicant is unmarried and has no children. He has a step-sister (age 15) and a fiancé who has resided with him since 2005 (see ex. 1; R.T., at 38-39). His step-sister (X) resides with his father who he has not seen in over a year (R.T., at 39). He has earned college credits at a local college (R.T., at 37).

Applicant's step-sister (X), 13 years of age at the time, introduced him to her friend (Y) in 2005 (see ex. 2; R.T., at 40-41). From the time they met in 2005 to at least August 2006, Applicant maintained social contact with Y through family gatherings. In August 2006, they began e-mailing each other on a regular basis (R.T., at 41-42). Over a two-month period between August and October 2006, Applicant and Y exchanged e-mail communications with each other weekly. Sometimes X would participate in their e-mail exchanges (R.T., at 53-54). The content of their discussions is not clear. Applicant claims they discussed daily events in their lives, but nothing of a sexual nature (see ex. 2; R.T., at 51). Y provided no account of their exchanges that can be gauged in this

record. But Y did testify about her experiences with Applicant, and the depth and scope of their e-mail communications (R.T., at 55). Whether any sexually suggestive words were exchanged by either e-mail participant is unclear.

In October 2006, Y e-mailed Applicant about a costume she was going to wear for Halloween. In her e-mail she stated that she was going to dress up a gangster and wear a flapper dress (see ex. 2; R.T., at 42). Applicant responded to her e-mail. In his e-mail response, he stated that Y should show off her legs and make sure that she shows off her backside to make it look good (ex. 2).<sup>1</sup> He indicated that he wished he could be there to see her (R.T., at ). Y brought a copy of the e-mail exchange to school to show a friend.

Under circumstances unclear in the record, Y's teacher gained access to Applicant's October 2006 e-mail to Y. Upon seeing the e-mail (considering it inappropriate), she promptly turned it over to the campus police officer. This campus police officer, in turn, contacted Y's mother. Records indicate that the mother wanted the police officer to personally investigate Applicant's contact with Y. The officer talked to both Y and Applicant about their e-mail exchange and reportedly told Applicant not to worry (see ex. 2).

Y's mother, unaware of Applicant's e-mail exchanges with her daughter filed charges with the local district attorneys' office (R.T. at 55-56). In November 2006, Applicant received a summons from the local justice center, notifying him that he was charged with annoying a minor/molesting a minor in violation of §647.6(a) of the C Penal Code (a misdemeanor). In December 2006, Applicant appeared in court on the charge and pleaded not-guilty. He was assigned a public defender, who was eventually transferred. Applicant was then assigned a new public defender. His case was placed on the trial calendar, and had to be continued several times due to repeated requests from both sides.

In June 2007, Applicant's case was heard by a jury. The case lasted roughly two days and included testimony from Y (R.T., at 45, 55) Y's mother did not testify according to Applicant (R.T, at 55), and it is not clear whether Applicant testified or produced the series e-mails transmitted between Y and himself. After the parties submitted their respective cases, the jury retired and later returned a guilty verdict on the §647.6(a) annoying a minor/molesting a minor charge (see exs. 2, 5 and 6).

Following the jury's return of its guilty verdict, the court remanded Applicant to a local jail for holding pending sentencing. Four days later, Applicant appeared before the trial judge for sentencing. The court committed Applicant to summary probation for a period of 36 months, subject to imposed conditions (see ex. 6; R.T., at 35). The court fined Applicant \$200.00 plus court costs and a restitution fee. Records confirm that

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In his hearing testimony, he varied his account somewhat of how he responded to Y's e-mail. At hearing, he said he suggested to Y in his e-mail that the dress "should look good across her backside and that it should show off her legs if she was going to wear that kind of a dress" (R.T., at 42).

Applicant satisfied these financial requirements. Besides fining him, the court sentenced him to 120 days of confinement (to be served on consecutive weekends beginning in August 2007 (ex. 6). The court also ordered Applicant to participate in group counseling and register with local law enforcement as a sex offender, provide a DNA sample as directed by the local probation department, and have no contact with Y (ex. 6; R.T., at 35).

Records confirm that Applicant satisfied the court's financial requirements of his probation and committed to an outpatient counseling program. His family counseling records confirm that he entered their counseling program in July 2007. Minutes of the court's records confirm that the court found Applicant in compliance with court ordered terms of probation and need not appear any further (see ex. 5).

