



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



In the matter of: )  
)  
) ISCR Case No. 10-03291  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Julie R. Mendez, Esq., Department Counsel  
For Applicant: *Pro se*

10/25/2012

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate sexual behavior and personal conduct security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On July 20, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D (sexual behavior), J (criminal conduct), and E (personal conduct). The action was taken under Executive Order (EO) 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 August 13, 2012, and requested a hearing before an administrative judge. The case was assigned to me on September 19, 2012. DOHA issued a notice of hearing on September 24, 2012, scheduling the hearing for October 16, 2012. The hearing was convened as scheduled. Government Exhibits (GE)

1 through 7 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibit (AE) A, which was admitted without objection. DOHA received the hearing transcript (Tr.) on October 23, 2012.

### **Procedural Ruling**

Upon motion by Department Counsel and without objection by Applicant, the SOR was amended by striking the allegation under Guideline J and by renumbering paragraph 3 as paragraph 2.

### **Findings of Fact**

Applicant is a 52-year-old engineer employed by a defense contractor. He has worked in the defense industry since 1984, and he has held a security clearance almost the entire time. He has worked for his current employer since 2009. He has a master's degree. He is married with three children, ages 22, 21, and 16.<sup>1</sup>

Applicant was administered a polygraph and was interviewed by an investigator on behalf of another government agency in October 2007. The interviewer reported that Applicant told him about inappropriate conduct, including the following conduct with his infant sons:

- Subject reported when his sons were very young, from birth (1990/1991) to approximately two and a half years old, Subject would take baths and showers with his sons, and sleep naked with his sons in the bed. In his sleep or drowsiness (occasionally in the absence of drowsiness)[,] Subject would sometimes roll over and feel the children's warm bodies next to his, this caused him to become aroused.
  - After taking a bath or shower, Subject would play naked on the bed with his sons before getting dressed. Subject stated, the boys would occasionally brush his genitals or grab his penis and Subject became sexually aroused, occasionally getting a partial erection. Subject expressed his feeling at the time by saying "it feels too good to be right." Subject stated it bothers him that he let his children touch him, and he "could see that if this went on" it would be bad.
  - When Subject's son was a year old, Subject would bite his son all over while playing. On one occasion, Subject's son grabbed Subject's penis and placed it in his mouth, pretending to bite it. Subject stated it was in his mouth for five seconds, but it seemed like forever. Subject acknowledged he waited longer than he should have to remove his penis and move his son away from his genitals. Subject stated he enjoyed the act and was aroused by it.

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<sup>1</sup> Tr. at 23, 29-30, 47-50; GE 1-3; AE A.

- Subject initially denied having masturbated after becoming aroused from playing with his sons, but later admitted he probably did.
- Subject reported this behavior bothered him and it was not right, so he stopped putting himself in a position that could pose a problem for him. Subject started wearing shorts to bed when his youngest son was born in 1996.<sup>2</sup>

The interviewer also reported that Applicant discussed viewing pornography on the Internet:

- Subject viewed underage pornography once a month while searching for adult pornography, for two years prior to testing, with the last instance occurring in July 2007.
  - Subject explained the underage pornography was not his primary focus. He would search the internet for pornographic images of adult women using the titles “taboo” and “incest,” just to see what was out there. Subject claimed he only viewed thumbnail images because a fee was required to view larger images.
  - Subject explained the images included mostly nude girls, but some nude boys, occasionally involved in sexual acts. Subject stated the individuals “looked a little young.” He described the girls as being underdeveloped, small breasts and little to no pubic hair. Subject described himself as an “equal opportunity” pornography viewer. Subject occasionally masturbated after viewing these images.<sup>3</sup>

The interviewer further reported several other incidents of questionable behavior discussed by Applicant. Some of the incidents constituted minor criminal activity.<sup>4</sup>

In April 2009, the agency revoked Applicant’s access to classified information. By letter dated May 7, 2009, the agency notified Applicant that the revocation was based upon the sexual conduct discussed above and the other incidents of questionable behavior, under the criminal conduct and personal conduct guidelines.<sup>5</sup>

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<sup>2</sup> GE 3.

<sup>3</sup> GE 3.

<sup>4</sup> GE 3. The other incidents of questionable behavior were not alleged in the SOR, and they will not be used for disqualification purposes. They may be considered when assessing Applicant’s credibility.

<sup>5</sup> Tr. at 29-30, 62-63; GE 1-7. Applicant’s appeal of the revocation was denied in 2011. I have made an independent appraisal of the case and I have not considered the other’s agency’s revocation of Applicant’s clearance for any purpose other than Applicant’s knowledge of the revocation when he discussed it with an Office of Personnel Management (OPM) investigator.

