



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



In the matter of:	)	
	)	
	)	ISCR Case No. 08-09463
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Paul M. DeLaney, Esquire, Department Counsel

For Applicant: *Pro se*

October 21, 2009

**Decision**

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O'BRIEN, Rita C., Administrative Judge:

Based on a review of the case file, pleadings, and exhibits, I conclude that Applicant has not mitigated the security concerns raised under the guidelines for sexual behavior and personal conduct. His request for a security clearance is denied.

**Statement of the Case**

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP), signed on September 30, 2005, to request a security clearance required as part of his employment with a defense contractor (Item 5). After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>1</sup> that it is clearly consistent with the national interest to grant Applicant's request.

On June 30, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) (Item 1) that specified the basis for its decision: security concerns addressed in the

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<sup>1</sup> Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

Directive under Guidelines D (Sexual Behavior) and E (Personal Conduct) of the Revised Adjudicative Guidelines (AG).

Applicant received the SOR on July 8, 2009. He submitted an Answer signed and notarized on July 24, 2009, which included one attached document. He requested a decision without a hearing. In his Answer, Applicant denied the Guideline D Concern identified in paragraph 1, but admitted to allegation 1.a. He also denied the Concern expressed in paragraph 2, Guideline E. He did not respond to allegation 2.a. However, this allegation repeats the allegation stated under ¶ 1.a. As Applicant admitted to ¶ 1.a., I construe allegation 2.a. to be admitted.

On August 13, 2009, DOHA Department Counsel submitted a file of relevant materials (FORM) in support of the government's preliminary decision to deny Applicant's request to be granted a security clearance. The FORM contained ten documents, identified as Items 1 through 10. The FORM and attached Items were forwarded to Applicant on August 17, 2009, and he received the package on August 28, 2009. Applicant was given 30 days from the date he received the FORM to respond. He provided a timely response dated September 25, 2009. Department Counsel forwarded the response without objection. The case was assigned to me on October 8, 2009, for an administrative decision based on the record.

### **Findings of Fact**

Applicant's admissions in response to the SOR are admitted as fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the FORM, I make the following additional findings of fact.

Applicant is 32 years old and holds a bachelor's degree. He has worked for the same defense contractor since 1998, and currently holds the position of Electro-Mechanical Tech II. He is married, with two children and two step-children. In 2007, when Applicant committed the cited offenseS, his children ranged in age from three to eleven years old. Applicant applied for a security clearance in 2003. It is unclear from the record whether or not this clearance was granted, and whether or not it was in effect in 2007. The SOR does not allege that the offense occurred while Applicant held a security clearance (Items 5, 8).

Between May 1 and May 3, 2007, Applicant drove to retail coffee shops on four occasions. On each occasion, he lowered his pants to below his knees, drove to the drive-through window, paid for coffee, and left. The female waitresses working at the drive-through reported that in each instance he wore a tee-shirt, but no slacks or underwear, and his genital area was clearly visible. Applicant stated that he engaged in this same behavior four times because he did not receive any reaction and he was seeking a reaction from the females (Items 6, 7).

In discussing the circumstances surrounding his offense, Applicant states that "this was by far the worst thing I have done in my life." He notes that he was

experiencing a stressful time in his life: his family had moved to a new house, and he had the “winter blues.” Although his general practitioner prescribed medication for depression and for Attention Deficit Disorder (ADD), Applicant stopped taking both medications because of their side effects. At the time that he exposed himself, he was not taking medication. (Items 7, 9; Response).

On May 3, 2007, Applicant was arrested at his home and escorted to jail, where he remained for several hours. He was charged with four counts of public indecency, a misdemeanor (Item 10). In June 2007, he pled “no contest” to two counts, and was found guilty; the remaining two counts were dismissed. Applicant was sentenced to 60 days in jail (54 suspended). He paid approximately \$800 in fines, and was required to avoid the stores where he had exposed himself. He was ordered to have a mental health assessment and participate in any recommended treatment. Applicant was also sentenced to two years of Community Control, under which he was required to report in every month. The Community Control ended in June 2009 (Items 6, 7, 10; Response).

From May 7 to September 14, 2007, Applicant attended nine therapy sessions with a clinical psychologist. He was diagnosed with Adjustment Disorder and Adult Antisocial Behavior. The therapy focused on his strained marriage, the effects of his antisocial act on his marriage, and how to reduce risk for future incidents. His therapist noted that Applicant completed the treatment goals, but did not provide information about the causes of Applicant's behavior, the life stresses that may have been involved, actions to avoid recurrence, or any prognosis about the likelihood of future similar conduct (Items 7, 9).

Applicant's arrest was publicized in a newspaper story and television reports. His statements as to who is aware of his offense are somewhat contradictory. Applicant reported in December 2008, that his wife, parents, and in-laws know of his conviction, but his children, friends, and co-workers, other than his supervisor and company administrators, do not know,. However, in his Answer of July 2009, Applicant stated that his children “know a little about what happened,” and his manager told him that “some people” saw the news report. However, Applicant has never been approached by a co-worker about the offenses (Items 6, 7; Answer and Attachment; Response).

