KEYWORD: Criminal Conduct; Sexual Behavior

DIGEST: Applicant's demonstrated criminal conduct and sexual behavior disqualify him for a security clearance. Clearance denied.

CASENO: 03-20320.h1

DATE: 07/30/2007

DATE: July 30, 2007

In Re:	)	
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SSN: ----------	)	
	)	
Applicant for Security Clearance	)	
	)	

DECISION OF ADMINISTRATIVE JUDGE
JOHN GRATTAN METZ, JR

APPEARANCES

FOR GOVERNMENT
Stephanie C. Hess, Esquire, Department Counsel

FOR APPLICANT
Sheldon I. Cohen, Esquire

SYNOPSIS

Applicant's demonstrated criminal conduct and sexual behavior disqualify him for a security clearance. Clearance denied.

STATEMENT OF THE CASE

Applicant challenges the 26 September 2005 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of criminal conduct and sexual behavior.[1] Applicant answered the SOR 7 October 2005 and requested a hearing. DOHA assigned the case to me 9 December 2005 and I convened a hearing 16 February 2006. DOHA received the transcript 27 February 2006.

FINDINGS OF FACT

Applicant admitted the SOR allegations. Accordingly, I incorporate his admissions as findings of fact. He is a 46-year-old information manager, employed by a defense contractor since March 2001, seeking his industrial clearance. He previously held a clearance while serving in the U.S. Marine Corps from 1978 to 2001.

On 2 July 2001, the day after his retirement from the Marine Corps,[2] Applicant surrendered to police on a felony arrest warrant for indecent liberties with a minor by custodian. The precipitating event for this arrest was the discovery that Applicant had sexually abused his adopted daughter from about October 1997, when she was 13 years old, to 2001, when she was 16. On 21 May 2001, the victim revealed the abuse to her grandmother, who reported it to her mother, who in turn reported it to Child Protective Services (CPS). CPS contacted the victim at school on 21 May 2001, and contacted Applicant on 22 May 2001, when it was arranged to have Applicant leave the family home so the victim and Applicant's two natural children could remain in the home with their mother rather than be placed in protective custody. He was not allowed to have any contact with any of the children for the next six months.

Applicant was subsequently indicted on these charges, and on 19 November 2001, pled guilty. On 15 February 2002, he was sentenced: five years incarceration, with all but six months suspended, and payment of all costs associated with the case. He was permitted to serve the six months incarceration on work release, returning each day to jail. He was required to participate in alcohol counseling, mental health counseling, sex offender counseling—including registering on the state police sex offender registry.[3] He was also placed on three-years supervised probation, beginning after his release from incarceration.

Applicant fully complied with the terms of his sentence. In November 1991, he was diagnosed as a pedophile by a court-appointed specialist—a license clinical psychologist, certified sex offender treatment provider, and certified addictions specialist—as part of his pre-sentence investigation. Although she placed him in the low-risk category for recidivism for sexual offenses,

[1]Required by Executive Order 10865 and Department of Defense Directive 5220.6, as amended (Directive).

[2]From March 2001, when he began work for his current employer, to 1 July 2001, when he retired from the Marine Corps, he was on terminal leave. In that status, he remained on active duty and subject to military discipline and prosecution under the Uniform Code of Military Justice (UCMJ)(Tr. 322).

[3]Where he will remain indefinitely.

she nevertheless recommend that he attend group sex offenders treatment, outpatient substance abuse (alcohol) treatment, and other family counseling as needed. He was recommended to have only supervised visitation with his two natural children. Applicant satisfactorily complied with the program recommendations.

During Applicant's participation in the treatment programs, he was eventually allowed to visit with his younger children, first in CPS offices with his wife and CPS personnel present. The frequency and length of visits expanded over time and by the middle of 2004, Applicant's wife was permitted to be the sole supervisor of these visits (Tr. 274). Applicant was released from incarceration in July 2002, and from supervised probation in July 2005. In the summer of 2005, Applicant was allowed overnight visits to the family home, first one night per week, then two, then three. He was allowed to return to the family home permanently in November 2005. In January 2006, he was released from the jurisdiction of CPS (Tr. 293). He was released from counseling in February 2006 (Tr. 62, 117).

