



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



In the matter of:	)	
	)	
	)	ISCR Case No. 08-11136
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Ray T. Blank, Jr., Esquire, Department Counsel  
For Applicant: Kenneth R. Young, Jr., Esquire

November 27, 2009

**Decision**

CREAN, Thomas M., Administrative Judge:

Applicant submitted a security clearance application (SF 86) on June 11, 2008. The security clearance application was submitted because Applicant had recently retired from active military service and was commencing work for a defense contractor. On May 19, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns for sexual behavior, personal conduct, and criminal conduct under Guidelines D, E, and J, respectively. The security concerns arose out of the same two incidents in July 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 the revised 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 acknowledged receipt of the SOR on May 26, 2008.

Applicant answered the SOR on May 29, 2009. He admitted all factual allegations under the three guidelines. He requested a hearing before an administrative

judge. Department Counsel was prepared to proceed on July 21, 2009, and I was assigned the case on July 24, 2009. Applicant's counsel agreed to a hearing date of September 2, 2009, and a Notice of Hearing was issued on August 13, 2009. The hearing convened as scheduled. Department Counsel offered six exhibits, marked Gov. Ex. 1 through 6 which were received without objection. Applicant testified on his own behalf and offered ten exhibits, marked App. Ex. A through J, and received without objection. The record was left open for Applicant to submit additional documents. Applicant timely submitted one document, marked and received as App. Ex. K. DOHA received the transcript of the hearing (Tr.) on September 9, 2009. 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 all of the factual allegations raised in the SOR.

Applicant is 44 years old and has been a military analyst for a defense contractor for approximately one year. He graduated from high school in 1983, and college with a Bachelors of Science degree in 1987. He has a master's degree in aeronautical engineering. He participated in the Reserve Officers Training Program (ROTC) in college. Upon graduation and commissioning, he entered active duty with the Air Force, and served for over 20 years on active duty in the Air Force as an F-16 pilot. He held a top secret clearance, a sensitive compartmented information access, and a special access security clearance while on active duty. He retired from active duty at the rank of lieutenant colonel with an Honorable Discharge in May 2008. He is a command pilot with 4,035 flight hours in the F-16. He received the Distinguished Flying Cross, six meritorious service medals, two air medals, three aerial achievement medals, and other service awards. His first wife was severely injured in an accident in October 2000, and passed away in January 2001 leaving Applicant with three young daughters. He remarried in 2002. He and his current wife have a five year old son (Tr. 25-28, 37-39, 45-47, 63-67; Gov. Ex. 1, e-QIP, dated June 11, 2008; Gov. Ex. 5, DD Form 214, dated May 31, 2008).

While still on active duty, Applicant's wife asked him to stop at a store and pick-up some photographs she left for processing. While in the store, Applicant, who was wearing his military flight uniform, used the camera on his new cell phone to take a picture under the skirt of a female store patron. The female patron felt Applicant's presence and challenged him, asking, if he had touched her. Applicant vehemently denied any inappropriate action and moved away from the woman to another part of the store. The woman followed Applicant around the store and observed him take another picture under the skirt of another female patron. She again loudly challenged Applicant, and alerted the other female patron. Applicant left the store, and was observed looking at and working with his cell phone. Local police were notified, and Applicant was

identified through examination of the store's surveillance cameras, and the receipt for the photographs that he picked up for his wife.

A few weeks later, Applicant was asked to report to the local police station. He went to the local police station accompanied by his commander. Applicant was apprehended and his cell phone and computer seized at his house by the police pursuant to a search warrant. When the police downloaded the camera phone, the pictures taken in the store on the cell phone had been erased, but there were pictures taken of Applicant's wife while she was in the shower. Applicant's wife did not know of the pictures, and did not give Applicant permission to photograph her in the shower. Applicant admits he erased the picture taken of the women in the store and admits taking the pictures of his wife without her permission after he had taken the pictures in the store. At the request of the police, Applicant called the women and apologized for his actions (Tr.30-34, 69-76; Gov. Ex. 2, Answers to Interrogatories, dated January 26, 2009; Gov. Ex. 6, Air Force Office of Special Investigations Report, dated April 16, 2009).