Applicant denied the incidents with his children happened the way it was reported by the interviewer in 2007. He wrote in his May 2009 letter to the other agency seeking a review of the revocation of his security clearance:

Specific responses to self-reported adverse statements in the 07 May 2009 letter of notification-

Statement: "...you reported contact with your sons that caused you to become sexually aroused..."

Response:

This statement was made to acknowledge a concern I had about a few limited incidents with my older two sons, born 1990 and 1991. Around 1992, when my sons were 2 and 1 years old, we did on a few occasions take showers together as that was the quickest and easiest way to get them cleaned up. There were instances that one of my sons would reach and grab my penis and I would tell them to stop and continue on with the cleaning. I did not want to create an overly focused situation where they would continue to think it was funny or that they could do this activity to get my attention or get a reaction out of me. At no time did I allow my son to have sexual contact with me. The primary area of concern I had when I reported this situation was that I should have exercised better judgment and not even allowed a situation where my sons could place me in such a compromising position. The key incident occurred in 1992 when we all took a shower and laid on the bed nude with the television on. I was tired and dozed off after a few minutes. When I awoke I noticed that my younger son had rolled on top of me and put his mouth near or on my penis. This absolutely horrified me, and I was very upset by the circumstances. When I reported I lingered, it was because I wasn't paying attention while lightly napping. I was fully honest, despite my humiliation, and reported it probably felt good even if I didn't enjoy it as it was occurring while I was sleeping. As soon as I understood what was going on, I immediately got up, dressed, and got the boys dressed. This particular incident shocked, disgusted, and disappointed me to my deepest core. Although it was a momentary accident and happened only that one time, I have always been ashamed that it happened at all. After that incident, I never showered or was in the nude with my boys again. From that point on, I washed my older boys in the bathtub and never allowed a repeat of that type of circumstance. My third son, born in 1996, has never been in the nude with me. In summary, my statement that I "enjoyed this incident and were aroused by it" was made because I couldn't fully honestly say at the time of the actual incident, what I was thinking or feeling physically. As soon as I understood what was happening, I ended the situation and have taken firm and corrective action to ensure this event from 17 years ago never happened again. I achieved

no pleasure from the event and have taken serious steps to avoid any compromising situations even remotely similar to this.<sup>6</sup>

In his response to the SOR, Applicant essentially denied all the misconduct that he discussed with the interviewer in 2007:

[M]y self-reported negative statements were just completely fabricated only as a result of pressures of the interview and my then inability to focus on the “big picture.” During my interview, I experienced severe panic attacks that caused me to ramble and spew an incoherent mix of minor thoughts, concerns, guilt, fears, and totally imagined situations that most people without this disorder could easily ignore or suppress under such a stressful situation. All of these statements I made were under extreme duress, solely related to my panic condition, and did not reflect any reality or truth. To be clear – at no point did I ever commit any major or minor crime, show any serious lack of judgment, or engage in any irresponsible behavior that your organization is charging me with.

Applicant’s testimony about the incidents with his sons is mostly consistent with his 2009 letter.<sup>7</sup> He stated that if there was any sexual contact, it was unintentional:

ADMINISTRATIVE JUDGE: So your testimony today is that your child never had his mouth -- your penis was never in or touched his mouth?

APPLICANT: I don’t know that. If it did, it was totally accidental. It was unintentional. I can’t say yes or no. That’s always been a fear.<sup>8</sup>

Applicant emphasized that he was emotionally fragile at the time of the 2007 interview. He had high blood pressure, and he was 45 pounds heavier than he is today. He father was diagnosed with Alzheimer’s disease, and his mother was undergoing surgery. His children were in high school, and his wife just lost her job. He stated that all these factors contributed to his panic attack, which caused him to admit things that were not true.<sup>9</sup>

Determining precisely what occurred between Applicant and his children in the early 1990s is difficult, but I find that it was more than he admitted to in his 2009 letter and at his hearing. Applicant remains deeply troubled by the event. It is unlikely that what he described, i.e., an inadvertent event with at most incidental contact, would cause such a significant enduring trauma. After considering all the evidence, I conclude

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<sup>6</sup> GE 3.

<sup>7</sup> Tr. at 36-38, 62, 66.

<sup>8</sup> Tr. at 66.

<sup>9</sup> Tr. at 23-34, 50-62; Applicant’s response to SOR; AE A.

there was contact between Applicant's penis and his son's mouth. Only Applicant knows the extent of that contact.

