



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



In the matter of:)	
)	
)	ISCR Case No. 07-17801
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Kathryn D. MacKinnon, Esquire, Deputy Chief Department Counsel
 For Government: Melvin A. Howry, Esquire, Department Counsel
 For Applicant: Joseph Testan, Esquire

January 10, 2013

Remand Decision

CEFOLA, Richard A., Administrative Judge:

The Applicant submitted his Security Clearance Application (SCA) on October 16, 2007. On February 4, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines I, D and E for the Applicant. 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 after September 1, 2006.

The Applicant acknowledged receipt of the SOR on February 15, 2011. He answered the SOR in writing on March 14, 2011, and requested a hearing before an Administrative Judge. DOHA received the request on March 17, 2011, and I received the case assignment on January 24, 2012. DOHA issued a notice of hearing on January 26, 2012, and I convened the hearing as scheduled on February 22, 2012. The

Government offered Exhibits (GXs) 1 through 10, which were received without objection. The Applicant testified on his own behalf, as did his Security Officer, and submitted Exhibits (AppXs) A through F, which were received without objection. DOHA received the transcript of the hearing (TR) on March 7, 2012. I granted the Applicant's requests, one made at his hearing and the other one after his hearing, to keep the record open until April 10, 2012, to submit additional matters, to include a Closing Argument. On March 22, 2012, through Department Counsel, the Applicant's Counsel submitted "Applicant's Closing Argument." The record closed on April 10, 2012. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information was granted, and a Decision was issued on April 25, 2012. The Government appealed this Decision. "Department Counsel raised the following issues on appeal: whether the Judge failed to consider critical aspects of the record; whether the Judge erred in his application of the mitigating conditions; and whether the Judge's whole-person analysis was erroneous." (Appeal Board Decision dated August 17, 2012 (Decision 1) at page 1.)

On August 17, 2012, the DOHA Appeal Board remanded this case, specifically noting the following:

The Judge's failure to discuss Applicant's contact with children impaired his analysis of the mitigating conditions and the whole-person factors. We conclude that the best resolution is to remand the case to the Judge for a new decision. The other issues raised by Department Counsel are not ripe for discussion. (Decision 1 at page 3.)

On September 10, 2012, I issued a Remand Decision, addressing the Appeal Board's above noted concerns, again granting the Applicant access to classified information. However, on December 5, 2012, the DOHA Appeal Board remanded this case (Decision 2), with further instructions. (Decision 2 at pages 3~8). The Appeal Board notes the following:

The main thrust of Department Counsel's arguments on appeal is that, after remand, the Judge's considerations and analysis of the issue of **Applicant's thoughts and interactions with young girls** remains both erroneous and inadequate. Department Counsel argues that the Judge's failure to properly address this issue affected his overall analysis of the case under the multiple Adjudicative Guidelines [I, D and E] set forth in the SOR. The Board agrees. (Decision 2 at page 3, emphasis supplied.)

Findings of Fact

In his Answer to the SOR, the Applicant admitted the factual allegations in Subparagraphs 1.a.~1.e. of the SOR, with explanations. He denied the factual allegations in Subparagraphs 1.f.~1.l., 2.a. and 3.a. of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Psychological Conditions & Sexual Behavior

The Applicant held a security clearance “from 1977 to 1985,” and again from 1995 to 2007. (TR at page 60 line 17 to page 67 line 10.) He has never had a security violation. (*Id.*) His Security Officer speaks most highly of the Applicant. (TR at page 41 line 9 to page 52 line 18.) She has known the Applicant for “[a]pproximately five years.” (TR at page 43 line 19.) The following colloquy occurred between her and Applicant’s Counsel:

Q Okay. So, you’re familiar with the evidence against him here today?

A Yes, I am.

Q And the allegations against him?

A Yes.

Q Based on what you know of . . . [the Applicant] and your experience in the Industry and what NSA - - the position they’ve taken - - what’s your opinion about how he’s been treated?

A I think they have operated on some basis that I just don’t think are(*sic*) sound. I think it’s a shame that he does not have his Clearance. I think his Clearance should be reinstated. Everything that I’ve seen of him says he can handle safeguarding classified information appropriately and is not a threat to national security in any way, shape or form. (TR at page 45 lines 1~21.)

