



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



In the matter of:	)	
	)	
	)	ISCR Case No. 11-15013
	)	
Applicant for Security Clearance	)	

**Appearances**

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

10/25/2013

**Decision**

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings and exhibits, Applicant’s eligibility for access to classified information is denied.

**Statement of the Case**

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on September 22, 2011. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) on May 8, 2013, detailing security concerns under Guideline D, Sexual Behavior, Guideline E, Personal Conduct, and Guideline J, Criminal Conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines For Determining Eligibility for Access to Classified Information* (AG), implemented on September 1, 2006.

Applicant received the SOR on May 14, 2013. He submitted an undated, notarized, written response to the SOR allegations, and requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a file of relevant material (FORM) and mailed Applicant a complete copy on August 12, 2013. Applicant received the FORM on August 21, 2013. He had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He submitted an undated response. The Defense Office of Hearings and Appeals (DOHA) assigned this case to me on October 11, 2013. The Government submitted six exhibits, which have been marked as Items 1-6 and admitted into the record. Applicant's response to the SOR has been marked and admitted as Item 2, and the SOR has been marked as Item 1. His written response to the FORM is admitted into the record as Applicant Exhibit A (AE A).

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted all of the factual allegations in the SOR. His admissions are incorporated herein as findings of fact. He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 29 years old, works as an engineering technician for a DOD contractor. He began his current employment in September 2011. He previously worked from April 2009 until he accepted his current employment as a personal computer technician and sales associate at a national retail store and in the restaurant industry from 2006 until 2009. There is no evidence of disciplinary problems at work.<sup>1</sup>

Applicant is single. He lives with his mother and grandfather. Applicant graduated from high school in 2002. He received an associate's degree in May 2009. He received two additional associate's degrees: one in computer engineering technology and a second in electrical engineering technology in 2011. He recently received a bachelor's degree, summa cum laude, in both these fields of study.<sup>2</sup>

On May 24, 2004, the court issued a warrant for Applicant's arrest based on a probable cause statement. On June 1, 2004, Applicant voluntarily surrendered to police, who charged him with sex abuse of a child, first degree, based on a December 31, 2003 incident when Applicant was 19 years old. Applicant plead guilty to sex abuse of a child, second degree, a felony, on December 6, 2004. The court sentenced him to an indeterminate term of not less than one year nor more than 15 years in prison. The court immediately suspended the prison term; however, the court sentenced him to 365 days in the county jail with commitment to begin immediately. The court also fined him

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<sup>1</sup>Item 4.

<sup>2</sup>Item 2; Item 4.

\$1,850 and ordered him to pay \$1,980 in restitution to a crime victims fund. The court placed him on three years of probation to begin upon his release from jail, conditioned upon his completion of an inpatient and after care program for sex offenders, no contact with the victim and the victim's family, no contact with anyone under the age of 18 without supervision, complete DNA testing, payment of fine and restitution, and compliance with group conditions for sex offenders. As a result of this conviction, the Federal Bureau of Investigation Criminal Record for Applicant indicates that he has been registered as a sex offender since April 29, 2005.<sup>3</sup>

Near the completion of his time in jail, Applicant was admitted to a county sex offender treatment program on November 1, 2005. He returned to the county jail one-month later after disclosing another sex abuse incident in 2000. The court issued a warrant for violation of his probation and a show cause order on November 29, 2005. Applicant's counsel and the prosecutor reached an agreement regarding this show cause order, which was stricken by the court on February 1, 2006. Applicant was readmitted to the sex offender program on this date.<sup>4</sup>

During his enrollment in the sex offender program, Applicant became sexually involved with another person in the program, in violation of program rules. His conduct resulted in his removal from the program in July 2006 and the issuance of a second bench warrant for violation of probation. Two unidentified allegations were raised against Applicant in an order to show cause on his violation of probation. At a court hearing on August 7, 2006, Applicant admitted the first allegation, but denied the second allegation. The court dismissed the second allegation and revoked Applicant's probation. The court then sentenced Applicant to 90 days in jail and granted him credit for time served. The court reinstated his probation for 36 months to begin on August 7, 2006 and directed he comply with the probationary terms of his original sentence. He re-entered the sex offender program on September 9, 2006. He successfully completed this program on August 27, 2007. The court terminated his probation for his first conviction on July 16, 2009 and closed this case on the same date.<sup>5</sup>

While participating in the sex offender program, Applicant disclosed an additional sex child abuse incident which occurred in June 2000, when Applicant was 16 years old. In August 2007, the State charged him with two counts of sex abuse of a child, second degree, a felony, for his June 2000 conduct. Applicant plead guilty to charge 1 on October 29, 2007, and the court dismissed the second charge on the same date. The court sentenced him to an indeterminate term of not less than one year nor more than 15 years in state prison. The court immediately suspended the prison sentence and

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<sup>3</sup>Item 5.

