



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



In the matter of: )  
)  
) ISCR Case No. 07-02721  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Richard Stevens, Esquire, Department Counsel  
For Applicant: Wheeler M. Tillman, Esquire

March 10, 2009

**Decision**

CREAN, Thomas M., Administrative Judge:

Applicant submitted a security clearance application (SF 86) to update his security clearance on April 25, 2006. The security clearance application was submitted because Applicant was convicted of a felony offense in January 2006 for an incident that happened in May 2005. On June 19, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns for sexual behavior, personal conduct, and criminal conduct under Guidelines D, E, and J, respectively. The security concerns arose out of the same incident from May 2005. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006. Applicant acknowledged receipt of the SOR on June 27, 2008.

Applicant answered the SOR in an undated response received at DOHA on August 11, 2008. Applicant denied all allegations except for the allegation that he is a registered sex offender. He requested a hearing before an administrative judge.

Department Counsel was initially prepared to proceed on August 21, 2008, and a notice of hearing was issued on October 6, 2008, for a hearing on October 21, 2008. At the hearing under another administrative judge, Applicant did not understand his rights to counsel and the hearing was postponed to permit Applicant to obtain counsel. The case was reassigned to me on November 19, 2008. Applicant obtained counsel, and a new notice of hearing was issued by DOHA on January 8, 2009, for a hearing on February 6, 2009. I convened the hearing as scheduled. The government offered four exhibits, marked government exhibits (Gov. Ex.) 1 through 4, which were received without objection. Applicant and six witnesses testified on his behalf. Applicant also introduced six exhibits, marked Applicant Exhibits (App. Ex.) A through F which were admitted to the record without objection. Two hearing exhibits, marked Hearing Exhibits 1 and 2, for the purpose of establishing facts for administrative notice were also introduced by the government and received without objection. DOHA received the transcript of the hearing (Tr.) on February 23, 2009. Based on a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Findings of Fact**

Applicant is 40 years old and has been a network technician for a defense contractor for over six years. Applicant served almost four years in the Navy and received an honorable discharge as a Seaman (E-3). He did have some non-judicial punishments while on active duty. He returned to the area where he grew up and started working for a business as an assembly line worker. He attended and graduated from technical school as part of the employer's development program and became a set-up mechanic. He worked for that business for 13 years before starting work for the defense contractor. Applicant has had a security clearance while working for the defense contractor. He is married with two step-children by his wife from a former marriage and two children of his own. Only the two youngest children live at home. However, he and his wife are now separated and he lives separately from the family (Tr. 127-130; Gov. Ex. 1, SF 86, dated April 25, 2006; App. Ex. E, Transcript, dated December 19, 2006; App. Ex. F, Transcript, dated March 19, 1999).

Applicant's middle school counselor and special education teacher testified that even though Applicant had dyslexia and was hyperactive, he had a positive attitude and was eager to learn. He was pleasant, friendly, and respectful in school. He was very bright with an I.Q of 123 which is in the superior range. She prepared a letter outlining his need for special education accommodation so he could attend college and technical school (Tr. 21-32; App. Ex. A, Letter, dated June 8, 1999).

In May 2005, Applicant was at a camp site with family friends including the fifteen year old daughter of a close friend. While he and the girl were alone, she backed into

Applicant. He put his hands on her shoulders and she placed them on her breasts over her clothes. He stated he was surprised by he actions. He did not stalk the girl prior to the incident. There was no weapon involved, no threats were made, and no bondage was used. There was no penetration of the girl and no hands were placed under her clothing. Immediately after the incident, he left the state and drove to a neighboring state to think about the incident and seek guidance from family and friends. He turned himself into the police in the neighboring state, informing them of the incident. A warrant had not yet been issued so he told the police where he could be located. He was arrested the next day after an arrest warrant was issued and he voluntarily returned to the state where the incident took place. Applicant was charged with the felony of committing a lewd act upon a child under 16. He informed his supervisor and others at his company of the incident and his arrest. He pled guilty to the felony offense on January 4, 2006, and was sentenced to 12 years incarceration, suspended. He was placed on probation of four years. He was required to register as a sex offended. Applicant admitted and never denied the conduct whether questioned by the girl's father, criminal investigators for the state, or security investigators. He was straight forward and honest in his statements concerning the incident (Tr, 127-145; Gov. Ex. 4, Applicant's statement, dated December 19, 2006; See, Hearing Exhibit 1 and 2, State Statute on Sex Offender Registry; Gov. Ex. 2, Sex Offender Registry, dated December 12, 2007). When Applicant went to another state on business, he was also required to register as a sex offender. He did comply with the rules and direction and registered as a sex offender (Gov. Ex. 3, sex offender registry, dated December 10, 2007).

