



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 18-00036
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Benjamin R. Dorsey, Esq., Department Counsel  
For Applicant: *Pro se*

10/25/2018

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines D (Sexual Behavior), J (Criminal Conduct), and E (Personal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application on November 2, 2016. On June 6, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines D, J, and E. The DOD CAF acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on June 28, 2018, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on August 10, 2018, and the case was assigned to me on August 15, 2018. On August 27, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for September 26, 2018. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses or submit documentary evidence. I kept the record open until October 12, 2018, to enable him to submit additional evidence. He timely submitted Applicant's Exhibit (AX) A, which was admitted without objection. DOHA received the transcript (Tr.) on October 4, 2018.

### **Findings of Fact<sup>1</sup>**

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a, 2.a, and 3.a. He denied the allegation in SOR ¶ 3.b. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is 29 years old, unemployed, and has been offered a job with a federal contractor, contingent on obtaining a security clearance. He is unmarried and has no children. He received an associate's degree in May 2010 and a bachelor's degree in December 2015. He worked as a state produce inspector from May to August 2016. He has never held a security clearance.

On April 4, 2014, an undercover police officer posted an ad on the Internet, identifying herself as a 13-year-old girl looking for someone to "hang out with." Applicant responded to the ad and asked if she was really 13 years old and why she posted the ad. She told Applicant that she hated her mother, the boys at her school were "lame," and she wanted to find someone else to hang out with. The conversation was interrupted and blocked by the internet service provider for about a week.

About a week later, the undercover police officer emailed Applicant again, and they resumed their conversation. Applicant asked her what she thought they would be doing if they were alone together, but further conversation was blocked again by the Internet provider. She then contacted Applicant using another email account, and they resumed their conversation. Applicant told her that he wanted her to "strip" for him and perform various sexual acts. She responded that she was willing to perform as he requested. He sent her a photograph of himself and told her that he was a 24-year-old college student.<sup>2</sup> (GX 3 at 5.)

Based on Applicant's conversations with the undercover police officer, Applicant was charged with two felonies: attempted indecent liberties with a child, and using a

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<sup>1</sup> Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

<sup>2</sup> The police officer stated in her report that a screenshot of her ad, Applicant's photo, and a trimmed-down version of the chat log were attached to her report, but none of these items were attached to the police report submitted by Department Counsel. (GX 3 at 5-6.)

communication device to solicit indecent liberties with a child. He appeared in court on March 31, 2015, represented by an attorney, and pleaded not guilty. After the trial commenced, he agreed to plead guilty to solicitation to commit a felony (also a felony under state law) in return for an agreement that any sentence to incarceration would be suspended. His plea of guilty was accepted, and he was sentenced to incarceration for three years, suspended, and placed on supervised probation for three years. (GX 3 at 1-2.) The terms of his probation required that he attend weekly group-counseling sessions, and he did so for about two years. (Tr. 32.) He was not required to register as a sex offender because he was not convicted of the charges alleging a sex offense with a child.

On June 25, 2014, as part of his preparation for trial, Applicant underwent psychological and psychosexual testing by a licensed clinical psychologist certified as a sex-offender treatment provider. The psychologist concluded that Applicant “does not possess similar characteristics to those who sexually abuse children or force sex onto others (e.g., rape). Furthermore, he does not suffer from sexual dysfunction or desire disorder, and he is not preoccupied with sex.” He concluded that Applicant “did not endorse attitudes that are supportive of sexual offending behavior on the sexual interest questionnaires.” (AX A.)

Applicant was interviewed by a DOD security investigator on June 28, 2017. The summary of the investigator’s interview reflects that Applicant told him that he met the person on an “adults only” website, and that when she asked to meet with him he declined and exited the chat room. When they resumed their conversation about ten days later, she again asked to meet with him, but he did not agree to meet her. The summary of Applicant’s interview reflects that he described his conduct to the investigator as follows:

Probably 10 days later, date not recalled, the Subject received an e-mail from the person stating that they (sic) wanted to continue chatting. For the next three to five days, the Subject chatted with the individual. As with the previous chats, they discussed sex, but the Subject never asked or propositioned the person.

(GX 2 at 7.)

At the hearing, Applicant testified that he found the person’s ad on an “adults only” website. It indicated that she was 13 years old, and he asked her what she was doing on an adult website. He admitted that they talked about sexual acts, but he denied “propositioning” her and stated that he was not sure what “propositioning” means. (Tr. 27.) He expressed no difficulty understanding what “asking” means. He admitted asking her if she was willing to perform specific sexual acts with him, but he testified that he did not take the additional step of inviting her to visit him or offering to visit her. (Tr. 28, 46.) He testified: “Going through my head, it was talk. It was sex talk. I was probably horny and I said some things I regret. And that why – what I was trying to say is I never actually invited [her] over or anything like that. . . .” (Tr. 42.)