<sup>4</sup>*Id.*

<sup>5</sup>Item 2; item 5; AE A.

placed him on 36 months of probation, which was terminated on August 18, 2009 by court order.<sup>6</sup>

The sex offender treatment program discharged Applicant on August 21, 2007 with a status of treatment completed. Staff prepared a discharge summary on August 27, 2007. The summary noted that during his third admission, he satisfactorily completed treatment goals and objectives. He actively participated in the program, specifically addressed his sexual abuse conduct, identified triggers for his conduct, and became a group leader. Applicant accepted responsibility for his conduct and developed techniques to control his conduct. After care recommendations, included outpatient treatment with a short-term intervention program. Applicant participated in two outpatient treatment programs. The first program began in 2007 and ended about 18 months later in 2008. The therapists indicated that Applicant successfully reconciled and reunified with two of his victims and their parents. The second program began in January 2010 and ended in August 2011 after 14 individual therapy sessions. Both therapists indicate that Applicant is making healthy and successful choices about his life. Neither can absolutely assure that he will not offend again; however, they see him as making correct choices in life.<sup>7</sup>

Applicant listed his criminal convictions for sexual abuse on his e-QIP. He told prospective employers about his convictions. He accepts responsibility for and is forthcoming about his conduct. He has not been arrested since 2006, and he has complied with the law as required. His statements in the file reflect remorse about his conduct and his poor decision making while in treatment.<sup>8</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,

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<sup>6</sup>*Id.*

<sup>7</sup>Item 2; Item 5; Item 6; AE A.

<sup>8</sup>Item 4; Item 5.

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. . . .” An applicant has the ultimate burden of persuasion for obtaining 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 an 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 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 D, Sexual Behavior**

AG ¶ 12 expresses the security concern as:

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 the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

- (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 was charged and convicted of sexual abuse of a child twice. His conduct shows poor judgment. He is a registered sex offender. The above disqualifying conditions apply.

The Sexual Behavior guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 14(a) through ¶ 14(d), and the following are potentially applicable:

AG ¶ 14 provides 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; and
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress.

Applicant has actively participated in counseling and appears to utilize the principles and techniques he learned in therapy. He is open about his convictions for sex abuse of a child, which makes it less likely that he can be coerced or exploited because of his conduct. Although Applicant's conduct occurred when he was ages 16-19 and has not reoccurred, he was convicted as an adult for both incidents. Because of his convictions, he is a registered sex offender. Despite his positive conduct, lingering concerns remain that his conduct may reoccur in the future. Given the seriousness of his conduct, I find that the evidence, when viewed in its entirety, is insufficient to establish mitigation of the security concerns raised under Guideline D.

## **Guideline J, 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 very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.”

AG ¶ 31 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and 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
- (f) conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year.

Applicant was convicted of sexual abuse of a child twice and of violation of his probation twice. He was sentenced to prison for not less than one year and not more than 15 years. Although his prison sentence was suspended, he spent approximately one year in the county jail for his crimes. He is a registered sex offender. The above criminal conduct disqualifying conditions apply.

The Criminal Conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 32(a) through ¶ 32(d), and the following 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 last criminal conduct involving sex abuse occurred in 2003. Since completion of his jail sentence, Applicant has actively participated in and completed an inpatient sex offender program. He also actively participated in two separate outpatient treatment programs. He continues to follow the recommendations of the treatment programs to avoid future criminal conduct. Following his release from inpatient care, he enrolled in a community college and started working. He completed three associate degrees and recently completed his bachelor's degree. He has worked steadily since

2007 without disciplinary actions, and he has stayed out of trouble. He successfully completed probation and is no longer under court supervision. He demonstrated remorse for his conduct and poor decision making. He has mitigated the security concerns about his criminal conduct under AG ¶¶ 32(a) and 32(d).

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

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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 the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: . . . and (3) a pattern of dishonesty or rule violations . . . .

AG ¶ 16(c) is raised when the adverse information is insufficient to be raised under any other single guideline. AG ¶ 16(d) applies when credible adverse information is not explicitly covered by another guideline and may not be sufficient for an adverse determination. In this case, the security concerns about Applicant's sexual and criminal conduct are explicitly covered under Guidelines D and J. There is sufficient information under Guideline D for an adverse determination. See Guideline D discussion, *supra*. The general security concerns in the personal conduct guideline about Applicant's lack of judgment and his conduct are specifically addressed in Guidelines D and J. Guideline E is found in favor of Applicant essentially as a duplication.



## 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 an 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's sexual abuse conduct began when he was 16 years old and last occurred when he was 19 years old. (See AG ¶ 2(a)(4).) The police charged him with sex abuse of a child, a felony. He plead guilty to a second degree felony and spent nearly a year in jail for his conduct. He revealed his first incident during sex offender counseling and plead guilty to a second felony. After violating a rule in his sex offender program, Applicant changed his behavior and attitude towards treatment, becoming actively involved in his treatment and care. He successfully completed his inpatient program, and he fully participated in two outpatient programs. He complied with the terms of his probation, and there have been no occurrences of criminal conduct for ten years. In 2009, the court released him from probation and closed both criminal cases. He completed three associates degrees and his bachelor's degree. He works steadily without work-related problems. His conduct reflects that he is using the tools he developed during treatment. Applicant's past conduct is unlikely to be a source of coercion, pressure, exploitation, or duress because he is open and forthright about what he did in the past.

Applicant's sexual abuse of a child while a teenager is serious and egregious. He violated the trust of a child. While he has taken many positive steps since he last

offended, his past conduct caused grief for many, including his victims, their families, and his family. He is now a registered sex offender. This registration and designation raises questions about his trustworthiness to hold a security clearance. In weighing his positive conduct against the seriousness of his sex abuse conduct, I find that the evidence is insufficient to grant him a security clearance.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his criminal conduct under Guideline J, but that he has not mitigated the security concerns arising from his sexual behavior and personal conduct under Guidelines D and E.

### **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:	Against Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For 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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MARY E. HENRY  
Administrative Judge