During a subsequent investigation by child protective service, it was reported that Applicant gave wine to his daughter when she was 13 years old and placed the hands of the sister of the girl in the May 2005 incident between his knees while on a fishing trip to keep them warm. The allegations were investigated but not substantiated and no action was taken. The allegations of the incidents were dropped. There are no other charges in the state pending against Applicant (App. Ex. D, Record check, dated January 21, 2009).

The father of the victim of the lewd act testified that he has known Applicant for over ten years. When he went to work for Applicant's initial employer, he was on the same shift as Applicant and they became friends. Applicant was always a good worker and was sent out on jobs because of his ability. He was proud of his work, open-minded to improvements, and always working to get the job done. He was always calm, and he never saw him excited or upset. Applicant was always honest, truthful, and followed the rules. He was selected for the employer's technical improvement program and became a set-up mechanic.

Their families were close and they did activities together. In fact, he worked with Applicant in Applicant's part-time side business. When he learned of the incident with his daughter and Applicant, he called Applicant. Applicant informed him that his daughter was truthful and he admitted the circumstances of the incident. He felt Applicant was honest and truthful with him about the incident (Tr. 32-44).

Applicant's probation officer testified that he has been a probation officer for about 11 years. He previously served in the Navy and worked in the naval shipyard for 19 years. He was Applicant's probation officer from January 2006 until he retired on June 27, 2008. He saw Applicant once a month in his office and on one or two home visits a month. Applicant followed the rules and performed satisfactorily during his probation. The witness trusted Applicant to do what he was required to do, but he did verify that he performed as required. Applicant was required to attend counseling and he did what was required. He was required to and did register as a sex offender. He would expect Applicant to conform to the terms and conditions of his probation. A lot of probationers violate the rules of probation, but Applicant was always cooperative. The witness considered the 12 year sentence to be fair and very motivating. It was an attention getter. He believes Applicant is calm and laid back, has a responsible position at work, and his employer thinks highly of him. Applicant four year probation will end in 2010 (Tr. 45-61).

Applicant's therapist, a licensed mental health counselor (App. Ex. B, Curricula Vitae) testified that he has been a therapist for sexual abuse offenders for over 11 years and counseled over 100 people. He also does general mental health counseling and contributes to professional journals on mental health issues.

He has seen Applicant in a clinical setting once a month in group therapy and once a month in an individual session since the sentence was imposed in January 2006. Applicant was always candid and honest in these sessions. He is laid back and not prone to anger. He is conscientious about following the rules, and is always straight forward, truthful, and forth coming. His initial diagnosis was Applicant had an adjustment disorder with a disturbance of conduct. This diagnosis is used when a therapist is not sure if the patient has a problem. After six months of therapy, he changed his evaluation to an impulse control diagnosis with intermittent explosive disorder. He further opined that Applicant is not a pedophile, sociopath, psychopath, or has an anti-social personality. Applicant simply made a mistake in judgment. This situation has not recurred and is not likely to recur. He believes Applicant would protect classified information (Tr. 62-95).

Applicant's supervisor testified that he has worked with Applicant for about six years. Applicant started as an electronic technician and is now a network specialist. He is very loyal to the company, serious about his job, and proactive. He is respected by his fellow workers and follows directions. Applicant has not been involved in any inappropriate behavior at work. He has held a security clearance while employed by the company. He prepared the Applicant's performance reviews since he has been with the company and rated him as an excellent employee who is an asset to the company (App. Ex. C, Evaluations, dated October 16, 2008, June 29, 2006, and June 30, 2004). He is absolutely sure Applicant would protect classified information (Tr. 96-112).

A government employee who oversees Applicant's work from the employer for the government testified that he controls Applicant's work. Applicant is a good worker. He is a regular, normal person, who is neither excitable nor laid back. Applicant will do

what is required for his sentence for the sexual misbehavior and criminal conduct incident. He is so reliable that he has absolute trust in Applicant's ability to protect classified information (Tr. 112-126).

## **Policies**

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). 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.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. 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. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk 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.

## Analysis

The security concerns raised for Applicant are all from the same incident. Security concerns are raised for sexual behavior, criminal conduct, and personal conduct and are the same for each. The security concern involves questions of Applicant's reliability, judgment, and trustworthiness. Sexual behavior that involves a criminal offense indicates a personality or emotional disorder, reflecting lack of judgment or discretion which can raise questions about the individual's reliability, trustworthiness, and ability to protect classified information (AG ¶ 12). 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 regulation (AG ¶ 30). Personal 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. Since the security concerns are similar, the concerns will be discussed as a group.

