



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-02422

**Appearances**

For Government: Caroline E. Heintzelman, Department Counsel  
For Applicant: *Pro se*

08/31/2016

**Decision**

DAM, Shari, Administrative Judge:

Applicant failed to mitigate the security concerns raised under the guidelines for criminal conduct and sexual behavior. Eligibility for access to classified information is denied.

**History of the Case**

On February 14, 2013, Applicant submitted a security clearance application (SF-86). On July 11, 2014, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), alleging security concerns under Guideline J, Criminal Conduct, and Guideline D, Sexual Behavior. 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 (AG) effective after September 1, 2006.

Applicant answered the SOR in writing on September 2, 2014 (Answer), and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on March 17, 2016. It issued a Notice of Hearing on April 18, 2016, scheduling the hearing for May 11, 2016. The hearing convened as scheduled. Department Counsel offered Government Exhibits (GE) 1

through 5 into evidence, which were admitted without objection. Applicant testified and called one witness. DOHA received the transcript of the hearing (Tr.) on May 23, 2016.

### **Findings of Fact**

In his Answer Applicant admitted the allegations contained in SOR ¶ 1.a. He admitted he was arrested as alleged in SOR ¶ 1.a, but denied the underlying charges regarding child molestation. He denied the allegations alleged in SOR ¶ 1.b. He did not answer the allegations in SOR ¶ 2.a; hence, his failure to answer those allegations will be construed as a denial. His admission is incorporated into these findings.

Applicant is 45 years old and divorced. He was married to his first wife from 1992 to 1996. He has two children from that marriage, a daughter, age 23, and a son, age 21. He was married to his second wife from 2002 to 2012. They have no children. In 2013 he started working for a defense contractor. He also works for a private insurance company, and in his computer repair business. He has a medical disability. He earned a college degree in 2014. (Tr. 17-22.)

On December 31, 1992, Applicant was arrested, jailed, and charged with three felony counts: (1) criminal sexual conduct, 1<sup>st</sup> degree, penetration, with a victim under 13 - actor more than 36 months older; (2) criminal sexual conduct, 2nd degree, penetration, with a victim under 13 - actor more than 36 months older; and (3) assault in the 5<sup>th</sup> degree. He pleaded guilty and was convicted of count 2, a felony, and sentenced to 18 months of confinement, 3 months stayed. He was incarcerated until December 31, 1993. The conduct underlying Applicant's arrest occurred on October 24, 1992, and involved allegations of molestation of a young child, whom his wife was babysitting. (GE 2, GE 4.) Applicant denied sexually fondling the child, but admitted spanking the child with a belt. (Tr. 25.)

While imprisoned Applicant was required to complete a treatment program for sex offenders. That four-month program consisted of daily counseling sessions. After being released from prison he was placed on probation and a home monitoring system for six months. He was required to participate in weekly treatment sessions for sex offenders. (Tr. 35-36; GE 2.)

Subsequent to returning home after leaving prison, Applicant was arrested and placed on probation for failing to register as a sex offender in December 1994. His young daughter was removed from his home because he had not completed the mandated sex offenders' treatment. He was ordered to participate in treatment until 1997 or 1998. (Tr. 38-39, 46; GE 2.) During this time his sister was awarded custody of his daughter. In 1996 he and his first wife divorced, and his sister gained custody of his young son, in addition to his daughter. (Tr. 29, 33-40.) Applicant could not regain parental rights over his children because he had not completed the required sex offender treatment program. As part of that program, he was required to disclose information regarding his personal activities, which he chose not to do, and as a result he delayed the completion of the program. (Tr. 42.)

In early 2006 Applicant wanted to regain custody of his son. He had married his second wife and had resumed treatment for sex offenders. At that time, he and his second wife were permitted supervised visits with his children. (Tr. 39, 45.) As part of the custody process, he sought an opinion from a psychologist regarding his risk of recidivism. (Tr. 45-46.) In a May 2006 letter to the court, the psychologist opined that he had reviewed the pertinent studies and concluded that there was a less than a 10% chance that Applicant would reoffend or sexually abuse his son. In reaching that opinion the psychologist considered the facts and behaviors underlying Applicant's conviction as factual. (Tr. 45; Answer.) There is no mention in the psychologist's reports that Applicant had denied the behaviors.

In June 2006 Applicant's daughter made allegations that he had engaged in sexual contact with her from the time she was 9 years old until she was 12 years old. She complained that the last time he had abused her was in April 2005 (Tr. 49-51.) Applicant was subsequently arrested and charged with two counts of criminal sexual conduct, 1<sup>st</sup> degree, penetration or contact with person under 13; and three counts of criminal sexual conduct, 2<sup>nd</sup> degree, sexual contact. Applicant said his daughter fabricated the charges against him. He said she also alleged that his sister and her husband engaged in similar conduct. All charges were dismissed. (Tr. 60; GE 4.)

