



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 09-02015  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Jeff Nagel, Department Counsel  
For Applicant: *Pro se*

June 21, 2010

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**Decision**

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LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on August 29, 2008. (Government Exhibit 1.) On August 20, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and E for 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 (DoD) for SORs issued after September 1, 2006.

The Applicant responded to the SOR on September 8, 2009, and he requested a hearing before a DOHA Administrative Judge. This case was assigned to this Administrative Judge on December 16, 2009. A notice of hearing was issued on January 8, 2010, scheduling the hearing for March 10, 2010. At the hearing the Government presented six exhibits, referred to Government Exhibits 1 to 6, which were

admitted without objection. The Applicant presented eight exhibits, referred to as Applicant's Exhibits A through H, and testified on his own behalf. The official transcript (Tr.) was received on March 24, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

## **FINDINGS OF FACT**

The following Findings of Fact are based on the Applicant's Answer to the SOR, the testimony and the exhibits. The Applicant is 33 years old, and has a Bachelor's degree in Chemistry. He is employed by a defense contractor as a pilot and is seeking to obtain a security clearance in connection with his employment.

Paragraph 1 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

Paragraph 2 (Guideline D - Sexual Misconduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in sexual misconduct.

Paragraph 3 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he has engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to protect classified information.

The Applicant admitted the allegations set forth under these guidelines. (Applicant's Answer to SOR.) The Applicant graduated from a military academy in 1998, then went on to pilot training school where he was a top performer. (Applicant's Exhibit A.) He then served flawlessly until 2002. He got married and was assigned overseas. He and his wife, an emergency room nurse, were both professionals, with conflicting schedules, and had very little time to spend together. As time passed, their marriage drifted apart and they began to fight. The Applicant started looking outside of his marriage for companionship.

In 2003, he contacted a generic Las Vegas adult chat room to meet adults looking for adult companionship and sexual relationships. On the chat line he met someone who he believed was a fourteen year old girl. He states that he initially told the young girl that she was not supposed to be on line, but she wanted to talk, so he agreed to talk. For about a year, the Applicant continued his chat room relationship with this young girl. He made suggestive comments to her that were vulgar and alarming. (Government Exhibits 5, 6 and Tr. pp. 97-98.) Over time, the discussions eventually came around to meeting. The Applicant states that he agreed to meet her but did not show up. He was contacted again by the girl to meet her, and agreed, but again did not show up. At this point, the police arrived at his home with a search warrant and took a statement from him concerning the incidents. Applicant learned that the girl he had been speaking to on the chat line for a year was actually an FBI agent.

In May 2004, the Applicant was arrested and charged with (1) Attempted Sexual Assault of a Victim Under 16, felony, and (2) Use of Technology to Lure a Child. He pled guilty to the amended charge of Annoyance of a Minor and was sentenced to one year of probation. In about 2006, the charge was dismissed and the record expunged. (Applicant's Exhibit H.) The Applicant and his wife divorced. He voluntarily underwent about twelve counselling sessions over a six month period to determine why he made bad choices. He states that he has learned how to deal with his emotions.

At the time of his arrest, the Applicant was serving on active duty. In July 2004, he was permanently disqualified from aviation service for failure to maintain professional standards. In August 2005, he was issued a Letter of Reprimand, for violation of the UCMJ Article 133 Conduct Unbecoming an Officer and a Gentlemen, Article 134 Indecent Language, and Article 134 Adultery.

In September 2006, he was recommended for discharge from the United States Air Force Under Honorable Conditions (General) by a Board of Inquiry, for conduct unbecoming of an officer and a gentleman, for writing, communicating indecent language to a person you believed was under the age of 16 in 2003 and 2004, and for wrongfully having sexual intercourse with a woman not your wife between about April 29, 2002, and January 19, 2004. The Applicant admitted that he committed adultery on his wife about half a dozen times. (Tr. p. 89). The Secretary of the Air Force accepted a conditional waiver of administrative discharge board proceedings in March 2008, and the Applicant was discharged Under Honorable Conditions (General) effective March 22, 2008. (Government Exhibit 4 and Applicant's Exhibit D.)

The Applicant recently remarried. His current wife is a woman with a young daughter. His wife testified that the Applicant fully disclosed to her the circumstances concerning his past sexual misconduct and his arrest. She states that she realizes that people can make mistakes and she has forgiven him. She agreed to allow the Applicant to adopt her daughter and he has done so. (Applicant's Exhibit B.)

The Applicant started looking for work in 2007, and was hired on with his current employer in February 2008. He is performing well at work, well respected among his peers, and favorably recommended for a position of trust. Letters of recommendation from the Applicant's current supervisor and work associates are favorable. (Applicant's Exhibit G). These individuals have no knowledge of Applicant's prior misconduct or the reasons for which he is undergoing this investigation. (Tr. pp 118 -119.)