During the time preceding his apprehension, Applicant stated he was undergoing a great deal of stress concerning his career. He had been requested to take a command assignment at another base but his wife refused to accompany him. He decided not to take the assignment, instead taking an assignment at his local base that would enable him to complete his service career. He knew at the time that these decisions would mean he had little if any chance of advancing in rank.

His oldest children as well as his wife's family are aware of the July 2006 incident and his arrest. He has not told his parents about the July 2006 incident as he sees no reason to involve them. Applicant attributed his action to poor judgment. He states he made changes since July 2006. He stated he gave the general officers that still mentor him and are his supervisors his assurance that it would not happen again (Tr. 27-30; 44-45, 47-51).

Applicant was indicted by a grand jury for sexual voyeurism. He agreed with the local prosecutor to being placed in a pre-trial intervention program. He received a counseling assessment that he was eligible to enter the pre-trial intervention program. He completed a counseling program as part of the intervention program. His wife also participated in the counseling. He was evaluated as stable emotionally, with no basis for any psychological diagnosis, and no current or anticipated need for any continued psychotherapeutic support. He was further evaluated as fully able to function in his work with no basis for concern that he would be subject to any particular level of duress related to the incident. The evaluation concluded that there is no clear basis to indicate Applicant would be prevented from performing his job in an excellent manner and without any external limits. No potential for similar behavior was identified. He completed the program, and his record was expunged (Tr. 57-61; App. Ex. B, Letter Evaluation, dated August 31, 2009; App. Ex. H, Order, dated December 30, 2008; App. Ex. K, Criminal Law, Chapter 22, State statute).

After his arrest, Applicant was barred from Special Access Programs, but he was permitted to continue with his access to classified information (App. Ex. I, Letter, dated October 4, 2006; App. Ex. J, Memorandum, dated October 4, 2006). He received a Letter of Reprimand from his Commanding General. He remained on operational flight status until his retirement from the Air Force in May 2008 (Tr. 37-40; App. Ex. G, letter, dated June 1, 2009).

An Air Force Lieutenant General wrote that he has known Applicant since Applicant joined his squadron in 1989. Applicant distinguished himself and was an exceptional officer and pilot. Applicant also served as his wing man. He notes that the incident in question was the result of poor judgment and that Applicant took full responsibility and corrective positive action. He recommends Applicant be granted access to classified information (App. Ex. C, letter, dated August 11, 2009).

Another Air Force officer wrote that he has known Applicant and worked with him for many years. He also works with Applicant in his civilian capacity since his retirement. He recommends Applicant for any leadership position in industry or businesses that contract with the Department of Defense. Applicant has shown leadership, patriotism, and unquestioned performance at the highest level. He has complete trust in Applicant (App. Ex. D, Letter, dated September 1, 2009).

Applicant's present father-in-law writes that he has known Applicant and his family for many years and has been directly associated with Applicant since he married his daughter in 2002. He knows Applicant to be hard working, reliable, and respected. He does not believe Applicant presents any security risk and recommends him as worthy of the highest national security clearance (App. Ex. E, Letter, dated August 4, 2009).

A former Air Force Brigadier General who is Applicant's supervisor in their civilian capacity writes that he has known Applicant for many years. Applicant has a reputation for trustworthiness, loyalty, and patriotism. He knows of the July 2006 incident and is impressed with how Applicant took responsibility for his actions and positive corrective action (App. Ex. F, Letter, dated August 10, 2009).

The Commanding General, who issued Applicant the Letter of Reprimand for the July 2006 incident, wrote that he has known Applicant for over 15 years and that the incident in July 2006 was an aberration that Applicant has aggressively self-corrected. Applicant showed strong moral character to make effective corrections in his actions. He strongly recommends that Applicant be granted access to classified information (App. Ex. G, Letter, dated June 1, 2009).

