



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



In the matter of: )  
 )  
 ) ISCR Case No. 07-04863  
 SSN: )  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Francisco Mendez, Esquire, Department Counsel  
For Applicant: *Pro Se*

June 27, 2008

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant failed to mitigate the criminal conduct security concerns raised by his aberrant sexual behavior and convictions. Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on January 26, 2006. On October 16, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the Government's security concern under Guideline J (Criminal Conduct).<sup>1</sup>

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<sup>1</sup> 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 answered the SOR on December 4, 2007, and requested a hearing before an Administrative Judge. The case was assigned to me on January 3, 2008. The first Notice of Hearing was issued on January 11, 2008, convening a hearing on February 6, 2008. Applicant requested two continuances due to the unavailability of his expert witness (Tr. 15-17). The final Notice of Hearing was issued on February 11, 2008, convening a hearing on February 25, 2008. The hearing was convened as scheduled. The Government presented eight exhibits, marked GE 1-8, which were admitted without objection. Applicant testified on his own behalf, and presented 8 exhibits, marked AE 1-8, which were admitted without objection.<sup>2</sup> DOHA received the transcript (Tr.) on March 4, 2008.

### **Procedural Issues**

The Government withdrew SOR ¶ 1.h. Section 1072 of the Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181, signed on January 28, 2008), repealed 10 U.S.C. § 986, formerly known as the “Smith Amendment” (Tr. 22).

The Government moved to amend the second sentence of SOR ¶ 1.e, by deleting the date “June 10,” and substituting the date “February 6.” Applicant did not object. I granted the motion (Tr. 22-23).

### **Findings of Fact**

In his answer to the SOR, Applicant admitted the factual allegations in all the SOR allegations, except SOR ¶ 1.h, which he failed to answer. I considered this last allegation denied. His admissions are incorporated herein as findings of fact. After a thorough review of all evidence of record, including his demeanor, I make the following additional findings of fact.

Applicant is a 55-year-old senior management consultant, working as an independent contractor, for a government contractor. He completed a Bachelor of Science degree in Wildlife Biology in 1974, and his Master of Arts in Management and Human Relations in 1990 (GE 1, Tr. 6). He also graduated from the Army Command and General Staff College in 1987.

Applicant served as an officer in the U.S. Army from 1975 to 1994. He was administratively discharged in 1994 because of misconduct. His service was characterized as “under other than honorable conditions”. He testified his characterization of service has been upgraded to honorable (Tr. 128). While in the Army, Applicant had access to classified information at the secret level from 1975 to 1987, and at the top secret level from 1987 to 1992.

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<sup>2</sup> AE 1 was admitted at the hearing. Applicant attached AE 2 - 8 to his answer to the SOR. Department Counsel did not object to me considering the documents and I made them made part of the record (Tr. 19-20).

Applicant has been working for his current employer, a defense contractor, since November 2000. The vice president and president of his company have known and worked with Applicant for approximately nine years. They endorsed Applicant's clearance without hesitation. A friend/colleague also endorsed Applicant's security clearance without reservations. His references attest to Applicant's dedication, reliability, integrity, ethics, and the quality of his work. Applicant is considered a highly skilled employee, who is articulate and intelligent, and who loves the military and its mission. While working for his current employer, he has been placed in positions of responsibility over mission essential tasks and sensitive matters. He has consistently performed in an outstanding manner. They are all aware that Applicant was convicted of a felony. However, there is no indication in their letters as to whether they are aware of the heinous nature of the sexual offenses Applicant committed (AEs 5, 6, and 7).

Applicant married his wife in 1986, and she divorced him in 1997. They have four daughters (age 30, 28, 16, and 14) and one son (age 12) born of this marriage (GE 1, Tr. 141-144).

### **Criminal Conduct Allegations**

In 1975, Applicant was arrested for window peeping, and was forced to post a bond. The charge was later dismissed. In 1979, he was arrested for window peeping and charged with disorderly conduct. He posted a \$200 bond. In 1982, he was arrested and charged with disorderly conduct. He posted a \$21 bond and the charge was later dismissed. During his freshman year at college, Applicant used binoculars to view into the rooms of female students (GE 5).

