



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 10-04191

**Appearances**

For Government: Braden M. Murphy, Esquire, Department Counsel

For Applicant: *Pro se*

April 13, 2011

**Decision**

HARVEY, Mark, Administrative Judge:

From April to August 2009, Applicant sexually abused his 17-year-old stepdaughter on seven or eight occasions. The court gave him deferred adjudication in exchange for his guilty plea to a felony child abuse offense. The court-ordered probation is currently scheduled to continue until April 1, 2020. He failed to mitigate security concerns regarding his sexual behavior and criminal conduct. His eligibility for access to classified information is denied.

**Statement of the Case**

On February 5, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86). (Item 4) On October 28, 2010, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guidelines D (sexual behavior) and E (personal conduct). (Item 1) 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 Applicant's clearance should be granted, continued, denied, or revoked. (Item 1)

On November 17, 2010, Applicant responded to the SOR allegations. (Item 3) He waived his right to a hearing. (Item 3) A complete copy of the file of relevant material (FORM), dated February 8, 2011, was provided to him on February 14, 2011. He was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation.<sup>1</sup> He did not respond to the FORM. The case was assigned to me on April 4, 2011.

### **Findings of Fact<sup>2</sup>**

Applicant admitted that on or about August 29, 2009, he engaged in conduct that resulted in his arrest and order of probation without adjudication of guilt for injury to a child.<sup>3</sup> (Items 3, 7) He denied that his conduct raised security concerns and explained why he believes he is reliable and trustworthy. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is a 52-year-old aircraft mechanic employed by a defense contractor (Tr. 106; GE 1). In 1979, he received an associate's degree in vehicle mechanics. From 1982 to present, he has been employed as an aircraft mechanic. He has never been fired from his employment. He has never served in the military. He was married to his first spouse from 1992 to 2000. He married his current spouse in 2002. His son was born in 1986. He did not disclose any incidents involving alcohol abuse or illegal drug use on his SF 86.

### **Sexual behavior and criminal conduct**

On March 30, 2010, Applicant told an Office of Personnel Management (OPM) investigator during his personal subject interview (PSI), which he authenticated and updated on July 14, 2010:

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<sup>1</sup>The DOHA transmittal letter is dated February 8, 2011, and Applicant's receipt is dated February 14, 2011. The DOHA transmittal letter informed Applicant that he had 30 days after the date on his receipt to submit information.

<sup>2</sup>Some details were not included to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

<sup>3</sup>Unless stated otherwise, the basis for the facts in this paragraph and the next paragraph is Applicant's February 5, 2010 SF 86. (Item 4)

[Subject's stepdaughter] was a 17-year-old senior [in] high school when [she] began having an intimate relationship, 4/09. Subject's wife was away from home quite a bit and subject was lonely for companionship. Subject's stepdaughter participated in sports, and often came home tired and sore. Subject would offer to rub down [her] tired muscles which eventually escalated into sexual activity. Subject estimates participating in sexual encounters with [his] stepdaughter seven to eight times between April and August of 2009 before [his] stepdaughter told subject's wife of the conduct in 9/09. All sexual encounters took place at subject's residence when only subject and [his] stepdaughter were at the home. (Item 5 at 3)

Applicant explained that his spouse discovered his sexual relationship with his stepdaughter during a discussion between Applicant's spouse and stepdaughter about whether his stepdaughter had an ongoing lesbian relationship with a fellow high school student and whether his stepdaughter should be required to move to a different high school. (Item 5 at 3) In September 2009, Applicant's stepdaughter told her mother about Applicant's sexual relationship with her. (Item 5 at 3-4) Applicant's spouse and stepdaughter moved out of Applicant's home, and his spouse reported his conduct to police. (Item 5 at 3-4)

The district attorney's office charged Applicant with Injury to a Child with Intent to Commit Bodily Injury, a felony of the third degree. (Item 6) On April 1, 2010, Applicant pleaded guilty and received court costs of \$265, and an order of probation without adjudication of guilt. (Items 6, 7) The court adjudged probation for 10 years beginning on April 1, 2010. (Item 5 at 7; Item 7) Applicant can apply to end his probation after five years. (Item 5 at 7)

Applicant notified security and his supervisor about his arrest. (Item 5 at 4) When Applicant completed his February 5, 2010 SF 86, he disclosed his arrest for indecency with a child and sexual assault and noted he was pending trial. (Item 4)

Applicant's spouse filed for divorce. (Item 5 at 4) However, Applicant hopes to reconcile with his spouse. (Item 5 at 4) Applicant's spouse, co-workers, parents, security officials, law enforcement, and the courts are aware of Applicant's offense. (Item 5 at 3-4)

Applicant sought counseling through the employee assistance program and through his church. (Item 5 at 4) He is currently seeing a therapist for moral rehabilitation therapy. (SOR response, Item 3) Applicant has held a security clearance for 27 years. (Item 5 at 7) He acknowledged he had "made terrible choices," but contended he had "learned much" from his bad decisions. (Item 5 at 7) He has renewed his faith in God. (Item 5 at 7) Because of his changes after his arrest, he argues he is "better qualified today than ever before to possess a security clearance." (SOR response, Item 3)

## Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once 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). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

### **Analysis**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the relevant security concerns are under Guidelines D (sexual behavior) and J (criminal conduct).

#### **Sexual behavior**

AG ¶ 12 describes the concern about sexual behavior stating:

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 . . . .

