



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 08-08761
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Melvin A. Howry, Esq., Department Counsel  
For Applicant: Stephen M. Weiss, Esq.

May 21, 2010  
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**Decision**  
\_\_\_\_\_

CURRY, Marc E., Administrative Judge:

Applicant mitigated the security concerns generated by his sexual behavior and criminal conduct, but failed to mitigate the security concern generated by his personal conduct. Clearance is denied.

**Statement of the Case**

On June 19, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under the sexual behavior, criminal conduct, and personal conduct guidelines. 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.

Applicant answered the SOR on July 23, 2009, admitting the allegations except SOR subparagraph 3.a. On September 9, 2009, the case was assigned to another

administrative judge who scheduled the hearing for December 9, 2009. On December 3, 2009, the hearing was continued. On December 15, 2009, the case was reassigned to me. On January 13, 2010, a notice of hearing was issued scheduling the case for February 2, 2010. At the hearing, I received five Government exhibits, eight Applicant exhibits, and the testimony of two Applicant witnesses. The transcript was received on February 12, 2010.

### **Findings of Fact**

Applicant is a 66-year-old married man with four adult children. Three previous marriages ended in divorce. He is a veteran of the United States (U.S.) Navy where he served from 1961 to 1964. He was honorably discharged. (Tr. 48) He has taken some courses at a community college over the years.

Since 2001, Applicant has worked for a defense contractor as an engineer. He writes test code for guided missiles. (Tr. 49) He worked for the same company as a contractor during the previous six years. (Tr. 47) Applicant has held a security clearance since 1983. (Tr. 48)

Applicant is highly respected on the job. A former coworker whom Applicant supervised described him as a trustworthy person and an excellent engineer. (Tr. 103, 107) Since working for his current employer, Applicant has earned multiple accolades including the Team Award in 2008, and the Individual Achievement Awards in 2005 and 2006. (*see generally*, AE D)

From 2003 to 2007, Applicant dated a woman with a teenage daughter. (Tr. 83) Between 2005 and 2006, his girlfriend and her daughter lived with him. One evening in November 2006, Applicant and his girlfriend's daughter drove to the store. Applicant had consumed three to four glasses of wine before they left the home. (AE 1 at 16) After they finished shopping, his girlfriend's daughter, aged 15, asked to drive the car. (Tr. 86) Applicant refused, and she began arguing with Applicant. She continued to argue with him as they drove home. Subsequently, he pulled the car over to the side of a street, stopped it, put his hand on her breast, then asked her if she wanted to drive. (GE 1 at 16) She then backed away from Applicant, "as far as she could get," whereupon Applicant apologized. (Tr. 92)

Approximately two days later, the teenager reported the incident to a school counselor who then reported it to the local social services agency. (AE 1 at 9) A representative from the agency then interviewed the girl. A detective was present at the interview. (AE 1 at 9)

After the interview, the police took the girl to the police station and arranged for her to call Applicant. Unbeknownst to Applicant, the police officer was listening to the conversation and recording it. (AE 5 at 4) During the conversation, Applicant acknowledged touching the girl's breast, apologized, and told her not to tell her mother. (AE 1 at 10, 14)

The police then contacted Applicant and asked him to come to the station for an interview. (AE 1 at 10) Although Applicant admitted that he spanked his girlfriend's daughter on her bare bottom to reprimand her approximately twice weekly, he strenuously denied touching her breast. (AE 1 at 10-11) The police then replayed the tape of Applicant's conversation with his girlfriend's daughter. Applicant then admitted touching the girl's breast. (AE 1 at 16)

Applicant was then charged with sexual abuse, a class five felony in the state where the incident occurred, which carries a maximum penalty of two and a half years in prison. (A.R.S. § 13-701) Subsequently, Applicant pleaded guilty to disorderly conduct, a misdemeanor. (Tr. 43) The court then sentenced him to three years of unsupervised probation. (Tr. 68) Upon being charged with the initial offense, Applicant notified his employer. (Tr. 69)

While on probation, Applicant voluntarily attended counseling with a licensed psychologist. He attended five sessions from March 2007 to May 2007. (AE H) The psychologist, a member of the American Psychological Association, and the Association for the Treatment of Sexual Abusers, (AE F) characterized Applicant as "a motivated client [who] participated fully in the discussions, and followed through with suggestions." (AE E) According to the psychologist, Applicant's main concern when he entered treatment was to understand why he did what he did. (AE H at 1) At the conclusion of the therapy, the psychologist determined that Applicant's prognosis was good, and that no further therapy was necessary. (AE H at 2)

Applicant's relationship with the mother of the girl he touched inappropriately ended approximately four months after the incident. He has not had any contact with the girl since she reported the episode to the school counselor.

Applicant's probation ended in March 2010. At the hearing, Applicant characterized the touching the breast of his then-girlfriend's daughter as accidental. (Tr. 60, 89-91)

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied together with the factors listed in the adjudicative process. 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."

