



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



In the matter of: )  
 )  
----- ) ISCR Case No. 08-10745  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government:  
Melvin A. Howry, Esquire, Department Counsel  
Jeff Nagel, Esquire, Department Counsel

For Applicant:  
Joseph Testan, Esquire

July 27, 2010

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**DECISION**

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ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on July 30, 2008. (Government Exhibit 1.) On February 22, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J (Criminal Conduct) and D (Sexual Behavior) concerning Applicant. 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 (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on March 15, 2010, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed

on April 19, 2010. This case was assigned to me on April 22, 2010. DOHA issued a notice of hearing on May 3, 2010, and I convened the hearing as scheduled on June 9, 2010. The Government offered Government Exhibits 1 through 7, which were received without objection. Applicant testified on his own behalf, called two additional witnesses, and submitted Applicant Exhibits A through K, which were also received without objection. DOHA received the transcript of the hearing, and the record closed, on June 29, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

## **Procedural Rulings**

### **Request for Administrative Notice**

At the request of both parties, Official Notice was taken of various state criminal statutes referenced in this case. Copies of the statutes in question are included in the record as Official Notice Documents I and II. (Transcript at 39-43.)

### **Amendment to the SOR**

On April 22, 2010, the Department Counsel sent a "Notice of Amendment to the Statement of Reasons" to the Applicant. The Government proposed to amend the SOR by adding an allegation under Guideline E, Personal Conduct. In a letter dated May 3, 2010, Applicant's counsel objected to the amendment.

At the hearing in this matter, both parties were heard. Applicant's objection was overruled and the SOR amended to add Paragraph 3 under Guideline E. (Transcript at 54-58.) The impact of this amendment will be discussed under "Findings of Fact" and "Conclusions," below.

## **Findings of Fact**

The Applicant is 27 and single. He is employed by a defense contractor and seeks to obtain a security clearance in connection with his employment.

### **Guideline J - Criminal Conduct**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal conduct.

### **Guideline D - Sexual Behavior**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in inappropriate or illegal sexual behavior, which is related to his criminal conduct.

## **Guideline E - Personal Conduct**

The Government alleges in this paragraph that Applicant is ineligible for clearance because his criminal conduct, and related sexual behavior, shows poor judgment, irresponsibility or untrustworthiness.

In late 2007, Applicant became involved in an internet relationship with a person who turned out to be a 15 year old boy (Boy). The Boy had indicated over the internet that he was interested in having a sexual relationship with an older man. At that time Applicant was 24.

Applicant and the Boy soon began meeting each other in person. Applicant stated to an investigator from the Office of Personnel Management:

Some time after, exact date is unknown, [the Boy] initiated some groping. Some time after, exact date is unknown, things progressed, and [the Boy] and I had oral sex on 2 occasions. On both occasions, [the Boy] and I performed oral sex on each other. Both sexual encounters occurred several months apart in my vehicle. (Government Exhibit 3 at 1.)

Applicant was subsequently arrested by the police and charged with 1) Lewd Act Upon Dependent Adult, 2) Oral Copulation With Person Under 16, and 3) Lewd Act Against Child 14/15, all felonies. On December 9, 2008, he plead guilty to an amended charge of Oral Copulation with a Person Under Age of 18, a misdemeanor. On January 30, 2009, he was sentenced to three years probation, fined, 20 days of community service, and ordered to complete one year of therapy. (Government Exhibits 4 and 7; Applicant Exhibit J.)

Applicant made a motion to have his probation terminated early by the court. The motion was successful, and the probation was terminated on May 27, 2010. (Applicant Exhibit I.) Applicant also completed the one year of therapy on December 16, 2009. (Applicant Exhibit A.)

At the recommendation of his primary therapist, Applicant has continued therapy with a clinical psychologist. As of May 29, 2010, Applicant and the psychologist had 18 sessions together. The psychologist writes:

While [Applicant] had initially taken some responsibility for his inappropriate sexual acts, he saw himself as the passive recipient of his underage victim's sexual advances. He now understands that he was in the powerful position as a result of his age. [Applicant's] taking, clear unequivocal responsibility for his role in this affair is a noteworthy step.

[Applicant] should continue in therapy for an extended period of time. I believe that with support, greater insight, and attendant social skills

training, the chance of a recurrence of his illegal sexual acts is quite low. I say this with confidence partly because of the advances he has already made, and partly because his arrest and the potential consequences for his future life have seriously frightened him. (Applicant's Exhibit B.) (See Transcript at 74-75.)

At the hearing, Applicant was asked why he didn't end his relationship with the Boy after each sexual contact, when he admitted knowing the contact was illegal. He said, "It felt good. I enjoyed it. It fulfilled some sort of need with me and I don't think I was really thinking about it too much either." (Transcript at 186.) (See Transcript at 67, 144.)<sup>1</sup>

## **Mitigation**

Applicant's father, and a friend, testified for him. Applicant is described as a good son, who understands the issues of what he did. (Transcript at 12.) His friend describes Applicant as someone who is "very responsible, very ethical." (Transcript at 19.)

A letter was also submitted from his step-mother. She states that he is "reliable and trustworthy." (Applicant Exhibit H.)

