



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



In the matter of:

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) ISCR Case No. 16-02769  
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Applicant for Security Clearance

**Appearances**

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

02/06/2018

**Decision**

DAM, Shari, Administrative Judge:

Applicant failed to mitigate the security concerns related to his criminal conduct and sexual behavior. National security eligibility for access to classified information is denied.

**History of Case**

On September 2, 2015, Applicant submitted a security clearance application (SF 86). On November 15, 2016, 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 (EO) 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 within the DoD after September

1, 2006. On June 8, 2017, new AG were implemented and are effective for decisions issued after that date.<sup>1</sup>

Applicant answered the SOR in writing on December 17, 2016 (Answer), and requested a decision be decided on the written record. On February 10, 2017, Department Counsel requested a hearing. The Defense Office of Hearings and Appeals (DOHA) assigned this case to another administrative judge on March 30, 2017, and re-assigned it to me on June 22, 2017. DOHA issued a Notice of Hearing on August 24, 2017, setting the hearing for September 19, 2017. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 4 into evidence. Applicant testified, and offered Exhibit (AE) A into evidence. All exhibits were admitted.<sup>2</sup> DOHA received the hearing transcript (Tr.) on September 27, 2017.

### **Findings of Fact**

Applicant is 54 years old and has been married to his second wife for 10 years. She has a son and daughter from a previous marriage. Applicant and his first wife divorced in 2003. They have two daughters, a 17-year-old and a 19-year-old. Applicant attended college but did not earn a degree. (GE 1)

Applicant enlisted in the Air Force after graduating from high school in 1987. He retired with an honorable discharge in 2009 as a master sergeant (E-7). He received commendation and achievement medals, and awards for being the non-commissioned officer (NCO) of the year and for the quarter. In October 2011, he began a position with a defense contractor. He has performed community service work both while he was in the military and in his civilian life. (Tr. 18-25)

In 2009, Applicant's stepdaughter, age 21, alleged that he inappropriately touched her while she was visiting Applicant and her mother. After the incident, she left the house, and his wife moved out for a month. Applicant and his wife subsequently went to family counseling three or four times. Applicant admitted that he accidentally touched his stepdaughter's buttocks while he was rubbing her back, but denied that it was intentional, sexual, or inappropriate.<sup>3</sup> (Tr. 34-36, 46-47; GE 2)

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<sup>1</sup> I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same if the case was considered under the previous AG.

<sup>2</sup> Applicant made several corrections to information contained in GE 2, which is the April 2016 summary of his personal interview. Department Counsel did not object to any of the corrections, and they are noted in the transcript. (Tr. 11-13)

<sup>3</sup> The SOR did not allege a security concern related to this 2009 incident. That fact will not be analyzed as a potential disqualifying condition, but will be considered under the analysis of mitigating conditions, the whole-person concept, and evaluation of Applicant's credibility.

On the morning of April 15, 2014, the police came to Applicant's house and took him to the police station where he was fingerprinted and given his Miranda rights. He was then interviewed about an incident involving his stepdaughter that allegedly happened earlier that morning. His stepdaughter told the police that she woke up in the morning and felt Applicant touching her vaginal area on top of her clothes without her consent. She admitted that she had been consuming alcohol and was intoxicated the night before the incident. He was booked by the police and returned to his residence. Applicant denied the allegation. (Tr. 27-28, 40-41, 47; GE 2, GE 3) At his hearing, he said he did not realize that he was being arrested that day and did not understand the situation until around Christmas 2014 when he received a summons from the court. (Tr. 27-30, 59-60; GE 3) He did not disclose the situation to his security officer until April 2015 because he thought there was a mistake and his lawyer had not received the pertinent documents until then. (Tr. 60)

In May 2015, Applicant plead guilty to sexual abuse – 2<sup>nd</sup> degree, a misdemeanor. He was sentenced to two years of supervised probation and ordered to attend sex offender classes for two years. While on probation, Applicant participated in group therapy once a week. He was released from probation on May 29, 2017. (Tr. 50; GE 3)

Applicant testified that he plead guilty to the crime because he did not want to spend \$8,000 to \$15,000 to defend himself. He continues to deny any wrongdoing, and claims any admissions that he made to the court or his counselors were for purposes of expediency and cost, and not because he committed the crime. He was also worried about taking a polygraph and the legal ramifications of having an inconsistent answer. (Tr. 33, 42-43, 49)