In April 1992, Applicant exposed himself to a female and fled the area on foot. He was pursued and drove away in his car. He was identified and charged with indecent exposure. His case was placed on a Stet Docket (GE 3). Applicant blamed his misconduct on his alcohol dependence and the fact that he had been drinking the day of the incident. Because Applicant was an officer (major) in the Army and had access to classified information, the Army Central Personnel Security Clearance Facility ordered Applicant's mental health evaluation. In February 1993, an Army psychiatrist diagnosed Applicant as (1) alcohol dependent, in remission and (2) Voyeurism and Exhibitionism (provisional), remission uncertain. In his findings and recommendations, the doctor/psychiatrist noted:

The diagnoses of Voyeurism and Exhibitionism (provisional), generally represent chronic psychiatric problems which do not resolve without major psychiatric interventions or changed life circumstances. Even with treatment, these disorders have a high relapse rate. Given the chronic nature of these disorders and the tendency of patients with these problems to deny on-going voyeurism and exhibitionism, it is the judgment of the undersigned that [Applicant] possesses poor judgment in the area of sexuality which may compromise his reliability. Continued psychotherapy is strongly advised.

GE 5 at 18.

Applicant underwent residential alcohol treatment from November to December 1992. At the end of his treatment, his prognosis was considered good; however, he was required to attend another year of after care treatment. From 1992 to 1995, he averred he participated in Alcoholic Anonymous and Sexual Compulsive Anonymous meetings (Tr. 122). He claimed he did well after attending AA for two years. Because of the above mentioned misconduct and psychiatric evaluation, in April 1994, Applicant's security clearance was revoked and his SCI access was withdrawn (GE 5).

Between 1991 and 1995, Applicant sexually molested three of his four daughters and four of his daughters' young girlfriends (Tr. 135). Specifically, in 1991, he sexually fondled, allegedly over the top of her clothes, his then 12-year-old daughter. He also sexually fondled his then 11-year-old daughter, twice during a one-month period. Moreover, Applicant inserted his penis in the vagina of his then six-month-old daughter (Tr. 135-136, 141-145).

In 1995, his older daughter was having emotional and mental problems which required her to receive mental counseling. She disclosed to her counselor and her mother that Applicant was sexually molesting her and that it had happened before. As a result, Applicant was charged with Aggravated Sexual Battery and Indecent Liberties with Children, both felony offenses. In February 1997, Applicant was convicted of both felony offenses. He was sentenced to five years jail (suspended), and 20 years supervised probation on the Indecent Liberties charge. On the Aggravated Sexual Battery charge, he was sentenced to 15 years jail (suspended), and 20 years supervised probation.

In March 1997, Applicant consumed alcoholic beverages and exposed himself to a female in a library. In June 1997, he was convicted of obscene display and sentenced to six months jail of which he served three months. His behavior violated the conditions of his 20-year-probation resulting from his February 1997 conviction for Aggravated Sexual Battery and Indecent Liberties. In November 1997, Applicant's 20-year-probation was revoked and he was sentenced to five years jail. He served two and one-half years in a correctional facility and was placed on 15 years supervised probation, starting from his release from jail. He is a registered sex offender.

Applicant has been in therapy/counseling since his release from jail. He initially participated in a sexual offenders' treatment group. Afterwards, he was referred to individual counseling, and has continued his counseling to the hearing date. Applicant's counselor believes Applicant is doing well, and he is satisfied with Applicant's progress. To the counselor's knowledge, Applicant has not relapsed since 1996. In the counselor's opinion, "there has been rehabilitation of the presenting compulsivity issues and the probability of re-offense is low based on the client's history of compliance with treatment and probation and the [Applicant's] ability to receive insight and make persona intrinsic changes" (AE 4). The counselor stated he would trust Applicant with

his own daughters (Tr. 71). Additionally, Applicant has participated in AA and Sexual Compulsive Anonymous (SCA) continuously to the hearing date.

Applicant's probation/parole officer confirmed that in February 1997, Applicant was sentenced to an indefinite term of supervised probation. In the parole officer's opinion, Applicant has adjusted well to supervision. Applicant has maintained an open and honest line of communication with the probation office, and has not received sanctions for any type of violations. He has worked diligently on his treatment, and is aware of the lifelong commitment it takes to overcome his offending triggers (AE 4).