In addition, the following colloquy occurred with Department Counsel:

Q Okay. You mentioned your daughters who are older now, but assuming you had granddaughters, would you have any hesitation to allow . . . [the Applicant] to be alone with your granddaughters?

A Absolutely not. He is not - - anything that I’ve seen or read, not a pedophile¹. I just think that’s wrong. It’s a wrong conclusion.

Q Do you believe that any of his conduct which he has admitted to would in any way compromise his ability to safeguard classified information?

A Absolutely not. (TR at page 48 line 23 to page 49 line 11.)

¹The Appeal Board correctly notes that “[t]he witness . . . offered a medical opinion that she was not qualified to make.” (Decision 2 in Footnote 1 at page 4.) This is correct, but as she was responding to a question by Department Counsel, and as Department Counsel did not ask me to disregard that part of her testimony, it is part of the record. It is her opinion, but clearly not the opinion of an expert witness.

1.a.~1.i. and 2.a. The Applicant grew up in what was in many ways a dysfunctional family. He was “the youngest of three sons”; but in his mother’s eyes, he “was supposed to be a girl.” (TR at page 65 line 5 to page 67 line 10.) His mother treated him as she would a daughter. By age five he was cross-dressing, and by age eight he began engaging in sadomasochistic acts by injuring himself. (*Id.*) His sadomasochistic behavior ceased in about 2004, and his treating Psychiatrist gives the Applicant injections of medication to control his obsessive behavior. (GX 3 at pages 9~11.)

It is also alleged that the Applicant is sexually attracted to young girls, has fantasies about inappropriate conduct with young girls, and has sought non-sexual contact with young girls. (GX 3 at pages 14~15, 17~19 and 22~23.) The Applicant admits he has sought what he avers to be appropriate, non-sexual, conduct with young girls. (TR at page 80 line 14 to page 84 line 9, and GX 10 at pages 4~8.) However, the Applicant denies that he is sexually attracted to, or has fantasies about inappropriate conduct with, young girls. (TR at page 80 line 14 to page 84 line 9.)

The Appeal Board finds that “setting aside the issue of whether or not Applicant’s attraction to and contact with young girls had a sexual component, given the record evidence . . . , the Board concludes that the record provides no basis for any reasonable person to view Applicant’s interactions with young girls as appropriate conduct.” (Decision 2 at page 6.) As the Appeal Board ordered that I “issue a new Decision consistent with the analysis contained herein” (Decision 2 at page 8), I find that the Applicant’s conduct, delineated at length in the Appeal Board’s Decision (Decision 2 at pages 5~6), to be inappropriate.

From **1980~1983**, the Applicant saw **Psychiatrist A** for a condition initially diagnosed as Anxiety Reaction, and later changed to Depressive Neurosis. (TR at page 67 line 11 to page 68 line 18, and GX 3 at page 9.) He was prescribed medication to treat his Depression. (*Id.*) When Psychiatrist A moved, the Applicant saw Psychiatrist B, who had purchased Psychiatrist A’s practice. (TR at page 68 line 19 to page 72 line 13.)

Psychiatrist B saw the Applicant about every two weeks **from 1983 until Psychiatrist B passed away in 1998**. (*Id.*, and TR at page 72 lines 21~23.) In October of 1995, this treating psychiatrist answered a “Medical Information Questionnaire” regarding the Applicant. (GX 6.) In part, Psychiatrist B noted that the Applicant was suffering from, “Depression, anxiety and obsessive-compulsive behavior.” (GX 6 at page 1.) He found “no immoral or deviant behavior.” (*Id.*) His prognosis was “fair good progress made.” (GX 6 at page 2.) He found “no impairment” in judgement or reliability. (*Id.*)

Since 1998, the Applicant has seen **Psychiatrist C** every two weeks “for treatment of Obsessive Compulsive Disorder.” (TR at page 72 line 14 to page 75 line 11, at page 115 line 1 to page 116 line 14, GX 9, and AppX A at pages 3 and 4.) In September of 2009, this treating Psychiatrist noted, in part, the following: “I am satisfied

with the current state of therapy. He has good control of his behavior and is highly unlikely to be influenced, coerced, or manipulated because of his fantasies.” (AppX A at page 4.) In March of 2011, his treating Psychiatrist further noted that the Applicant “is truthful and conscientious and would not permit his private fantasies to interfere with his ability to protect sensitive government information.”