Later in 2006, Applicant's two children were removed from his sister's care and placed with his cousin, who subsequently adopted them. Applicant said he was not informed of this change in guardianship and termination of parental rights when it occurred. (Tr. 55.) He has not spoken to his daughter since 2012. (Tr. 53.) He has ongoing communication with his son. (Tr. 57.) He said he completed all sex offenders' treatment in May 2006, and is now legally permitted to live with minor children. (Tr. 59, 61.)

Applicant's son testified. He is 21 years old. He said that he made false accusations of sexual misconduct against his father because his sister repeatedly threatened and physically assaulted him until he agreed to do so. He was 11 years old in 2006 when he made charges against his father. He said he has had regular contact with his father for the past four years. (Tr. 66-69.)

Applicant said that his employer is not aware of the allegations contained in the SOR. (Tr. 70.) In his closing argument, Applicant asserted that he never committed the crimes in 1992 or 2006. He emphasized that the 1992 allegation is over 20 years old and that he deserves a second chance. (Tr. 73.)

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AGs. In addition to brief introductory explanations for each guideline, the AGs 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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states that, "[t]he 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person applying for access to classified information seeks to enter 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. Finally, as emphasized in Section 7 of Executive Order 10865, "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *a/s/o* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

## **Analysis**

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

AG ¶ 30 sets forth the security concerns 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 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
- (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.

The evidence established the above disqualifying conditions. In 1992 Applicant was convicted in State court of a serious felony for which he was sentenced to 18 months of incarceration, which he served from the time of his arrest on December 31, 1992 until December 31, 1993. In 2006 he was charged with five counts of criminal conduct.

AG ¶ 32 provides two conditions that could mitigate the above 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;
- (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 was convicted of criminal conduct that occurred in October 1992, about 24 years ago. He did not complete the court-imposed sex offenders' treatment program until May 2006. In June 2006 he was arrested and charged with criminal sexual conduct with his daughter as a result of allegations she made regarding abuse from about 2003 to 2005. Those charges were dismissed, establishing mitigation under AG ¶ 32(c) as to that allegation. Based on the passage of time without the recurrence of criminal activity since 1992, the evidence establishes some mitigation under AG ¶ 32(a). Over the past four years Applicant and his son have re-established a relationship. In 2014 Applicant completed a college degree. Although he has worked for his employer since 2013, he presented no evidence of a good employment record. During this hearing Applicant continued to deny the underlying sexual behaviors leading to the 1992 conviction. He expressed no remorse or sadness over the totality of the situation, which caused his family pain and disruption for many years. Hence, the evidence establishes limited mitigation under AG ¶ 32(d).

## **Guideline D, Sexual Behavior**

AG ¶ 12 expresses the security concerns that pertain to sexual behavior:

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 two conditions that could raise a security concern and may be disqualifying in this case:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted; and
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

The evidence raises both of the above disqualifying conditions. Applicant was convicted of criminal sexual conduct involving a minor. That behavior causes him to be vulnerable to coercion, exploitation, or duress, as it is the type of conduct, which, if known, could affect his personal or professional standing in the community.

AG ¶ 14 provides two conditions that could mitigate security concerns raised under this guideline:

- (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.

As articulated above under AG ¶ 32(a), the sexual behavior underlying Applicant's criminal conviction occurred 24 years ago. Applicant presented a May 2006 opinion from a psychologist that Applicant's risk profile for committing similar behavior was less than 10%. That opinion did not include any reference to Applicant's denial of the criminal conduct, and was drafted a month before additional allegations were raised. There is insufficient evidence to conclude with reliable certainty that similar conduct will not recur. Additionally, there is no evidence demonstrating that Applicant's behavior does not serve as a potential basis for coercion, exploitation, or duress. Applicant did not produce evidence that his employer or members in his community are aware of the sexual misconduct underlying the security concerns, which knowledge would diminish

his vulnerability to exploitation or duress. His concealment of the facts alleged in the SOR from his employer demonstrates his recognition of this ongoing vulnerability. Neither AG ¶¶ 32(b) nor 32(c) applies.

### **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 relevant circumstances. 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 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.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is a 45-year-old man, who was convicted (based on his guilty plea of a serious crime years ago. As a consequence, he was incarcerated for a year, placed on probation, and ordered to participate in sex offenders' treatment. Additionally, he was required to register as a sex offender. After failing to comply with those conditions, he was placed on probation until 1997 or 1998. He said he completed all treatment requirements in 2006, about 14 years after the crime. Although he insists that he did not commit the crime that resulted in his conviction, those assertions lack credibility. It is most improbable that the State based its entire case on unsubstantiated facts, given the 18-month sentence he received, along with an order to undergo substantial psychological treatment. While he appears to be re-establishing his life, work, and a relationship with his son, the record does not contain sufficient evidence to support his eligibility for a security clearance, particularly considering the ongoing potential for pressure, exploitation, or duress.

After weighing the disqualifying and mitigating conditions, and all facts and circumstances in the context of the whole-person, Applicant has not mitigated the security concerns pertaining to criminal conduct and sexual behavior. Overall, the record evidence leaves doubt as to Applicant's eligibility and suitability for a security clearance.

## **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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For 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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Shari Dam  
Administrative Judge