



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



In the matter of: )  
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----- ) ISCR Case No. 11-14430  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Tovah A. Minster, Esq., Department Counsel  
For Applicant: *Pro se*

03/11/2013

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**Decision**

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LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for a security clearance to work in the defense industry. The evidence shows Applicant has engaged in a pattern of questionable sexual behavior and related criminal conduct. He did not present sufficient evidence of reform and rehabilitation to mitigate the security concerns. For the reasons discussed below, this case is decided against Applicant.

## Statement of the Case

Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> on October 12, 2012, the Department of Defense (DOD) sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him access to classified information. The SOR is similar to a complaint, and it detailed the reasons for the action under the security guidelines known as Guideline D for sexual behavior, Guideline J for criminal conduct, and Guideline E for personal conduct. The criminal conduct and personal conduct matters are directly related to the sexual behavior matters alleged under Guideline D.

Applicant timely answered the SOR. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.<sup>2</sup>

On or about December 11, 2012, Department Counsel submitted all relevant and material information that could be adduced at a hearing.<sup>3</sup> This so-called file of relevant material (FORM) was mailed to Applicant, who received it December 14, 2012. He did not reply to the FORM within the 30-day period allowed under the Directive. The case was assigned to me February 25, 2013.

## Findings of Fact

In his answer, Applicant admitted all the SOR allegations. His admissions are accepted and adopted and incorporated as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 46-year-old consultant to a federal contractor, who is seeking to retain a clearance at the top-secret level.<sup>4</sup> His educational background includes a bachelor's degree awarded in 1989 and some postgraduate school during 2007–2008. He has been married twice. His first marriage was relatively brief and ended in divorce in 1994. He married his current wife in 1997, and they have one child, a teenage son.

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<sup>1</sup> This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

<sup>2</sup> Directive, Enclosure 3, ¶ E3.1.7.

<sup>3</sup> The file of relevant material consists of Department Counsel's written brief and supporting documents, some of which may be identified as exhibits in this decision.

<sup>4</sup> Exhibit 8.

His security clearance application indicates that he has worked in the information technology field since at least 2001.<sup>5</sup>

The genesis of this case goes back to a June 2008 action by a non-DOD agency disapproving Applicant for access to classified information due to issues involving criminal conduct and personal conduct.<sup>6</sup> In doing so, the non-DOD agency made the following findings concerning Applicant:

During security processing, you reported that you have viewed nude and sexually [explicit] images of underage individuals on the [I]nternet. You revealed you do this weekly and that the last time you searched for underage pornography was three months prior to your security testing.

You advised that you have engaged in voyeuristic activity from the time you were in high school until 2005. Your activities include looking into neighbors' homes, sometimes with a telescope or binoculars; watching neighbors engaging in sexual activity; and video recording others in your home while they were using the bathroom. You reported the above information in a piecemeal fashion during two security testing sessions in May and June 2007.

The SOR allegations, to which Applicant has admitted, essentially repeat the above matters.

Applicant confirmed these matters during a 2011 background investigation conducted by the U.S. Office of Personnel Management.<sup>7</sup> In doing so, he attributed his behavior to depression and a lack of respect for others. He also stated that he did not intend to engage in similar behavior in the future.

Applicant was treated at a counseling center for cyclothymic disorder<sup>8</sup> during 2004–2009.<sup>9</sup> He also received a diagnosis of bipolar disorder in the past.<sup>10</sup> His treatment included the taking of prescribed medicines. He was last seen for treatment in June 2009, and he then had a good prognosis.<sup>11</sup>

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<sup>5</sup> Exhibit 4.

<sup>6</sup> Exhibit 5.

<sup>7</sup> Exhibit 5.

<sup>8</sup> It is also call cyclothymia, and it is a type of chronic mood disorder widely considered to be a milder or subthreshold form of bipolar disorder.

<sup>9</sup> Exhibits 4 and 6.

<sup>10</sup> Exhibit 6 at 37.

<sup>11</sup> Exhibit 7.

## Law and Policies

It is well-established law that no one has a right to a security clearance.<sup>12</sup> As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>13</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>14</sup> An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>15</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>16</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>17</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>18</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>19</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>20</sup> The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.<sup>21</sup>

The AG set forth the relevant standards to consider when evaluating a person’s security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense

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<sup>12</sup> *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

<sup>13</sup> 484 U.S. at 531.

<sup>14</sup> Directive, ¶ 3.2.

<sup>15</sup> Directive, ¶ 3.2.

<sup>16</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>17</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>18</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>19</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>20</sup> *Egan*, 484 U.S. at 531.

<sup>21</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.<sup>22</sup> Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

### **Discussion**

The three guidelines will be discussed together because, for the most part, the various allegations are factually interwoven. Under Guideline D, the concern is that 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 may raise questions about a person's reliability, trustworthiness, and ability to protect classified information.<sup>23</sup> Under Guideline J, the concern is that criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.<sup>24</sup> And under Guideline E, the concern is that 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.<sup>25</sup>

Here, based on Applicant's admissions to the SOR allegations, and as documented in the exhibits, the evidence shows Applicant engaged in conduct that raises obvious security concerns, regardless of the fact that he has not been arrested, charged, prosecuted, or convicted. Under Guideline D, the disqualifying conditions found at AG ¶ 13(a)–(d) apply; under Guideline E, the disqualifying condition found at AG ¶ 16(e) applies; and under Guideline J, the disqualifying condition found at AG ¶ 31(c) applies. Taken as a whole, his past conduct reflects poorly on his judgment, reliability, trustworthiness, and ability to protect classified information.

I have considered the various mitigating conditions under the three guidelines. Based on the evidence before me, none of the mitigating conditions are sufficient to fully mitigate the security concerns. Applicant did not present sufficient evidence of reform and rehabilitation to persuade me that his questionable sexual behavior and related criminal conduct are safely in the past. What is missing here is reliable and persuasive evidence, such as a current evaluation from a mental-health professional, that there is no indication of a current problem and that his past behavior is unlikely to recur. Indeed,

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<sup>22</sup> Executive Order 10865, § 7.

<sup>23</sup> AG ¶ 12.

<sup>24</sup> AG ¶ 30.

<sup>25</sup> AG ¶ 15.

my view of this case is that the evidence raises as many questions as it answers about Applicant's security suitability.

Applicant's pattern of questionable sexual behavior and related criminal conduct justifies doubts about his judgment, reliability, and trustworthiness. Following *Egan* and the clearly-consistent standard, I resolve these doubts in favor of protecting national security. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.<sup>26</sup> Having done so, I conclude that Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision.

### **Formal Findings**

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline D:	Against Applicant
Subparagraphs 1.a–1.b:	Against Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraph 2.a:	Against Applicant
Paragraph 3, Personal Conduct:	Against Applicant
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	For Applicant <sup>27</sup>

### **Conclusion**

In light of the record as a whole, 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.

Michael H. Leonard  
Administrative Judge

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<sup>26</sup> AG ¶ 2(a)(1)–(9).

<sup>27</sup> This matter is decided for Applicant because reporting information in a piecemeal fashion does not amount to deliberately providing false or misleading information under the guideline.