



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



In the matter of:	)	
	)	
	)	ISCR Case No. 10-01260
SSN:	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Pamela Benson, Esq., Department Counsel  
For Applicant: *Pro se*

November 24, 2010

**Decision**

LAZZARO, Henry, Administrative Judge

Applicant was convicted of sexual misconduct in September 2009. He is currently serving a two-year probationary sentence. He failed to mitigate the security concern that arises from his criminal conduct. Clearance is denied.

On August 2, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.<sup>1</sup> The SOR alleges a security concern under Guideline J (criminal conduct). Applicant submitted a response to the SOR that was received by DOHA on August 23, 2010. He admitted the sole SOR allegation and requested a hearing.

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<sup>1</sup> This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended (Directive), and adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

The case was assigned to me on September 15, 2010. A notice of hearing was issued on September 21, 2010, scheduling the hearing for October 6, 2010.<sup>2</sup> The hearing was conducted as scheduled. The government submitted four documentary exhibits that were marked as Government Exhibits (GE) 1-4 and admitted into the record without objection. Applicant testified and submitted two documents that were marked as Applicant Exhibits (AE) 1 and 2. Department Counsel's objection to AE 1 was overruled and it was admitted into the record. AE 2 was admitted into the record without objection. The transcript was received on October 20, 2010.

### **Findings of Fact**

Applicant's admission to the SOR allegation is incorporated herein. In addition, after a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is 32 years old. He has been employed by a defense contractor since June 2004. He currently works as a field engineer. Applicant served in the U. S. Army from July 1996 until July 2000, when he was honorably discharged. He has possessed a security clearance since at least July 2006, and no prior action has been taken to revoke or downgrade that clearance for adverse reasons.

Applicant has been married since May 2007. He has a 17-month-old child from this marriage. He also has three step-children, ages 15, 12, and 10, who reside with him and his wife.

Applicant was arrested on July 7, 2008, on warrants charging him with forcible rape and forcible sodomy alleged to have occurred on May 24, 2008. He pled guilty to a reduced charge of sexual misconduct, a misdemeanor, in September 2009, and was sentenced to 24 months probation and 12 months incarceration (suspended). His probation has been modified so that he no longer has to report to a probation officer. However, he is required to report in writing to the probation department and he is scheduled to remain on probation until September 2011.

Applicant's version of the events that led to his conviction is that he, his wife, and the victim visited several bars where they all consumed alcohol. They returned to the victim's residence, she went to her room, and he and his wife went to the guest room. Applicant and his wife decided they should engage in three-way sex with the victim and he entered the victim's room to begin the process. The victim agreed to engage in sex with him and he removed her clothing and placed his mouth on her breasts. However, when he began to move down to perform oral sex on her she became startled and began crying. He then left and his wife entered the room and laid with the victim. He and his wife left the victim's residence about 6:00 AM.

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<sup>2</sup> Applicant acknowledged on the record that he had agreed upon the date of the hearing with Department Counsel sometime before the notice of hearing was issued and that he was willing to waive any technical defect that might exist based on his not having received the formal notice 15 days prior to the hearing. (Tr. 14-15)

The victim's version is that after she, Applicant, and Applicant's wife had been out drinking they returned to her residence where she went to her room and fell asleep. Applicant and his wife had gone to the guest bedroom where they were to spend the night. She awoke to find Applicant on top of her. She felt that she was being penetrated by Applicant and believed that he was having sexual intercourse with her. She began to scream and he left the room. Applicant and his wife left her residence at about 6:00 AM at which time she called and reported the incident to a friend.

The victim's friend persuaded her to go to a hospital and report the incident to the police. The police were called and a report was prepared. The victim consented to submitting to the preparation of a rape kit which included vaginal and rectal swabs. She also consented to the police searching and securing physical evidence from her residence. DNA tests were performed that conclusively established the presence of Applicant's DNA on the victim's breasts and panties.

On June 25, 2008, the police had the victim make a telephone call to Applicant which they recorded. (GE 3) During that call, Applicant made several inculpatory statements, including: "Everything in the world told me not to do it, to leave that alone," "I did not have sex with you, the only thing I did was go down on you and I only got started," and "Whether you were wide awake or asleep or what, I shouldn't have done that."

According to a pleading submitted by Applicant (AE 1), the victim had made a similar allegation against another person in 2005. It appears that was the motivation for the prosecutor to reduce the charges against Applicant to a misdemeanor and to allow him to plead guilty to the reduced charge pursuant to an Allford Plea.<sup>3</sup>

## **Policies**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the disqualifying conditions and mitigating conditions for each applicable guideline. Each clearance decision must be a fair and impartial decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Guideline J (criminal conduct) with its disqualifying and mitigating conditions is most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an

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<sup>3</sup> In an Allford Plea, the defendant does not admit he/she committed the offense, does admit the government has sufficient evidence to convict him/her of the offense, and acknowledges he/she is receiving a substantial benefit by being allowed to plead guilty.

applicant.<sup>4</sup> The Government has the burden of proving controverted facts.<sup>5</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence,<sup>6</sup> although the Government is required to present substantial evidence to meet its burden of proof.<sup>7</sup> “Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.”<sup>8</sup> Once the Government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>9</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>10</sup>

No one has a right to a security clearance<sup>11</sup> and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>12</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>13</sup>

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## Analysis

### Guideline J, Criminal Conduct

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 and the victim agree that he entered her bedroom after they had been out, together with his wife, and consumed alcohol. He claims she agreed to engage in sexual conduct with him. She denied that the conduct was consensual and instead told police that she awoke to find Applicant engaging in non-consensual sexual activity with her. Considering her prompt report to a friend, transport to a hospital, report and compliance with police procedures, and Applicant’s inculpatory statements during a recorded phone call, Applicant’s claim that the sexual activity was consensual is not credible.

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<sup>4</sup> ISCR Case No. 96-0277 (July 11, 1997) at 2.

<sup>5</sup> ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, Item E3.1.14.

<sup>6</sup> *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

<sup>7</sup> ISCR Case No. 01-20700 (December 19, 2002) at 3 (citations omitted).

<sup>8</sup> ISCR Case No. 98-0761 (December 27, 1999) at 2.

<sup>9</sup> ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, Item E3.1.15.

<sup>10</sup> ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, Item E3.1.15.

<sup>11</sup> *Egan*, 484 U.S. at 528, 531.

<sup>12</sup> *Id.* at 531.

<sup>13</sup> *Egan*, Executive Order 10865, and the Directive.

Applicant was charged with rape and forcible sodomy. He was convicted, pursuant to an Alford Plea, of sexual misconduct, a misdemeanor, in September 2009. He is currently serving a sentence of probation that is not scheduled to terminate until September 2011. Disqualifying Conditions (DC) 31(a): *a single serious crime or multiple lesser offenses*; DC31(b): *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*; and DC 31(d): *individual is currently on parole or probation* apply.

Whether Applicant thought the victim would agree to have consensual sex with him and his wife or not, the evidence establishes that he engaged in sexual conduct with the victim while she was asleep and most likely under the influence of alcohol. Applicant's version of the events is unbelievable and his testimony at the hearing about what occurred was false. I have considered all mitigating conditions and conclude that none apply.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant failed to mitigate the criminal conduct security concern. He has not overcome the case against him nor satisfied his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance. Guideline J is decided against Applicant.

### **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

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Henry Lazzaro  
Administrative Judge

