



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



In the matter of:	)	
	)	
	)	ISCR Case No. 09-06406
SSN:	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Candace Garcia, Esquire, Department Counsel  
For Applicant: Francis J. Flanagan, Esquire

January 12, 2010

**Decision**

HOGAN, Erin C., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on May 11, 2009. In March 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline J, Criminal Conduct, and Guideline D, Sexual Behavior. (SOR is undated March 2010 date is an estimate.) 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) effective within the Department of Defense on September 1, 2006.

On April 14, 2010, Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on May 10, 2010. The case was assigned to another administrative judge on May 11, 2010. The case was transferred to me on July 26, 2010. On August 13, 2010, a Notice of Hearing was issued scheduling the hearing for September 14, 2010. On September 14, 2010, the hearing was cancelled due to unforeseen circumstances. The hearing was rescheduled for October 27, 2010, and was held on that date. The Government offered four exhibits,

which were admitted as Government Exhibits (Gov) 1 - 4 without objection. Applicant testified, called three witnesses, and offered three exhibits, which were admitted as Applicant Exhibits (AE) A – C without objection. The record was held open until November 10, 2010, to allow Applicant to submit additional documents. Applicant timely submitted a two-page document that was admitted as AE D without objection. Department Counsel's response to AE D is marked as Hearing Exhibit (HE) I. The transcript was received on November 4, 2010. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Findings of Fact**

In his Answer to the SOR, Applicant admits SOR ¶ 1.a and denies SOR ¶ 2.a.

Applicant is a 55-year-old employee of a Department of Defense contractor who seeks a security clearance. He has been employed with the same company since 1974. This is his first time applying for a security clearance. The highest level of education he completed is high school. He is married and has two children, a daughter, age 35, and son, age 31. (Tr at 21-25, 131; Gov 1)

In December 1988, Applicant was arrested and charged with multiple felony counts of First Degree Sexual Assault and First Degree Child Molestation. On January 22, 1990, Applicant pleaded nolo contendere to seven counts of Sexual Assault in the First Degree and seven counts of First Degree Child Molestation. He was sentenced to 25 years in jail. The jail sentence was suspended to 25 years of probation. Applicant's probation expires on January 21, 2015. (Tr. 38, 76; Gov 2; Gov 3; Gov 4)

Applicant molested his daughter on numerous occasions between the ages of four and 13. (Applicant testified that it was between the ages of 8 and 13. His wife testified that it was between the ages of 4 and 12.) During this timeframe, Applicant drank a lot of alcohol and smoked marijuana a couple times a week. The first time it happened, his daughter climbed into bed with him after his wife left for work. He touched his daughter's genitals and backside. He knew his actions were inappropriate and illegal. He continued to inappropriately touch his daughter when he had the opportunity. He estimated that this would happen between two to four times a week. Sometimes it happened while his wife was at home, but busy doing dishes, cooking dinner, or doing laundry. Sometimes he was under the influence of alcohol or marijuana. Other times he was sober. (Tr. 46 – 59; Gov 2)

Applicant had sexual intercourse with his daughter on one occasion when she was 13, and he described the event as follows:

Applicant: It wasn't intentional.

Department Counsel: What do you mean?

Applicant: It happened – I had put her in a position where it should not have happened, but she moved, and it happened, and I can't take that back.

Department Counsel: So, are not taking responsibility for –

Applicant: No, I am talking full responsibility for everything.

(Tr. 60 – 61)

Applicant testified that this incident “scared the hell out of him.” He told his wife the next evening after the incident happened. He arranged to see a psychiatrist the next day. (Tr. 60, 80-81) His wife testified that she first learned that Applicant had been inappropriately touching her daughter from her daughter. After her daughter told her about the inappropriate touching, she confronted Applicant. He admitted it and agreed to go to a counselor. They went to a counselor. The counselor was required by law to report abuse cases and Applicant was arrested on June 29, 1988. (Tr. 142 – 143; Gov 2 at 3; Gov 3; Gov 4)

After Applicant was arrested, he retained a lawyer who arranged for him to attend counseling sessions with a psychiatrist. Applicant, his family, and his daughter also attended individual and family counseling sessions. Applicant was ordered out of the family residence by the court system for a total of four years. Three years before the trial and one year after. He was allowed to see his family during family counseling sessions. The last year, he was given permission to visit the family residence during special occasions such as birthdays and holidays. The no-contact order was lifted after four years and Applicant moved back in with his family. His family saw that he had changed. He no longer drank excessively or used drugs. (Tr. 29-32, 64, 72-73, 77, 80-81)

On August 3, 1993, the center where Applicant and his family were receiving counseling discharged them from treatment because they completed all treatment goals. (AE D at 2)

Applicant is still on probation. He checks in with his probation officer once a month. He is not allowed to travel outside the state without permission. He recently received permission to travel outside the state for work-related purposes. (Tr. 37 – 38) Applicant's probation officer provided a letter stating that he has never committed a probation violation. The no-contact order with the victim was vacated by the court. His probation started on January 22, 1990, and ends on January 21, 2015. (AE C)

Applicant takes full responsibility for his actions. He believes that he has repaired his relationship with his family. His daughter is married and has an eight-year-old son. He and his wife see his daughter and her family on a regular basis. His son works with him. His son is in the National Guard and was deployed to Iraq. (Tr. 26 – 28, 33 – 34)