Applicant has consistently denied intentionally seeking or receiving child pornography<sup>10</sup> when he searched for adult material on the Internet. He used a common search engine to link him to the material, and he believes it is unlikely that any of the thumbnail images he viewed actually contained child pornography.<sup>11</sup>

Applicant submitted a Questionnaire for National Security Positions (SF 86) for his Department of Defense clearance on June 8, 2009. He listed that his clearance was revoked by the other agency in April 2009. The SF 86 did not request him to list the basis of the revocation.<sup>12</sup>

Applicant was interviewed by an OPM investigator for his Department of Defense clearance on August 17, 2009. He discussed the revocation of his clearance by the other agency. He stated that it was based on panic-driven over-reporting during his polygraph interview. He stated that the issues and concerns that he volunteered during the interview were not factual. He stated the issues leading to the revocation were the viewing of underage pornography and the other incidents of questionable behavior. He never discussed the inappropriate contact with his children, and he stated that there was no other reason for the revocation of his clearance.<sup>13</sup>

Applicant denied attempting to mislead the OPM investigator. He stated that he knew the information about the inappropriate contact with his children was available to the Department of Defense.<sup>14</sup> Applicant's reluctance to discuss the behavior involving his children may have been due to his discomfort and embarrassment about the conduct vice an attempt to keep the information from the Department of Defense. Nonetheless, no matter the motive, his statement that there was no other reason for the revocation of his clearance was false, and Applicant knew it was false when he made it.

Applicant responded to DOHA interrogatories in May 2010. He provided the documentation used by the other government agency to revoke his clearance.<sup>15</sup>

Applicant's background investigation revealed that he does not have a criminal record; he has no security violations; and he has not been the subject of adverse

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<sup>10</sup> The SOR alleges that Applicant viewed "underage pornography." That term is not defined. For the purpose of this decision, I will use the definitions of child pornography contained in 18 U.S.C. §§ 2252, 2252A, and 2256.

<sup>11</sup> Tr. at 34-36, 63-66, 79-82; Applicant's response to SOR; GE 3, 7.

<sup>12</sup> GE 1.

<sup>13</sup> GE 7.

<sup>14</sup> Tr. at 40-47, 66-71; Applicant's response to SOR.

<sup>15</sup> GE 3.

disciplinary actions. He is highly regarded by co-workers, colleagues, and neighbors, who praised his excellent job performance, intelligence, professionalism, dependability, reliability, trustworthiness, honesty, stability, and integrity.<sup>16</sup>

## **Policies**

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 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, administrative judges apply the guidelines 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."

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 the 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 safeguard 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 EO 10865 provides that adverse 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).

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<sup>16</sup> GE 3.

## Analysis

### 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 can 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.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

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

There is insufficient evidence for a finding that Applicant viewed child pornography over the Internet. His viewing of sexually explicit material that did not involve minors does not establish any of the above disqualifying conditions. SOR ¶ 1.b is concluded for Applicant.

Applicant is obviously still haunted by what transpired between him and his sons in the early 1990s. When discussing what he described as at most an inadvertent contact, he stated: "This particular incident shocked, disgusted, and disappointed me to my deepest core. Although it was a momentary accident and happened only that one time, I have always been ashamed that it happened at all." The events described by Applicant in his testimony would not constitute criminal activity. The events described to the interviewer in 2007 crossed the line into criminal conduct. Since I do not believe Applicant's testimony about what occurred, I find that it was closer to what was described in 2007. AG ¶¶ 13(a), 13(c), and 13(d) are applicable.

Conditions that could mitigate sexual behavior security concerns are provided under AG ¶ 14. The following are potentially applicable:

- (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

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

It has been about 20 years since the events between Applicant and his sons. However, Applicant is still significantly affected by the acts, and he has not fully faced what occurred. That is evident by his failure to address it in his OPM interview. The behavior still serves as a basis for coercion, exploitation, and duress; and it continues to cast doubt on his current reliability, trustworthiness, and good judgment.<sup>17</sup> There are no applicable mitigating conditions.

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

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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 . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant intentionally provided false and misleading information to the OPM investigator in August 2009, when he failed to name the inappropriate contact with his children as one of the bases for the revocation of his clearance and he stated that there was no other reason for the revocation. AG ¶ 16(b) is applicable.

Applicant's sexual contact with his children created a vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable.

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<sup>17</sup> See ISCR Case No. 09-03233 (App. Bd. Aug. 12, 2010). The Appeal Board determined that an applicant's child molestation offense "even though it occurred long ago, impugn[ed] his trustworthiness and good judgment."

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

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

Applicant provided false information to the OPM investigator in 2009, and he has not been completely forthcoming about what occurred between him and his sons when they were infants. There are no mitigating conditions applicable.

### **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 relevant 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 have incorporated my comments under Guidelines 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.

I considered Applicant's favorable character evidence and his long work record in the defense industry. Applicant has not faced what transpired between him and his children about 20 years. It still troubles him to the point that he lied rather than discuss it honestly and completely. I have significant unresolved doubts about his judgment, honesty, and trustworthiness.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated sexual behavior and personal conduct security concerns.

### **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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraphs 2.a-2.b:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Edward W. Loughran  
Administrative Judge