



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



In the matter of: )  
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----- ) ISCR Case No. 08-10404  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Francisco Mendez, Esq., Department Counsel  
For Applicant: Robert J. Judd, Esq.

August 30, 2010

**Decision**

CURRY, Marc E., Administrative Judge:

Applicant's sexual abuse of his stepdaughter raises security concerns that he failed to mitigate. Clearance is denied.

**Statement of the Case**

On March 1, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D, Sexual Behavior, J, Criminal Conduct, and E, Personal Conduct. DOHA took the action 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.

Applicant answered the SOR on March 22, 2010. He denied all of the allegations and requested a hearing. The case was originally assigned to another administrative judge on April 5, 2010 and scheduled for April 29, 2010. On April 21, 2010, Applicant's

attorney filed a notice of appearance, and moved to continue the hearing until after August 2010, the month that the state court scheduled the criminal trial involving the same allegations. Department Counsel objected. The administrative judge partially granted the motion, agreeing to continue the case from April 2010, but denying the request to reschedule it after August 2010. Instead, he scheduled it for May 24, 2010. On May 7, 2010, the case was transferred to me.

The hearing was conducted as scheduled. The Government moved to admit nine exhibits, marked as Government's Exhibits (GE) 1 through 9. Applicant's counsel objected to the admission of GE 3 through 9, and did not object to GE 1 and GE 2. I admitted all of the Government's exhibits except GE 9. Also, I admitted one Applicant exhibit, marked as Applicant Exhibit (AE) A, and received the testimony of Applicant and two supporting witnesses. At the close of the hearing, I ordered Department Counsel to submit copies of the relevant state law governing Applicant's allegedly criminal conduct. He submitted it within the time allotted and I marked it as Hearing Exhibit (HE) 1. DOHA received the transcript on June 4, 2010.

### **Evidentiary Ruling**

At the close of the hearing, Department Counsel moved to amend the SOR by adding the following allegation, as follows:

3.b. On or about January 2008, you sent your step-daughter, who was 13 years old at the time, a text message, which stated that she had a "banging ass," using a company cell phone.

I granted the motion. (Tr. 157)

### **Findings of Fact**

Applicant is a 42-year-old married man with one child, age five. He has been married since 2005. A previous marriage ended in 2002. He has one stepchild, a 15-year-old girl, who is his wife's child from a previous relationship.

Applicant graduated from college in 1992 with a bachelor of science degree in mechanical engineering. Since then, he has worked for a defense contractor managing computer database systems. (Tr. 128) Currently, he is a senior-level employee who supervises 15 people. (Tr. 151) He has held a security clearance since 1993. According to the company's facility security officer, Applicant is a conscientious employee who has won several awards for his exceptional handling of security-related matters. (Tr. 146) Applicant's supervisor characterizes him as a reliable team leader. (Tr. 153)

Applicant's stepdaughter alleges that he molested her on the evening of March 16, 2008. Specifically, she alleged they were lying on his bed watching television. Her head was at his feet and *vice versa*. (GE 5 at 2) Applicant was massaging her feet and calves. She briefly fell asleep, then awoke when she felt him rubbing her buttocks under

her underwear. She then walked out of the room, went to the bathroom, and went to bed. (Tr. 77)

Applicant's stepdaughter went to school the next morning. When she returned home, she told her mother what Applicant allegedly did. (Tr. 77) Her mother then asked Applicant if he touched her daughter "on the butt." (Tr. 78) Applicant responded that he did "not recall anything like that." (Tr. 78) She then ordered him to leave their home. They have been separated since then.

On March 18, 2008, Applicant's wife went to court and sought a protective order. (Tr. 80) The judge issued the order. It restricts Applicant from any contact with either his stepdaughter or wife and requires visitation with his daughter to be supervised. (GE 2 at 4) The order is still in effect. (GE 3)

Applicant's wife then reported the incident to the local department of social services. A child protective services social worker took a statement from Applicant's stepdaughter. (GE 5 at 3) This statement formed the basis of a criminal complaint filed on March 19, 2008 charging Applicant with sexual abuse of a minor child, unlawful sexual contact with a child under the age of 14 (third degree sexual assault), and unlawfully engaging in sexual contact without the victim's consent (fourth degree sexual assault). (GE 5 at 1) The trial was originally scheduled for February 2009, but was continued multiple times. It is currently scheduled for August 2010.

Applicant denies the allegations. He admits to rubbing his stepdaughter's feet and calves, but not her buttocks. (Tr. 74, 116) It was not unusual for Applicant to rub his stepdaughter's feet. (Tr. 85, 134; GE 5 at 2) He had rubbed them about 20 times before the alleged incident. (Tr. 85) Her mother was aware of the foot rubs. (Tr. 87) After Applicant's stepdaughter reached puberty, his wife asked him to stop rubbing her feet. (Tr. 87-88) His stepdaughter, however, continued to ask him for foot rubs. (Tr. 87, 121)

On the evening of the alleged incident, Applicant relented "because [he] wanted her to be quiet" so that his daughter, who was then a toddler, could get to sleep.<sup>1</sup> (Tr. 91) Applicant contends that after his daughter eventually fell asleep, he took her to her bedroom. (Tr. 91) When he returned to his bedroom, his stepdaughter "was still sitting on [his] bed." (Tr. 92) She then asked him to resume rubbing her feet. (Tr. 92) Applicant obliged, and rubbed them "until she popped up and said 'oh, I fell asleep'." (Tr. 93) She then left the room "for no apparent reason . . . without say[ing] anything to [Applicant]." (Tr. 93)

According to Applicant, his stepdaughter is a rebellious, emotionally troubled child who was prone to hallucinations and on medications to control anxiety. (Tr. 39-40) She had been receiving treatment from a psychiatrist for five months preceding the

