



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



In the matter of: )  
)  
) ISCR Case No. 11-11814  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Ray T. Blank, Esq., Department Counsel  
For Applicant: *Pro se*

02/20/2014

**Decision**

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline J, criminal conduct, and Guideline D, sexual behavior. Applicant’s eligibility for a security clearance is denied.

**Statement of the Case**

On July 3, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J and D. DOD acted 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 DOD on September 1, 2006.

Applicant answered (Answer) the SOR on July 27, 2013, and requested a hearing before an administrative judge. The case was originally assigned to a different administrative judge on September 14, 2013, and reassigned to me on December 11, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 20, 2013, and the hearing was convened as scheduled on January 28, 2014. The Government offered exhibits (GE) 1 through 8, which were admitted into the record without objection. Department Counsel's exhibit index is marked as Hearing Exhibit (HE) I. Applicant testified, called three witnesses, and offered exhibits (AE) A through D that were admitted into the record without objection. DOHA received the hearing transcript (Tr.) on February 6, 2014.

## **Procedural Ruling**

### **Motion to Amend SOR**

Upon motion by Department Counsel, I amended SOR allegation ¶ 1.a to change the language of the allegation from "you plead guilty" to "you pleaded not guilty, but were found guilty." Applicant had no objection to this amendment. This amendment conforms the factual allegation to the evidence set forth in the record.<sup>1</sup>

## **Findings of Fact**

In Applicant's answer to the SOR, he admitted all the underlying factual allegations, except for language in SOR ¶ 1.a, which stated that he "plead guilty to Aggravated Assault of a Minor Child." The admissions are incorporated as findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following additional findings of fact.

Applicant is 48 years old. He worked for a defense contractor for about 15 years. He was married in 1987. He has three children. He has a high school diploma. He served about 10 years in the Air Force and was discharged with an honorable discharge at the pay grade of E-4. He held a security clearance while in the Air Force, apparently without incident.<sup>2</sup>

Applicant's conduct raised in the SOR includes: (1) being found guilty of aggravated assault of a minor and indecency with a child by sexual contact, and (2) as a result of this conviction, he is required to register as a sexual offender for the rest of his life in the state where he resides. This conduct is alleged under Guideline J and Guideline D.

In late May 2004, friends of the Applicant's had their 12-year old daughter (AB) stay overnight at the Applicant's home. The friends had known Applicant for a number

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<sup>1</sup> Tr. 87-88.

<sup>2</sup> Tr. at 6-7, 55-56; GE 1.

of years and were in the Air Force together. Applicant was AB's godfather and AB had stayed with his family on earlier occasions with her mother and father. AB's parents were divorced, but there were ongoing custody issues at this time. AB reported to her mother that Applicant had touched her inappropriately in a sexual manner. AB's father took her to the local police where she was interviewed and completed a written statement. She stated that while she was attempting to sleep the night at Applicant's house, he came into her room and pulled up her shirt and touched her breasts. He also touched her buttocks, spread her legs, pulled her underwear to the side, and inserted his finger into vagina. She did not immediately tell anyone about the incident, but when her father was preparing to have her stay another night on June 2, 2004, she told her mother about the incident.<sup>3</sup>

An investigation ensued by the local authorities. Applicant provided a sworn affidavit denying any wrongdoing with AB. The case went before a grand jury which indicted Applicant on three counts in October 2007.<sup>4</sup> Applicant maintained his innocence and pleaded not guilty to all the charges. The case went to trial before a jury in January 2011. He was convicted on all three counts and the jury sentenced him to 10 years confinement, suspended, and 10 years supervised probation. He was also required to register in the sexual offender program in his state of residence. Additionally, his terms of probation required his participation in a sexual abuse treatment program. His probation period does not end until 2021. Applicant appealed his conviction to the state appeals court. That court issued an opinion in December 2011 upholding the conviction, although it dismissed count 2 because of double jeopardy. Applicant indicated that all other appeal attempts (state and federal) have been exhausted. Applicant still maintains his innocence despite his conviction and the appeals court ruling.<sup>5</sup>

