



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



In the matter of:)
)
-----) ISCR Case No. 07-00186
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: John Bayard Glendon, Esquire, Department Counsel
For Applicant: *Pro se*

November 13, 2009

Decision

CURRY, Marc E., Administrative Judge:

In June 2006, Applicant was arrested and charged with four felony counts of crimes against nature and four felony counts of indecent liberties with a minor after his adult daughter accused him of molesting her on multiple occasions over a four-year period during her childhood. Under a plea agreement negotiated in August 2009, the state nolle prossed the charges of crimes against nature, and reduced the remaining charges to four misdemeanor counts of contributing to the delinquency of a minor. Applicant pleaded no contest to these reduced charges, and the court, after considering the evidence, found him guilty, imposing a jail term of 12 months suspended on each charge, respectively. Because the court's final disposition of the case is still pending, Applicant is an unacceptable candidate for a security clearance. Clearance is denied.

Statement of the Case

On April 30, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing a security concern under Guideline J, Criminal Conduct. 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 27, 2008, admitting the allegation, in part, and requested a hearing. The case was assigned to me on August 12, 2009. On August 31, 2009, a notice of hearing was issued scheduling the case for September 17, 2009. The hearing was conducted as scheduled. I received eight government exhibits, two Applicant exhibits, and the testimony of two Applicant witnesses. Also, at Department Counsel's request, I took administrative notice of four sections of relevant state law. At the conclusion of the hearing, I left the record open to allow both parties to submit additional exhibits. Within the time allotted, Department Counsel submitted another exhibit that I marked and received as Exhibit 9, and Applicant submitted another exhibit that I marked and received as Exhibit C. The transcript was received on September 24, 2009.

Findings of Fact

Applicant is a 49-year-old married man. He has a GED, and served in the U.S. Navy from 1980 through his retirement in 2004 (Tr. 18). He spent the majority of his career working on submarines (Tr. 76). Currently, he works for a defense contractor as an engineer. He helps maintain sonar and tactical control systems on submarines (Exhibit A). According to his supervisor, he is a "hardworking and meticulous" worker who mentors junior employees and fosters a collaborative team environment (*Id.*).

Applicant was married twice previously. His first marriage ended in divorce in 1987. He remarried in 1989. This marriage ended with the death of his wife in 2000 (Exhibit 2 at 3). He has three daughters, ages 22, 20, and 17. All are from his second marriage (Tr. 19). His oldest daughter is adopted. She is the natural-born daughter of his second wife and a former boyfriend. Applicant adopted her in 1992, when she was five years old (Tr. 52). In 1999, Applicant and his second wife separated (Exhibit 4 at 3). The children remained with her (*Id.*).

In 2000, while the divorce proceedings were pending, Applicant's wife was murdered. Applicant's daughters then moved in with him (Tr. 22). Because of the traumatic nature of his wife's death, Applicant enrolled his daughters in therapy (Tr. 84 - 86). The adopted daughter had stopped attending therapy by the time she had reached high school (Tr. 86). It is unclear from the record exactly how long each daughter was in therapy.

Applicant was single when his daughters moved in with him. Because he spent "a substantial amount of time out at sea" his stepdaughter from his first marriage who was in her late teens at the time, helped him raise the girls when he was away from home (Tr. 23). Shortly before retiring from the Navy, Applicant began dating a woman to

whom he later became engaged. Although this relationship ultimately failed, she also watched the children when he was out to sea (Tr. 23).

In the fall of 2004, Applicant's adopted daughter moved out of his home to live with her boyfriend (Tr. 24). In the fall of 2005, Applicant became engaged to his current wife (Tr. 28). In February 2006, they married. She and her teenage son then moved in with Applicant and his youngest daughters. (*Id.*).

None of the new family members got along with one another (Tr. 29-31). Applicant's daughters accused the stepson of vandalizing their property, and they accused their stepmother of being emotionally abusive (Tr. 30). Frequent and increasingly intense verbal arguments ensued. As the situation worsened, Applicant began discovering that "really strange things [were] taking place in the house," such as the kitchen being ransacked, and furniture being vandalized (Tr. 31).

Applicant initially attributed the problems to his wife and stepson. Some time during the spring of 2006, Applicant's daughters moved in with their older sister at his suggestion (Tr. 34). Applicant and his wife then attended marital counseling (Tr. 35).

In May 2006, Applicant, at his wife's suggestion, underwent marital counseling (Tr. 37). The counselor suggested that his two youngest daughters return to his home and participate jointly in counseling (Tr. 37). Although they returned and participated in counseling, they remained hostile, and requested to return to live with their older sister (Tr. 38). By June 2006, the oldest daughter, who also had a bad relationship with the stepmother, began calling the home daily, demanding to see her sisters and threatening the stepmother (Tr. 39).

On or about June 10, 2006, Applicant's daughters' maternal grandparents visited from out of town to attend the middle daughter's middle school graduation (Tr. 41). The grandparents asked Applicant to transfer custody of the girls to them (Tr. 42). Applicant refused. Shortly thereafter, the two younger daughters alleged that Applicant had sexually molested them (Tr. 44; Exhibit 4 at 9).

Applicant was then arrested (*Id.*). The specific charges are unknown from the record. He was released after posting bond (*Id.*). He transferred custody to the girls' grandparents while the local department of social services investigated the complaint (*Id.*). Currently, the girls remain in their grandparents' custody.

On August 2, 2006, "after a thorough evaluation," the local social services department completed the investigation and concluded that the complaint was unfounded (Exhibit 4 at 11).