Applicant admits and the information clearly establishes that he committed a lewd act on a child under the age of 16. This criminal offense establishes the Sexual Behavior Disqualifying Condition (SB DC) AG ¶ 13(a) "sexual behavior of a criminal nature, whether or not the individual has been prosecuted." This is a felony offense and establishes Criminal Conduct Disqualifying Condition (CC DC) ¶ 31(a) "a single serious crime or multiple lesser offenses." Since Applicant is still under his sentence to probation, CC DC AG ¶ 31(d) "individual is currently on parole or probation" is also established. The incident also establishes Personal Conduct Disqualifying Condition (PC DC) AG ¶ 16(c) "credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guidelines, 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 regulation, or other character issues indicating that the person may not properly safeguard protected information."

The government produced substantial evidence by way of Applicant's admission and statements to establish the disqualifying condition in AG ¶¶ 13(a), 31(a), 31(d), and 16(c). The burden shifts to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns under sexual behavior, criminal conduct, and personal conduct. An applicant has the burden to refute an established allegation or prove a mitigating condition, and the burden to prove or disprove it never shifts to the government.

Each of the alleged security concerns has a similar mitigating condition. These mitigating conditions involve the passage of time, the unusual nature of the action causing security concerns, the likelihood of recurrence, and whether the actions cast doubt on the individual's reliability, trustworthiness, and judgment. I considered Criminal Conduct Mitigating Conditions (CC MC) ¶ 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"; Sexual Behavior Mitigating Condition (SB MC) 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 good judgment"; and Personal Conduct Mitigating Condition (PC MC) 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." The incident took place in May 2005, and Applicant pled guilty to the felony of committing lewd acts on a child under 16 and sentenced in January 2006 to a suspended jail sentence of 12 years and four year probation. The incident took place almost four years ago. Applicant is still serving his period of probation, and attending therapy with a mental health professional. Four years is not a long time to establish successful rehabilitation for a felony offense such as lewd acts on a child under 16. There were no unusual circumstances causing Applicant to commit the offense. He was not forced into the action and his judgment was not impaired by any substance abuse or other circumstances. While Applicant appears on the path to rehabilitation for his sexual deviant and criminal conduct, he has not provided sufficient information to establish that it would not happen again. Accordingly, he has not established these mitigating conditions for the security concerns alleged.

Successful rehabilitation is also a factor to consider in mitigating the security concerns. There is no rehabilitative mitigating condition for deviant sexual behavior. However, I have considered Criminal Conduct Mitigating Condition (CC MC) AG ¶ 32(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"; and Personal Conduct Mitigating Condition (PC MC) 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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur." Applicant always acknowledged his behavior and never denied he did something wrong. He registered as required as a sex offender and has followed the directives of registering when he travels to other states. He has continued to work and perform excellently for his employer. He has not been involved in any conduct that causes security concerns since the incident in May 2005. He successfully followed the directives of his probation officer, and faithfully attended counseling, both individual and group, with his mental health therapist. There are signs of successful rehabilitation. Again however, Applicant is still under probation for another ten months and still attending mental health counseling. Under these circumstances, it is too soon to determine that he has been successfully rehabilitated. Applicant has not presented sufficient information to mitigate security concerns for criminal conduct, sexual behavior, and personal conduct.

## **“Whole Person” Analysis**

Under the whole person concept, the Administrative Judge must evaluate an applicant’s security eligibility by considering the totality of the applicant’s conduct and all the circumstances. An 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 a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered that Applicant is a good employee and a conscientious and dependable worker held in high regard by this supervisors and peers. Applicant exhibits signs of successful rehabilitation. He always acknowledged his guilt of the offense which is the first sign of rehabilitation. He is remorseful for his conduct and the impact it had on the victim, her family, and his family. He has followed every direction of his probation officer and has done everything required of his probation. He is faithful to his mental health counseling. While there are signs of rehabilitation, it is too soon to determine that Applicant has been successfully rehabilitate, and that sexual behavior or criminal and personal conduct problems will not arise in the future causing security concerns. Applicant received a stiff sentence for his criminal conduct. He is still on probation with the threat of that sentence still real to him. Under these circumstances, Applicant can be expected to exhibit good behavior or he would face significant adverse consequences. He is still living under direct supervision of the probation officer. Society has a stake in ensuring that Applicant continues to be supervised. Under these circumstances it is too soon to determine that he can be trusted with access to classified information. Overall, on balance the record evidence leaves me with questions or doubts as to Applicant’s eligibility and suitability at this time for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his criminal and personal conduct, and sexual behavior.

## **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
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Paragraph, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against 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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THOMAS M. CREAN  
Administrative Judge