



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



In the matter of: )  
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----- ) ISCR Case No. 10-00195  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Melvin A. Howry, Esq., Department Counsel

For Applicant: Joseph Testan, Esq.

August 25, 2011

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**DECISION**

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ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on May 18, 2009. (Government Exhibit 1.) On October 8, 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 adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on October 26, 2010, and requested a hearing. Department Counsel was prepared to proceed on December 28, 2010. This case was assigned to another administrative judge on January 4, 2011. It was reassigned to me on January 18, 2011. DOHA issued notices of hearing on January 4 and January 5, 2011. I convened the hearing as scheduled on January 21, 2011. The Government

offered Government Exhibits 1 through 4, which were admitted into evidence.<sup>1</sup> Applicant testified, called one additional witness, and submitted Applicant Exhibits A through E, which were admitted without objection. DOHA received the transcript (Tr) of the hearing on February 8, 2011. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

### **Findings of Fact**

Applicant is 30 and single. He is employed by a defense contractor and seeks to retain a security clearance in connection with his employment.

#### **Paragraph 1 (Guideline D, Sexual Behavior)**

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in sexual behavior that is illegal, reflects a lack of judgment or discretion, or may subject Applicant to undue influence or coercion.

#### **Paragraph 2 (Guideline E, Personal Conduct)**

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in conduct which displays questionable judgment, dishonesty, or unwillingness to comply with rules and regulations.

The allegations in Paragraphs 1 and 2 of the SOR involve the same conduct. Accordingly, they will be discussed together. Applicant admitted all of the allegations in the SOR.

Between the years 1994 and 1997, when Applicant was in high school, he engaged in acts of voyeurism twice. During the same period, he also twice brushed his hand against the buttocks of unsuspecting female schoolmates. (Tr at 50-51, 71-74.)

Applicant also was involved in sexual behavior involving women's underwear. Applicant described his conduct:

I would go into the laundry facility after seeing a cute girl or a girl I knew from the apartment complex. Go in there. Walk in there, take her underwear or bra out of her laundry basket, pick it up, look at it, touch it. Fantasize about it. Put it back. It was probably less than a minute sitting there with it. Then I would go back to my apartment and gratify myself to the mental image of that girl wearing it. I never took the underwear, but except out of the - - it never left the laundry facility. (Tr at 47.)

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<sup>1</sup>Applicant's counsel objected to the admission of certain parts of Government Exhibit 2. The objection was overruled. (Tr at 13-22.)

Applicant would also go into his roommates' bedrooms and look at their girlfriend's underwear. (Tr at 49, 64-66, 71.) Applicant was adamant in stating that he never stole underwear, or took it back to his room, as alleged in Government Exhibit 2.<sup>2</sup> This testimony was credible. (Tr at 47-48, 64; Government Exhibit 2 at 6-9, 21-25.)

This conduct occurred about three times before 1999; 12 to 20 times between 1999 and 2003; and five times between 2003 and 2008. The last incident occurred in about September 2008. (Tr at 48-50.) Applicant testified that he does not have the desire to engage in this conduct again and his confident that it shall not recur. (Tr at 63, 80.)

Applicant was processed for a clearance by another Government agency (Agency) in the fall of 2008. Based on the allegations in the SOR, the Agency denied Applicant access on December 22, 2008. (Government Exhibit 2.) Applicant appealed that decision and, on March 18, 2009, Applicant was informed that he would "be afforded the opportunity to continue process for access." (Government Exhibit 2 at 26.) (See *also* Applicant Exhibit B.)

When he received the denial letter from the Agency, Applicant stated, "I realized that I needed some accountability in my life to be able to rid myself of these unwanted behaviors." (Tr at 52.) To do this Applicant states:

I confessed my sexual addiction to both my best friend and my pastor, among others. By having my behavior out in the open, I am able to have accountability in my actions. I can call my friend or pastor anytime I need to talk and discuss my temptations and how I can overcome them. They also continually check in with me and ask how I'm doing. (Government Exhibit 3 at 4.)

Applicant's pastor, the pastor's son, and a third member of this "accountability group" submitted letters on Applicant's behalf. All three of the parties state that they have knowledge of Applicant's conduct, that he is open and honest about his situation, and that they believe the conduct is a thing of the past. (Government Exhibit 3 at 6; Applicant Exhibit E at 4, 5; Tr at 52-55, 74.)

Applicant also has been attending a support group at his church for men struggling with what they describe as "sexual sin." This group meets weekly and Applicant has been attending it regularly for two years. (Tr at 56-58, 81-83.) The community pastor of the support group submitted a letter on Applicant's behalf. He states that Applicant, "Maintained a healthy distance from past struggles and continues to be admired by myself and others who have shared group with him. I believe [Applicant] to be a trustworthy man in his personal life and I have no doubt that his personal ethics transfer to his professional career." (Applicant Exhibit D.)