Applicant submitted documentary evidence showing that he is a highly respected employee. (Applicant Exhibits E and F.) Evidence was also submitted showing that the Applicant kept his employer fully and promptly informed of the proceedings in this case. (Government Exhibit 5; Applicant Exhibits D and G.)

## **Policies**

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the 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 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. In addition, the Administrative Judge may also rely on his own common sense,

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<sup>1</sup>Applicant's written description, and hearing testimony, frankly describes the course of his relationship with the Boy. For purposes of this Decision, while it is unnecessary to describe the relationship in depth, I have considered all of the evidence in making this Decision.

as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned 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.

Finally, as emphasized by President Eisenhower in Section 7 of Executive Order 10865, “Any determination under this order . . . shall be a determination 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**

**Guideline J - Criminal Conduct**  
**Guideline D - Sexual Behavior**  
**Guideline E - Personal Conduct**

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubts 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.

¶ 12: The security concern relating to the guideline for Sexual Behavior is set out in AG

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 of this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 15: The security concern relating to the guideline for Personal Conduct is set out in

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.

The Applicant was involved in criminal, sexual activity with a minor in 2007/2008, which resulted in the Applicant being arrested, charged with three felonies, and convicted of a misdemeanor. AG ¶ 31(a) under Guideline J applies to this case, stating that a disqualifying condition is "a single serious crime or multiple lesser offenses."

Two of the mitigating conditions also may apply and have been considered. They are AG ¶ 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 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."

The Applicant's sexual misconduct occurred just over two years ago. His probation was just terminated just shortly before the hearing. While the Applicant does take some responsibility for his acts, his testimony, and the letter from his psychologist, show a man who has had great difficulty admitting his actions with an underage child were wrong, and his fault. Not enough time has passed for me to be sure similar misconduct will not occur in the future. Paragraph 1 is found against the Applicant.

Turning to Guideline D, I find that all of the disqualifying conditions apply to this case. AG ¶ 13(a), "sexual behavior of a criminal nature, whether or not the individual has been prosecuted"; AG ¶ 13(b), "a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder"; AG ¶ 13(c), "sexual behavior that causes an individual to be

vulnerable to coercion, exploitation or duress”; and ¶ 13(d), “sexual behavior of a public nature and/or that reflects a lack of discretion or judgment.”

The evidence shows that Applicant engaged in an inappropriate sexual relationship with an underaged person. It was criminal, high risk sexual behavior that was symptomatic of a personality disorder. In addition, by its very nature it subjected the Applicant to possible coercion, exploitation or duress. Finally, in that the sexual acts occurred in his automobile they were of a public nature. Finally, the entire relationship reflects a severe lack of judgment.

I have examined the mitigating conditions and find that only AG ¶ 14(c) marginally applies, “the behavior no longer serves as a basis for coercion, exploitation or duress.” The Applicant has kept his employer, and through them the Government, fully informed of the progress in his case.

AG ¶ 14(b) does not apply. That condition states it may be mitigating when “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 incidents in this case occurred slightly over two years ago. As described above, the Applicant’s treating psychologist states Applicant requires an extensive period of treatment, and only now has begun to understand his responsibility as a then 24 year old for having sex with a 15 year old. I find that the conduct continues to cast doubt on the Applicant’s reliability, trustworthiness and good judgment. Paragraph 2 is found against the Applicant.

Finally, concerning the Personal Conduct allegation, Paragraph 3. AG ¶ 16 sets forth potentially disqualifying conditions, none of which are independently supported by this record. However, to the extent that Appellant’s sexual misconduct and criminal offense involved questionable judgment, or unwillingness to comply with rules and regulations, they can also be considered to support security concerns under AG ¶ 15. As discussed above, Applicant’s sexual and criminal conduct did involve questionable judgment and unwillingness to comply with criminal laws.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. For the same reasons that the equivalent mitigating conditions under Guidelines J and D were not established, as discussed above, Applicant failed to demonstrate mitigation under any of the Guideline E mitigating conditions, particularly 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”; and ¶ 17(e), “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.”

## 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 relevant circumstances. Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. The administrative judge must 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant engaged in a criminal, sexual relationship with an underaged person slightly more than two years ago. Under AG ¶ 2(a)(3), Applicant's conduct is recent. After examining the record, I find the Applicant lacked maturity at the time of the event, and still shows a significant lack of maturity today. AG ¶ 2(a)(4) applies. Based on the state of the record, and as stated in depth above, I cannot find that there have been permanent behavioral changes under AG ¶ 2(a)(6). That is particularly so when his own psychologist indicates that a lengthy, continued period of treatment is appropriate. Accordingly, at the present time, I find that there is the potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is a high likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his criminal conduct, sexual behavior, and personal conduct.

On balance, I conclude that Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a denial of his request for a security clearance. Accordingly, Paragraphs 1, 2 and 3 are found against the Applicant.



### **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:

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|---------------------------|-----------------------|
| Paragraph 1, Guideline J: | AGAINST THE APPLICANT |
| Subparagraph 1.a:         | Against the Applicant |
| Paragraph 2, Guideline D: | AGAINST THE APPLICANT |
| Subparagraph 2.a:         | Against the Applicant |
| Paragraph 3, Guideline E: | AGAINST THE APPLICANT |
| Subparagraph 3.a:         | Against the 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.

WILFORD H. ROSS  
Administrative Judge