



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



In the matter of:	)	
	)	
	)	ISCR Case No. 08-09539
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Daniel F. Crowley, Esq., Department Counsel  
For Applicant: *Pro se*

May 31, 2011  
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**Decision**  
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HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I deny Applicant's eligibility for access to classified information.

**Statement of the Case**

Applicant signed an Electronic Questionnaire for Investigations Processing (e-QIP) version of a security clearance application (SF-86) on August 1, 2005. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on June 23, 2010, detailing security concerns under Guideline D, Sexual Conduct, and Guideline J, Criminal Conduct, that provided the basis for its preliminary decision to deny him a security clearance. 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 For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant received the SOR on July 6, 2010. He answered the SOR on July 15, 2010. Department Counsel requested a hearing before an administrative judge and was prepared to proceed on November 29, 2010. DOHA assigned this case to another administrative judge on December 14, 2010, and for workload considerations, reassigned the case to me on March 2, 2011. DOHA issued a notice of hearing on March 15, 2011, and I convened the hearing as scheduled on April 6, 2011. The Government offered exhibits marked as GE 1 through GE 5, which were received and admitted into evidence without objection. Applicant testified. He submitted exhibits marked as AE A through AE F, which were received and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on April 13, 2011. I held the record open until April 21, 2011, for Applicant to submit additional matters. Applicant timely submitted AE G through AE K, without objection. The record closed on April 21, 2011.

### **Procedural Ruling**

#### **Notice**

Applicant received the hearing notice on April 5, 2011, less than 15 days before the hearing. I advised Applicant of his right in ¶ E3.1.8 of the Directive to receive the notice 15 days before the hearing. Applicant affirmatively waived his right to the 15-day notice. (Tr. 10.)

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted all the factual allegations in the SOR. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 55 years old, works as a telecommunications technician for a contractor to the National Aeronautics and Space Administration (NASA). He has worked for NASA contractors since October 1998. Applicant's manager and co-workers describe him as an individual who follows company policies and procedures and who pays attention to detail. His manager considers him a "model employee" and his co-workers consider him an outstanding technician. He works well with his colleagues. He is well-respected by them. All recommend him for a security clearance and do not consider him a threat to national security.<sup>1</sup>

Applicant graduated from high school and attended a vocational school, where he received training in electronic communications. He also participated in job-related training over four years, which resulted in a communications engineer certificate. He

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<sup>1</sup>AE B - AE E.

attended college, but has not graduated. He married in 1987 and divorced in 1997. He has one son, who is 23 years old. He has a step-daughter. He is active in his church and sings in the church choir.<sup>2</sup>

On August 3, 2006, Applicant's 15-year-old cousin spent the night with him. His cousin and he slept in the same bed. During the night, Applicant engaged in a sexual act with his young cousin. The cousin reported the incident to his parents several weeks later, and his parents contacted the police. After an investigation, the grand jury indicted Applicant for sexual assault of a child, age 14 to 17, a second degree felony in December 2006.<sup>3</sup>

Applicant appeared in court on January 3, 2007 with counsel, He pled guilty to a single charge of sexual assault of a child, age 14 to 17, a second degree felony. The court deferred adjudication of guilt and placed Applicant on community supervision for eight years and fined him \$500. The court placed numerous restrictions on his movement during his probation, including a prohibition against committing additional offenses; involvement with injurious habits, such as drugs and alcohol; travel restrictions; random alcohol and drug testing; gainful employment; 350 hours of community service at the rate of 10 hours a month; numerous fees; alcohol and drug evaluation; sex offender registration; participation in a sex offender treatment program; no contact with the victim; no contact with a minor under the age of 17; staying at least 1000 feet from where children gather; no employment involving children; avoid pornographic material; and 30 days confinement in jail.<sup>4</sup>

Applicant's probation officer verified that Applicant is in compliance with the conditions of his supervision and probation. His probation officer and his counselor, a licensed clinical social worker, indicate that he has accepted responsibility for his actions on August 3, 2006. Once a year, Applicant undergoes a clinical polygraph examination related to his sexual activities. He provided copies of the polygraph reports dated May 21, 2009 and September 30, 2010. Both reports reflect questions asked about his sexual activities with anyone under age 17. The examiner found no deception by Applicant on his "no" answers.<sup>5</sup>

Applicant attends weekly group counseling sessions for sex offenders. His counselor operates this program. Once a year, he meets with his counselor for an evaluation of his progress. She files a report with his probation officer. His counselor advises that he has been in treatment since January 2007, has been a model probationer, cooperated with all treatment efforts, and developed a viable relapse prevention plan. Based on court records, polygraphs, and urinalysis, Applicant does not

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<sup>2</sup>GE 1; GE 2; Tr. 21-23.

<sup>3</sup>GE 5.

