



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



In the matter of:	)	
	)	
	)	ISCR Case No. 08-09941
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Richard Stevens, Esquire, Department Counsel  
For Applicant: *Pro se*

April 27, 2010

**Decision**

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CREAN, Thomas M., Administrative Judge:

Applicant submitted a security clearance application (SF 86) on July 11, 2008, as part of his employment with a defense contractor. On December 4, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns for sexual behavior and criminal conduct under Guidelines D, and J. The security concerns arose out of two incidents, one in January 2004, and the other in December 2006. 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 adjudicative guidelines (AG) effective in the Department of Defense on September 1, 2006. Applicant acknowledged receipt of the SOR on December 8, 2009.

Applicant answered the SOR on December 17, 2009. He admitted two of the three factual allegations under Guideline D, but denied that the facts raised security concerns. He admitted the one allegation under Guideline J, and again denied that the factual allegation raised a security concern. He requested a hearing before an administrative judge. Department Counsel was prepared to proceed on January 4,

2010, and I was assigned the case on January 14, 2010. DOHA issued a Notice of Hearing on January 25, 2010, for a hearing on March 11, 2010. I convened the hearing as scheduled. Department Counsel offered seven exhibits, marked Gov. Ex. 1 through 7, which were received without objection. Applicant and one witness testified on his behalf. Applicant offered six exhibits, marked App. Ex. A through F, which were received without objection. DOHA received the transcript of the hearing (Tr.) on March 22, 2010. Based on a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Findings of Fact**

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact. Applicant admitted two of the factual allegations under Guideline D, and the one factual allegation under Guideline J. Applicant's admissions were considered in my findings of fact.

Applicant is 56 years old and has been employed as a production test supervisor for a defense contractor for over eight years. Previously, Applicant owned and operated his own business. He is a college graduate with a bachelor's degree in Industrial Management, and a master's degree in operations management and finance. Applicant married in 1977 and divorced in 2005. He had two children from the marriage. He married again in March 2008. He sold the business in 1997. He moved in 1998 with his first wife to where she had been transferred by her employer. He was a stay-at-home father from November 1998 until November 2003. During this time, he was involved in many activities for his children and in the community. (Tr. 13-14, 33-34; Gov. Ex. 1, SF 86, dated July 11, 2008; App. Ex. A, Resume, undated)

Applicant was arrested for exposure of his sexual organs in January 2004. An undercover police officer's report states that the officer was on patrol in a local park. While near a picnic grove, the Applicant walked up to him, with his penis exposed, and started to masturbate. He asked the officer "let's see what you got." The officer identified himself and arrested Applicant. (Gov. Ex 4, Arrest report, dated January 13, 2004)

Applicant denies the activity as reported by the police officer. Applicant states that he was jogging in the park and went to a public bathroom to relieve himself. When he entered the bathroom, he noticed two men standing against the wall. He was uncomfortable, so he left the building. He went behind a palm grove to relieve himself. As he was doing so, a person came up, identified himself as a police officer, and arrested him for exposure of a sexual organ. Applicant was represented by an attorney and pled no contest to the charge. He was placed in a pre-trial intervention program, paid a \$250 fine, and performed 50 hours of community service. After completion of the community service, the charges were dismissed. (Tr. 37, 43-49, 57-58; Gov. Ex. 2, Answers to Interrogatories, Testimonies, dated September 9, 2008 at 2)