Applicant has no relationship with his stepdaughter now. (Tr. 34) She left the country after the second incident and has not been in contact with him or her mother. He has not seen her for three years. (Tr. 39, 52)

Applicant's security officers are aware of his criminal conviction, but his direct supervisor is not. (Tr. 25) Other than his wife, who lives with him, and stepson, none of his family or friends are aware of the charges. He never told his former wife or daughters about the charges and conviction. (Tr. 38, 46)

## **Policies**

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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. 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 national security eligibility 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 says that an “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 national security eligibility 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 national security eligibility. 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 or sensitive 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/so* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

## **Analysis**

### **Guideline J: Criminal Conduct**

AG ¶ 30 sets out the security concern related 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 lists conditions that could raise a security concern and may be disqualifying. The following is potentially applicable in this case:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

In May 2015, Applicant plead guilty to one count of criminal sexual abuse, a misdemeanor. He was placed on supervised probation for two years and ordered to attend sex offenders' classes for those two years. These facts establish prima facie support for the foregoing disqualifying condition, and shift the burden to Applicant to mitigate the resulting security concerns.

AG ¶ 32 describes conditions that could mitigate criminal conduct security concerns raised under this guideline. The following two 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, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Over three years have passed since Applicant engaged in serious criminal activity in April 2014. Such conduct is unlikely to recur with his stepdaughter because he no longer has contact with her. However, that incident, in addition to the 2009 allegations, cast doubt on Applicant's trustworthiness and good judgment. AG ¶ 32(a) does not apply. Applicant completed a two-year probationary period in May 2017. He continues to work for his employer. Applicant's failure to take responsibility for his actions raises concerns about his successful rehabilitation. Minimal mitigation was established under AG ¶ 32(d).

#### **Guideline D: Sexual Behavior**

AG ¶ 12 sets out the security concerns relating to sexual behavior:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. 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 sets out the conditions that could raise a security concern. Two of them may be disqualifying in this case:

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

Applicant plead guilty to engaging in sexual misconduct with his stepdaughter in April 2014. That behavior causes him to be vulnerable to coercion, exploitation, or duress, especially since he has concealed it from many important people in his personal and professional life. The evidence establishes both disqualifying conditions.

AG ¶ 14 describes conditions that could mitigate security concerns raised under this guideline. Three of them potentially apply:

- (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 judgment;
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress; and
- (e) the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and consistent compliance with the treatment plan, and/or has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

There is insufficient evidence to establish mitigation under any of the above conditions. Applicant allegedly engaged in sexual misbehavior with his stepdaughter in 2009, and was convicted of similar behavior in 2015. These incidents cast doubt on his current reliability, trustworthiness, or judgment. Applicant has not disclosed his criminal conviction and underlying charge to his supervisor, friends, or immediate family members. As a result, that criminal conduct continues to serve as a basis for coercion, exploitation, or duress. Applicant completed two years of sex offenders' classes, as ordered by the court. However, he did not present evidence of a favorable prognosis from a qualified mental health professional indicating that his behavior is under control.

## **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant honorably served this country for 22 years. He has worked for his employer for over six years. These are positive factors in this case. However, in 2009 and 2014, Applicant engaged in inappropriate criminal sexual conduct with his stepdaughter. In each instance of sexual abuse, he touched her inappropriately and without her consent. In May 2015, he plead guilty and was convicted of a misdemeanor related to the second incident. Throughout this security investigation, Applicant consistently denied any misconduct, although he entered a guilty plea. He offered no insight into his conduct, or the role he played in both allegations. He neither exhibited remorse over the situation, nor provided a credible explanation for not timely reporting the situation to his security officers. It is not plausible that he would agree to plead guilty to a sexual assault, with the associated stigma, because he did not want to pay \$8,000 to \$15,000 to defend himself. There is insufficient evidence to fully mitigate the criminal conduct or sexual behavior security concerns, or my concerns as to Applicant's eligibility and suitability for a security clearance at this time.

## **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline J:

**AGAINST APPLICANT**

Subparagraph 1.a:

**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 interests of national security to grant Applicant access to classified information. National security eligibility is denied.

SHARI DAM  
Administrative Judge