More recently, Applicant's licensed counselor (XM) noted that Applicant has not exhibited any pattern of self-destructive or high-risk sexual behavior that he could not curtail. In his evaluation of Applicant, XM found no indication of a personality disorder or identified other occurrences or mental conditions. XM credited Applicant with presenting in group as a person of otherwise appropriate judgment and expressing authentic remorse for the hurt and anxiety his behavior caused Y and her family (see ex. 5). XM described the outcome of Applicant's treatment as very successful. He reaffirmed his remorse for the emotional stress he caused Y and her family (ex. 5; R.T., at 35-36, 62).

Since his June 2007 conviction, Applicant has stayed away from Y. To avoid even the chance of running into Y who still sees his step-sister, he does not visit his father any more (R.T., at 56-58). When his probation is completed in 2010, he hopes to file a motion to dismiss the charges and remove his name from sex offender registration (R.T., at 35).

Applicant continues to insist on the innocent nature of his e-mail exchanges with Y, acknowledging only that he used poor judgment in choosing the words he used in his October 2006 e-mail exchange (R.T., at 62). Applicant; though, provides no material corroboration for his assurances. When asked about the whereabouts of the months of e-mails he insists were innocent, he explained he used a neopets account (status unknown), and deleted the e-mails themselves (R.T., at 59-60). Presumably, the jury believed Y's account of the key e-mail and all of the circumstances surrounding the e-mail she was able to recount.

Applicant is praised by his fiancé and her family as a stable and considerate person. He impresses his fiancé, her sister and mother with his trustworthiness and the absence of any indicated inappropriate behavior around children (see ex. B; R.T., at 65-66, 73-74, 84-85). His fiancé (D) acknowledged her general awareness of his contacts with Y, but had not seen the specific contents of Applicant's October 2006 e-mail exchange with Y (R.T., at ). D's mother (E) is equally supportive of Applicant's trustworthiness. A retired school teacher, E credits Applicant with being good to her

daughter (ex. B; R.T., at 84-85). Likewise, D's sister (F) describes Applicant as a good and honest person (R.T., at 73-74).

Absent performance evaluations and furnished impressions from Applicant's employer, it remains unclear what impact (if any) his conviction has had on his employment relationship. The only furnished accounts from his employer entail a summary of Applicant's conviction and sentence forwarded to DoD by his employer's facility clearance officer (see ex. 7). Without more input from his employer, it is unclear whether any of his superiors and colleagues are aware of the facts and circumstances surrounding his 2007 conviction.

## **Policies**

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **Criminal Conduct**

*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. See Adjudicative Guidelines (AG), ¶ 18.

### **Sexual Behavior**

*The Concern.* Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress, 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 solely on the basis of the sexual orientation of the individual. See Adjudicative Guidelines (AG), ¶ 18.

## **Burden of Proof**

By virtue of the precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

## **Analysis**

Applicant is a security guard for a defense contractor who pleaded guilty to a misdemeanor charge of annoying or molesting a child under 18 years of age in 2007. Applicant was placed on three years of summary probation (to June 2010) by the court. Probation conditions include a fine, restitution, counseling, 120 days of electronic monitoring and registration with state authorities as a sex offender. While Applicant's family and close friends are aware of the incident and ensuing conviction, questions still persist over the extent of knowledge of the conviction and surrounding circumstances by Applicant's coworkers and supervisors.

Applicant's actions raise security concerns under both the criminal conduct and sexual behavior guidelines. DC ¶ 31(a) of Guideline J, "a single serious crime or multiple lesser offenses," is applicable to Applicant's situation. Equally applicable is DC ¶ 31(d), "individual is currently on parole or probation." Applicant's conduct is also covered by Guideline D and can be resolved under that Guideline as well.

Judgment and potential blackmail concerns still exist over Applicant's e-mail relationship with a minor and conviction in 2007 based on an e-mail found to violate the statutory protections provided §647.6 of the C Penal Code. These actions reflect both

serious judgment lapses and actions that could possibly expose him to risks of potential blackmail. Applicant's actions are expressly covered by Guideline D, and are entitled to independent cognizance under this Guideline according to the Appeal Board. See ISCR Case No. 06-20964, at 6 (April 10, 2008). Where (as here) there is additional probative adverse information covered by Guideline D that is not covered by Guideline J, and which reflects a recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior (*i.e.*, Applicant's established relationship with C which he pursued through e-mail exchanges with C (including the identified actionable one) for about two months before ceasing contacts with C pursuant to court order). Independent grounds do exist for considering questionable judgment and trustworthiness and exploitation and coercion risk allegations under Guideline D, quite apart from the criminal implications of his actions. Authority for considering overlapping conduct under both guidelines is contained in the guidance provided in Enclosure 2, ¶ 2(d) of the Directive's August 2006 amendments.