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<sup>2</sup>Applicant's counsel objected to my considering these statements. As stated, his objection was overruled, and the documents have been examined by me and given the appropriate weight.

Applicant also began individual counseling with a psychologist in January 2011. The psychologist states, “[Applicant] has accepted responsibility for his past behavior and has stated that he has a desire to work towards the goal of reaching his occupational aspirations.” (Applicant Exhibit A.)

Applicant has told many people about his conduct. These include his parents, his manager, several friends and their spouses, including his pastor, and the members of his support group. One of the friends testified, and others of both sexes submitted letters in support of the Applicant, which confirm their knowledge of his activities. (Applicant Exhibits C, D and E at 2-6; Tr at 25-36.)

## **Mitigation**

Applicant submitted letters of recommendation from work associates, including his past supervisor. That person, who supervised Applicant for two years, states, “I can say without reservation that [Applicant] excelled at every task he was assigned, consistently was rated above his peer group and always showed exuberance for the job that made selecting him as a team leader a natural choice.” (Applicant Exhibit C.)

A work associate who has known Applicant for eight years also submitted a letter on Applicant’s behalf. He says, “I believe that [Applicant] has the character, technical abilities, and work ethic that make him a valuable asset to a classified program, so I would recommend [Applicant] for a security clearance.” (Applicant Exhibit E at 1.)

As stated earlier, Applicant submitted letters of recommendation from friends, who he had told about his conduct. His friend, the pastor’s son, states, “He [Applicant] is never satisfied with mediocrity, and he consistently works to better himself. [Applicant] has been candid with his strengths and weaknesses. He knows what he is capable of, and relentlessly pursues his potential.” (Applicant Exhibit E at 4.) The other member of the accountability group states, “[Applicant] has exhibited a stand-up character and traits that make me feel blessed to have him as a friend.” (Applicant Exhibit E at 5.)

## **Policies**

Security clearance decisions are not made in a vacuum. When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used as appropriate 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, “Any 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 for 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Paragraph 1 (Guideline D, Sexual Behavior)**

The security concern for Sexual Behavior 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. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

The Government has presented enough evidence to meet their burden of proof. The following disqualifying conditions are applicable based on this finding:

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

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;

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

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

Under the particular facts of this case, the following mitigating conditions have application:

14.b. the sexual behavior happened so long ago, so infrequently, or under such circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

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

## **Paragraph 2 (Guideline E, Personal Conduct)**

The security concern 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.

Regarding all the allegations, the following Disqualifying Conditions are applicable:

16.c. credible adverse information in several adjudicative 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;

16.d. credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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

16.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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Regarding all the allegations, the following Mitigating Conditions are applicable:

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.

Applicant admitted that his sexual conduct showed a lack of discretion and judgment. His conduct in high school happened at least ten years ago and has minimal security significance.

Applicant's conduct with regards to his fondling women's underwear, occasionally in public places, and then masturbating in private afterwards showed poor judgment. However, it is to his benefit that, when he was initially denied access by the Agency due to this conduct, he engaged in several steps to help him stop from engaging in the conduct in the future. He has worked with his pastor, with the church as a whole through a support group, and now with a psychologist. The behavior last occurred more than two years before the record closed and Applicant has compellingly showed that it will not recur.

In addition, Applicant has told many people, including his former supervisor and some of the women involved, about his conduct. Therefore, he is no longer subject to coercion about the conduct.<sup>3</sup>

After reviewing all of the evidence, Applicant has mitigated the security significance of his conduct. Paragraphs 1 and 2 are found for Applicant.

### **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 relevant circumstances. 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. 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.

I considered the potentially disqualifying and mitigating conditions in light of all the relevant facts and circumstances surrounding this case. I specifically find that the Applicant has mitigated the Government's security concerns under the whole-person concept, independently of Guidelines D and E.

Applicant did not meet the standard expected of individuals who hold security clearances when he engaged in the conduct set forth in the SOR. It was, at best, extremely immature. However, his conduct since September 2008 has been exemplary. At every step along the way he has been open about the conduct with the Agency, and with DOHA. He has acknowledged his wrongdoing and promises not to engage in the conduct again. DOHA proceedings are not designed to punish any particular applicant for past conduct, but to make a reasoned decision whether, under all the circumstances, he or she can be trusted with the nation's secrets. Applicant has shown many behavioral changes, which show that he is trustworthy. Under the particular facts of this case, I find that Applicant has shown the presence of rehabilitation and other permanent behavior changes (AG ¶ 2(a)(6)); there is little to no potential for pressure, coercion,

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<sup>3</sup>While not determinative, it is noted that the Agency, upon appeal, allowed Applicant to resume processing for access.



exploitation, or duress (AG ¶ 2(a)(8)); and that there is no likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his alleged Sexual Behavior and Personal Conduct. On balance, I conclude that Applicant has successfully overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports granting his request for a security clearance.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline D:	FOR APPLICANT
Subparagraph 1.a.:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a.:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS  
Administrative Judge