A neighborhood juvenile was passing by Applicant's house on the afternoon of December 24, 2006. The garage door and the door from the garage to the kitchen were open. The juvenile observed the Applicant standing in his kitchen nude and facing him. Applicant was masturbating his erect penis. The juvenile went home and reported what he had seen to his parents. His mother and another neighbor drove by Applicant's house and observed the garage door and the kitchen doors open and Applicant standing nude in the kitchen. The juvenile's parents then notified the police. Applicant was not at home when the police came to his house. They arrested him for lewd and lascivious acts in the presence of a minor, a felony, on December 27, 2006. Applicant pled guilty to a third degree child abuse misdemeanor, and was sentenced to five years probation, and to attend sex offender therapy group counseling. Applicant completed the outpatient sex offender treatment program. His counselor noted that he was a very hard worker who addressed his personal issues and did everything asked of him in the therapy. The counselor believes Applicant's nude life style led to the situation where he was naked in the house. (Answer to SOR, Letter, dated November 9, 2009; Gov. Ex. 2, Answers to Interrogatories, Testimonies, dated September 9, 2008, at 3; Gov. Ex. 5, Police Incident Report, dated December 27, 2006; Gov. Ex. 6, Statute, Lewdness, Indecent Exposure; Gov. Ex. 7, Statute, Abuse of Children)

Applicant testified that he was standing in his kitchen nude on the day in question but was not masturbating. Applicant and his future wife had been at his house that night after attending a party. She left in the morning, and he took a shower before getting dressed to go out. He had Christmas cards to finish and a Christmas present to wrap. He went to the kitchen to accomplish the tasks. He admits he was in the kitchen nude with the garage and kitchen doors open to air out the house. Someone could possibly see him from the street. He believes his neighbors were watching and targeting his actions because he was a single male on a street of families with children. Applicant pled guilty to the offense in November 2007 because he did not believe he would receive a fair trial. Applicant is not required to register as a sex offender. His company is aware of his arrest and conviction. Applicant's supervisor reminded him of the standards and conduct required of members of the company. He was told to report any further incidents to the company. Applicant's probation runs until November 2012. However, Applicant hopes he can get an early probation release as early as May 2010. (Tr. 49-56; 59-64; Gov. Ex. 2, Answer to Interrogatories, Testimonies, dated September 9, 2008 at 2; Gov. Ex. 3, Answer to Interrogatories, dated November 14, 2008; App. Ex. B, e-mail, dated February 24, 2008)

Applicant's present wife testified that she has known Applicant for about three years, and they have been married for two years. She considers him to be honest with good integrity and work ethic. If she did not have trust in him she would not have married him. She did not believe that the December 2006 incident happened as it was perceived by the juvenile. She had been with Applicant and left the house about an hour before the incident. She does not believe Applicant would have deliberately exposed himself to a child. (Tr. 20-30)

Applicant's brother-in-law, a police officer, wrote that he considers Applicant to be trustworthy, respectful of others, and dedicated to his job and family. He has observed Applicant in formal and social settings and Applicant was comfortable and maintained his composure. (App. Ex. C, e-mail, dated February 14, 2010) Applicant's next-door neighbor, a bank vice-president and former naval officer, wrote that he has known Applicant for over three years. He considers Applicant to be of excellent character with an engaging personality. Applicant and his wife have a refined lifestyle and a record of active involvement in community affairs. (App. Ex. D, Letter, dated March 1, 2010) Another brother-in-law, a doctor, wrote that he has known Applicant for about five years. Applicant is amiable, intelligent, and forthright. He is exemplary, caring, sincere, and honest in his relationships with his family and towards his work. He considers Applicant to be trustworthy and responsible. (App. Ex. E, Letter, dated March 2, 2010) One of Applicant's co-workers, the Director of National Programs for the company, wrote that he has known Applicant for over ten years and lives on the same street as Applicant. Applicant is very professional and responsible at work. He has no concerns about Applicant's loyalty, or his ability to protect classified information. (App. Ex. F, E-mails, dated March 9, 2010)

## **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 required to be considered 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, 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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.

### **Analysis**

The security concerns raised for Applicant are from the same incidents. Security concerns raised for sexual behavior and criminal conduct are the same, involving questions of Applicant's reliability, judgment, and trustworthiness. Sexual behavior that involves a criminal offense indicates a personality or emotional disorder, reflecting lack of judgment or discretion which can raise questions about the individual's reliability, trustworthiness, and ability to protect classified information. (AG ¶ 12) 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 regulation. (AG ¶ 30) Since the security concerns are similar, the concerns will be discussed together.

