

DATE: July 30, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-21070

DECISION OF ADMINISTRATIVE JUDGE

JOSEPH TESTAN

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's criminal and sexually perverted criminal conduct directed at his minor children was so egregious that the passage of time since the incidents occurred, standing alone, is insufficient to overcome the doubts about his judgment, reliability and trustworthiness. Clearance is denied.

STATEMENT OF THE CASE

On October 16, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on November 9, 2003, and elected to have his case determined on a written record in lieu of a hearing. Department Counsel (DC) submitted the Government's written case (FORM) on or about January 26, 2004. Applicant filed a response to the FORM on or about March 18, 2004. ⁽¹⁾ The case was assigned to me on May 25, 2004.

FINDINGS OF FACT

Applicant is a 49 year old employee of a defense contractor.

In January 1999, applicant was arrested and charged with (1) Aggravated Sexual Assault, a felony, and (2) Indecency with a Child, a felony. He was indicted on these charges in May 1999. The charges were based upon criminal and sexually perverted conduct applicant engaged in with his minor daughter in or about December 1994. In November 2000, he pleaded nolo contendere to both charges, and was sentenced to ten years of community supervision under a Deferred Adjudication of Guilt statute, ⁽²⁾ and fined approximately \$4,209.00. He was also ordered to attend alcohol and

behavior counseling. Applicant cannot live at home with his family until the behavior counselor deems him fit. In a statement that he gave to the Defense Security Service (DSS) in May 2003, applicant stated that he has completed Phase I of his therapy and has begun Phase II. There is no credible evidence that he has completed therapy, or that the behavior counselor has deemed him fit enough to live with his family.

Applicant admits the conduct alleged in SOR Paragraphs 1b, 1d and 1e. ⁽³⁾ These allegations are therefore incorporated by reference as Findings of Fact.

Applicant denies SOR Allegation 1c. In explanation he states, in essence, that he does not recall "ever doing this," but if his daughter said it happened, "then it must have happened." Given this statement, the fact he admitted to the conduct in a January 1999 interview with the police, and the fact he pleaded nolo contendere to the above-referenced charges, one or both of which were based on this very conduct, I find that he engaged in the alleged conduct.

In his response to the Form, applicant stated: " My acts against my son and daughter were wrong admittedly. My sorrow and remorse are tremendous. We all make mistakes in our lives, and my errors are proving to be very grave with my life. My only hope is that the court does not see me as an evil deviate person, but as a decent human being deserving a second chance."

CONCLUSIONS

Applicant's criminal and sexually perverted conduct directed at his minor son and daughter raises significant doubt about his judgment, reliability and trustworthiness under Guidelines D, J, and E.

With respect to Guideline D, Disqualifying Conditions E2.A4.1.2.1 (*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*), E2.A4.1.2.3 (*sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*), and E2.A4.1.2.4 (*sexual behavior which reflects lack of discretion or judgment*) are applicable.

Because applicant's sexually perverted conduct was not recent, he qualifies for Mitigating Condition E2.A4.1.3.2 (*the behavior was not recent and there is no evidence of subsequent conduct of a similar nature*). However, the lack of recency in this case is insufficient to remove the doubt about applicant's judgment, reliability and trustworthiness arising from his sexually perverted conduct. This is particularly so in light of the fact he has not completed the court ordered behavior counseling, and has not even completed half of his term of probation. Based on the foregoing, Guideline D is found against applicant.

With respect to Guideline J, Disqualifying Conditions E2.A10.1.2.1 (*allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and E2.A10.1.2.2 (*a single serious crime or multiple lesser offenses*) are applicable. Because applicant's criminal conduct was not recent, he qualifies for Mitigating Condition E2.A10.1.3.1 (*the criminal behavior was not recent*). However, for the same reasons as discussed above with respect to Guideline D, the lack of recency in this case is insufficient to remove the doubt about applicant's judgment, reliability and trustworthiness arising from his sexually perverted criminal conduct directed toward his minor children. Based on the foregoing, Guideline J is found against applicant.

With respect to Guideline E, Disqualifying Condition E2.A5.1.2.4 (*personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*) is applicable. No Mitigating Conditions are applicable. Applicant's incredibly poor judgment, untrustworthiness and unreliability are all cognizable under Guideline E, ⁽⁴⁾ and require denial of his clearance request.

FORMAL FINDINGS

PARAGRAPH 1: AGAINST THE APPLICANT

All subparagraphs found against applicant

PARAGRAPH 2: AGAINST THE APPLICANT

All subparagraphs found against applicant

PARAGRAPH 3: AGAINST THE APPLICANT

All subparagraphs found 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.

Joseph Testan

Administrative Judge

1. Applicant's March 18, 2004 response to the FORM begins with the statement: "I would like to be represented by a lawyer in my case before you." On March 24, 2004, DC contacted applicant to discuss his statement. Applicant advised DC that he had not yet retained an attorney and requested additional time to "look into retaining a lawyer." DC gave him until May 1, 2004 to explore his options. On May 20, 2004, well after the May 1, 2004 deadline, DC contacted applicant's office and was advised he was "on travel for the next couple weeks." Since DC had not received any communication from applicant since March 24, 2004, she forwarded the FORM to the Hearing Office for adjudication. Based on the fact that applicant was advised as early as October 2003 that he had the option of having an attorney represent him, and the fact that, despite being granted a generous extension of time by DC to look into retaining an attorney, there is no evidence that he has taken any action to retain an attorney, I find that applicant waived his right to be represented by an attorney.
2. Applicant was advised in writing that if his probation is revoked he is liable to be sentenced to any punishment provided by law, which in applicant's case, could be a sentence of life imprisonment.
3. Interestingly, applicant does not deny that he sexually assaulted his neighbor. In his response to the SOR, he merely states "she could not prove the allegations."
4. *See*, "The Concern" under Guideline E at Page 27 of the Directive.