<sup>4</sup>*Id.*

<sup>5</sup>AE A; AE G; AE H.

have any other legal problems, a substance abuse problem, and no diagnosis of mental illness or personality disorder. He has responded well to the cognitive-behavior treatment approach to his recovery. In her opinion, Applicant poses a minimal risk to society for re-offending. She believes that he does not pose a risk for protecting classified information. In her annual report to his probation officer, she indicated that Applicant's overall progress in his treatment was about 60% and outlined the goals he had achieved, including accepting responsibility for his offense and identifying his emotional issues. She further made other recommendations related to improving his progress for successful completion of his treatment program. She provides an overall favorable prognosis for Applicant.<sup>6</sup>

At the hearing Applicant described himself as an average guy, "who loves the Lord, his son, his family, and his country." He acknowledged his conduct, saying that he did "something horrible" and describing his conduct as "terrible". He sincerely regrets his conduct, and states he will regret his conduct for the rest of his life. He provided specific information about his weekly therapy sessions and advised about the polygraph tests. He talked about techniques and boundaries he has developed to prevent a future offense. His family and church members are aware of his conduct and probationary status. His brother and one sister attended a chaperone class with him as part of his treatment. The class also included his counselor and probation officer. The class provided them with skills to protect young children and to notice Applicant's behavior. They love their brother and talk openly with him about this incident. Applicant admitted an early incident in 1978 when he was 26 years old, which involved sexual experimentation with a 16-year-old male cousin. He stated that he did not come to the hearing to defend his conduct, but to show that he was not a security risk. Because he is a registered sex offender and those closest to him and involved in his life know about his conduct, he cannot be coerced. He remains on probation.<sup>7</sup>

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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 overarching 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,

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<sup>6</sup>AE A; AE J; Tr. 28, 31.

<sup>7</sup>AE K; Tr. 24-36.

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 ¶ 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” An applicant has the ultimate burden of persuasion for 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 an 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**

### **Guideline D, Sexual Behavior**

AG ¶ 12 expresses the security concern as:

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.

AG ¶ 13 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

- (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; and
- (d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

In 2006, as an adult, Applicant engaged in sexual conduct with a child between the ages of 14 and 17, which is a crime. While his conduct did not occur in a public place, it shows a lack of judgment and placed him in a position of being vulnerable to coercion, exploitation, or duress. The Government established its case under the above disqualifying conditions.

AG ¶ 14 provides conditions that could mitigate security concerns. I have considered all the conditions, and the following are potentially applicable:

- (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; and
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress.

While one incident occurred in 1978, more than 30 years ago, the second incident happened four and one-half years ago. Because he again became involved in sexual conduct with a child, AG ¶ 14(b) is not applicable.

Applicant is currently participating in a sex offender's treatment program and has been in this program for more than four years. He accepted responsibility for his conduct in 2006 and in 1978. He discusses his conduct with his family members and has made his church members aware of what he has done. As required, he registered as a sex offender. He complies with the requirements of his probation. With his openness about his conduct and his registration as a sex offender, there is little likelihood that he can be coerced, pressured, exploited, or placed under duress for his past sexual conduct. AG ¶ 14(c) has some applicability.

## **Guideline J, Criminal Conduct**

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “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.”

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying:

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and
- (d) individual is currently on parole or probation.

Applicant pled guilty to a second degree felony offense in 2007 after he engaged in a sexual act with his 15-year-old cousin. The court placed him on probation for eight years, which will end in January 2015. The Government has established the above disqualifying conditions.

AG ¶ 32 provides conditions that could mitigate security concerns. I have considered all the mitigating conditions, and especially the following:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and
- (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 involvement.

More than 30 years has elapsed since the first incident involving sexual conduct with a child between the age of 14 and 17. While this incident occurred many years ago, Applicant again engaged in sexual conduct with an underage child less than five years ago, which raises concerns about his judgment. Based on the statements from his manager and co-workers, his reliability and trustworthiness at work are not an issue.

Applicant admitted his conduct in court and has accepted responsibility for his actions. He attends his group therapy sessions every week and has willingly participated in these sessions. He works with his counselor on emotional issues to prevent a reoccurrence. He works steadily and is highly respected at his job for his technical skills. He complies with the requirements of his probation. His counselor and

family do not consider him a threat. He has a strong support system as he progresses forward in his treatment and management of his conduct. Applicant has presented strong evidence that he is being rehabilitated. However, he still remains on probation.

### **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 an applicant's conduct and all relevant circumstances. The administrative judge should 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.

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 decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's sexual conduct with his 15-year-old cousin in 2006 and with a 16-year-old cousin in 1978 is serious and egregious. He recognizes this, and he has accepted responsibility for his conduct. He willingly and actively participates in his group therapy sessions. With the assistance of his counselor and therapy sessions, he has developed a strong support system through his family and church to help him manage his emotions in a positive way, which will prevent a future reoccurrence. He has complied with all the many requirements of his probation, including no involvement with children 17 or younger and registering as a sex offender. He is to be commended for the efforts he has taken and his success over the last four years in understanding his behavior. He is well-respected at his job. The evidence in this case reflects that he cannot be coerced, exploited, pressured or placed under duress for his sexual and criminal conduct.



However, Applicant has not mitigated the security concerns raised because he remains on probation, which does not end until January 2015. Of concern, is the fact that he engaged in wrongful conduct, not once, but twice. The second occurrence happened many years after the first, and this fact alone raises concerns about his judgment. He needs additional time and treatment to learn to fully manage his emotions in stressful situations and to learn to prevent his conduct in the future.

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 sexual and criminal conduct under Guidelines D and J.

### **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 D:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.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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MARY E. HENRY  
Administrative Judge