Applicant's parents, siblings, and several of his friends know about his conviction. His father attended the hearing for moral support. (Tr. 5.) At the hearing, Applicant assumed that his prospective employer was aware of his conviction, but he could not recall disclosing it on his job application or otherwise. (Tr. 34-35.)

### **Policies**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance 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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr.20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

## **Analysis**

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

The SOR alleges that in April 2014, Applicant was charged with use of a computer to commit a sex offense with a minor and indecent liberties with a child by proposing a sexual act. It also alleges that he was convicted of solicitation to commit a felony; and that he was sentenced to supervised probation until March 31, 2018 (SOR ¶ 1.a).<sup>3</sup> The concern under this guideline is set out in AG 12:

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. . . .

The following potentially disqualifying conditions are relevant:

AG ¶ 13(a): sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

AG ¶ 13(b): a pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;

AG ¶ 13(c): sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

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<sup>3</sup> Arguably, Applicant was estopped from denying that he solicited the person to commit sexual acts with him. The doctrine of collateral estoppel generally applies in DOHA hearings and precludes applicants from contending that they did not engage in criminal acts for which they were convicted. ISCR Case No. 95-0817 at 2-3 (App. Bd. Feb. 21, 1997). Department Counsel declined to assert collateral estoppel, on the ground that the record and the trial order pertaining to his civilian felony conviction does not contain a recitation of facts showing the acts on which the plea of guilty and conviction were based. (Tr. 17.)

AG ¶ 13(d): sexual behavior of a public nature or that reflects lack of discretion or judgment.

AG ¶¶ 13(a), 13(c), and 13(d) are established. Applicant admitted and was convicted of a sexual offense. Although he testified that his family and some of his friends were aware of his conviction, he had not specifically informed his prospective employer of his conviction and the facts underlying it. His sexual conversations with a person that he thought was a 13-year-old girl reflected lack of discretion and judgment.

AG ¶ 13(b) is not fully established. Applicant engaged in high-risk sexual behavior for several days. However, the psychologist's report and Applicant's successful completion of his probation tend to negate the element of this disqualifying condition that he is unable to stop his behavior.

The following mitigating conditions are potentially applicable:

AG ¶ 14(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;

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

AG ¶ 14(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.

AG ¶ 14(b) is not established. Applicant's behavior occurred more than four years ago. However, he was on probation until March 2018 and faced incarceration for three years for any violation of his probation. Even though he has completed the probation, he remains under pressure to qualify for the security clearance on which his job offer depends. His sexual conversations were frequent and did not occur under unusual circumstances.

AG ¶ 14(c) is not established. Although Applicant's family and some of his friends are aware of his felony conviction, he was unable to testify with any certainty that his prospective employer is aware of it. He has presumed that his prospective employer is aware of it, but he has not taken any affirmative steps to ensure that he is aware of it.

AG ¶ 14(e) is not established. Applicant apparently completed the program of group therapy required as a condition of his probation, but there is no evidence of a diagnosis or prognosis from that program. The psychological and psychosexual evaluation by the licensed clinical psychologist was not a treatment program, but was

limited to administering a battery of tests and interpreting of the results. While the tests administered to Applicant may indicate that he is not a sexual predator or a pedophile, they do not reflect the quality of Applicant's discretion and judgment in his choice of persons with whom he chooses to interact sexually. To the extent that the group therapy and the psychosexual evaluation are mitigating factors, they are not determinative. The presence of some mitigating evidence does not compel a favorable security clearance decision. ISCR Case No. 12-00120 (App. Bd. Feb. 10, 2014). An administrative judge is required to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, keeping in mind that, once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. ISCR Case No. 09-01652 at 3 (App. Bd. Aug 8, 2011), *citing Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

## **Guideline J, Criminal Conduct**

SOR ¶ 2.a cross-alleges the sexual behavior alleged in SOR ¶ 1.a. The concern under this guideline 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."

Applicant's admissions and the documentary evidence submitted at the hearing establish the potentially disqualifying condition in AG ¶ 31(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."

The following mitigating conditions are relevant:

AG ¶ 32(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

AG ¶ 32(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.

AG ¶ 32(a) is not established for the reasons set out in the above discussion of AG ¶ 14(b). AG ¶ 32(d) is not fully established. Applicant has completed his probation, including the required group therapy. He received a favorable diagnosis from a certified sex offender treatment provider. He returned to college after his conviction, earned his bachelor's degree, and has been offered a job by a defense contractor. However, insufficient time has passed since he completed his period of probation. Furthermore,

as noted in the discussion under Guideline E below, he has not been fully candid with security investigators, and his lack of candor undermines a finding of successful rehabilitation.

