

DATE: June 17, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-22909

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Catherine M. Engstrom, Esquire, Attorney-Advisor

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant molested his underage daughter in 1996 by fondling her repeatedly. He was convicted for this offense in 2000, and received a deferred sentence with probation for ten years. He is attending treatment, but available records are two years old. Insufficient mitigation is shown. Adverse inference is not overcome. Clearance is denied.

STATEMENT OF THE CASE

On July 1, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on July 24, 2002, and requested that the case be decided without a hearing. The Government submitted its File of Relevant Material (FORM) to the Applicant on November 7, 2002. The Applicant was given 30 days from receipt of the FORM to submit any documents in rebuttal, extenuation or mitigation. The Applicant received the FORM on December 11, 2002, and did not submit any additional information. The case was received by the undersigned on February 3, 2003.

FINDINGS OF FACT

The Applicant is 41 and divorced. He is employed by a defense contractor as an electrician, and he seeks to retain a DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the

SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1(Guideline J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

Paragraph 2(Guideline D - Sexual behavior). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in sexual behavior which is of a criminal nature, indicates a personality or emotional disorder, subjects the individual to undue influence or coercion, or reflects a lack of judgment or discretion.

These two paragraphs reference the same incident. The Applicant is divorced with three daughters. In June 1996, the daughters were staying with the Applicant. During that time, the Applicant fondled his then 12-year old daughter in an inappropriate manner at least seven times. This conduct included touching her breasts and vagina. Once the daughter returned to her mother, she told her mother what had happened.

The mother subsequently informed the local police department, and the Applicant was charged with "Child-Fondling of a Child Under 17." This charge is a felony in the Applicant's state. (Items 7 at 2, 4; 8 and 9.) After several continuances, the Applicant pleaded guilty on January 13, 2000. He received a deferred sentencing along with probation for ten years. The terms of probation required community service and that he obtain an evaluation for sex offenders and attend a complete psychological counseling/treatment program. (Item 9a.)

It appears that in August 1996 the Applicant received an evaluation by a counseling center after a referral from Child Protective Services. The Evaluation Outcome states, in part, "Psychophysiological responses indicate a primary sexual attraction to adolescent females. A secondary attraction appears to be towards adult females." (Item 10.)

From January 2000 through at least March 2001 the Applicant had been attending weekly counseling sessions with a treatment center that concentrates on sexual offenders. His monthly reports, found in Item 11, indicate that his involvement in group discussion has been "good." The reports also indicated that, by arch 2001, he had completed 52% of treatment goals. Neither the Applicant nor the Government submitted more recent treatment summaries. In his answer to the SOR, the Applicant states, "I have completed all required community service, attended all counseling sessions, am current on all probation fees and all court expenses, and have also passed all annual polygraphs and urinalysis." (Item 3 at 3.) Based on the available record, it is unclear whether the Applicant is still in treatment.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline J (Criminal conduct)

Conditions that could raise a security concern:

- (1) Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
- (2) A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns:

(None of the stated conditions have application in this case.)

Guideline D (Sexual behavior)

Conditions that could raise a security concern:

- (1) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (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;
- (3) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;
- (4) sexual behavior of a public nature and/or that which reflects a lack of discretion or judgment.

Condition that could mitigate security concerns:

- (2) The behavior was not recent and there is no evidence of subsequent conduct of a similar nature.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in criminal sexual misconduct that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant

concerned."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant fondled his underage daughter on several occasions in 1996, and that this conduct was in violation of a felony criminal statute (Guidelines J and D).

The Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him. The incident occurred seven years ago, but the Applicant did not begin his treatment on a full time basis until after he plead guilty in 2000. While the records up to March 2001 show that his conduct was "good" in treatment, there are no more recent reports in the record. Given that lack, based on the record available to me, I cannot find that Mitigating Factor 6 ("There is clear evidence of successful rehabilitation") applies. His criminal conduct and current probation are still of security significance. Paragraph 1 is found against the Applicant.

Turning to Paragraph 2, here as well the fact that the incident occurred seven years ago has been considered. However, given that it occurred to his underage daughter over a prolonged period of time, I believe the conduct is still of security significance. Not only was it criminal, but it was self-destructive and compulsive, obviously subjected the Applicant to coercion and showed a severe lack of judgment. Once again, the lack of any more current records from his probation officer or treatment provider makes it impossible for me to find that, today, he shows the discretion and good judgment required of security clearance holders. Paragraph 2 is found against the Applicant.

The Applicant's efforts at reform are noted. Under the particular circumstances of this case, this evidence does not overcome the adverse information that has been presented by the Government.

On balance, it is concluded that the Applicant has failed to overcome the Government's information opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: Against the Applicant.

Subparagraph 1.a.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subparagraph 2.a.: Against the 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 the Applicant.

Wilford H. Ross

Administrative Judge