



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 14-06238

**Appearances**

For Government: Chris Morin, Esquire, Department Counsel

For Applicant: *Pro se*

12/20/2016

**Decision**

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the criminal conduct security concerns, but failed to mitigate the sexual behavior and personal conduct security concerns. Eligibility for a security clearance and access to classified information is denied.

**Statement of the Case**

On February 26, 2013, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.<sup>1</sup> The Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him on August 1, 2015, under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guidelines D (Sexual Behavior), J (Criminal Conduct), and E

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<sup>1</sup> GE 1 (e-QIP, dated February 26, 2013).

(Personal Conduct), and detailed reasons why DOD was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant received the SOR on August 19, 2015. In a sworn statement, dated October 9, 2015, Applicant responded to the SOR allegations and requested a hearing.<sup>2</sup> Department Counsel indicated the Government was prepared to proceed on February 23, 2016. The case was assigned to me on March 23, 2016. A Notice of Hearing was issued on May 2, 2016, and I convened the hearing, as scheduled, on May 20, 2016.

During the hearing, seven Government exhibits (GE 1 through GE 7), one Applicant exhibit (AE A), and one administrative exhibit, were admitted into evidence without objection, with the exception that one section of AE A was deleted upon Department Counsel's motion.<sup>3</sup> Applicant testified. The transcript of the hearing (Tr.) was received on June 1, 2016. The record closed on May 20, 2016.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted all of the factual allegations in the SOR pertaining to sexual behavior (§ 1.a.), criminal conduct (§ 2.a.), and personal conduct (§§ 3.a. through 3.d.). Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 47-year-old employee of a defense contractor, and he is seeking to retain the top secret (TS) security clearance which was suspended in September 2015. He also sought Sensitive Compartmented Information (SCI) access with another government agency, but that access was denied.<sup>4</sup> He was initially granted a secret security clearance in 1999, and TS clearances in 2003 and 2009. He has been employed full-time by the same defense contractor since November 2014, and currently serves as a security manager and account manager.<sup>5</sup> He was previously with other employers serving as facility security officer (FSO) and security manager (1998 – 2010); security director (2010 – 2012); and cognizant security specialist officer (CSSO) (2010 – 2014).<sup>6</sup>

Applicant graduated from high school in 1987.<sup>7</sup> When completing an application for a public trust position, Applicant indicated that he had received an associate of arts

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<sup>2</sup> Applicant's Answer to the SOR, dated October 9, 2015.

<sup>3</sup> Tr. at 24-26; AE A (Psychological Evaluation, dated May 20, 2014).

<sup>4</sup> GE 5 (Letter, dated October 30, 2013); GE 7 (First Appeal Review Memorandum, dated February 24, 2014); GE 6 (Final Outcome of Appeal Case Memorandum, dated August 29, 2014).

<sup>5</sup> Tr. at 50.

<sup>6</sup> Tr. at 31-37.

<sup>7</sup> Tr. at 51-52.

(AA) degree, but when he was subsequently confronted, he acknowledged that he had not received such a degree.<sup>8</sup> During the hearing, he again acknowledged that he had not received an AA degree, and he explained that he had taken a few courses at a local community college and interpreted the question to mean the degree which he intended to obtain.<sup>9</sup> Applicant was married in January 1992.<sup>10</sup> He and his wife have one daughter, born in 1993.<sup>11</sup>

### **Sexual Behavior, Criminal Conduct, and Personal Conduct**

When Applicant was 16 years old and a high school junior, he frequently cut classes, had unspecified academic issues, and was involved in fights. As a result, he was placed in a special school with other students with disciplinary issues.<sup>12</sup> Between 1988 and 1990, when he was an employee of a pizza restaurant, he periodically stole \$10 to \$20. He estimated the total amount stolen was between \$90 and \$100. In his next job, between 1991 and 1994 or 1995, he stole between \$1,500 and \$2,000 worth of wine, lottery tickets, and cash.<sup>13</sup> There is no evidence of any police or court involvement in either of the two theft issues.

In 1994 or 1995, Applicant and his wife moved in with his mother-in-law for approximately three months. The sleeping arrangements were as follows: Applicant and his wife slept on a floor mattress in her brother's room with the brother occupying his own bed. It was not uncommon for her two minor sisters to watch television from Applicant's floor mattress or the bed, or to sometimes sleep in the bed. On one particular occasion, while they were all watching television on the bed, they all fell asleep. Applicant's wife, brother, and one sister got out of the bed and slept on the floor mattress, while Applicant and one sister-in-law remained asleep in the bed. Applicant awoke during the night and placed his hand, initially on top of her underwear, and starting rubbing her vagina with his fingers. He moved his hand under her underwear and continued rubbing her vagina. Although he could not remember if he penetrated her vagina, he conceded that he may have done so. There was no resistance or reaction from his sister-in-law during the incident. At the time, Applicant was 24 or 25 years old and his sister-in-law was 11 or 12 years old. Two other incidents of an identical nature occurred within a matter of days. Once again, there was no resistance or reaction from his sister-in-law during those incidents. Applicant was not under the influence of alcohol or drugs when the molestations took place. He denied, and there is no evidence of, sexual intercourse, oral sexual contact, or any other form of sexual contact with his sister-in-law.<sup>14</sup>

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<sup>8</sup> GE 2 (Report, dated January 23, 2013), at 4.