Ten performance appraisals of the Applicant for the periods from September 2000 through May 2007 reflect favorable ratings. (Applicant's Exhibit A.)

Letters of recommendation from various military officers submitted on behalf of the Applicant to the Board of Inquiry while the Applicant was in the Air Force are all favorable. (Applicant's Exhibit C.)

Applicant current performance appraisal indicates that he either meets, exceeds or is outstanding on the job. (Applicant's Exhibit F.) He has also received an award for his excellent contributions. (Applicant's Exhibit E.)

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

### Guideline J (Criminal Conduct)

30. *The Concern.* Criminal activity creates a 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 regulations.

#### Conditions that could raise a security concern:

31.(a) a single serious crime or multiple offenses;

31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

#### Conditions that could mitigate security concerns:

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;

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.

### Guideline D (Sexual Conduct)

12. *The Concern.* 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 on the sexual orientation of the individual.

Conditions that could raise a security concern:

13. (a). sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

13. (c). sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

Conditions that could mitigate security concerns include:

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;

14. (c) the behavior no longer serves as a basis for coercion, exploitation, or duress.

Guideline E (Personal Conduct)

15. *The Concern.* 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.

Conditions that could raise a security concern:

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 regulations, or other characteristics indicating that the person may not properly safeguard protected information.

Conditions that could mitigate security concerns:

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;

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;

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

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, extent, and seriousness of the conduct;
- b. The circumstances surrounding the conduct, to include knowledgeable participation;
- c. The frequency and recency of the conduct;
- d. The individual's age and maturity at the time of the conduct;
- e. The extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavioral changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states:

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination.

The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in

nature. Finally, as emphasized by President Eisenhower in 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."

## CONCLUSIONS

In the defense industry, a security clearance is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for such access may be involved in instances of criminal conduct, sexual conduct and personal conduct, which demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in Criminal Conduct (Guideline J), Sexual Conduct (Guideline D), and has demonstrated poor Personal Conduct (Guideline E). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

The Applicant's sexual relationship in a chat room with a person whom he believed was a minor, was despicable, criminal, sexual, and personal misconduct. This poor judgment ruined his military career, his marriage, and brought great humiliation upon himself. Since his arrest and conviction in 2004, he has satisfied the court's sentencing requirements, voluntarily underwent counselling sessions to learn how to properly deal with his emotions, and has not had any problems since then. In fact, since then, the Applicant has become happily remarried and adopted his wife's daughter. He has turned his life around and become a productive citizen in society. His past criminal conduct occurred almost six years ago and has not recurred. For the past six years, he has demonstrated that he is not a criminal or a pervert. He is well respected and comes highly recommended for a position of trust among his supervisors, professional colleagues and friends.

Under Guideline J, Criminal Conduct, Disqualifying Conditions, 31.(a) *a single serious crime or multiple offenses* and 31.(c) *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or*

*convicted apply. I have also considered Mitigating Conditions 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 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. They also apply in this case.*

*Under Guideline D, Sexual Conduct, Disqualifying Conditions 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 apply. However, Mitigating Conditions 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, 14.(c) the behavior no longer serves as a basis for coercion, exploitation, or duress also apply.*

*Under Guideline E, Personal Conduct, Disqualifying Condition 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 regulations, or other characteristics indicating that the person may not properly safeguard protected information applies.*

*However, under the particular facts of this case, Mitigating Conditions 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; 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 also apply. Accordingly, I find for the Applicant under Guidelines D and E.*

*I have also considered the "whole-person concept" in evaluating the Applicant's eligibility for access to classified information, including the favorable evaluations and letters of recommendation. The circumstances that contributed to the Applicant's poor judgment in the past have changed. He is now happily married and is a father. He has demonstrated good judgment. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole-person assessment of good judgement, trustworthiness, reliability, candor, willingness to comply with rules and regulations, or other characteristics indicating that the person may properly safeguard classified information.*



On balance, it is concluded that the Applicant has overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1, 2 and 3 of the Government's Statement of Reasons.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: For the Applicant.

- Subpara. 1.a.: For the Applicant.
- Subpara. 1.b.: For the Applicant.
- Subpara. 1.c.: For the Applicant.
- Subpara. 1.d.: For the Applicant.
- Subpara. 1.e.: For the Applicant.
- Subpara. 1.f.: For the Applicant.
- Subpara. 1.g.: For the Applicant.
- Subpara. 1.h.: For the Applicant.
- Subpara. 1.i.: For the Applicant.

Paragraph 2: For the Applicant.

- Subpara. 2.a.: For the Applicant.

Paragraph 3: For the Applicant.

- Subpara. 3.a.: For the Applicant.
- Subpara. 3.b.: For the Applicant.
- Subpara. 3.c.: For the Applicant.

### **DECISION**

In light of the circumstances presented by the record in this case, it is clearly consistent with the national interests to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson  
Administrative Judge