Applicant testified that he is required to report to the local sheriff's office every three months. Although his probation requirements included his participation in a sex abuse treatment program, upon advice from his probation officer, he stopped attending during the pendency of his appeal case. He did not resume participation once his appeals were exhausted. He has not received any psychological treatment. His last contact with his probation officer was about three years ago.<sup>6</sup>

Applicant presented the testimony of a friend, his current supervisor, and his wife. His friend testified that he believed Applicant was a law abiding person and

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<sup>3</sup> Tr. at 70-71; GE 2, 6.

<sup>4</sup> The indictment was for the following counts (summarized): Count 1, penetration of the sexual organ of the victim by the Defendant's finger; Count 2, sexual contact of the victim by touching her genitals with the intent to gratify sexual desires; Count 3, sexual contact of the victim by touching her breast with the intent to gratify sexual desires. See AE 8.

<sup>5</sup> Tr. at 72, 76; GE 8; AE B.

<sup>6</sup> Tr. at 73-74, 76.

someone who is helpful and caring. His supervisor testified for him at the criminal trial and still believes in his innocence. He called Applicant one of the finest men he has known. Applicant's wife also believes in his innocence and testified to what a fine father he is to their three sons. He also introduced awards, appraisals, and his honorable discharge from his Air Force career.<sup>7</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 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, 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.

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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 that an applicant may deliberately or inadvertently fail to 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.

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<sup>7</sup> Tr. at 41, 43, 46-47, 49, 52, 54, 56; AE D.

Section 7 of Executive Order 10865 provides that 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 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 in this case. The following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (d) the individual is currently on probation.

In January 2011, Applicant was found guilty by a jury of his peers of felony child sexual abuse offenses and sentenced to 10 years’ probation. He remains on probation until 2021. I find that both the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

- (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
- (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.

Applicant’s acts of child sexual contact occurred in 2004, but his conviction did not occur until 2011. The nature of the criminal acts, against a 12-year old girl who was his goddaughter, and which occurred while he was placed in a position of trust by AB’s parents, casts doubt on his reliability, trustworthiness, and good judgment. Under these

circumstances, his actions are not sufficiently attenuated after considering his behavior in its totality. AG ¶ 32(a) does not apply. Although Applicant, his friends, and his wife believe in his innocence, a jury of his peers, after considering all the evidence, including testimony by AB, convicted him on all counts. An appeals court upheld that conviction. AG ¶ 32(a) does not apply. Applicant remains on probation and is still considered a risk by the state where he resides. He has not taken the recognized first step towards rehabilitation which is to admit wrongdoing. He also has not participated in any sex offender treatment program. He is required to register annually as a sexual offender. Applicant produced insufficient evidence that his reliability, trustworthiness and judgment are not in question based upon the nature of his previous conduct. AG ¶ 32(d) does not apply.

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

AG ¶ 12 expresses the security concern:

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.

I have considered all of the sexual behavior disqualifying conditions under AG ¶ 13 and the following is potentially applicable:

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

In 2004, Applicant engaged in indecent sexual contact with a child who trusted him and who was his goddaughter. He was arrested, convicted, sentenced, and had the conviction upheld on appeal in 2011 for his actions. The above listed disqualifying condition applies.

I have considered all of the sexual behavior mitigating conditions under AG ¶ 14 and the following is 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.

Although Applicant's criminal acts occurred 2011, his abuse of trust and his failure to admit wrongdoing in the face of his conviction cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 14(b) does 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 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have considered Applicant's Air Force career and his supportive character evidence. He remains on probation until the year 2021. Applicant continues to deny wrongdoing and therefore has made little effort toward rehabilitation. Applicant failed to provide sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline J, criminal conduct, and Guideline D, sexual behavior.

### 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
Subparagraphs 1.a -1.b:	Against Applicant
Paragraph 2, Guideline D:	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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Robert E. Coacher  
Administrative Judge