<sup>9</sup> Tr. at 53-55.

<sup>10</sup> GE 1, *supra* note 1, at 16-17.

<sup>11</sup> GE 1, *supra* note 1, at 20.

<sup>12</sup> GE 2, *supra* note 8, at 2.

<sup>13</sup> GE 2, *supra* note 8, at 5.

<sup>14</sup> GE 3 (Report, dated July 3, 2013), at 2-3.

There was no police involvement regarding any of the incidents, and no one other than Applicant and his sister-in-law was aware of the incidents at the time they occurred. However, in approximately 2008 or 2009, his now-married sister-in-law claimed to her family that Applicant had sexually molested her when she was younger. Applicant denied the allegations to them.<sup>15</sup>

In January 2013, Applicant was interviewed by an investigator of another government agency. During that security processing polygraph pre-test interview, Applicant said he had sent the family an e-mail in which he denied the allegations, but indicated that, while he was asleep, he may have “potentially” touched his sister-in-law on one occasion, thinking it was his wife, for it was not uncommon for him to touch or have sex with his wife while he was fully asleep.<sup>16</sup> Applicant eventually admitted he was not prepared to discuss the incidents because he was too nervous and embarrassed to do so to a female polygrapher, and he was afraid of the eventual repercussions if he did admit the incidents.<sup>17</sup>

In July 2013, during another security processing polygraph pre-test interview, Applicant finally admitted the three incidents. He was unable to explain his motivation for the sexual contact with his sister-in-law, but he did acknowledge that his behavior was wrong and against the law. He expressed remorse for his actions and said that if he could go back in time, he would not have done what he did. Applicant claimed he had been in denial about molesting his sister-in-law, and that was his explanation for failing to previously admit his actions.<sup>18</sup>

As of August 1, 2015, the date the SOR was issued, Applicant had not fully told his wife and family members that he had molested her sister on at least three occasions in 1994 or 1995. If placed in a position of blackmail, he stated he would fully confess his actions to them.<sup>19</sup> During the hearing, Applicant again acknowledged that he has not told his wife, daughter, or best friend about the molestations, largely because his acts were of a heinous nature and he did not want them to bear the results of the information.<sup>20</sup> Although he advised his employer that there was a sexual incident in the past, no specific details were shared with him.<sup>21</sup>

Commencing in January 2005, Applicant has been treated for conditions diagnosed as anxiety and Obsessive-Compulsive Disorder (OCD). He was initially

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<sup>15</sup> GE 2, *supra* note 8, at 7.

<sup>16</sup> GE 2, *supra* note 8, at 7; GE 4 (Clearance Decision Statement, dated October 23, 2013), at 1-2; Tr. at 42.

<sup>17</sup> Applicant's Answer to the SOR, *supra* note 2, at 1; Tr. at 38-39.

<sup>18</sup> GE 4, *supra* note 16, at 2-3.

<sup>19</sup> Applicant's Answer to the SOR, *supra* note 2, at 2.

<sup>20</sup> Tr. at 46-48.

<sup>21</sup> Tr. at 48.

administered Effexor, and subsequently transitioned to Paxil.<sup>22</sup> In April and May 2014, Applicant underwent a complete psychological evaluation by two licensed psychologists. A number of tests were administered, including the Derogatis Sexual Functioning Inventory and the Garos Sexual Behavior Inventory. According to the psychologists, Applicant's test results generally were within normal limits, and the molestation incidents of over two decades ago do not reflect a long-standing pattern of deviant sexual ideation or perverted interest.<sup>23</sup>

## Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."<sup>24</sup> As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."<sup>25</sup>

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 useful in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."<sup>26</sup> The Government initially has the burden of producing evidence to establish

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<sup>22</sup> GE 1, *supra* note 1, at 25; GE 2, *supra* note 8, at 4-5; Tr. at 55-56.

<sup>23</sup> AE A, *supra* note 3, at 7-9.

<sup>24</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>25</sup> Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

<sup>26</sup> "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994).

a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.<sup>27</sup>

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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. Furthermore, "security clearance determinations should err, if they must, on the side of denials."<sup>28</sup>

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."<sup>29</sup> Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

## **Analysis**

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

The security concern 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.

