



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
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----- ) ISCR Case No. 07-17134  
 )  
Applicant for Security Clearance )

**Appearances**

For Government:  
Kathryn D. MacKinnon, Esquire, Deputy Chief Department Counsel

For Applicant:  
*Pro se*

March 2, 2011

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**DECISION**

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ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on August 29, 2006. (Item 6.) On March 2, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline I (Psychological Conditions) and Guideline D (Sexual Behavior). (Item 1.) The action was taken under 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on March 8, 2010, and requested that a decision be made without a hearing. (Item 2.) Department Counsel submitted a File of Relevant Material (FORM) to Applicant on June 30, 2010. Applicant received the FORM on July 7, 2010, and was given 30 days to submit any additional information. Applicant

did not submit any additional information. The case was assigned to me on October 14, 2010. Based upon a review of the written record eligibility for access to classified information is denied.

### **Findings of Fact**

Applicant is 58 and married. He is employed by a defense contractor and seeks to obtain or retain a security clearance in connection with his employment.

#### **Paragraph 1 (Guideline I, Psychological Conditions)**

#### **Paragraph 2 (Guideline D, Sexual Behavior)**

The Government alleges in Paragraph 1 of the SOR that Applicant is ineligible for clearance because he has an emotional, mental or personality condition that can impair his judgment, reliability or trustworthiness. It is further alleged in Paragraph 2 that Applicant is ineligible for clearance because he has engaged in sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, or reflects a lack of judgment or discretion.

Applicant did not submit an answer to Paragraph 1 or its single subparagraph. His nonresponse is deemed a denial. He admits all of the allegations under Paragraph 2 in the SOR, with the exception of 2.c., which he admits as to specific dates in his Answer. Those admissions are deemed findings of fact. (Item 2.)

The SOR alleges, Applicant admits, and Government exhibits substantiate, that he has been involved in questionable or illegal sexual conduct from approximately 1970 until at least 2002. (Items 3, 4 and 7.) This conduct consisted of fondling a six to nine year old girl while she was sleeping, when he was eighteen years old in approximately 1980; in 1982, forcing anal sex on a woman who was then his fiancé against her will; from 1976 to 1980 soliciting male and female prostitutes while serving in the U.S. military;<sup>1</sup> and in 2002, engaging in mutual public masturbation with another person in an adult bookstore. Applicant stated that his wife knows about his solicitation of prostitutes, but not of the other incidents. (Item 4 at 1.)

In November 2008, Applicant was examined by a Department of Defense (DoD) psychiatric consultant. In his report, the consultant, a board certified psychiatrist, found:

[Applicant] did not appear to meet diagnostic criteria for a current major mental disorder, however he did meet the criteria for personality disorder, not otherwise specified with schizotypal and dependant traits. He has a history of paraphilia, i.e. he engaged in inappropriate sexual behavior since age 18. Since these activities are of such long duration and

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<sup>1</sup>Applicant admitted soliciting prostitutes during this time period in his Answer, and not consistently up to 2002. The Government's FORM documents support his statement.

he receives no sexual gratification from his wife, *it is likely that he may continue to engage in behaviors that could be potentially risky for him.* (Emphasis supplied.) (Item 8 at 1.)

The consultant goes on to say that the “condition is of a continuing nature.” Further, “In the future, it may cause significant defect in judgement or reliability.” He also stated that the condition may cause a “significant defect in psychological, social or occupational functioning in the future.” Finally, the consultant stated, “The probability of recurrence is more than 30%.” (Item 8 at 1-2.) Applicant chose not to respond to the findings in any way.

Applicant provided no evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his track record with respect to handling sensitive information and observation of security procedures. He submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

### **Policies**

Security clearance decisions are not made in a vacuum. When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used as appropriate in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s over-arching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as 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. In addition, the administrative judge may also rely on his or her own common sense, knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) 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.

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 and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Paragraph 1 (Guideline I, Psychological Conditions)**

The security concern relating to the guideline for Psychological Conditions is set out in AG ¶ 27:

Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified mental health professional (e.g., clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this guideline. No negative inference concerning the standards in this Guideline may be raised solely on the basis of seeking mental health counseling.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 28(a), “behavior that casts doubt on an individual’s judgment, reliability, or trustworthiness that is not covered under any other guideline, including but not limited to emotionally unstable, irresponsible, dysfunctional, violent, paranoid, or bizarre behavior” is disqualifying.

Similarly under AG ¶ 28(b), “an opinion by a duly qualified mental health professional that the individual has a condition not covered under any other guideline that may impair judgment, reliability or trustworthiness” may raise security concerns. The evidence is sufficient to raise these potentially disqualifying conditions.

The guideline at ¶ 29 also includes examples of conditions that could mitigate security concerns arising from Applicant’s psychological conditions:

(a) the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;

(b) the individual has voluntarily entered into a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health practitioner;

(c) recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by the U.S. Government that an individual’s previous condition is under control or in remission, and has a low probability of recurrence or exacerbation;

(d) the past emotional instability was a temporary condition (e.g., one caused by death, illness, or marital breakup), the situation has been resolved, and the individual no longer shows indications of emotional instability; and

(e) there is no indication of a current problem.

AG ¶ 29(a), (b), (c) and (d) do not apply based on their specific terms. As for (e), the Government has made a strong case that the Applicant’s problem is continuing, it may significantly effect his psychological, social or occupational functioning in the future, and it has an unacceptably high probability of recurrence. Applicant chose not to present any evidence showing that his condition is resolved, that he is in counseling or treatment, or that his problem has a low probability of recurrence. Paragraph 1 is found against the Applicant.

## **Paragraph 2 (Guideline D, Sexual Behavior)**

The security concern relating to the guideline for Psychological Conditions is set out in AG ¶ 12:

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 solely on the basis of the sexual orientation of the individual.

The Government has presented more than sufficient evidence to meet its burden of proof. The following disqualifying conditions under ¶ 13 are applicable based on this finding:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (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;
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation or duress;
- (d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

The Applicant's admitted conduct, consisting of fondling an underaged girl, engaging in coercive sexual acts, soliciting prostitutes of both sexes, and engaging in public acts of masturbation, bring him within the strictures of these conditions. As discussed, the alleged conduct continued until at least 2002, but the psychiatric consultant states that the probability of recurrence is unacceptably high at 30%.

Under the particular facts of this case, none of the mitigating conditions have application. They are:

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;
- (b) the sexual behavior happened so long ago, so infrequently, or under such circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress;
- (d) the sexual behavior is strictly private, consensual, and discreet.

His conduct was relatively recent, repeated, public in nature, and continues to serve as a bases for coercion since his wife does not know its true extent. Paragraph 2 is found against the Applicant.

## Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the relevant circumstances. Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. The administrative judge must consider the nine adjudicative process factors listed at 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 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has engaged in repeated acts of a sexual nature which call into question his judgment, reliability and trustworthiness. A DoD psychiatric consultant has found that his conduct may recur. His conduct makes him, by definition, vulnerable to coercion. Under AG ¶ 2(a)(3), Applicant's conduct is recent. Based on the state of the record, I cannot find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I find that there is the potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is a high likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his psychological condition and sexual behavior.

On balance, I conclude that Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a denial of his request for a security clearance.

## 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, Guideline I:	AGAINST THE APPLICANT
Subparagraph 1.a:	Against the Applicant

Paragraph 2, Guideline D:

AGAINST THE APPLICANT

Subparagraphs 2.a through 2.e:

Against the 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.

WILFORD H. ROSS  
Administrative Judge