At hearing, Applicant submitted counseling records and testimony from two psychologists. The first was his counselor through the most important period of his post-trial counseling—who had just released him from further counseling requirements. The other was the specialist who evaluated him for the pre-sentence report, and had been asked by Applicant to provide an updated evaluation for his clearance hearing. Both emphasized common themes in their favorable testimony for Applicant: that Applicant was a situational offender rather than a preferential offender, meaning that his sexual attraction was to his adopted child, not to his natural children or children in general (Tr. 92, 107), i.e. that preferential offenders are at greater risk to re-offend. Both noted the family issues that contributed to his misconduct: financial and work stresses, alcohol abuse, lack of communication with his wife. Both noted his significant lifestyle changes and his improved communication with his wife. Both gave him a favorable prognosis, and stated that he was at low risk to re-offend. However, both psychologists acknowledge certain reservations and caveats to their opinions. His regular counselor acknowledged that Applicant's giving gifts to the victim to ensure compliance and silence (known as "grooming") showed Applicant's intentionality in his misconduct—notwithstanding the stressors present in his life (Tr. 111). Although she considered the risk of re-offense low (5% over 5 years)(Tr. 82), she was not comfortable describing Applicant as "rehabilitated (Tr. 103)." Further, she had devised a "safety plan" for Applicant and his wife to use with their two minor children, prescribing certain behaviors for Applicant to abide by (Tr. 116). Still, she stated she would not have discharged him from counseling if she thought he was still relying largely on external restraints (Tr. 117).

The other expert's testimony was substantially similar, except for noting that sexual abuse was not a diagnosis that could be considered "in remission (Tr. 200)." Although she concurred that Applicant's risk of re-offending was low, she considered the risk not only higher over five years (7.6%), but noted that the risk actually rose between five and ten years (11.2%)(Tr. 181, 220). In addition, she conceded that her February 2006 evaluation did not include review of treatment records from earlier periods of treatment that were less favorable to Applicant (Tr. 209, 224-225)

Both the victim (now age 20) and Applicant's wife testified favorably on his behalf, including details about how their relationships with Applicant are much better than they were before the sexual abuse was disclosed. However, in both instances there are details that are in sharp variance with that testimony. Although the victim testified that she would trust being alone with him, the

safety plan requires that he not be alone with her at home (Tr. 40). More tellingly, while she stated that she testified at the hearing as a means of getting some closure, she clearly views the criminal proceedings and possibly the clearance hearing as punishing the family as much as the Applicant, largely because of the potential financial impact on the family and her ability to continue in college (Tr. 42-44).[4] Applicant's wife similarly varies between stating that she is very vigilant of his behavior, yet feeling that the family paid most for his crime because he is essentially the sole financial support for the family (Tr. 166-168).

In his testimony, Applicant testified that he did not advise the Marine Corps of the charges against him. He did not advise his civilian employer of the charges until his guilty plea in November 1991. The employer did not advise the government of the adverse information until his sentencing in February 2002. His security officer is aware of his conviction, as are some of his key bosses. However, personnel at his work site are unaware of his conviction. He is on the state police registry of violent sexual offenders. Applicant has given inconsistent descriptions of the extent of his sexual abuse of his daughter. During the initial CPS investigation, he simply deferred to whatever his daughter said, although the record contains no first hand report from her, merely the recorded notes of CPS personnel. Applicant's 30 July 2003 sworn statement (G.E. 2) records a wide variety of sexual misconduct, but lacks details on the number of occasions. At hearing, he variously described the abuse as 5-7 times (Tr. 308), "best guess" (Tr. 311), not recalling the number of times (Tr. 327). Nevertheless, he did not retreat from the numbers implied in his sworn statement (Tr. 327).

Applicant's work and character references give him favorable recommendations for obtaining his clearance.

