



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



|                                  |   |                        |
|----------------------------------|---|------------------------|
| In the matter of:                | ) |                        |
|                                  | ) |                        |
| -----                            | ) | ISCR Case No. 09-05484 |
| SSN: -----                       | ) |                        |
|                                  | ) |                        |
| Applicant for Security Clearance | ) |                        |

**Appearances**

For Government: Fahryn Hoffmann, Esq., Department Counsel  
For Applicant: *Pro se*

September 21, 2010

**Decision**

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct), D (Sexual Behavior), and E (Personal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application on November 12, 2008. On November 5, 2009, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines J, D, and E. DOHA acted 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) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on November 25, 2009, but did not state whether he requested a hearing. He submitted a second answer on December 15, 2009, and requested a determination on the record without a hearing before an administrative judge. DOHA received the request on December 24, 2009. Department Counsel requested a hearing on January 19, 2010, and was ready to proceed on May 13, 2010. The case was assigned to me on May 26, 2010. DOHA issued a notice of hearing on June 1, 2010, scheduling the hearing for June 29, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through K, which were admitted without objection. He also submitted copies of two ISCR decisions, which were attached to the record as Hearing Exhibits I and II. DOHA received the transcript (Tr.) on July 9, 2010.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted all the allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 29-year-old senior logistics analyst employed by a defense contractor since November 2005. He served on active duty in the U.S. Navy from September 1999 to September 2005, and he was released from active duty under honorable conditions. (AX A.) He served in the U.S. Navy Reserve from September 2005 to September 2007. He received a security clearance in October 1999, while on active duty, but it was suspended as a result of the conduct alleged in the SOR. (Tr. 8.)

Applicant's first performance evaluation from his current employer rated him as meeting performance requirements. (AX F.) His next two annual evaluations rated him as exceeding performance requirements. (AX G; AX H.) He was promoted in 2008, and his two performance evaluations after being promoted rated him as meeting requirements. (AX I; AX J.) In January 2010, a supervisor commended him for the high quality of his work and his valuable contributions to the team. (AX K.)

Applicant married in November 2003. He and his spouse separated in July 2008 and intend to divorce. They have a four-year-old daughter and a one-year-old son. Their son was born after they separated. Their children are in the custody of his wife's cousin. (Tr. 45-46.) Applicant and his wife have had virtually no contact since their separation.

Applicant's wife was hospitalized on July 3, 2008, after she became depressed and suicidal. Applicant's 13-year-old sister-in-law agreed to stay in his home and take care of his daughter while he was at work. On the evening of July 5, 2008, Applicant visited his wife in the hospital, went out with friends until about 11:30 p.m., and returned home. He and his sister-in-law first talked about his daughter, and then the conversation turned to sexual matters. Applicant gave his sister-in-law an alcoholic beverage and they both became intoxicated. Applicant asked his sister-in-law to remove her clothing and she complied. Applicant also removed his clothing. He touched his sister-in-law's body with his hands and mouth, but she refused to allow him to kiss her on her mouth.

Applicant stopped short of sexual intercourse when he realized that what he was doing was wrong, and he apologized. His sister-in-law slept on the living room sofa and left his home on the following day. (GX 2 at 3-4; Tr. 38-39.)

On July 22, 2008, Applicant was arrested and charged with indecent liberties with a child by a custodian and aggravated sexual battery. (GX 3.) The record does not reflect who notified the police. Applicant notified his supervisor of his arrest. (Tr. 40.) He was held in jail for about two and a half weeks. (Tr. 55.) In November 2008, the charge of aggravated sexual battery was disposed of by nolle prosequi. In January 2009, he was indicted for indecent liberties with a child by a custodian, a felony. He pleaded guilty in March 2009. In May 2009, he was sentenced to confinement for 12 months (suspended for 12 months) and placed on supervised probation for 10 years. (GX 4.) The sentencing order required him to register as a sex offender and to have no contact with anyone under the age of 18 without supervision. (GX 5; AX E.)