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.

## Analysis

### Guideline J, Criminal Conduct

Under this guideline, “criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness.” (AG ¶ 30) Also, “by its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.” (*Id.*)

The potentially applicable disqualifying condition is AG ¶ 31(a), “a single serious crime or multiple lesser offenses.” Because Applicant committed one crime, not multiple ones, the applicability of AG ¶ 31(a) depends on whether the crime he committed constitutes a serious crime. Under the state law where the conduct occurred, “a person commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person who is fifteen or more years of age without the consent of that person . . .” (A.R.S. § 13-404(A) If Applicant’s conduct constituted sexual abuse, it would be sufficiently serious to trigger AG ¶ 31(a).

Conversely, disorderly conduct under relevant state law encompasses minor conduct such as “engaging in fighting,” making “unreasonable noise,” or engaging in “a protracted commotion.” (A.R.S. § 13-2904) If Applicant’s conduct merely constituted disorderly conduct, AG ¶ 31(a) would not apply.

Department Counsel argues that AG ¶ 31(a) is applicable because Applicant was arrested for a felony offense and later pleaded guilty to a lesser offense. (Tr. 109-110) This analysis is incorrect. Under DOHA jurisprudence, a guilty plea is, at most, evidence that Applicant engaged in conduct covered by the statute to which he pleaded guilty, not the statute he was initially charged with violating. (ISCR Case No. 93-0369 (App. Bd. October 26, 1994 at 3)) Consequently, Applicant’s guilty plea to the crime of disorderly conduct does not trigger the application of AG ¶ 31(a).

Instead, for AG ¶ 31(a) to apply, there must be substantial evidence that Applicant engaged in sexual misconduct as alleged in the SOR. (*Id.*) Applicant provided contradictory accounts of what happened in the car. When first questioned by the police, he denied any touching of his girlfriend’s daughter’s breast. After the police played a recording of a conversation with the girl in which he admitted the touching, he corroborated her account of the incident. During the DOHA investigative process, he acknowledged the touching, but characterized it as accidental. Given these contradictions, I conclude Applicant touched his girlfriend’s daughter’s breast intentionally, and that this conduct constituted sexual abuse under state law. AG ¶ 31(a)

applies. In reaching this conclusion, I also considered his acknowledgment of the weekly spankings he administered to the girl on her bare bottom.

Applicant completed counseling and received a favorable prognosis. He no longer has any contact with his ex-girlfriend's daughter. Also, he has a good employment record. AG ¶ 32(d), "there is evidence of successful rehabilitation; including, but not limited to the passage of time without a recurrence of criminal activity, remorse or restitution, job training, or higher education, good employment record, or constructive community involvement," applies.

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

Under this guideline, "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" (AG ¶ 12). Applicant's touching of his then-girlfriend's daughter's breast constituted sexual abuse under state law. Consequently, AG ¶¶ 13(a), "sexual behavior of a criminal nature, whether or not the individual has been prosecuted," 13(c), "sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress," and 13(d), "sexual behavior . . . that reflects a lack of discretion or judgment," apply.

Applicant notified his employer of the incident. He voluntarily attended counseling with a psychologist who specializes in treating sexual abusers. He was highly engaged in counseling and received a favorable prognosis upon its conclusion. Applicant no longer has any contact with the girl. He has not engaged in any similar conduct since the incident. AG ¶ 14(b), "the sexual behavior happened so long ago . . . that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," and AG ¶ 14(c), "the behavior no longer serves as a basis for coercion, exploitation, or duress," apply.

#### **Guideline E, Personal Conduct**

Under this guideline, "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." (AG ¶ 15) Applicant's initial falsification to the authorities when asked whether he inappropriately touched his then-girlfriend's daughter triggers the application of AG ¶ 16(b), "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative."

Applicant admitted the conduct after listening to a police recording of his conversation with his then-girlfriend's daughter. Since then, he has repeatedly attempted to minimize it by characterizing it as accidental. This lack of candor renders any of the mitigating conditions inapplicable.

## 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), as follows:

(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.

Applicant's inappropriate touching of his ex-girlfriend's teenage daughter represents a serious lapse in judgment. Since then, Applicant successfully completed counseling and served his probation without incident. He no longer is in contact with either his ex-girlfriend or her daughter. Consequently, it is unlikely such conduct will recur. I remain concerned, however, about Applicant's lack of candor. He did not admit the inappropriate touching until the police replayed a recording of a conversation with his ex-girlfriend's daughter where he admitted it and asked her not to tell her mother. Later, during the security clearance investigation, he began characterizing the touching as accidental. This lack of candor makes him an unacceptable candidate 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 J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline D:	FOR APPLICANT
Subparagraph 3.a:	For 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.

MARC E. CURRY  
Administrative Judge