AG ¶ 13 provides four conditions relating to sexual behavior that could raise a security concern and may be disqualifying:

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

Applicant admitted that he sexually abused his 17-year-old stepdaughter on seven or eight occasions from April to August 2009. His sexual abuse of his stepdaughter is a felony. He received deferred adjudication in return for his guilty plea. He does not have a criminal conviction. His court-ordered probation began on April 1, 2010, and is currently scheduled to continue until April 1, 2020. He is not vulnerable to coercion because his spouse, family members, the police, courts, and his employer are aware of his offense. Applicant has stopped his criminal, sexual behavior. Although his sexual behavior was in private, he showed an exceptional lack of judgment and discretion. AG ¶¶ 13(b) and 13(c) do not apply; however, AG ¶¶ 13(a) and 13(d) apply.

AG ¶ 14 lists four conditions that could mitigate security concerns:

- (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.

Applicant committed the offenses when he was 50 years old, and AG ¶ 14(a) does not apply because Applicant was not an adolescent when he committed the sexual crimes. In regard to the issue of whether the sexual offenses were recent or infrequent, they occurred on seven or eight occasions from April to August 2009. Applicant contends the offenses are unlikely to recur. He is on probation for ten years, and if he violates probation, he will face severe repercussions from the court. His stepdaughter is no longer present in his residence and is unavailable for his exploitation and abuse. He is receiving therapy, and he has not committed any sexual crimes since August 2009. There is still a possibility of recurrence (which is one of the reasons the court ordered probation) and AG ¶ 14(b) can only be partially applied. As indicated previously, the behavior no longer serves as a basis for coercion, exploitation, or duress and AG ¶ 14(c) applies. Applicant sexually abused a 17-year-old child, and she could not legally consent to the sexual activity. Therefore, AG ¶ 14(d) does not apply. However, the whole-person concept, *infra*, elaborates on whether Sexual Behavior under Guideline D can be mitigated under all of the circumstances.

### **Criminal conduct**

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations."

AG ¶ 31 describes three conditions that could raise a security concern and may be disqualifying in this case:

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and
- (d) individual is currently on parole or probation.

AGs ¶¶ 31(a), 31(c), and 31(d) apply because Applicant sexually abused his 17-year-old stepdaughter on seven or eight occasions from April to August 2009. Under state law, he committed Injury to a Child with Intent to Commit Bodily Injury, a felony of the third degree. He pleaded guilty and received deferred adjudication. He received 10 years of probation, which will not end under the terms of the court order until April 1, 2020.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

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

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(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.

None of the mitigating conditions fully apply. AG ¶¶ 32(b) and 32(c) do not apply because Applicant admitted the offenses and no one pressured him into committing the offenses. AG ¶ 32(a) mirrors AG ¶ 14(b), *supra*, and the same discussion is applicable, resulting in partial mitigation. AG ¶ 32(d) is also partially applicable because there is significant evidence of successful rehabilitation. His offenses ended in August 2009 and criminal conduct has not recurred. He expressed remorse, has a 27-year history of successful employment, and has never violated security rules or abused illegal drugs. He is receiving rehabilitation therapy or counseling. He understands his criminal offenses had a devastating impact on his lifestyle, family, and career. He accepted responsibility and culpability for his offenses. His demonstrated intent not to commit future crimes is encompassed in the partial application of AG ¶¶ 32(a) and 32(d).

Notwithstanding these positive attributes, more progress is necessary to assure Applicant has the improved reliability, trustworthiness, and good judgment necessary to safeguard classified information. When he was sexually abusing his 17-year-old stepdaughter on seven or eight occasions from April to August 2009, he had ample time to recognize that what he was doing was wrong and damaging to his family and stepdaughter. He continued to sexually abuse his stepdaughter over and over again. His multiple offenses are still relatively recent, and criminal conduct concerns are not fully mitigated under Guideline J.

## **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 have incorporated my comments under Guidelines D and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Although the rationale for reinstating Applicant's clearance is insufficient to support a security clearance at this time, there are several factors tending to support reinstatement of his access to classified information. Applicant notified security and his supervisor about his arrest. When Applicant completed his February 5, 2010 SF 86, he disclosed his arrest for indecency with a child and sexual assault and noted he was pending trial. His spouse, co-workers, parents, security officials, law enforcement, and the courts are aware of Applicant's offense. His offense is a matter of public record. His spouse has filed for divorce, and his stepdaughter is no longer living in Applicant's residence. He sought counseling through the employee assistance program and through his church. He is currently seeing a therapist for moral rehabilitation therapy. He has held a security clearance for 27 years. He acknowledged he had "made terrible choices," and learned from his bad decisions. He has renewed his faith in God. He significantly contributes to his company and the Department of Defense. There is no evidence at Applicant's employment that he had any work-related disciplinary problems. There is no evidence of disloyalty or that he would intentionally violate national security. There is no evidence of alcohol or drug abuse. His 27-year history of good work performance shows some responsibility, rehabilitation, and mitigation.

The whole-person factors against reinstatement of Applicant's clearance are more substantial at this time. Applicant was 50 years old when he committed the sexual offenses with his 17-year-old stepdaughter. He made multiple decisions over several months to abuse his position of trust in the family. He knew before he engaged in the sexual misconduct that there would be negative consequences, and he chose to sexually abuse his stepdaughter anyway. His sexual misconduct was committed less than two years ago. He is not scheduled to complete probation until April 1, 2020, which



is a manifestation that the court believes he will pose some risk to reoffend for a substantial period of time.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Applicant's sexual offenses in 2009 show a lack of judgment and raise an unmitigated, serious security concern. I conclude sexual behavior and criminal conduct concerns are not mitigated. Eligibility for access to classified information is denied.

### **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
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.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 continue Applicant's eligibility for access to classified information. Applicant's eligibility for a security clearance is denied.

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Mark W. Harvey  
Administrative Judge