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<sup>27</sup> See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

<sup>28</sup> *Egan*, 484 U.S. at 531

<sup>29</sup> See Exec. Or. 10865 § 7.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 13(a), “sexual behavior of a criminal nature, whether the individual has been prosecuted” is potentially disqualifying. Similarly, under AG ¶ 13(c), “sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress” may raise security concerns. In addition, “sexual behavior of a public nature and/or that reflects lack of discretion or judgment” is potentially disqualifying under AG ¶ 13(d). In 1994 or 1995, on three occasions, Applicant inappropriately touched, thereby sexually molesting, his 11 or 12-year old sister-in-law when he was 24 or 25 years old. AG ¶¶ 13(a), 13(c), and 13(d), have been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from sexual behavior. Under AG ¶ 14(b), the disqualifying condition may be mitigated where “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.” If “the behavior no longer serves as a basis for coercion, exploitation, or duress,” it is potentially mitigating under AG ¶ 14(c). Similarly, if “the sexual behavior is strictly private, consensual, and discreet,” AG ¶ 14(d) may apply.

AG ¶ 14(b) applies. AG ¶¶ 14(c) and 14(d) do not apply. Applicant’s three incidents of inappropriate sexual behavior with his minor sister-in-law occurred during a very brief period over two decades ago and have, since that time, not recurred. Based on his 2014 psychological evaluation, Applicant’s test results were found to be within normal limits, and those incidents do not reflect a long-standing pattern of deviant sexual ideation or perverted interest. Considering Applicant’s subsequent evolvment and maturity, the sexual behavior is unlikely to recur and no longer casts doubt on his current reliability, trustworthiness, or good judgment. However, while the Government is aware of his sexual behavior from his past, his wife is still unaware of the incidents involving her husband and sister, and that sexual behavior continues to serve as a basis for coercion, exploitation, or duress. While those three incidents were strictly private and discreet, they occurred with a minor who is legally incapable of entering into consensual sexual activity.

## **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 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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 31(a), “a single serious crime or multiple lesser offenses” is potentially disqualifying. Similarly, under AG ¶ 31(c), if there is an “allegation of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” security concerns may be raised. Applicant’s SOR-alleged history of criminal conduct consists solely of three incidents of sexual molestation of a minor. The incidents involving thefts

were not alleged in the SOR. As to the sexual molestations, AG ¶¶ 31(a) and 31(c) have been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from criminal conduct. Under AG ¶ 32(a), the disqualifying condition may be mitigated where “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.” Also, AG ¶ 32(d) may apply when “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.”

AG ¶¶ 32(a) and 32(d) apply. As noted above, the three incidents of inappropriate sexual behavior with Applicant's minor sister-in-law occurred during a very brief period over two decades ago and have, since that time, not recurred. His 2014 psychological evaluation determined that those incidents do not reflect a long standing pattern of deviant sexual ideation or perverted interest. With two decades of maturity, the absence of *alleged* repeated criminal conduct, the presence of successful rehabilitation, expressed remorse, and a good employment record, his criminal conduct is unlikely to recur and no longer casts doubt on his current reliability, trustworthiness, or good judgment.

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

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(b), it is potentially disqualifying by “deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.” In addition, under AG ¶ 16(c), security concerns may be raised where there is:

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.



Also, under AG ¶ 16(e), security concerns may be raised where there is

personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing. . . .

Applicant sexually molested his minor sister-in-law on three occasions in 1994 or 1995. When confronted by her, in the presence of her family, in 2008 or 2009, he again denied the allegations. In January 2013, during his security processing polygraph pre-test interview, Applicant denied the allegations, but acknowledged that he may have "potentially" touched his sister-in-law on one occasion, thinking she was his wife. It was not until his July 2013 processing polygraph pre-test interview, that he finally admitted the incidents. Applicant has acknowledged that he has not told his wife, daughter, or best friend about the molestations. AG ¶¶ 16(b), 16(c), and 16(e) have been established.

The guidelines also include examples of conditions that could mitigate security concerns arising from personal conduct, but none of them 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 have incorporated my comments under Guidelines D, J, and E in my analysis below.

There is some evidence in favor of mitigating Applicant's conduct. He has a history of serving in responsible positions as a security manager, FSO, security director, or CSSO. Although he sexually molested his minor sister-in-law two decades ago when he was 24 or 25 years old, there has been no recurrence of such behavior over the ensuing decades. His 2014 psychological evaluation test results were found to be within normal limits, and those incidents do not reflect a long-standing pattern of deviant sexual ideation or perverted interest.

The disqualifying evidence under the whole-person concept is more substantial. In this instance, the relatively recent cover-ups are more important than the three sexual molestation incidents of two decades ago, that resulted in the cover-up. As an FSO, CSSO, security director, or security manager, Applicant is cognizant of his responsibilities as well as those who have a security clearance. Lying to his family about the incidents in 2008 or 2009 is one thing, but lying to the investigator during the January 2013 security processing polygraph pre-test interview, is far more significant. In addition, by keeping the truth about his actions with his sister-in-law from his wife, he is continuing his vulnerability to coercion, exploitation, or duress.

I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.<sup>30</sup> Overall, the record evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has mitigated the criminal conduct security concerns, but failed to mitigate the sexual behavior and personal conduct security concerns. (See AG ¶¶ 2(a)(1) - 2(a)(9).)

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

### **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 E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	For Applicant

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<sup>30</sup> See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Paragraph 3, Guideline J:

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 national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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ROBERT ROBINSON GALES  
Administrative Judge