However, in **December of 2008**, the Applicant met with a **Government Psychologist** for an hour; and based on that meeting and a review of unspecified records, he found a “DSM IV diagnosis of Obsessive Compulsive Disorder, Major Depression, recurrent, Pedophilia, Transvestic Festishism (*sic*), and Sexual Masochism and Sadism.” (GX 7.) He further found “a defect in judgment, and less so in reliability at the time, and it is likely to continue in the future.” (*Id.*)

In **September of 2010**, this same **Government Psychologist**, armed with the review of specified records, gave a more thorough Psychological Report. He reiterated his previous diagnosis, but noted, in part, the following: “There is no evidence of a defect in judgment, reliability or trustworthiness at work. When he has sufficient duties at work to keep him preoccupied, he feels productive, effective, appropriate, and that he is a valued contributor.” (GX 8 at page 3.)

Most recently, in **February of 2012**, his current treating Psychiatrist, **Psychiatrist C**, opined the following: “This is to verify that my patient, . . . [the Applicant], does not have a medical condition nor is he receiving medical treatment that impairs his judgment, reliability, or trustworthiness in safe-guarding classified national security information.” (AppX A at page 1.)

Personal Conduct

3.a. In February of 2007, another Government Agency denied the Applicant access to SCI, based on allegations similar to those noted above; i.e., Psychological Conditions, Sexual Behavior, and Personal Conduct. (GX 10 at pages 3~12.)

Policies

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 useful 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 Paragraph 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.

The protection of the national security is the paramount consideration. AG Paragraph 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 Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph 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. 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.

Section 7 of Executive Order 10865 provides that decisions shall be “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

Psychological Conditions

The concern under Paragraph 27 is that, “Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness.” Here, a Government Psychologist saw the Appellant in December of 2008, and made a diagnosis. The disqualifying condition under Paragraph 28(b) is applicable as there appears to be “*an opinion by a duly qualified mental health professional that the individual has a condition not covered under any other guideline that may impair judgement, reliability, or trustworthiness.*” That diagnosis called into question the Applicant’s judgement.

This is countered, however, by the opinion of his treating Psychiatrist, who has seen the Applicant every two weeks for the last 14 years. The mitigating condition under Paragraph 29(e) clearly applies, as *“there is no indication of a current problem.”* Here, most recently, the Applicant’s treating Psychiatrist opined that the Applicant, *“does not have a medical condition nor is he receiving medical treatment that impairs his judgment, reliability, or trustworthiness in safe-guarding classified national security information.”*

Sexual Behavior

Paragraph 12 sets out the security concern relating to Sexual Behavior. *“Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgement 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.”*

The disqualifying conditions described by Subparagraphs 13(b) and 13(c) are arguably applicable here. Subparagraph 13(b) proscribes *“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.”* The Applicant has a history of sadomasochistic acts, which involve self harm. Subparagraph 13(c) proscribes *“sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.”* These disqualifying conditions are countered, however, by Subparagraphs 14(b) and 14(c). Subparagraph 14(b) finds it mitigating where *“the sexual behavior happened so long ago, . . . that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.”* His last act of sadomasochism occurred more than seven years ago, and he is administered injections to prevent any future such acts. Furthermore, under Subparagraph 14(c) *“the behavior no longer serves as a basis for coercion, exploitation, or duress.”* The Applicant’s Security Officer, who testified at his hearing, knows of his condition, and the Applicant’s spouse, who sat through his hearing, is also aware of it. (TR at page 41 line 9 to page 52 line 18, at page 84 line 24 to page 25 line 5, and at page 85 line 21 to page 86 line 12.)

Personal Conduct

The security concern for Personal Conduct is set out in AG Paragraph 15:

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.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 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.” Here, the Applicant has engaged in inappropriate conduct, vis-a-vis young girls, on numerous occasions. I can find no countervailing mitigating condition that is applicable, here.

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 circumstances. Under AG Paragraph 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole-person concept. The Administrative Judge should also consider the nine adjudicative process factors listed at AG Paragraph 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 all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. Although the Applicant has the unqualified support of those who know him in the work place and in the community (AppX B), I cannot ignore his numerous acts of inappropriate conduct. 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 Personal Conduct.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant

Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	For Applicant
Paragraph 2, Guideline D:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, 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.

Richard A. Cefola
Administrative Judge