## **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 all from the same incident. Security concerns raised for sexual behavior, criminal conduct, and personal conduct are the same for each. The security concern involves 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).

Personal 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. Since the security concerns are similar, the concerns will be discussed as a group.

Applicant admits and the information clearly establishes that he committed the criminal act of sexual voyeurism under state statute by taking pictures with a cell phone camera under the skirts of two females. He also took pictures of his wife in the shower without her permission but this act is not alleged as criminal activity. It does show a continued course of conduct by Applicant. This criminal offense establishes the Sexual Behavior Disqualifying Condition (SB DC) AG ¶ 13(a) (sexual behavior of a criminal nature, whether or not the individual has been prosecuted). The criminal act is a felony offense for which Applicant was indicted and establishes Criminal Conduct Disqualifying Condition (CC DC) ¶ 31(a) (a single serious crime or multiple lesser offenses). The incident also establishes Personal Conduct Disqualifying Condition (PC DC) AG ¶ 16(c) (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 regulation, or other character issues indicating that the person may not properly safeguard protected information).

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), 31(a), and 16(c). The burden shifts to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns under sexual behavior, criminal conduct, and personal 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.

Each of the alleged security concerns has a similar mitigating condition. 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); 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); and Personal Conduct Mitigating Condition (PC MC) 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). The incident took place in July 2006, and Applicant was placed in a pre-trial intervention program that he successfully completed in December 2008. The

incident took place only two years ago. Applicant completed the pre-trial intervention program only eleven months ago. Even though Applicant has completed the pre-trial intervention program and all counseling, two years is not a long time to establish successful rehabilitation for a felony offense. While Applicant cites the stress he was under in July 2006 because of his career choices and issues at the time, there were no unusual circumstances causing Applicant to commit the offense. He was not forced into the action and his judgment was not impaired by any substance abuse or other circumstances. While Applicant appears on the path to rehabilitation for his sexual deviant and criminal conduct, he has not provided sufficient information to establish that it would not happen again. After being confronted in the store by the women he inappropriately photographed, he went home and took inappropriate photographs of his wife without her permission. Accordingly, he has not established these mitigating conditions for the security concerns alleged.

Successful rehabilitation is also a factor to consider in mitigating the security concerns. There is no rehabilitative mitigating condition for deviant sexual behavior. However, I have 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); and Personal Conduct Mitigating Condition (PC MC) 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 always acknowledged his behavior to investigative and military authorities, and never denied he did something wrong. He has not been involved in any conduct that would raise additional security concerns since the incident in July 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 two years ago and the pre-trial intervention was only completed about eleven 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, sexual behavior, and personal conduct.

### **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 served his country as a fighter pilot for over 20 years and had a very successful career. His life has had turmoil since his first wife died as the result of an automobile accident in 2002 leaving him to raise three daughters. However, he married a woman who was a help to him with the daughters and gave him a son. He betrayed her trust in him by taking inappropriate pictures of her without her permission on his cell phone camera. I considered the letters of recommendation from his Air Force colleagues and general officers as to his trustworthiness, reliability, and good judgment. I considered his reputation for excellent work. I consider that Applicant held a top security clearance while on active duty with no security issues or violations.

However, Applicant was a command pilot in the Air Force with 4,035 flight hours as an F-16 pilot. As such, he is taught to be deliberate, think through, and consider the outcome of his actions. He is taught not to be reckless and not undertake actions inadvertently. He is taught to be thoughtful and calculating about his actions. Applicant took deliberate actions when taking inappropriate pictures of two women he did not know in a store. He continued this inappropriate course of action even after being challenged by later taking inappropriate pictures of his wife without her permission. This conduct shows lack of judgment and discretion. Such a lack of judgment and discretion indicated that he may not be reliable, trustworthy, 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 and personal 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 and personal conduct, and sexual behavior. I make this determination knowing that Applicant held access to top level classified information while on active duty in the Air Force with no security violation incidents.

### **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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Paragraph 3, Guideline D:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

---

THOMAS M. CREAN  
Administrative Judge