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

SOR ¶ 3.a cross-alleges the conduct alleged in SOR ¶ 1.a. The SOR also alleges in SOR ¶ 3.b(i) that Applicant falsified material facts during his June 2017 interview with a security investigator as follows:

[I]n approximately April 2014, you engaged in an online chat with a person believed to be a female and that you found the individual on [a website] under Adult Personnel's (sic) when in fact you contacted an individual who had posted an ad on [the website] as a 13 year old female looking for someone to hang with.

SOR ¶ 3.b(ii) alleges that Applicant falsified material facts when he stated that he never asked or propositioned the person for sex when in fact he told this individual that he wanted her to perform various sex acts on him.

The concern under this guideline 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

The relevant disqualifying condition for the allegation that Applicant falsified material facts during his security interview is AG ¶ 16(b): "deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an . . . investigator . . . involved in making a recommendation relevant to a national security eligibility determination . . . ."

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's experience and level of education are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

The relevant disqualifying conditions for the sexual behavior alleged in SOR ¶ 1.a and cross-alleged under this guideline are:

AG ¶ 16(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 individual may not properly safeguard classified or sensitive information;

AG ¶ 16(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 individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: . . . (2) any disruptive, violent, or other inappropriate behavior; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing . . . .

The allegation in SOR ¶ 3.a(i) is poorly drafted, and it is difficult to determine the specific facts or omissions that are the basis for the allegation. It appears to be an attempt to allege that Applicant failed to disclose that he thought he was talking to a 13-year-old girl. However, Applicant told the investigator that he was charged with indecent liberties with a child and soliciting sex using a computer. I conclude that intentional omission of material facts as alleged in SOR ¶ 3.a(i) is not established.

However, the falsification alleged in SOR ¶ 3.a(ii) is established. Applicant told the investigator that he and the person he thought was a 13-year-old girl discussed sex but that he never asked or propositioned her for sex. Applicant admitted at the hearing that he asked the person if she was willing to perform specific sex acts with him, but he testified that he did not specifically ask her to meet him and perform the acts they had discussed.

Applicant's quibbling about whether he was asking for sex raises a question whether he has fully accepted the nature of his criminal conduct. Applicant asked the person whether she was willing to perform certain sex acts, and she responded in the affirmative. The fact that the conversation did not proceed further to an agreement regarding a specific time and place to meet does not negate the fact that a solicitation occurred.

A security clearance investigation is not a forum for an applicant to split hairs or parse the truth narrowly. An applicant who deliberately fails to give full, frank, and candid answers to the government in connection with a security clearance investigation or adjudication interferes with the integrity of the industrial security program. ISCR Case No. 01-03132 at 3 (App. Bd. Aug. 8, 2002). I conclude that SOR ¶ 3.a(ii) is established by the evidence and is sufficient to raise the disqualifying condition in AG ¶ 16(b). Applicant's admission that he asked a person that he believed was a 13-year-old girl to perform specific sexual acts with him is sufficient to establish the disqualifying conditions in AG ¶¶ 16(c), 16(d), and 16(e).

The following mitigating conditions are relevant:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

AG ¶ 17(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

AG ¶ 17(a) is not established. Applicant made no effort to clarify his statement to the investigator until the hearing.

AG ¶ 17(c) is not established. Applicant's sexual behavior with a person he believed to be a 13-year-old girl was a felony and is not mitigated by the passage of time, for the reasons set out in the above discussion of AG ¶ 14(b). His falsification during his June 2017 interview with a security investigator was recent, because it affected the current adjudication of his application for a security clearance. It was serious, because it undermined the integrity of the security investigation.

AG ¶ 17(d) is not fully established. Applicant has acknowledged that he engaged in sexual conversations with a person he thought was a 13-year-old girl, but he has not acknowledged that he asked the girl to perform sexual acts with him. To his credit, he has completed the extensive group therapy mandated by the court, and he appears to have gained some insight into the foolishness of his behavior.

AG ¶ 17(e) is not fully established. Applicant has presumed that his prospective employer is aware of his felony conviction for sexual behavior, but he has taken no positive steps to inform his employer about it.

### **Whole-Person Concept**

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. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances and applying the adjudicative factors in AG ¶ 2(d).<sup>4</sup>

I have incorporated my comments under Guidelines D, J, and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines D, J, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his sexual behavior, criminal conduct, and personal conduct.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline D (Sexual Behavior):    **AGAINST APPLICANT**

    Subparagraph 1.a:                                **Against Applicant**

Paragraph 2, Guideline J (Criminal Conduct): **AGAINST APPLICANT**

    Subparagraph 2.a:                                **Against Applicant**

Paragraph 3, Guideline E (Personal Conduct): **AGAINST APPLICANT**

    Subparagraph 3.a:                                **Against Applicant**

    Subparagraph 3.b(i):                            **For Applicant**

    Subparagraph 3.b(ii):                          **Against Applicant**

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<sup>4</sup> The factors are: (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.

## **Conclusion**

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman  
Administrative Judge