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<sup>1</sup>Applicant's daughter was also on the bed with Applicant and his stepdaughter on the night when the alleged incident occurred.

alleged incident.<sup>2</sup> (Tr. 51) Also, according to Applicant, she frequently lied about her whereabouts and the friends with whom she associated. (Tr. 46, 49, 53) In sum, Applicant characterized his stepdaughter's allegations as part of a broader continuum of oppositional behavior stemming from unhappiness with her mother for getting remarried. (Tr. 51, 52)

One day in January 2008, while sitting at home next to his wife, Applicant decided to send a text message to his stepdaughter. (Tr. 64) Neither Applicant nor his wife were upset with his stepdaughter or concerned about her safety. Rather, they were bored and wondering what she was doing. (Tr. 66) When Applicant's stepdaughter received his text message, she did not know that he had sent it. Instead, she thought it was a friend who shared the same first name as Applicant.<sup>3</sup> Applicant then told his wife that he was "just going to kid around with [his stepdaughter] and see what's going on." (Tr. 62) His wife played along with the joke and told him to "go ahead and ask her a couple of things." (Tr. 63) Applicant then sent his stepdaughter a text message that she had a "banging ass." (Tr. 54)

Applicant and his stepdaughter ended their phone-texting conversation. Later, Applicant's wife told his stepdaughter that he was the one who sent the text message. His stepdaughter then got uncomfortable. (Tr. 63)

Applicant contends that he had no prurient interest in his stepdaughter's buttocks. (Tr. 63) Instead, he was merely seeking to build her self-esteem because "she had been complaining . . . about how nobody comments on her . . . posterior." (Tr. 63)

## **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 AG lists potentially disqualifying conditions and mitigating conditions.

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.

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<sup>2</sup>Applicant never reported the alleged hallucinations to his stepdaughter's psychiatrist. (Tr. 49-50)

<sup>3</sup>Applicant did not use his personal cell phone to text his stepdaughter. Instead, he used his work-issued cell phone that she did not recognize. (Tr. 57) Applicant knew that his work-issued cell phone was only supposed to be used for work-related purposes. (Tr. 58)

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 Department Counsel. . . .” The applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

### **Analysis**

The absence of a conviction does not preclude the Government from proving an applicant engaged in criminal conduct. (ISCR Case No. 99-0119 (App. Bd. Sept. 13, 1999) However, the fact that an applicant has been arrested or otherwise charged with a criminal offense, standing, alone, does not constitute proof the applicant engaged in criminal conduct. (See ISCR Case No. 98-0424 (App. Bd. July 16, 1999) at p. 4)

The SOR is based primarily on GE 3, Applicant’s stepdaughter’s statement to a social worker that the state used to draft its statement of charges. During Applicant’s testimony, he reiterated his denial of the allegations and asserted that his stepdaughter was either lying or delusional. After considering both the Government’s evidence and Applicant’s testimony, I find that Applicant sexually abused his stepdaughter, as alleged.

Applicant’s testimony was not credible. Although he vehemently denied the allegations throughout the security clearance investigative process, when his wife asked him the day after the incident if the molestation occurred, he told her he did not recall. Also, he testified that he had stopped massaging his stepdaughter’s feet after she reached puberty, but resumed on the evening of March 16, 2008, in response to her repeated requests so that she would be quiet and her younger half-sister, a toddler, could get to sleep. However, after the toddler fell asleep, Applicant admitted that he resumed massaging his stepdaughter’s feet. As for Applicant’s contention that his daughter was delusional, he testified that she had experienced hallucinations in the three months preceding the episode; however, he never reported this to her psychiatrist. Most important, Applicant had manifested a perverse interest in his stepdaughter two months before the incident when he sent her a text message complimenting her buttocks.

I conclude Applicant’s conduct raises security concerns under the adjudicative guidelines governing sexual behavior, criminal conduct, and personal conduct.

### **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 conduct triggers the application of AG ¶¶ 13(a), "sexual behavior of a criminal nature, whether or not the individual has been prosecuted," and 13(c), "sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress."

Applicant presented no evidence establishing that he has undergone counseling to remedy whatever compelled him to molest his stepdaughter. Consequently, I cannot conclude that his conduct "no longer serves as a basis of coercion, exploitation, or duress." (AG ¶ 14(c)) None of the other mitigating conditions under this guideline are relevant.

### **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.*)

Applicant's conduct triggers the application of AG ¶ 31(a), "a single serious crime or multiple lesser offenses." The potentially applicable mitigating conditions set forth in AG ¶ 32 are:

(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;

(c) evidence that the person did not commit the offense, 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.

Applicant's evidence that he did not commit the offense was limited to his testimony, which was not credible. AG ¶ 32(c) does not apply.

Although the offense occurred nearly two and a half years ago, Applicant is still awaiting trial, and a protective order prohibiting contact with his stepdaughter is still in place. AG ¶ 32(a) does not apply. As discussed above, Applicant has neither attended any counseling nor sought treatment to address what compelled him to molest his stepdaughter. AG ¶ 32(d) does not apply.

## **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 conduct triggers the application of AG 16(e), “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person’s personal, professional, or community standing.”

The relevant, potentially mitigating conditions under AG ¶ 17 are:

(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;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress, and

(f) the information was unsubstantiated or from a source of questionable reliability.

These mitigating conditions are inapplicable for the same reasons as discussed under Guidelines D and E.

## **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.

The criminal allegations against Applicant remain pending as of the hearing date. This fact, combined with the nature and seriousness of the allegations make Applicant an unacceptable security risk.

### **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
Subparagraphs 1.a - 1.b:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a - 3.b:	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.

MARC E. CURRY  
Administrative Judge