



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



In the matter of:	)	
	)	
XXXXXXXXXX, XXXXX	)	ISCR Case No. 09-07229
SSN: XXX-XX-XXXX	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Kathryn D. MacKinnon, Esq., Deputy Chief Department Counsel  
For Applicant: *Pro se*

November 19, 2010

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guidelines D (sexual behavior) and E (personal conduct). Clearance is denied.

**Statement of the Case**

Applicant submitted his Questionnaire for National Security Positions (SF-86) on October 25, 2007. On March 24, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines D (sexual behavior) and E (personal conduct). 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.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On March 30, 2010, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated June 30, 2010, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. The DOHA transmittal letter is dated June 30, 2010, and Applicant received the FORM on July 7, 2010. The DOHA transmittal letter informed Applicant that he had 30 days after Applicant's receipt to submit additional information. Applicant submitted information within the 30-day time period after receiving a copy of the FORM.

### **Findings of Fact**

Applicant admitted all of the SOR allegations. His admissions are incorporated herein as findings of fact. I make the following additional findings of fact:

#### **Background Information**

Applicant is a 49-year-old employee of a defense contractor.<sup>1</sup> He seeks a security clearance in conjunction with his employment. He held a high-level security clearance from approximately 1986 until August 2006 at which time it was revoked by Another Government Agency (AGA), discussed *infra*. (Items 4 and 6.)

Applicant was married to his first wife from August 1983 to a date uncertain.<sup>2</sup> He was married to his second wife from June 2000 to June 2006. Those marriages ended by divorce. He married for the third time in October 2007. His SF-86 lists one child, a 21-year-old daughter.

Applicant's SF-86 does not provide any information regarding his educational background. He lists U.S. Army service from June 1985 to June 1991 as an "officer" and his status as "active reserve."

#### **Sexual Behavior**

In July 2005, Applicant completed an SF-86 for AGA, and in March 2006 that AGA submitted him for access to a higher security level. In May 2006, Applicant was interviewed regarding responses he made on his SF-86. The responses in question centered on remarks in his SF-86 that noted there were rumors at his previous place of

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<sup>1</sup> All background information pertaining to the Applicant was derived from his October 2007 SF-86, unless otherwise stated.

<sup>2</sup> Applicant's October 2007 SF-86 did not list the divorce date from his first wife.

employment regarding his loss of access and that further information about that event was available through proper channels.

During that May 2006 interview, Applicant revealed that in late 2004, he videotaped his 14-year-old stepdaughter for his own sexual arousal while she was taking a shower. He recounted how he surreptitiously placed a video camera in the bathroom just before she entered the bathroom and removed it after she left the bathroom. He further admitted that he masturbated while watching the videotape and later hid the tape. He claimed his obsession with his stepdaughter began around the time she was 12 years old when her body began to develop. (SOR ¶¶ 1.a. -1.c., Response to SOR).

### **Personal Conduct**

During that May 2006 interview, discussed *supra*, Applicant admitted that he fabricated earlier statements to a security representative that he had thoughts of placing bombs in buildings as an attempt to divert attention from the issue surrounding his stepdaughter. (SOR ¶ 2.a., Response to SOR.) In August 2006, the AGA revoked Applicant's program access for sexual behavior and personal conduct concerns. (SOR ¶ 2.b.) Applicant also revealed during this interview that the information regarding his stepdaughter was forwarded to his state child protection office and local sheriff's office. The sheriff's office confiscated his computer and video equipment and returned the items once their investigation was closed. However, the state child protection office held a separate hearing and found probable cause for child abuse. (SOR ¶ 2.e.)