Approximately three weeks later on August 25, 2006, Applicant's adopted daughter accused him of molesting her approximately two days per month from 1995 to 2004 (Exhibit 5 at 2). That day, the magistrate issued an arrest warrant. Referencing an arcane, Jim-Crow era state statute that has long been amended, the magistrate

charged Applicant with committing “forcible sodomy by engaging in cunnilingus with A WHITE FEMALE¹ when such act was accomplished against the victim’s will, by force, threat, or intimidation of or against the victim or another person” (Exhibit 5 at 3). Applicant is African-American. Applicant was arrested and incarcerated for ten days before posting bond of \$16,000 (Exhibit 5 at 16; Exhibit 6 at 1; Tr. 58).

Shortly after Applicant’s arrest, the prosecution amended the charge striking the reference to the race of the victim (Exhibit 5 at 4). On November 13, 2006, a grand jury indicted Applicant charging him with four felony counts of crimes against nature and four felony counts of indecent liberties under §18.2 of the state’s criminal code (see *generally*, Exhibit 5; Exhibit C at 2). The abuse allegations alleged in the charging documents were limited to 2000 through 2004, the period that the alleged abuse occurred within the court’s jurisdiction.

In December 2006, the adopted daughter attempted to break into Applicant’s house (Tr. 81). Subsequently, he obtained a temporary restraining order against her (Tr. 82).

Approximately six years before Applicant’s daughter alleged that he molested her, she alleged that someone had raped her (Tr. 84). In response, Applicant enrolled her in therapy. During therapy, she recanted the rape allegations (Tr. 85).

In August 2009, the state and Applicant negotiated a plea bargain. Under the agreement, the four felony counts of crimes against nature were nolle prossed, and the four felony indecent liberty counts were reduced to four misdemeanor counts of contributing to the delinquency of a minor under § 18.2-371 of the state code, which states as follows:

Any person 18 years of age or older, including the parent of any child, who (i) willfully contributes to, encourages, or causes any act, omission or condition which renders a child delinquent, in need of services, in need of supervision, or abused or neglected as defined in § 16.1-228,² or (ii) engages in consensual sexual intercourse with a child 15 or older not his spouse, child, or grandchild, shall be guilty of a Class 1 misdemeanor.

Applicant pleaded not guilty to the reduced charges, but stipulated that the evidence if heard would be sufficient to convict him of the four misdemeanors (Exhibit 8). The state did not require his plea to specifically address the section of the misdemeanor code involving sex with minors (Exhibit 9).

¹In citing this portion of the arrest warrant, I copied the magistrate’s language exactly as it appeared on the arrest warrant including the use of all capital letters for the phrase “a white female.”

²Under 16.1-228, “abused or neglected” means any child “whose parents . . . create or inflict, threaten to create or inflict, or allow to be created or inflicted upon such child a physical or mental injury by other than accidental means . . .”

Subsequently, the court sentenced Applicant to 12 months in jail for each charge, suspended (Exhibit 8; Tr. 71). Applicant was also ordered to complete a psychological evaluation and to have no contact with his adopted daughter. The psychological evaluation is scheduled for December 2009, and Applicant is to comply with any recommendations of the psychologist and report the findings to the court (Tr. 73). If Applicant fails to follow any of the court-ordered requirements over the next five years, or engages in any other criminal conduct during this period, the court may lift the suspension, and require him to serve jail time (Tr. 73).

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. 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."

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.

Analysis

Guideline J, Criminal Conduct

Under this guideline, "criminal activity creates doubt about a person's judgment, reliability, and trustworthiness" (AG ¶ 30). Also, "by its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations" (*Id.*).

Applicant was charged with four felony counts of crimes against nature and four felony counts of indecent liberties after his oldest daughter accused him of molesting her on multiple occasions over a ten-year period. Approximately six years earlier,

Applicant's daughter alleged she had been raped, then recanted while in therapy that Applicant had arranged.

Applicant persuasively testified to a severely troubled relationship between his children, his wife, and new stepson. His two youngest daughters did not accuse him of molestation until after he had reached the conclusion that they, not their step-family members, were the principal source of the family's discord, and his oldest daughter did not accuse him of molestation until the local child protective services agency investigated and dismissed the youngest daughters' allegations. Applicant has readily enrolled his daughters in therapy throughout their childhood, including after the death of their mother, after the oldest daughter's earlier rape allegation, and after he married his current wife.

Nevertheless, Applicant pleaded no contest to four misdemeanor counts of contributing to the delinquency of a minor. The court then sentenced him to a year in prison for each count, suspended, ordered that he have no contact with his oldest daughter, and ordered him to undergo a psychological evaluation. After he completes the evaluation, the court will order any of the psychologist's recommendations. If Applicant violates any terms of this order, the court may lift the suspension. AG ¶¶ 31(a) "multiple lesser offenses," and 31(d), "the individual is currently on parole or probation, apply."

Because Applicant pleaded no contest to misdemeanors rather than felonies, the doctrine of collateral estoppel does not preclude me from weighing the credibility of the evidence underlying the misdemeanor charges.³ However, any exculpatory evidence is outweighed by Applicant's plea admission that the state possessed enough evidence to have convicted him of the underlying misdemeanors if the matter had been tried.

Applicant's plea occurred less than a month before the ISCR hearing. He is still awaiting the results of a psychological evaluation, scheduled for December 2009, so that it can supplement its order with any of the psychologist's recommendations. Consequently, it is too soon to conclude that 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," applies.

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

³See ISCR Case No. 04-05712 (App. Board, October 31, 2006) at 7.

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

MARC E. CURRY
Administrative Judge