



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



In the matter of: )  
)  
) ISCR Case No. 11-06598  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: David F. Hayes, Esq., Department Counsel  
For Applicant: *Pro se*

October 31, 2012

**Decision**

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant is a 49-year-old employee of a defense contractor. In August 2005 Applicant pled guilty to three counts of Indecent Assault and Battery on a Child Under 14. As a result of the guilty plea, he was placed on probation for ten years and required to register as a sex offender. His criminal conviction and sexual conduct raises security concerns under Guidelines D and J, which are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On May 3, 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; and J, Criminal 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) effective for cases after September 1, 2006.

Applicant answered the SOR on June 1, 2012, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on September 19, 2012. A complete copy of the file of relevant material (FORM) was received by Applicant on September 25, 2012. He was afforded a 30-day opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant responded on October 22, 2012, with exhibits marked and admitted as Items A through G. The case was assigned to me on October 29, 2012.

### **Findings of Fact**

Applicant admitted to SOR allegations ¶¶ 1.a, and 2.a. After a thorough and careful review of the pleadings, and exhibits, I make the following findings of fact.

Applicant is a 49-year-old employee of a defense contractor. He has worked in the same contracting position since April 2002. He held a security clearance while in that position from 2002 through 2009. Applicant served in the Air Force from 1981 to 2001. He achieved the rank of Technical Sergeant (E6). He is divorced and has three children. (Item 5; Item 8; Item C.)

As stated in the SOR, Applicant was charged in or around August of 2005 with three counts of Indecent Assault and Battery on a Child Under 14. He pled guilty and was sentenced to ten years of probation. (Item 10; Item 11.)

Applicant was interviewed by an authorized agent of the Office of Personnel Management on August 10, 2006, regarding his arrest and conviction. The report of investigation disclosed:

In 12/2004, while the subject and his family were in family counseling . . . the subject was told by his wife and Dr. [family counselor's omitted] that he needed to move out of the house immediately and that he was being accused of improperly touching his 14 year old daughter [name omitted] on 3 occasions in 04/2004. The subject was not involved in any violent act. The subject and his family had been seeing Dr. [family counselor's omitted] for family counseling because the subjects daughter [name omitted] kept running away from home. The subject and his family had seen Dr. [family counselor's omitted] a total of 2 or 3 visits. After leaving the marital residence the subject voluntarily sought counseling with Dr. [second physician's name omitted] for his problem. From 12/2004 to present he has seen Dr. [second physician's name omitted] once every three weeks. In 08/2005 he was formally charged with indecent assault and battery and appeared in [omitted] county court to answer to the charges. The subject pled guilty to all charges. During court he was recommended to be recorded as a level 2 sex offender. He was ordered to ten years probation, register in the county where he lives as a level 2 sex offender, and cannot leave the state of [omitted] without his probation officers approval. (Item 7.)

Applicant described this offense on his February 2011 security clearance application, indicating:

Offense: Indecent assault and battery. I inappropriately touched my daughter. I do not want to give out specific details of the incident because people from outside of work have approached me about the incident when they would have no way of knowing what happened if it had not been for the investigative report and me losing my security clearance.

Action taken: 10 yr probation. I sought out counseling on my own when the offense occurred. The state mandated that I attend counseling directed at such offenses. I started counseling in June 2005 and have been going weekly ever since. (Item 5.)

Applicant “was unwilling to provide further details regarding the incident,” during his personal subject interview on March 2, 2011. (Item 6.)

Police reports filed in this case indicate that Applicant inappropriately fondled both of his daughters. (Item 9.) Applicant’s probation is scheduled to expire in August 2015. He is not permitted to have any unsupervised contact with children under the age of 16. (Item 8.)

Applicant indicated he sought out counseling in May 2005 and successfully completed a treatment program in 2007. Applicant presented a letter from a licensed clinical social worker as evidence that he continues to participate in a monthly aftercare program. (Item B.) Applicant contends that he is in full compliance with all requirements set out by the court and cannot be coerced or blackmailed with the information regarding his offense. He voluntarily disclosed his criminal offense to his current supervisors. His supervisor indicated that he is aware of Applicant’s legal issues, but that he would recommend Applicant for a position of trust based upon his performance the past six years. (Item B.)

Applicant served honorably in the Air Force for 20 years. During his service, he was awarded two Air Force Achievement Medals, three Air Force Commendation Medals, and was the Noncommissioned Officer of the Year. During his civilian career, Applicant has been recognized with a number of professional awards. His performance evaluations reflect he excels in his job. (Item D; Item E; Item G.)

### **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 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." 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 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 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 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).

## **Analysis**

### **Guideline D, Sexual Behavior**

The security concern relating to the guideline 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.

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.

Applicant has clearly engaged in sexual behavior that was criminal and causes him to potentially be vulnerable to coercion, exploitation, or duress. He inappropriately touched his two minor daughters. His decisions to engage in these acts reflect that Applicant has poor judgment and lacks discretion. The above disqualifying conditions have been established.

AG ¶ 14 provides conditions that could mitigate security concerns. The following are potentially applicable:

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

None of the above mitigating conditions apply. Applicant's conduct occurred in or prior to 2004, but he is still on probation for this offense. It was not an isolated incident, but occurred over time, to both of his daughters. Further, he has not been sufficiently forthcoming with the details of his offense with the investigators and on his security clearance application to allow for a reasoned decision concerning his security eligibility. None of the mitigating conditions apply.

### **Guideline J, Criminal Conduct**

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (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.

Applicant was convicted of three counts of Indecent Assault and Battery on a Child Under 14. The above disqualifying conditions have been established.

Two Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

- (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; 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.

Applicant's most recent criminal activity occurred in 2004. While Applicant has received counseling since 2005, not enough time has passed to determine if Applicant has successfully been rehabilitated because he is still on probation and under the jurisdiction of the court. His impressive record of service in the Air Force and in his civilian position does not mitigate his criminal acts, which took place outside of the workplace. Further, his inability to be forthcoming with all of the details surrounding his convictions indicates he still demonstrates questionable judgment. AG ¶¶ 32(a) and 32(d) do not apply.

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

Applicant is well respected by his supervisor. He has served the U.S. honorably for 20 years with the Air Force and has been in his current position since 2002. However, his judgment in choosing to touch his daughters inappropriately reflects a lack of judgment and was a criminal activity. He has not fully completed his probation. Further, his unwillingness to discuss the criminal allegations in detail indicates that he may be subject to coercion over the incidents.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has failed to mitigate the Sexual Behavior and Criminal 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 |
| Paragraph 2, Guideline J: | AGAINST APPLICANT |
| Subparagraph 2.a.:        | 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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Jennifer I. Goldstein  
Administrative Judge