In August 2008, while awaiting trial, Applicant voluntarily contacted a licensed clinical social worker who is a certified sex offender treatment provider. (GX 2 at 4; AX C; AX D.) Applicant started individual therapy in September 2008 and group therapy in May 2009. He completed his therapy in late November 2009 and participated in an aftercare program from December 2009 to May 2010. His diagnosis upon discharge from the program was depressive disorder, not otherwise specified; impulse control disorder, not otherwise specified; and sexual abuse of a child, offender issues. His level of risk of recurrence was assessed as "Low provided he uses what he has learned in treatment." (AX D at 2.)

Applicant's therapist provided a letter dated May 6, 2010 (AX C), reciting the following:

Since my last written update [Applicant] has continued to come to sessions on time and well prepared. He has completed assignments diligently and has been active in discussing relevant treatment issues in group and in individual therapy sessions. He has continued to express remorse for his actions and a commitment to learning everything he can in the interest of relapse prevention.

[Applicant] has addressed all of these factors and issues known or commonly believed in the scientific community to correlate with a propensity toward recidivism and has completed all treatment objectives. He has completed aftercare and passed his exit polygraph exam.

He understands that he has not been given a cure but that he has developed an understanding of those factors leading to his offending, skills to ameliorate them and a specific plan for reducing any high risk situations which could otherwise lead him to reoffend. He understands that he must actively use what he has learned in treatment in order to remain a reduced risk for offending.

Applicant began attending a synagogue before the incident with his sister-in-law, and he has made many friends among the congregation. He formally joined the congregation in June 2010, and he has disclosed his conviction to his rabbi and the congregation. (AX B; Tr. 41, 48, 52.)

In his answer to the SOR, Applicant stated that his misconduct with his sister-in-law occurred while he was under great emotional pressure, dealing with his wife's bipolar disorder, her threats to kill him and their daughter, and her attempts to kill herself. At the hearing, he testified he acquired skills during his therapy that help him cope with stress. He keeps a journal of stressful situations to make himself more aware of stress when it occurs. He has learned to mentally step back from stressful situations and to contact a friend or his rabbi for support when he needs it. (Tr. 48-49.)

### **Policies**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## **Analysis**

### **Guideline J, Criminal Conduct**

The SOR alleges that Applicant was arrested in July 2008 for indecent liberties with a child by a custodian and aggravated sexual battery; that he pleaded guilty to indecent liberties with a child by a custodian; and that he was sentenced to 12 months in jail, fined, and placed on supervised probation for ten years (SOR ¶ 1.a). It also alleges that he is a registered sex offender (SOR ¶ 1.b).

The security concern related to criminal conduct is: “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 regulations.” AG ¶ 30. Applicant’s conviction of indecent liberties with a child by a custodian, a felony, raises the disqualifying conditions in AG ¶¶ 31(a) (“a single serious crime”) and 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”). His sentence to ten years of supervised probation raises AG 31(d) (“individual is currently on parole or probation”).

Since the Government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 31(a), (c), and (d), the burden shifted to Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns raised by criminal conduct may be mitigated if “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." AG ¶ 32(a). The first prong of this mitigating condition focuses on whether the criminal conduct was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.*

Applicant's criminal conduct was two years ago, but he was not sentenced until May 2009, and he did not complete his therapy until May 2010, the month before the hearing. He has completed only one year of his ten-year probation. Arguably, the 22 months between his criminal conduct and the hearing is "a significant period of time," but most of that time elapsed while the criminal proceedings were ongoing and he was undergoing therapy. His therapist made it clear that he is not cured, and the risk of recurrence depends on his willingness and ability to use the tools he was provided in therapy to cope with stress. Under these circumstances, insufficient time has passed to demonstrate reform or rehabilitation.

The second prong ("unusual circumstances") also is not established. Applicant was under considerable stress caused by his bipolar and suicidal spouse, and that situation is not likely to recur. However, other stressful situations may well occur in his life, and it is too soon to whether he will resort to unlawful stress relievers when they occur. I conclude AG ¶ 32(a) is not established.