At the time of his arrest, an article was published in the local paper. Some of his coworkers posted a copy of the newspaper article on bulletin boards throughout the work place. His managers called him in to discuss the arrest. He continues to work for the same employer. (Tr. 34-35)

Applicant's manager wrote a letter on his behalf. He has known Applicant for 30 years. He states Applicant has been a model employee despite the problems that Applicant had in the early days of his career. Applicant excels in the performance of his assignments and is trusted by his coworkers. He does not believe Applicant is a security risk. (AE A)

Applicant's next door neighbor wrote a letter stating Applicant has done everything possible to rectify his mistakes and is a good neighbor. He turned his life around and is an outstanding citizen and good family man. He finds no reason Applicant should not be given a clearance. (AE B)

Applicant's supervisor over the past five years testified. He has no concerns about Applicant holding a security clearance. He was aware of Applicant's past criminal charges and that he pled guilty to some charges. He does not know the specifics of the charges, but is aware of the general nature of the charges. He states Applicant is a good employee. He recommends him for a security clearance despite his criminal history. Under cross-examination, he admitted that he would not allow his children to be entrusted to Applicant's care. (Tr. 108-117)

A friend of Applicant's testified that he has known Applicant for 30 years. He was a former employee at Applicant's company. He is aware that Applicant is applying for a security clearance. He has no concerns about Applicant being granted a security clearance. He is aware of the incident in 1988. He and Applicant discussed the incident, but did not go into detail. He is aware that the incident involved Applicant molesting his daughter. (Tr. 118 – 127)

Applicant's wife testified that she and Applicant have been married for 36 years. During the four years the family was separated, Applicant continued to provide financial support to the family. She was angry at Applicant for a long time. She no longer lives in the past. She lives in the present. Her family is doing well. Applicant has a good relationship with his children and his grandson. She would trust her husband to be alone with their grandson because she believes Applicant has learned his boundaries. She trusts her husband and is proud of him. He learned from his mistake and is trustworthy. (Tr. 131-141)

## **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 used 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.

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 to obtain 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "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

### Criminal Conduct

The security concern raised under the criminal conduct guideline is set forth in ¶ 30 of the Adjudicative Guidelines:

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.

There are several Criminal Conduct Disqualifying Conditions that apply to Applicant's case. AG ¶ 31(a) (a single serious crime or multiple lesser offenses) and AG ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted) apply. Applicant molested his daughter on numerous occasions beginning when she was 4 and ending when she was 13. He had sexual intercourse with his daughter on one occasion when she was 13. He committed serious criminal conduct on numerous occasions over a lengthy period.

AG ¶ 31(d) (individual is currently on parole or probation) applies because Applicant is still on probation. His probation does not end until January 21, 2015.

Since 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).

The following Criminal Conduct Mitigating Conditions are relevant to Applicant's case:

AG ¶ 32(a) (so much time has elapsed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment); and

AG ¶ 33(d) (there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement).

Applicant's supervisors attest to his good employment record. He has not been arrested since 1988. However, Applicant molested his daughter on numerous occasions over an eight-year period. While Applicant claims to have self-reported his conduct, he

did not do so until after being confronted by his wife. Applicant committed serious felonies. He remains on probation until 2015. While he and his wife appear to have moved on since the incident, the serious nature of the criminal conduct outweighs any progress Applicant has made after the authorities became aware of his offenses. Questions about Applicant's reliability, trustworthiness, or good judgment remain because of the serious nature of his criminal conduct.

#### **Guideline D, Sexual Behavior**

The security concern raised under the Sexual Behavior guideline is set forth in ¶12 of the Adjudicative Guidelines:

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 of the sexual orientation of the individual.

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

AG ¶ 13(d) (sexual behavior of a public nature and/or that reflects lack of discretion or judgment).

Applicant's sexual behavior with his underage daughter was criminal. It is unclear whether the jurisdiction that prosecuted Applicant's case was aware that Applicant had sexual intercourse with his daughter. However, his admitted conduct was criminal and considered to be serious felony offenses. Even though Applicant's conduct became known in 1988, he is still vulnerable to coercion, exploitation, and duress because of the sensitive nature of his past sexual behavior. While Applicant's manager and another friend testified that they were aware of the general nature of the charges, they were not aware of the specific incidents of conduct. Applicant's past sexual behavior was not of a public nature, but clearly shows a lack of discretion and judgment.

Concerns raised under Sexual Behavior can be mitigated. The following mitigating conditions potentially apply to Applicant's case:

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

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

I find neither mitigating condition applies. While it has been over 22 years since it was discovered that Applicant had been molesting his daughter, he molested his daughter approximately two to four times a week over a nine-year period. While Applicant and his family have learned to deal with the matter by undergoing counseling, his past conduct still casts doubt on his reliability, trustworthiness, and good judgment. The sensitive nature of Applicant's past sexual behavior still makes him vulnerable to coercion, exploitation, or duress regardless of the passage of time.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant's past criminal sexual behavior. I considered his favorable employment history and that he and his family appear to have resolved their issues through counseling. However, whatever favorable progress Applicant has made since 1988 does not outweigh the serious nature of the offenses committed on his daughter from age 4 to 13. While he did not receive jail time, Applicant remains on probation until 2015. Concerns about Applicant's judgment, trustworthiness, and reliability remain based on the serious nature of the offenses which occurred on numerous occasions over a lengthy period of time. Security concerns are not mitigated.



## **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 J:	AGAINST APPLICANT
Subparagraph 2.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.

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ERIN C. HOGAN  
Administrative Judge