So, under Guideline D, core judgment and exploitation concerns covered by D.C. ¶ 13(a), "sexual behavior of a criminal nature, whether or not the individual has been prosecuted," DC ¶ 13(c), "sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress," and DC ¶ 13(d), "sexual behavior of a public nature and/or that reflects lack of discretion or judgment."

To be sure, Applicant is of record in making his exchanges with Y known to his fiance, her mother, and her sister. While this reduces his vulnerability risk to coercion and pressure, it does not resolve concerns about his judgment and trustworthiness. His key 2006 e-mail response reflects not only poor judgment but insensitivity to the emotional fragility of a minor (just 13 at the time).

While Applicant may not be at high risk to recurrence at this time, he still remains under the court's imposed summary probation. His probation is not due to expire until June 2010. So, at least for the duration of his probation, he must remain registered as a sex offender. Applicant's probation and registration status represent the considered assessments of his jury and presiding jurist, and remain a prudent bench guide for gauging any recurrence risks.

The recurrent judgment lapses that inhere in Applicant's 2006 annoying/molesting conviction, his continued probation and registration status and the uncertainty surrounding his employer disclosures to date, preclude safe predictive judgments at this time that he will not engage in any similar activity in the foreseeable future. Neither the timing of his actions, the accompanying circumstances, the recurrence risks, nor the still potential for blackmail warrant the application of any of the mitigating conditions in Guideline J or Guideline D.

So recurrent and recent are his encounters with Y (no matter how innocent some of them might be) that the likelihood of their occurring again cannot be safely discounted. Whether any of the unidentified e-mails Applicant exchanged with Y could have made a difference can not be not be gauged without seeing the e-mails. And for whatever

reason, Applicant is not able to provide copies of these e-mails. As long as risks of recurrence and blackmail exist, Applicant's conduct cannot be mitigated, either under the guidelines or under the whole person concept.

From a whole person perspective, Applicant has established a good relationship of trust with his fiance and her family. Much less is known, however, about his professional relationships with his colleagues and supervisors. Whether his coworkers and supervisors are aware of his 2007 conviction is unclear. Without such clarity and emergence from probation (still two years away), he is not able mitigate the Government's security concerns at this time.

It is true that Applicant's telling his colleagues and supervisors about his relationship with Y could pose something of a dilemma for him. Informing them of the details of his encounters, though, is a necessary prerequisite to absolving himself of risks of blackmail and other forms of pressure and coercion. His continued probation status and registration as a sex offender also poses judgment, as well coercion and duress risks. This is a situation where strong family credits cannot overcome the security risks associated with his judgment lapses, continued probation and sex offender registration status, and his potential exposure to exploitation, coercion and duress risks.

Taking into account all of the circumstances surrounding Applicant's e-mail relationship with Y and ensuing conviction and sentencing, it is still too soon to absolve Applicant of security risks associated with his recurrent 2009 conviction and sentencing disposition. Based on his recurrent exchanges with Y reflecting questionable judgment and trustworthiness concerns, his continued probation and sex offender registration status, and his potential risk to exploitation, coercion or duress, Applicant does not mitigate the Government's security concerns. Unfavorable conclusions warrant with respect to the underlying conduct covered by subparagraphs 1.a through 1.c of Guideline J and subparagraph 2.a of Guideline D.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Enclosure 2(a) of the Adjudicative Guidelines of the Directive.

### **Formal Findings**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

<b>GUIDELINE J: (CRIMINAL CONDUCT):</b>	<b>AGAINST APPLICANT</b>
Sub-para. 1.a:	Against Applicant
Sub-para. 1.b:	Against Applicant
Sub-para. 1.c	Against Applicant
<b>GUIDELINE D: (SEXUAL BEHAVIOR):</b>	<b>AGAINST APPLICANT</b>



Sub-para. 2.a.:

Against Applicant

**Conclusions**

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 security clearance. Clearance is denied.

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Roger C. Wesley  
Administrative Judge