## **Policies**

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).<sup>2</sup> Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the “whole person” concept. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent

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<sup>2</sup> Directive. 6.3.

policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guidelines D and E.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest<sup>3</sup> for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case.

Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.<sup>4</sup> A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness to protect the national interests as her or his own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.<sup>5</sup>

## Analysis

### Guideline D, Sexual Behavior

AG ¶ 12 expresses the security concern under Guideline D:

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.

Under Guideline D, the following disqualifying conditions are relevant: AG ¶ 13(a) (*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*) and AG ¶ 13(d) (*sexual behavior of a public nature and/or that reflects lack of discretion or judgment*). The evidence is insufficient to support application of AG ¶ 13(c) (*sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*). Adult members of Applicant's family are aware of the offense,

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<sup>3</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>4</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>5</sup> See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

as are his supervisor and administrators. It appears that some co-workers are aware, and his children have limited knowledge of it. Finally, Applicant's conduct was the subject of newspaper and television reports. It is unlikely that he could be coerced to provide classified information based on this offense. However, Applicant did commit a criminal sexual offense, and he performed it in order to provoke a reaction from female members of the public. The crime, by its nature, is a public offense. Such conduct demonstrates a complete lack of discretion. Disqualifying conditions AG ¶ 13(a) and AG ¶ 13(d) apply.

Two mitigating conditions are relevant: AG ¶ 14(a) (*the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature*) and AG ¶ 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*). Applicant's behavior occurred not when he was an immature adolescent, but when he was 30 years old, married, and the father of pre-adolescent children. AG ¶ 14(a) does not apply. Applicant receives some mitigation under AG ¶ 14(b) because his conduct was infrequent, and there is no evidence of similar conduct. However, he committed the offense approximately two-and-one-half years ago, which is not distant in time. In addition, Applicant's conduct appears to have been in response to stressful events in his life. It is likely that such events will continue at various points in the future. It cannot be confidently predicted that Applicant will not act out again, especially since his therapist provided no prognosis on which to determine the likelihood of recurrence. On the whole, the limited favorable mitigation under AG ¶ 14(b) is insufficient to outweigh the disqualifying conditions.

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

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

SOR ¶ 2.a. under Guideline E cross-references the 2007 offense cited under Guideline D. AG 16 (c) applies (*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*). Applicant's decision to expose his genitals to unknown females, in an effort to "get a reaction," shows

extremely poor judgment. Applicant repeated the action four times, each time showing untrustworthiness and willingness to violate the law.

As to mitigation under Guideline E, AG ¶ 17(c) (*the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*) cannot be applied. A little more than two years have passed since Applicant exposed himself which, as discussed previously, is not distant in time. Moreover, although the criminal offense was a misdemeanor, it cannot be taken lightly or considered minor.

Some mitigation is available under AG ¶ 17(d) (*the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur*). Applicant admits that his conduct demonstrated poor judgment, and he has attended therapy. However, the therapy lasted only nine sessions. As discussed under Guideline D, the record contains no evidence as to the stressors that caused his behavior, methods to prevent it from recurring, or a prognosis as to whether it is likely to recur. Without such information, mitigation under AG ¶ 17(d) is insufficient to outweigh Applicant's disqualifying conduct. His behavior demonstrates a willingness to place his marriage and family relationships in jeopardy, and to break the law, in order to satisfy his own desires. It casts doubt on his trustworthiness and judgment.

### **Whole Person Analysis**

Under the whole person concept, an administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. I have evaluated the facts presented and have applied the appropriate adjudicative factors under the cited guidelines. I have also reviewed the record before me in the context of the whole person factors listed in 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. Under each guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant was not an adolescent, but a 30-year-old husband and father when he deliberately exposed himself to female waitresses at a coffee shop. In Applicant's favor, he recognizes the poor choice he made when he committed the offense, and there is no evidence that he engaged in such conduct since 2007. However, these facts are insufficient to mitigate his conduct.

Although Applicant contends that he is not vulnerable to coercion because of the publicity about his offenses, vulnerability is not the only basis on which an Applicant's behavior is judged. Judgment, reliability and trustworthiness are also key elements in determining an Applicant's suitability to hold a security clearance. Moreover, those who hold security clearances enter into a fiduciary relationship with the government which is predicated on trust. Any criminal conduct by an applicant raises serious doubts about his or her trustworthiness. Here, Applicant showed a willingness to break the law, and to violate the trust of his family, to satisfy his own needs. Such behavior raises questions as to his trustworthiness and good judgment.

For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guidelines. A fair and commonsense assessment of the available information bearing on Applicant's suitability for a security clearance shows he has not satisfied the doubts raised by criminal sexual conduct. Such doubts must be resolved in favor of the government.

### **Formal Findings**

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1, Guideline D:	AGAINST Applicant
Subparagraph 1.a.	Against Applicant
Paragraph 2, Guideline E:	AGAINST Applicant
Subparagraph 2.a	Against Applicant

### **Conclusion**

In light of all of the foregoing, it is not clearly consistent with the national interest to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

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RITA C. O'BRIEN  
Administrative Judge