Applicant admits and the information clearly establishes that he committed the criminal act of indecent exposure and the criminal act of sexual action before a child by exposing himself to a police officer and being nude while masturbating in his kitchen with the outside doors open. The sexual criminal offenses for which Applicant pled guilty or no contest resulting in misdemeanor convictions raise Sexual Behavior Disqualifying Condition (SB DC) AG ¶ 13(a) (sexual behavior of a criminal nature, whether or not the individual has been prosecuted); and Criminal Conduct Disqualifying Condition (CC DC) ¶ 31(a) (a single serious crime or multiple lesser offenses). Applicant is still on probation until November 2012 for the offense that took place in December 2006. Applicant's probation status raises CC DC ¶ 31(d) (individual is currently on parole or probation).

The government produced substantial evidence by way of court documents, investigative reports, and Applicant's admission and statements to establish the disqualifying condition in AG ¶¶ 13(a) and 31(a). The burden shifts to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns under sexual behavior and criminal conduct. An applicant has the burden to refute an established allegation or prove a mitigating condition, and the burden to prove or disprove it never shifts to the Government.

The alleged security concerns have similar mitigating conditions. These mitigating conditions involve the passage of time, the unusual nature of the action causing security concerns, the likelihood of recurrence, and whether the actions cast doubt on the individual's reliability, trustworthiness, and judgment. I considered Criminal Conduct Mitigating Conditions (CC MC) ¶ 32(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 Sexual Behavior Mitigating Condition (SB MC) 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). The first incident took place in January 2004, and Applicant was placed in a pre-trial intervention program that he successfully completed by December 2004. The second incident took place in December 2006. Applicant was convicted in November 2007, and completed the pre-trial intervention program only six months ago. Even though Applicant completed the pre-trial intervention program and all required sexual offense counseling, three years is not a long time to establish that he is successfully rehabilitated for his sexual and criminal conduct. He is still under probation for the last offense. There were no unusual circumstances raised to show why Applicant committed the offenses. He was not forced into the action and his judgment was not impaired by any substance abuse or other circumstances. While Applicant may be on the path to rehabilitation for his sexual deviant and criminal conduct, he has not provided sufficient information to establish that his sexual and criminal conduct would not happen again. Accordingly, he has not established these mitigating conditions for the security concerns alleged.

Successful rehabilitation is also a factor to consider in mitigating the criminal conduct security concerns. There is no rehabilitative mitigating condition for deviant sexual behavior. I considered Criminal Conduct Mitigating Condition (CC MC) AG ¶ 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). Applicant always acknowledged his behavior to police and his employer, but he always denied that his actions were wrong. He has not been involved in any conduct that would raise additional security concerns since the incident in December 2006. He successfully completed the pre-trial intervention program, and faithfully attended counseling. These are signs of successful rehabilitation. However under the circumstances that the offense was committed only four years ago, he is still on probation, and the pre-trial intervention was only completed about six months ago, it is too soon to determine that he has been successfully rehabilitated. Applicant has not presented sufficient information to mitigate security concerns for criminal conduct and sexual behavior.

### **Whole-Person Analysis**

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all

the circumstances. An 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 a security clearance must be an overall commonsense 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 been successful in his career and is considered a reliable and trustworthy person in the community and at work. His conduct in these two incidents shows a lack of judgment and discretion. Such a lack of judgment and discretion indicate that he may not be reliable, trustworthy, willing and able to exercise good judgment, comply with laws, rules, and regulations, and protect classified information. While there are signs of rehabilitation, it is too soon to determine that Applicant has been successfully rehabilitated, and that sexual behavior or criminal conduct problems will not arise in the future. Under these circumstances it is too soon to determine that he can be trusted with access to classified information. Overall, on balance the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability at this time for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his criminal conduct and sexual behavior.

### **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
Subparagraph 1.c:	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 the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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THOMAS M. CREAN  
Administrative Judge