POLICIES AND BURDEN OF PROOF

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guidelines are Guideline J (Criminal Conduct) and Guideline D (Sexual Behavior).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute,

[4]In similar fashion, she sent a letter to the judge before his sentencing, pleading with him to keep Applicant out of jail because of the financial impact it would have on the family. She characterized the criminal proceedings and CPS involvement in the case as detrimental to her financial future (G.E. 10).

extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.[5]

CONCLUSIONS

The government established a case for disqualification under Guideline J by demonstrating that Applicant sexually abused his adoptive daughter between October 1997 and May 2001.[6] He failed to mitigate the security concerns raised by his criminal conduct. His criminal conduct was both recent, in the context of being under probation until July 2005, and not isolated, having constituted a course of conduct over more than three years.[7] Similarly, he was not pressured or coerced into committing the criminal acts,[8] and his conduct was entirely voluntary.[9] While he presented substantial evidence of successful rehabilitation, I do not consider that he has provided clear evidence of rehabilitation, given the caveats expressed by his psychological experts.[10] I resolve Guideline J against Applicant.

The government also established a case for disqualification under Guideline D by demonstrating that Applicant sexually abused his adopted daughter for over three years.[11] He was diagnosed as a pedophile, albeit situational as opposed to preferential.[12] Although Applicant claims that he is not in a position to be exploited, it does not appear that knowledge of his past conduct is

[5] *See*, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

[6] E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged; E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

[7] E2.A10.1.3.1. The criminal behavior was not recent; E2.A10.1.3.2. The crime was an isolated incident;

[8] E2.A10.1.3.3. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life;

[9] E2.A10.1.3.4. The person did not commit the act and/or the factors leading to the violation are not likely to recur;

[10] E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

[11] E2.A4.1.2.1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

[12] E2.A4.1.2.2. Compulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive or high-risk behavior or that which is symptomatic of a personality disorder;

much known outside government personnel involved in his clearance adjudications.[13] His conduct betrays a significant lack of discretion and judgment.[14]

The conclusions of his experts notwithstanding, Applicant failed to mitigate the security concerns raised by his sexual behavior. The conduct occurred when Applicant was not an adolescent.[15] The conduct is still recent.[16] Further, his sexual behavior is not the only evidence of questionable judgment, irresponsibility, or emotional instability.[17] His delay in reporting his criminal charges to his employer, and in the case of the Marine Corps failing to report it altogether, suggest an unwillingness to come forward with adverse information raising security concerns until such information is likely to become public through other sources. Finally, even accepting that Applicant has ceased his sexual abuse and is unlikely to re-offend, his past conduct still serves as a basis for coercion, exploitation, or duress.[18] Paradoxically, he may be subject to potential duress whether he re-offends or not, because even a false claim that he abused either of his natural children, now 12 and 11 (just younger that the victim when Applicant began abusing her), could bring tremendous pressure on Applicant. Further, Applicant was only recently released from probation, the custody of CPS, and his required treatment. While his psychologist testified that she would not have released him from treatment if she thought he was still relying on external forces to avoid re-offending, the fact remains that February 2006, is the first time he has been completely without external forces, including the possibility that his probation be revoked. He has no established track record back in the home without these external forces, and even within the home is being watched very carefully by his wife. Applicant views his re-introduction into the family home, and release from probation, CPS jurisdiction, and treatment requirements, as the successful conclusion of his journey, whereas I see it as only the beginning of a potentially successful journey. On balance, I find it too early to tell if Applicant will avoid recurrence of his sexual misconduct. I resolve Guideline D against Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph a: Against Applicant

Paragraph 2. Guideline D: AGAINST APPLICANT

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[13] E2.A4.1.2.3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;

[14] E2.A4.1.2.4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

[15] E2.A4.1.3.1. The behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature;

[16] E2.A4.1.3.2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;

[17] E2.A4.1.3.3. There is no other evidence of questionable judgment, irresponsibility, or emotional instability;

[18] E2.A4.1.3.4. The behavior no longer serves as a basis for coercion, exploitation, or duress.

Subparagraph a: Against Applicant
Subparagraph b: Against Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance denied.

John G. Metz, Jr.
Administrative Judge