Applicant claimed the first time he realized he had a deviant sexual behavior problem was after he was indicted by his daughter in 1995. Before that incident, he had worked on his alcohol dependence problem, but not on his sexual deviancy problems. He expressed remorse, regret, and guilt for his past deviant sexual behavior, and lamented the necessity of losing his family and being incarcerated to cause him to realize he had to change (Tr. 105-109). Applicant averred he has not consumed alcoholic beverages or engaged in any sexual misconduct since 1997.

Applicant testified that, notwithstanding his heinous past sexual behavior and conviction, he is a man of character and integrity. To support his assertions he relied on his Army record and duty performance while in the service and while working for his current employer during the last nine years. He believes the intensive treatment/counseling programs he has undergone since 1997, have given him the necessary tools to arrest his obsessive compulsive sexual behavior and alcohol dependence.

### **Policies**

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.<sup>3</sup>

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). The adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be considered 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 controlling 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,

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<sup>3</sup> See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

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.”<sup>4</sup> 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.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

Under Guideline J, the security concern is that 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 ¶ 30.

From 1975 to 1997, Applicant was involved in six criminal conduct related incidents. He was convicted of Aggravated Sexual Battery and Indecent Liberties with a Minor in 1997, both felony offenses. The remaining five incidents involved charges for

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<sup>4</sup> *Egan, supra*, at 528, 531.

aberrational sexual behavior. All of Applicant's offenses occurred while he was serving as an officer in the U.S. Army. He sexually abused and/or molested his own three young daughters and four of their girlfriends. After his felony conviction, Applicant was placed on probation. Within months, Applicant violated the terms of his probation and was convicted of obscene display. Taken together, these incidents show Applicant lacks judgment, and raise serious doubts on his ability or willingness to comply with laws, rules, and regulations. Criminal Conduct disqualifying conditions AG ¶ 31(a) "a single serious crime or multiple lesser offenses," AG ¶ 31(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted," AG ¶ 31(d) "individual is currently on probation or parole or probation," and AG ¶ 31(e) "violation of parole or probation," apply.

AG ¶ 32 lists four conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31. After considering all the mitigating conditions, I find that none apply. He receives some mitigation because his last criminal related incident occurred in 1997, and there is no evidence of additional alcohol related incidents or criminal misconduct for more than 10 years.

Notwithstanding, because of his history of compulsive sexual criminal behavior over an extended period of time; the seriousness nature of the offenses; his age, education, and employment at the time of the offenses; the young age of the victims and their relationship to Applicant; his violation of probation; the fact that he is still on indefinite probation; and the chronic nature of his obsessive compulsive behavior, the passage of time, and the extent of his therapy and counseling, are insufficient to mitigate his criminal behavior.

Applicant appears to be making progress in his rehabilitation. However, his evidence is not sufficient to show that the circumstances that caused his questionable behavior are no longer present in Applicant's life, and I believe his questionable behavior is likely to recur. Moreover, having observed Applicant's demeanor, and considering his testimony in light of the record evidence, I find Applicant's testimony was not fully candid and forthright, and that he tried to minimize his questionable behavior. Applicant's overall behavior cast serious doubts about his judgment, reliability, and willingness to comply with laws, rules and regulations. Although Applicant expressed remorse for his behavior and has initiated changes in his lifestyle, these factors are insufficient to establish his reliability, trustworthiness, judgment, and rehabilitation.

### **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 carefully weighed all evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines in light of all the facts and circumstances surrounding this case. I considered Applicant's age, education, maturity level, his 19 years of service, his prior access to classified information, and his years of good performance for a government contractor. I considered that he is doing well on his probation, and in his rehabilitation efforts. I also considered the seriousness of the criminal conduct at issue. On balance, the record evidence does not convince me of Applicant's eligibility and suitability for a security clearance. Applicant has failed to mitigate the security concerns arising from his criminal conduct concerns.

### **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
Subparagraphs 1.a - 1.g:	Against Applicant
Subparagraph 1.h:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to continue Applicant's security clearance. Eligibility for access to classified information is denied.

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JUAN J. RIVERA  
Administrative Judge