Security concerns under this guideline also may be mitigated if "(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." AG ¶ 32(d). Applicant expressed remorse for his conduct by apologizing to the victim shortly after it happened, in his answer to the SOR, and at the hearing. He has continued to perform well at his job. He has become an active member of his synagogue. Nevertheless, for the reasons set out in the above discussion of AG ¶ 32(a), insufficient time has passed to show successful rehabilitation.

Applicant's registration as a sex offender, alleged in SOR ¶ 1.b, is a consequence of his criminal conduct in SOR ¶ 1.a and not an independent act raising security concerns. As such, SOR ¶ 1.b duplicates SOR ¶ 1.a. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Accordingly, I will resolve SOR ¶ 1.b in Applicant's favor.

## **Guideline D, Sexual Behavior**

The SOR cross-alleges Applicant's criminal conduct under this guideline. The security concern under this guideline is set out in AG ¶ 12:

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.

Applicant's conduct raises the following disqualifying conditions: 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"), and AG ¶ 13(c) ("sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress). AG ¶ 13(a) is raised because Applicant's conduct was a felony. AG ¶ 13(b) is raised because his behavior was compulsive, made him vulnerable to criminal prosecution, and was symptomatic of his impulse control disorder. AG ¶ 13(c) is raised because his behavior with his 13-year-old sister-in-law made him vulnerable to coercion, exploitation, or duress.

Security concerns raised by sexual behavior may be mitigated if "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" or "the behavior no longer serves as a basis for coercion, exploitation, or duress." AG ¶¶ 14(b) and (c). I conclude that AG ¶ 14(b) is not established for the reasons set out in the above discussion of AG ¶ 32(a) under Guideline J. However, I conclude that AG ¶ 14(c) is established because Applicant has disclosed his conduct to his supervisors, friends, his rabbi, and the members of his religious congregation, and his registration as a sex offender is a matter of public record. No other enumerated mitigating conditions are relevant.

## **Guideline E, Personal Conduct**

The SOR cross-alleges Applicant's criminal conduct under this guideline. The security concern is set out in AG ¶ 15: "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."

Applicant's criminal conduct raises the following disqualifying conditions under this guideline:

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

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.

Security concerns raised by personal conduct may be mitigated if “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.” AG ¶ 17(c). Although Applicant committed only one offense, I conclude that this mitigating condition is not established for the reasons set out in the above discussions of AG ¶¶ 14(b) and 32(a).

Security concerns also may be mitigated if “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.” AG ¶ 17(d). Although Applicant has acknowledged his behavior and obtained counseling, I conclude this mitigating condition is not established for the reasons set out in the above discussion of AG ¶¶ 14(b) and 32(a).

### **Whole-Person Concept**

Under the whole-person concept, an 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. 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 eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines J, D, and E in my whole-person analysis. Some of the



factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature adult. He served honorably in the U.S. Navy and has held a clearance for many years. He was sincere, candid, and remorseful at the hearing. He is respected by his supervisors, even though they are aware of his criminal record. On the other hand, the diagnosis of his therapist reflects that he suffers from an impulse control disorder and that he is not cured. Insufficient time has passed for him to demonstrate that he will deal with future stress in an appropriate and lawful manner.

After weighing the disqualifying and mitigating conditions under Guidelines J, D, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on his criminal conduct, sexual behavior, and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

|  |                   |
|--|-------------------|
| Paragraph 1, Guideline J (Criminal Conduct): | AGAINST APPLICANT |
| Subparagraph 1.a:                            | Against Applicant |
| Subparagraph 1.b:                            | For Applicant     |
| Paragraph 2, Guideline D (Sexual Behavior):  | AGAINST APPLICANT |
| Subparagraph 2.a:                            | Against Applicant |
| Paragraph 3, Guideline E (Personal Conduct): | AGAINST APPLICANT |
| Subparagraph 3.a:                            | Against Applicant |

### **Conclusion**

In light of all of the circumstances, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman  
Administrative Judge