In October 2007, he completed an SF-86 for a DoD clearance. He was interviewed on two separate occasions in November 2008 and January 2009. During the second interview, he submitted a signed, sworn statement. During both interviews, Applicant was asked to provide clarification and the circumstances surrounding his access denial and security clearance revocation in August 2006. On both occasions Applicant refused to disclose material facts to the investigator and stated that the issues surrounding this event were in the past, and he chose not to revisit these events further. (SOR ¶¶ 2.c. and 2.d.) Applicant later explained that he was under the impression the facts surrounding the incident with his stepdaughter were well known to DoD. He further stated that he was uncomfortable when discussing facts he believed were well documented while in his place of business. This discomfort caused him to be less than forthcoming. He added that it was never his intent to hinder the investigative process and offered his sincere apology for that perception. (Response to FORM.)

Applicant stated in his January 2009 interview that he sought professional help from approximately 2005 to 2007 and had provided his medical and mental health counselor records during his previous background investigation with AGA. (Item 4.) The FORM does not contain any of those records. He also stated in that interview that his family and spouse are aware of the details surrounding the denial of his August 2006 access denial. His co-workers are aware that his clearance had been revoked and stated that he cannot be coerced in any way as a result of past actions. (Item 4.)

## 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 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.

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

### Guideline D, Sexual Behavior

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

The Guideline lists two applicable disqualifying conditions under AG ¶ 13:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted; and
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

The Government established through Applicant's admissions and evidence presented the allegations in SOR ¶¶ 1.a. – 1.c. Under Guideline D, the evidence supports application of sexual behavior disqualifying conditions AG ¶¶ 13(a) and 13(c). The evidence further supports that the acts occurred as alleged and clearly shows that Applicant's conduct lacked discretion or judgment. Additionally, there is no evidence in the FORM from a medical professional that supports Applicant's assertion that this behavior is behind him and that he is not vulnerable to coercion, exploitation, or duress.

The Guideline lists four mitigating conditions under AG ¶ 14:

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;
- (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;
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress; and
- (d) the sexual behavior is strictly private, consensual, and discreet.

The sexual behavior spanned a period of at least two years from 2002 to 2004 while Applicant was a mature adult. His conduct violated the trust of his spouse and stepdaughter. It casts doubt on his current reliability, trustworthiness, and good judgment. The behavior was non-consensual and serves as a basis for coercion, exploitation, and duress. Applicant did not present evidence sufficient to warrant full application of any sexual behavior mitigating conditions.

### **Guideline E, Personal Conduct**

The security concern relating to the Guideline for personal conduct 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. 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 Guideline lists two applicable disqualifying conditions under AG ¶ 16:

- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and
- (e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, . . . .

The Government established through Applicant's admissions and evidence presented the allegations in SOR ¶¶ 2.a. – 2.e. His concealment or omission of relevant facts throughout the background investigation process, questionable judgment, and conduct as a whole, establishes AG ¶¶ 16(a) and 16(e)(1). Apart from his assertions, there is no evidence in the record that his past conduct and lack of judgment could not subject him to vulnerability or exploitation. His conduct is extremely embarrassing and public disclosure would affect his personal, professional, or community standing.

The Guideline lists seven mitigating conditions under AG ¶ 17:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made

aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

I considered all Guideline E mitigating conditions and conclude that none fully apply. Applicant's conduct spans a significant period of time. Furthermore there is no evidence in the FORM, apart from his assertions, that he has sought professional help to address the sexual behavior concerns. His favorable information is not sufficient to fully apply any of the mitigating conditions. For the reasons outlined under the discussions of Guidelines D and E, I conclude Applicant's behavior shows questionable judgment, lack of reliability, and untrustworthiness.

To conclude, Applicant presented little or no evidence to explain, extenuate, or mitigate the sexual behavior and personal conduct security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept was given due consideration and that analysis does not support a favorable decision.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole-person factors"<sup>3</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant

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<sup>3</sup> See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

has not mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

### **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 D:	AGAINST APPLICANT
Subparagraphs 1.a. – 1.c.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Subparagraph 2.b.:	For Applicant
Subparagraphs 2.c. – 2.d.:	Against Applicant
Subparagraph 2.e.:	For 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. Clearance is denied.

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ROBERT J. TUIDER  
Administrative Judge