



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



In the matter of:	)	
	)	
	)	ISCR Case No. 08-05176
SSN:	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Francisco (Paco) Mendez, Esquire, Department Counsel  
For Applicant: Pro Se

June 10, 2009

**Decision**

HOGAN, Erin C., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on September 14, 2007. On February 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline J, Criminal Conduct, and Guideline D, Sexual Behavior. 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

On March 6, 2009, Applicant answered the SOR and requested a determination be made in his case without a hearing. On April 16, 2009, Department Counsel prepared a File Of Relevant Material (FORM). The FORM was mailed to Applicant on April 17, 2009. Applicant received the FORM on April 23, 2009. He had thirty days from the receipt of the FORM to submit additional matters. He timely submitted additional matters. On May 20, 2009, Department Counsel indicated that they had no objection to the additional matters. The case was assigned to me on June 1, 2009. Based upon a

review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

### **Findings of Fact**

In his Answer to the SOR, Applicant denies the allegation in SOR ¶ 1.a, admits to the allegation in SOR ¶ 1.b, and neither admits or denies the allegation in SOR ¶ 1.c. His failure to admit or deny the allegation SOR ¶ 1.c is treated as a denial.

Applicant is a 44-year-old employee of a Department of Defense contractor seeking to obtain a security clearance. He is a ship fitter and has worked for his current employer since April 2003. This is his first time applying for a security clearance. He recently married and has three children. (Item 3)

On October 2, 2006, Applicant was arrested and charged with two counts of sexual battery, a misdemeanor offense, and two counts of indecent liberties with a child, a felony offense. The alleged offenses occurred on November 1, 2005, and April 24, 2006. No specific details regarding the offenses are provided in the record. (Item 5; Item 6. Item 7)

On March 13, 2007, Applicant pled guilty to two counts of sexual battery, a misdemeanor. He was sentenced to 12 months in jail, suspended, ordered to pay \$150 court costs, and given three years unsupervised probation. (Item 6) The indecent liberty charges were nolle prossed. (Item 6) Applicant was required to register as a sexual offender on his state's web-site because of his guilty plea and conviction of two counts of sexual battery. (Item 7)

In his answer to the SOR, Applicant denies that he pled guilty to sexual battery. He claims that he entered an Alford plea because he would not admit to something that he did not do. (Item 3) In his response to the FORM, postmarked May 11, 2009, Applicant states that his probation was complete on March 16, 2009. He did not provide documentation from the court system verifying his probation was terminated. He indicated that his only regret is that he did not fight his case. He pled because he believed he had too much to lose. (Response to FORM, postmarked May 11, 2009)

### **Policies**

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised 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 common sense 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.

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, 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**

### **Criminal Conduct**

The security concern raised under the criminal conduct guideline is set forth in ¶30 of the Revised Adjudicative Guidelines:

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.

There are two Criminal Conduct Disqualifying Conditions (CC DC) which apply to Applicant's case. CC DC ¶31(a) (a single serious crime or multiple lesser offenses) and CC DC ¶31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted) apply with respect to Applicant's arrest and charges of two counts of Sexual Battery and two counts of Indecent Liberties with a Child. He pled guilty to two counts of Sexual Battery. The Indecent Liberty charges were nolle prossed.

While the record lacks specific information about the specific conduct that was the basis for the charges, the government established a prima facie case under criminal conduct. Since the government produced substantial evidence to raise disqualifying conditions under the criminal conduct concern, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. (See, ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005)).

The following Criminal Conduct Mitigating Conditions (CC MC) are relevant to Applicant's case:

CC MC ¶32(a) (so much time has elapsed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment). The criminal charges were relatively recent. Although Applicant claims he entered an Alford plea, the court records indicate that he pled guilty to two counts of sexual battery. There is not enough information for me to conclude CC MC ¶ 32(a) applies.

CC MC ¶32(c ) (evidence that the person did not commit the offense) does not apply. Applicant claims that he entered an Alford plea because he did not commit the offense. Court records indicate Applicant pled guilty to two misdemeanor offenses of sexual battery. The record does not contain additional evidence to corroborate Applicant's claims of innocence.

CC MC ¶32(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) does not apply. Not enough time has passed to conclude Applicant has been successfully rehabilitated. Applicant was sentenced to three years probation which would end in March 2010. Applicant claims that he has completed probation but provided no proof that his probation has terminated. He provided no information about his employment record and/or community involvement.

There is not enough information in the record to conclude Applicant mitigated the criminal conduct concern.

## Sexual Behavior

The security concern raised under the sexual behavior guideline is set forth in ¶12 of the Revised Adjudicative Guidelines:

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 following disqualifying conditions are relevant to Applicant's case:

Sexual Behavior Disqualifying Condition (SB DC) ¶ 13(a) (sexual behavior of a criminal nature, whether or not the individual has been prosecuted)

SB DC ¶ 13(c) (sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress)

SB DC ¶ 13(d) (sexual behavior of a public nature and/or that reflects lack of discretion or judgment)

Applicant was arrested on two counts of sexual battery and two counts of indecent liberties with a minor. SB DC ¶ 13(a) applies. These arrests and the underlying behavior that led to the arrests make Applicant vulnerable to coercion, exploitation, or duress. SB DC ¶ 13(b) applies. The sexual behavior also reflects a lack of discretion or judgment since Applicant's behavior resulted in criminal charges being brought against. SB DC ¶ 13(d) applies.

Concerns raised under Sexual Behavior can be mitigated. The following mitigating conditions potentially apply to Applicant's case.

Sexual Behavior Mitigating Condition (SB MC) ¶ 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) does not apply. The offenses were relative recent. Applicant was charged with more than one offense so it cannot be concluded the unlawful sexual behavior was isolated. There is insufficient evidence in the record for me to conclude Applicant's current reliability, trustworthiness, and judgment are sound.

SB MC ¶ 14(c) (the behavior no longer serves as a basis for coercion, exploitation, or duress) does not apply. Applicant is still vulnerable to coercion, exploitation, or duress.

SB MC ¶ 14(d) (the sexual behavior is strictly private, consensual, and discreet) does not apply. There is insufficient evidence in the record to determine whether this mitigating condition applies.

Applicant has not met his burden of proof to mitigate the concerns raised under sexual behavior.

### **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. 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered that Applicant has worked for the same defense contractor over the past six years. However, he did not provide information pertaining to his work performance. I considered that Applicant was arrested and charged with two counts of sexual battery and two counts of indecent liberties with a minor. I considered that he pled and was found guilty of two counts of sexual battery. The government established a prima facie case to raise concerns under criminal conduct and sexual behavior. As such, the burden switched to Applicant to mitigate the concerns raised under the criminal conduct and sexual behavior concerns. He did not mitigate the concerns.

### **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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline D:	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 national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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ERIN C. HOGAN  
Administrative Judge